THE COURT OF APPEAL

APPROVED
Neutral Citation Number: [2022] IECA 170
Appeal Number: 2021/268

Whelan J.
Collins J.
Pilkington J.

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

- AND –

PERSONS UNKNOWN IN OCCUPATION
OF THE PROPERTY KNOWN AS
21 LITTLE MARY STREET DUBLIN 1

APPELLANTS

AND

Appeal Number: 2021/270

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

-AND-

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

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of July 2022

Introduction

1. This is an appeal against a judgment delivered on 13th August, 2021 and subsequent orders made by Sanfey J. in attachment and committal motions in the High Court on 1st October, 2021 in each of the above-entitled proceedings.

2. The first Order under appeal was made in proceedings 2020/6888 between *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown in Occupation of the Property Known As 21 Little Mary Street, Dublin 7*, ordering: "Margaret Hanrahan and Augustin Gabor with any other adult person who is in possession and/or occupation of the said property to have them before this Court … on Friday the 8th day of October 2021 … to answer for the contempt which by reason of such default it is alleged they have committed against this Court and to show cause why they should not be committed to prison for such contempt."

3. The second Order under appeal was made in proceedings 2020/6889P *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the Property Known As 31 Richmond Avenue, Fairview, Dublin 3.* It provides: "…IT IS ORDERED that the Plaintiff be and it is hereby at liberty to issue an Order of Attachment directed to the Commissioner and Members of An Garda Síochána against each of the said Firuca Puscas and Gavrila Puscas and Doina Bortas and Vasile Circu and Mihai Bataraga and Danut Vlad and Irina Ucaciu and Ion Mihali and any other adult person who is in possession and/or occupation of the said Property to have them before this Court (Mr. Justice Sanfey) on Friday the 8th day of October 2021 at the hour of 2.00 o'clock in the afternoon (or the first opportunity thereafter) to answer for the contempt which by reason of such default it is alleged they have committed against this Court and to show cause why they should not be committed to prison for such contempt."

4. 31 Richmond Avenue and 21 Little Mary Street ("the properties") were at all material times sub divided into separate dwelling units. In the case of 31 Richmond Avenue, it was sub-divided into 7 separate units, and 21 Mary Street was sub-divided into 5 separate dwelling units. They had been so sub-divided since at least 2006/2007. The appellants were occupiers of dwelling units in one or other of the premises. The mortgagor, Mr. Jerry Beades, a defaulting mortgagee against whom orders for possession had been obtained in respect of the properties, was the landlord and the occupiers in each case paid rent to him. The relationship of landlord and tenant never subsisted between Pepper and the appellants.

5. To more fully understand the genesis of the orders under appeal it is necessary to briefly consider the key relevant events in the litigation history as between Pepper's predecessors in title and the mortgagor.

Background

6. On the 23rd June, 2008 IIB Homeloans Limited (formerly Irish Life Homeloans Limited) ("IIB") obtained an order for possession against Mr. Beades in respect of the properties arising from a default under the terms of mortgages secured over them. The said order for possession of the properties was the subject of an unsuccessful appeal by Mr. Beades to the Supreme Court which was ultimately dismissed by that court in 2014.

7. Over the years, title to the mortgagee's interest in the security changed hands from time to time. Ultimately in 2020 Beltany Property Finance DAC disposed of the mortgagee's interest in the security to Pepper Finance Corporation (Ireland) DAC ("Pepper").

8. By order made on the 18th November, 2020 by Mr. Justice Twomey in the High Court, Pepper was substituted as plaintiff in the substantive proceedings and secured an order pursuant to O. 42, r. 24(a) of the Rules of the Superior Courts and/or the inherent jurisdiction

of the High Court granting liberty to issue execution on foot of the possession order of the 23rd June, 2008. Other consequential orders were also made on that date.

Dwellings

9. Before considering the grounds of appeal it is necessary to have regard to the nature and usage of the two properties at the date the High Court granted the original order for possession on the 23rd June, 2008. This is so because it appears to have been variously contended on behalf of Pepper that all lettings of the properties by the mortgagor were prohibited under the terms of the mortgage itself and further that neither Pepper nor its predecessors in title had knowledge of the tenancies. The validity or otherwise of any negative pledge to be found in the mortgage instruments is not centrally relevant to this appeal and for that reason I shall express no concluded view on that issue. In any event, as a matter of fact it appears that under a mortgage dated the 12th June, 2003 created over both properties, IIB Homeloans Limited ("IIB") consented to the borrower creating tenancies in respect of the premises subject to various conditions specified in Clause 34 of the Special Condition attaching to the loan offer. There does not appear to be any evidence of any objection on the part of IIB to the creation of any tenancies by the mortgagor up to or including the date of the order for possession made on 23rd June, 2008 in the High Court.

10. The level of knowledge on the part of IIB as to the existence of tenancies and the identity of the tenants in the properties at the date the order for possession was granted by Dunne J. on the 23rd June, 2008 in respect of both properties is a question of fact which I will now consider.

The 2008 Affidavit of Service

11. In an affidavit of service sworn in the possession proceedings in January 2008 by Maria Kavanagh, a legal secretary, supporting the application for the order for possession,

copies of the summons were deposed to have been served on individuals in occupation of Flats A to G, inclusive, at 31 Richmond Avenue in December 2007.

12. In relation to 21 Little Mary Street, the affidavit of service deposes to service of copies of the summons on the 19th December, 2007 on named occupiers of Apartments 1 to 5 (inclusive) thereof.

13. Service of the original possession proceedings was thus effected on named occupiers in December 2007, (apart from one exception where it was served on the "occupier") at the specific dwelling unit occupied by each within the respective properties. It seems reasonable to infer that, when in 2006 possession proceedings were instituted by IIB against the borrower, Mr. Beades, seeking possession of the properties, if it had been the case that IIB considered that the tenancies created by Mr. Beades were in breach of the Mortgage or facility terms it would have specifically raised this point. IIB appears not to have done so. Pepper cannot, in the context of committal proceedings, seek to characterise those individuals as never having been in lawful occupation where its predecessor in title appears to have actively acquiesced in at least two such tenancies.

14. I pause to observe that at the date of the institution of the plenary proceedings for possession on the 8th October, 2020, within which the orders the subject of this appeal were made, Ioan Brat had been in occupation and possession of a dwelling unit at 31 Richmond Avenue for upwards of 17 years together with his wife. Likewise, Augustin Gabor had been in occupation and possession of an apartment within 21 Little Mary Street for upwards of 15 years. The relationship of landlord and tenant had subsisted at all material times between each of them and the mortgagor. Such tenancies were registrable with the Private Rental Tenancies Board ("PRTB"). Two occupiers are named in the 2008 Affidavit of Service and their names, together with the specific addresses of all individual dwelling units, were

ascertainable from documentation either in the possession or otherwise in the procurement of Pepper.

15. In light of this affidavit, Pepper must be taken to have known the exact address of each unit or certainly could have ascertained same with reasonable diligence. Pepper, as successor in title to IIB, was thus fixed with notice that the two premises had been subdivided into seven self-contained dwelling units in the case of 31 Richmond Avenue and five self-contained dwelling units in the case of 21 Little Mary Street. There was no evidence that Pepper sought to engage with the PRTB or ever took any formal step to identify the individuals who had held each unit as tenant(s) of the defaulting mortgagor.

The Plenary Summonses

16. Substantially identical plenary summonses were issued in respect of each property on the 8th October, 2020 seeking, *inter alia*, an order requiring "the Defendants their servants and/or agents and all other persons having notice of the said order immediately to surrender possession and control of the property described in the Schedule hereto (the "Property") to the Plaintiff." An extensive range of prohibitory and mandatory orders were sought. Five different categories of damages were sought together with accounts, enquiries and costs. Each property is identified in the schedule to the respective writ.

The Defendants

17. No individual was named as defendant in either proceedings. Rather the defendants were described as "Persons Unknown in Occupation of the Property known as 21 Little Mary Street…" and "Persons Unknown in Occupation of the Property known as 31 Richmond Avenue…", respectively. For the most part the defendants were non-nationals including persons from Eastern Europe and Albania. Some had little knowledge of the English

language. The appellants contend that this gives rise to an infirmity in the constitution of both proceedings.

18. On the 9th October, 2020 Pepper caused an *ex parte* docket to issue out of the Central Office of the High Court returnable for the following day seeking special leave to issue a notice of motion seeking, *inter alia*, interlocutory injunctive relief returnable for the 13th October, 2020, together with orders that service of documents relating to the proceedings "[by] hand delivery … and/or certified post to the Defendants at the address of 31 Richmond Avenue, Fairview Dublin 3 … [and] 21 Little Mary Street, Dublin 7." It appears that liberty to issue and serve a notice of motion returnable for the 25th November, 2020 was granted by Ms. Justice Reynolds in the High Court on the 14th October, 2020 in respect of both properties. Each motion seeking interlocutory relief was grounded on the affidavit of Gerard McHugh, Portfolio Manager of Pepper sworn on the 8th October, 2020. The said affidavits depose that various correspondence on behalf of Pepper and its predecessor Beltany had been hand delivered to the respective properties. In the case of 31 Richmond Road they had also been emailed to an address said to be connected with that property. No correspondence had ever been addressed to any specific dwelling unit or any named individual said to be in occupation of any particular dwelling-unit of the twelve such apartments/flats within the two properties.

19. On the 23rd November, 2020, two days prior to the hearing of the interlocutory motion, Margaret Hanrahan, in occupation of Flat 1, 21 Little Mary Street for upwards of ten years as a tenant of the mortgagor, entered an appearance. On the same date Gabriel Petrut, then in occupation of Flat C, 31 Richmond Avenue for one year, entered an appearance. However, neither attended at the hearing of the motion for interlocutory orders before the High Court on the 25th November, 2020, nor did any other occupant.

Interlocutory Orders

20. On the 25th November, 2020 Reynolds J. granted similar mandatory orders and interlocutory relief in respect of each property as follows:

> "IT IS ORDERED that the Defendants and each of them their servants and/or agents and all other persons having notice of the said Order
>
> 1. immediately surrender possession and control of the property described in the Schedule to the Plenary Summons (the 'Property') to the Plaintiff
>
> 2. immediately deliver up to the Plaintiff all keys alarm codes and/or security and access devices in respect of the Property
>
> AND IT IS ORDERED that the defendants and each of them their servants and/or agents and all other persons having notice of the said Order be restrained pending the trial of this action from
>
> 1. impeding and/or obstructing the Plaintiff its servants and/or agents in their efforts to take possession of the Property
>
> 2. impeding and/or obstructing the Plaintiff its servants and/or agents in their efforts to secure the Property
>
> 3. impeding and/or obstructing the Plaintiff its servants and/or agents in their efforts to sell or rent the Property
>
> 4. trespassing or entering upon or otherwise interfering with any portion of the Property without he prior written consent of the Plaintiff
>
> 5. collecting or attempting to collect any rent or other payments in respect of any portion of the Property

6. holding themselves out as having any entitlement to sell rent or otherwise grant any entitlement to possession of any portion of the Property

7. making contact with any current or prospective tenant or purchaser of any portion of the Property without the written consent of the Plaintiff…" (emphasis added)

21. Pepper gave by its counsel an undertaking to the court –

"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 damage by reason of this order which the Plaintiff ought to pay."

Directions regarding Service & Stay

22. In each case, the High Court ordered "that the Plaintiff's Solicitor be at liberty to notify the making of this order to the Defendants their servants and/or agents and all other persons by hand delivery and Ordinary Pre-Paid Post." The orders were subject to a stay until 5 p.m. on Thursday 14th January, 2021.

23. Notwithstanding that No. 31 Richmond Avenue comprised seven separate dwelling units, the High Court initially directed on 25 November 2020 that service of five copies of relevant documentation addressed to "persons unknown in occupation of the property known as 31 Richmond Avenue Fairview Dublin 3" would constitute valid service and in the case of No. 21 Little Mary Street, which clearly was subdivided into five separate individually numbered dwelling units, service of two copies on "persons unknown in occupation of the property known as 21 Little Mary Street" would suffice.

24. The interlocutory orders were perfected on the 26th November, 2020.

Affidavits of service

21 Little Mary Street

25. As stated above, this property is divided into five separate dwelling units. In an affidavit of service of Oisin Ferriter sworn on the 16th December, 2020 and filed in the Central Office of the High Court on the 7th January, 2020, he deposed that he attended that property on the 7th December, 2020 "for the purpose of serving the occupants of the property with an envelope addressed to 'The Occupants, 21 Little Mary Street, Dublin 7'" (para. 3) (emphasis added). The second envelope addressed to 'Margaret Hanrahan, 21 Little Mary Street, Dublin 7." He deposes that he rang "each of the buzzers…but did not receive an answer." He left the two envelopes "in the front porch of the property behind a steel gate." (para. 8) The affidavit of service deposes that each envelope contained a letter dated 7th December, 2020 and a true copy of the perfected order of Ms. Justice Reynolds dated 25th November, 2020, bearing an endorsement as required by O. 41, r. 8 RSC (penal endorsement). On the same date two identical envelopes similarly addressed were sent to the address by certified post. The presence of the buzzers offered clear evidence that the property was subdivided into separate units.

26. He deposes that on 10th December, 2020 he attended the property again, rang each of the buzzers and got no answer. He placed two envelopes addressed to "The Occupants" at the said address "in the front porch of the property behind a steel gate." (para. 11)

No. 31 Richmond Avenue

27. On the 16th December, 2020 Oisin Ferriter swore an affidavit of service in respect of, *inter alia*, 31 Richmond Avenue which was occupied as seven separate dwelling units. He deposes having attended at that property at 2:15 p.m. on the 7th December, 2020 "… for the purpose of serving the occupants of the property with an envelope addressed to 'the

occupants' 31 Richmond Avenue … and serving Gabriel Petrut with a separate envelope addressed to 'Gabriel Petrut', 31 Richmond Avenue, Fairview, Dublin 3." (para. 3) (emphasis added) Each envelope contained a copy of the letter of 7th December, 2020 from Maples and Calder and a "true copy of the perfected order" (para. 4(ii)) of 25th November, 2020 bearing a penal endorsement.

28. This indicates that on the 7th December, 2020, only two envelopes were delivered to a property subdivided into seven separate dwelling units, one of which was addressed to Mr. Petrut, the other to "The Occupants." Paragraph 8 states:-

> "I knocked on the door of 31 Richmond Avenue, which was open, I rang each of the buzzers but did not receive an answer… I placed the envelope … addressed to 'The Occupants' and the envelope addressed to 'Gabriel Petrut' on the postage shelf to the immediate right of the door, in the hallway."

Since there were 7 separate dwelling units, it seems reasonable to infer that there were more than two buzzers at this premises.

29. The affidavit further deposes that three days later on the 10th December, 2020 at 1:33 p.m., he attended the said premises "with five separate envelopes addressed to 'the occupants' 31 Richmond Avenue Fairview Dublin 3…" He deposes that each contained, *inter alia*, "true copy perfected order of Ms. Justice Reynolds dated 25th November 2020 bearing a penal endorsement." (para. 4) The five envelopes were placed on the postage shelf to the immediate right of the door, in the hallway. No envelope was delivered or served directly on any person at either premises. No reason was identified by Pepper in its submissions for purporting to serve a lesser number of copies of the endorsed order at each premises than the number of dwelling units occupied in each. It seems reasonable to infer

that the number of buzzers at each premises offered an indication of the minimum likely number of dwelling units in each premises.

30. The validity of the said service of the mandatory and prohibitory orders made on 25th November, 2020 for the purposes of compliance with the orders and directions of Reynolds J. is not in contention in this appeal. Rather the focus of the appellants' complaint regarding service is confined to disputing the validity of service by Pepper compliant with Order 41, r.8 for the purposes of securing coercive orders of attachment against them.

Valid Service of penally endorsed copies of orders pursuant to O. 41 r.8 not established

31. In the judgment under appeal delivered on the 13th August 2021, Sanfey J. observed;

> "109. … Where it is established beyond a reasonable doubt that a person to whom an order is addressed received a penally endorsed copy of the order at **the correct address** at which that person resides, it will not usually avail that person simply to swear an affidavit stating that they were not aware of the order.
>
> 110. However, that is not to say that service of a penally endorsed order in accordance with the terms of that order is necessarily sufficient to establish wilful breach of an order… for attachment and committal… something more than valid service of the application is required. The essence of an application for attachment and committal for breach of a court order is that the person to whom the order is directed is aware of the order, and yet decides not to comply with it. If this is not established, in my view the application cannot succeed.
>
> 111. …in view of the fact that the orders, although served in accordance with the orders of 25th November, 2020, were not served on individual apartments, **I do not think it is established beyond a reasonable doubt that the occupants each knew of the making of the orders, or that the circumstances of service outweigh the**

> **evidence from the eight deponents across the two properties such as would allow me to conclude beyond a reasonable doubt that a conscious decision was made to disobey the orders."** (emphasis added)

32. The trial judge concluded that such service did not allow him to conclude to the standard "beyond reasonable doubt" that a conscious decision had been made by any of the occupants to disobey the respective court orders. Since Pepper did not cross-appeal against the latter determination it provides an uncontested determination and backdrop to this appeal. Sanfey J. proceeded to determine the applications for orders of attachment and grant the orders sought based on a "fall-back" argument advanced by Pepper which I find did not constitute a valid basis for the orders made for the reasons set out hereafter.

Application to Court of Appeal for a Stay Extension

33. The stay granted by the trial judge expired at 5 p.m. on 14th January, 2021. That was, of course, in the middle of the Covid-19 Pandemic. On the 15th January, 2021 Gabriel Petrut and Margaret Hanrahan applied to the Court of Appeal (Noonan J.) seeking a stay on the orders of Ms. Justice Reynolds made on the 25th November, 2020 pending the determination of two appeals issued by them on the 15th and 16th December, 2020 respectively against the High Court orders. Margaret Hanrahan was present during the hearing of the application. Noonan J. was informed that Gabriel Petrut could not attend on the said date as he was out of the jurisdiction. Noonan J. granted a stay in the following terms "IT IS ORDERED … that the stay granted in the High Court be extended for a period of 3 weeks from the date of this Order only." The said orders were not perfected until the 23rd June, 2021. There is an issue in this appeal as to the effect of the said respective orders and whether, as Pepper contends, the stay granted by Noonan J. applied only to Margaret Hanrahan and Gabriel Petrut or, as the appellants argue, operated generally to vary and extend the duration of the stays that had been granted by the High Court on 25th November, 2020.

Copies of the orders of 15th January, 2021, whether endorsed in accordance with O.41, r. 8 RSC or otherwise, were not served on any of the appellants prior to issuing two motions seeking their attachment and/or committal on 12th February, 2021; as already explained, the orders had not been perfected by then and were not perfected until June 2021.

Motions for attachment

34. On the 9th February, 2021 Ms. Justice Reynolds in the High Court granted liberty to Pepper to issue notices of motion for attachment and committal by the 12th February, 2021 same to be returnable before the High Court on the 19th February, 2021. On the latter date Margaret Hanrahan was present in court.

35. Each notice of motion sought an order pursuant to O. 44, r. 3 of the Superior Court rules and/or pursuant to the inherent jurisdiction of the High Court granting liberty to Pepper to issue an order of attachment of all persons in occupation of the property "by reason of their failure to abide by the order of the High Court (Ms. Justice Reynolds) dated 25th November, 2020."

36. In an affidavit sworn on the 22nd February, 2021, Eoghan O'Reilly, Solicitor on behalf of the appellants swore an affidavit wherein he deposed: -

> "3. I say that I make this affidavit to ensure that this Honourable Court is made aware of all relevant matters in this case and to highlight what I consider to be defects in the information that has, to date, been provided or submitted to this Honourable Court."

He outlined that he represented the tenants/occupants of 21 Little Mary Street and 31 Richmond Street whom he named as follows:

> **Tenant Register 31 Richmond Avenue**
>
> - Flat A – Firuca Puscas and Gavrila Puscas in occupation for 11 years.

- Flat B – Dorina Brat and Ioan Brat in occupation for 17 years.
- Flat C – Gabriel Petrut in occupation for 1 year.
- Flat D – Doina Bortas and Vasile Circu in occupation for 16 years together with their children Cosmina Circu aged 6 and Annabell Circu aged 9.
- Flat E – Mihai Bataraga in occupation for 12 years together with his child Alex Constantin Bataraga aged 16.
- Flat F – Danut Vlad.
- Flat G – Irina Ucaciu, Ion Mihali and Nicolae Mihali who had been in occupation for ten years.

37. The tenant register in respect of 21 Little Mary Street is deposed to be as follows:

- Flat 1 – Margaret Hanrahan in occupation for 10 years.
- Flat 3 – Iuliu Putina and Svetlana Gannokha in occupation for 8 years.
- Flat 4 – Vasile Ivanov in occupation for 6 years and Augustin Gabor in occupation for 15 years.
- Flat 5 – Vasile Rus, Mihai-Romica Striblea and Iosua Striblea all in occupation for two years.

38. It is not disputed by Pepper that since at the latest December 2007 Ioan Brat occupied a flat at 31 Richmond Avenue and that Augustin Gabor occupied an apartment at 21 Little Mary Street for 17 years.

39. Despite being apprised of the identity of **all** the individuals in occupation and possession of both properties as of 22nd February, 2021, no step was taken at any time by

Pepper to amend the title to the proceedings to join the said individuals as defendants either in lieu of or in addition to "persons unknown".

40. Appearances were entered on behalf of each occupant/appellant in late February 2021.

41. Margaret Hanrahan and Gabriel Petrut brought appeals against the orders of Ms. Justice Reynolds made in the High Court on the 25th November, 2020. Those appeals were heard in July 2021 and by order of the Court of Appeal dated the 14th October, 2021 the said appeals were dismissed and the orders of the High Court affirmed.

42. Separately, two motions were brought on behalf of the other individuals in occupation of the two properties seeking an extension of time to lodge an appeal and a stay on the "eviction order of the 25th November 2020 pending the determination of the herein appeal on 13th July 2021." This Court refused that application on the 13th July, 2021.

Hearing of Motions for attachment

43. The motions for attachment came on for hearing in the High Court on the 4th and 5th May, 2021. Judgment was reserved. The following appellants/occupants swore affidavits for the purpose of the attachment application:

(a) Ioan Brat affidavit sworn 22nd February, 2021.

(b) Mihai Bataraga affidavit sworn 22nd February, 2021.

(c) Augustin Gabor affidavit sworn 19th March, 2021.

(d) Iosua Striblea affidavit sworn 19th March, 2021.

(e) Affidavit of Vasile Circu sworn 19th March, 2021.

(f) Affidavit of Doina Bortas sworn 19th March, 2021.

(g) Affidavit of Gabriel Petrut sworn 19th March, 2021.

(h) Supplemental affidavit of Ioan Brat sworn 20th March, 2021.

(i) Affidavit of Nicolae Mihali sworn 20th March, 2021.

(j) Affidavit of Irina Ucaciu sworn 20th March, 2021.

(k) Ioan Mihali affidavit sworn 20th March, 2021.

The affidavits depose in detail as to each deponent's history of occupation of the properties which comprised the places of residence of the deponents and, in certain instances, of their respective spouses/partners, families/children.

Judgment of the High Court

44. Judgment was reserved and delivered on the 13th August, 2021. The judgment outlines in great detail the anterior litigation history, briefly sketched out above, of the possession proceedings as between Pepper's various predecessors in title: IIB, KBC Ireland Plc ("KBC"), Beltany Property Finance DAC ("Beltany") as well as Pepper on the one hand and the mortgagor, Mr. Jerry Beades, on the other.

45. At para. 22 of his judgment the trial judge noted that "the Court of Appeal (Noonan J.) refused the applications of Mr. Petrut and Mr. Beades for a stay but extended the existing stay to 5pm on 5th February, 2021" in relation to No. 31 Richmond Avenue. He observed that "the transcript of the court's judgment makes it clear that the stay applied only to Mr. Petrut and Ms. Hanrahan – who had attended court on that occasion and sought a stay also – and not any other party: see transcript of the hearing p.61, lines 23 to 29."

46. I note at this juncture that as of the date of hearing of the said attachment/committal motions before the High Court in May 2021, the order of Mr. Justice Noonan of the 15th January, 2021 had not been perfected. It appears to have been perfected only on the 23rd June, 2020. It appears that the trial judge did not have before him a perfected copy of that order.

47. The importance of having an Order passed and perfected is noted by the authors Delany & McGrath on *Civil Procedure* (4th ed., Round Hall, 2018) at paragraph 25-35:-

> "When the order has been drawn up, signed by the registrar and particulars entered in the books of the High Court or Supreme Court as appropriate, it is regarded as having been passed and perfected. The order will then be indorsed with the date of perfection and this date is important in the case of a High Court order because the period for appeal is measured from it."

It is, in my view, particularly important that before coercive orders such as attachment or committal are sought based on alleged non-compliance with orders of the court previously made, that the moving party is in a position to demonstrate valid service of all such orders with the appropriate endorsement compliant with O.41, r. 8 together with any subsequent order or orders concerning same or which might be capable of having any bearing or effect on the order in question. That did not occur here.

48. At para. 31 of his judgment the judge identified the net position of Pepper in relation to the application for attachment as follows: -

> "It was submitted … that the defendants remained in occupation of one or other of the properties, something which was '…expressly and unequivocally prohibited by the Injunction Orders'; that the occupants had been '…given every possible opportunity to surrender vacant possession of the Properties without facing the risk of imprisonment'; and that there was no basis upon which the injunction orders could or should be amended or revisited …"

49. The trial judge at the same paragraph noted Pepper's contention that the occupants had been served with the proceedings. Pepper had asserted in their written submissions:–

> "… the documents comprising the injunction applications and the injunction orders bearing a penal endorsement in strict compliance with the directions concerning service which were given by the High Court … involved *inter alia*, the delivery by hand of five hard copies of each of the relevant documents to Richmond Avenue and the delivery by hand of three hard copies of each of the relevant documents to Little Mary Street."

This appears to refer to the steps described in the affidavits of service of Oisin Ferriter sworn 16th December, 2020.

50. The court further noted apparent attempts made by Pepper or its immediate predecessor, Beltany, to communicate with the occupants of the properties between the 28th August, 2019 and the 25th September, 2020, prior to the institution of the proceedings, including, *inter alia*, correspondence exhibited in affidavits sworn by Gerard McHugh on behalf of Pepper in both proceedings. It is noteworthy that the said correspondence was not directed towards any named individual or any specific dwelling unit/flat or apartment in either case. In my view, a generic piece of posted correspondence directed towards a general address and not identifying any individual unit within that building or any particular addressee does not *per se* constitute evidence of communication of the correspondence to any particular resident or any particular residential unit.

51. The court noted the objections of counsel on behalf of the occupants/tenants, it being contended that, with the exception of Mr. Petrut and Ms. Hanrahan, the said occupants/tenants were unaware of the application for the interlocutory injunction on the 25th November, 2020 due to (a) the failure of Pepper to identify the occupants and (b) a failure by Pepper to specify the flat occupied by each when corresponding with them.

52. A separate argument was advanced contending that Judge Reynolds had been misled on the 25th November, 2020 by being informed that consent had never been furnished by the mortgagee to the creation of the tenancies in the first place. The court noted the arguments developed in regard to the Special Conditions in the original facility letter of May 2003 whereby the original lender IIB consented to the borrower creating tenancies in respect of the premises subject to certain criteria and preconditions. It was contended that said provisions had not been brought to the attention of the High Court judge before the mandatory and interlocutory injunctions were made on the 25th November, 2020. No issue arises as to the validity of the said orders in this appeal.

53. Having reviewed the mortgage documentation, the trial judge concluded that there was no basis for the occupants asserting that any of them had a tenancy that was binding on the mortgagee/Pepper. He considered that there was no basis upon which a valid tenancy could have been created after the date of the order for possession on the 23rd June, 2008. It is to be observed that in the instant case, over 13 years had elapsed since the making of the said order for possession and over 7 years had passed since the appeal from the order for possession had concluded in the Supreme Court by the hearing date. During that entire time the units continued to be occupied as dwellings by tenants on foot of tenancies granted - in two cases before the 23rd June, 2008 - by the mortgagor without any apparent objection by the respondent's predecessors in title apart from a few generic letters addressed to no specific dwelling unit and no named person but to the premises address.

54. It is to be observed that the judgment does not engage with the specific circumstances of Ioan Brat of Flat B, 31 Richmond Avenue or Augustin Gabor of Flat 4, 21 Little Mary Street who clearly were tenants in occupation of dwelling units in the respective properties at the time of institution of the possession proceedings in 2006/2007 and who had been served at their specific addresses with the special summons proceedings in December 2007.

In that regard, I note no evidence was adduced by Pepper to suggest that their predecessor in title IIB or its successor KBC had ever contended that either of the said two tenancies had been created by the mortgagor in breach of the terms of the mortgage or any of its special conditions. There was no evidence that, in the period after the order for possession was granted in June 2007 up until the within proceedings were instituted in October 2020, IIB or its successors took any formal step or sought any order to restrain or prevent lettings or tenancies of the units being either continued or created by the mortgagor Mr. Beades.

55. It is to be observed, that whereas the decision in *Fennell v. N17 Electrics Limited* [2012] 4 I.R. 634 is cited at para. 47 of the judgment, in the context of the decision of this court to refuse an application to extend time on behalf of several of the occupiers of the properties for the purposes of appealing the orders of Ms. Justice Reynolds made in the High Court on the 25th November, 2020, that issue is not directly engaged in this appeal. It will be for the courts on another day to conclusively determine whether and to what extent the decision in *Fennell v. N17 Electrics* applies to a case such as the present where the property comprises of dwelling units/family homes. In *N17 Electrics*, by contrast with the instant case, the power to grant leases was expressly excluded under the terms of the mortgage. Further, the terms of the mortgage/Facility Letter did not contain a provision analogous to Clause 34 of the facility letter at issue in this case. Additionally, that case concerned a retail premises, no part of which was in occupation or possession for human habitation. The *ratio* might well be modified in circumstances where there are express terms/special conditions in the mortgage/Facility Letter of the kind found in the instant case, where the mortgage is secured on a property subdivided into dwelling units and occupied for human habitation and where the mortgagee was on notice of the said user for a substantial period of time and did not object to same.

56. The trial judge found as a fact (para. 48) that on a consideration of the transcript of the injunction hearing of the 25th November, 2020, on that date "the court was given the impression that there was no consent from any mortgagee to any occupation or lease of either of the properties." He accepted that the facility letter had been exhibited to the grounding affidavit and observed: "it might have been preferable if it had been specifically brought to the attention of Reynolds J. However, I do not believe the view of the court as to whether there was any valid tenancy on the part of the occupants would have been altered by considering the letter." The judge concluded that there had been "no deliberate non-disclosure to the court of the limited consent offered in the facility letter, and the facility letter …"

57. In my view, Sanfey J. was correct that the validity of the tenancies – apart from Mr. Gabor and Mr. Brat - *quo ad* the mortgagee might not have been affected. However, the characterisation by Pepper of the occupiers as "trespassers" throughout the litigation might have attracted far greater scrutiny had the High Court judge been made aware in November 2020, as she ought to have been, of salient facts including the 2003 mortgage documentation, facility letter and the affidavit of service of Maria Kavanagh sworn in January 2008. If the true position was known to Judge Reynolds, she might have been inclined to insist on greater efforts being made to identify and serve personally the occupants or, at the very least, allowed them a longer period to vacate their residences.

Wilful disobedience

58. A key determination on the part of the trial judge is found at para. 109 where he observes: -

> "… where it is sought to imprison someone for a failure to abide by an order of the court, that person must be proved beyond a reasonable doubt to have wilfully

disobeyed the order. It must be established that the person knew of the order and of the consequences of breaching it. It is for this purpose that the rules of court require a penal endorsement to be placed upon the orders served, so that there is evidence before the court that the recipient of the order was aware of the consequences of breaching it, but nonetheless decided to do so. Where it is established beyond a reasonable doubt that a person to whom an order is addressed received a penally endorsed copy of the order at the correct address at which that person resides, it will not usually avail the person simply to swear an affidavit stating that they were not aware of the order.

110. However, that is not to say that service of a penally endorsed order in accordance with the terms of that order is necessarily sufficient to establish wilful breach of an order. The dicta in *Kavanagh* and *Godfrey* … are helpful in illustrating the approach of the court in circumstances where a defendant denies that valid service is effected; however, both cases concerned a motion for judgment rather than a motion for attachment and committal. For the latter application, I think that something more than valid service of the application is required. The essence of an application for attachment and committal for breach of a court order is that the person to whom the order is directed is aware of the order, and yet decides not to comply with it. If this is not established, in my view the application cannot succeed.

111. I think, on consideration of all the evidence, that it is probable that most, if not all, of the occupants were aware of the applications and the making of the injunction orders. However, in view of the fact that the orders, although served in accordance with the orders of the 25th November, 2020 were not served on individual apartments, I do not think it is established beyond a reasonable doubt that the occupants each knew of the making of the orders, or that the circumstances of service outweigh the

evidence from the eight deponents across the two properties such as would allow me to conclude beyond a reasonable doubt the conscious decision was made to disobey the order."

59. Pepper did not cross-appeal against this significant determination by the trial judge that it had failed to establish beyond a reasonable doubt that the occupants of each dwelling unit knew of the making of the orders and the consequences of breaching same. Neither did it appeal the determination of the trial judge that it had failed to establish beyond reasonable doubt that a conscious decision had been made by the said occupants to disobey the orders.

"Fall-Back"

60. The court having determined that service had not been effected on the individual appellants in a manner sufficient to establish beyond reasonable doubt a wilful breach of the terms of the order by them, thereafter proceeded to consider a fall-back argument advanced by Pepper to support its contention that orders of attachment could nonetheless properly be made. The court distilled the arguments of Pepper down to four key elements at para. 113 of the judgment, namely that: –

" …

i. The occupants had remained in occupation of the properties 'something that is 'expressly and unequivocally prohibited by the injunction orders' …;

ii. The occupants are beyond doubt **now** [i.e., the date of the hearing 4th/5th May 2021] aware of the orders and their terms and the consequences of breaching same, having been represented by solicitors since at least the 22nd February, 2021";

iii. The occupants have chosen to contest the present application, rather than comply with the injunction orders;

iv. copies of the injunction orders bearing penal endorsements have been served on the occupants and "… there is no authority for the proposition that a true copy of an order bearing a penal endorsement must be served before an application for attachment and committal issues";

v. "The relevant question, even in cases where there is doubt as to whether the alleged contemnor was aware of the terms of the relevant order (which is patently not the case here), is whether a true copy of the order bearing a penal endorsement has been served before the application for attachment and committal is heard." (emphasis in High Court judgment)

61. The judge determined at para. 114 of the judgment: -

"There is no basis for impugning the order of Reynolds J. made on the 25th November, 2020. I am satisfied that it is a valid order. The occupants have been served with the orders in accordance with the terms of those orders. I am satisfied that the penal endorsement was sufficient and effective. If there is doubt as to whether the occupants were aware of the terms of the orders prior to the end of February 2021 when they acquired legal representation, there can be no doubt in this regard after that point. The order of Reynolds J. applies to the occupants and they have chosen not to abide by it, but rather to attempt to persuade the court that it should be set aside, or the compliance with it should be excused."

The judgment continues –

"It cannot be the case that a party is entitled to ignore a regular and enforceable order of this Court, having not appealed it, simply by virtue of resisting an application for its attachment and committal on foot of breach of the order on the basis that the order should not have been granted in the first place. Where there may be situations in

which a court might accommodate the making of such an argument, this is not one of them." (para. 115)

The trial judge concluded that the occupants "are in deliberate breach of the orders 25th November, 2020." (para. 117)

Orders of Attachment

62. On the 1st October, 2021, the High Court made orders granting liberty to Pepper issue orders of attachment directed to the Commissioner and members of An Garda Síochána against each appellant and any other adult person in possession and/or occupation of the respective properties to have them before the court on Friday 8th October, 2021 "to answer for the contempt which … it is alleged they have committed against this court and to show cause why they should not be committed to prison for such contempt."

Grounds of appeal

63. Grounds 1, 2 and 3 contend that the trial judge erred in considering that the sole order relevant to a determination of contempt was the Order made by Reynolds J. on the 25th November, 2020 when same was subsequently varied by Noonan J. in the Court of Appeal 15th January, 2021 (the Court of Appeal Order), both orders were relevant and were required to be served. The latter order was not served (with or without penal endorsement) on the appellants' solicitor until after the Motion for committal had issued and was served only on the appellants' solicitors in late February 2021.

The Orders made on 1st October, 2021 make no reference to the order of Noonan J. extending the Stay made in the Court of Appeal 15th January, 2021 and varying the earlier order of 25th November, 2020.

Grounds 4 & 5 argue that the appellants were entitled to be named on the title to the proceedings as defendants and in the orders made against them.

Ground 6 submits that the Penal Endorsement was invalid.

Ground 7 argues the judge applied the wrong legal test and standard in determining the motion.

Ground 8 submits that the judge erred in holding that service was valid.

The respondent raised a preliminary objection that since the orders made had been subsequently vacated there was no basis for the appeal.

Preliminary Issue raised by Pepper - Mootness

64. The respondent raised mootness as a preliminary issue, arguing that, since the orders of Sanfey J made on the 1st October, 2021 granting liberty to the respondent to issue orders of attachment directed to the Commissioner and members of an Garda Síochána against the appellants were subsequently discharged on the 12th October, 2021 with the consent of the appellants, the appeal was rendered moot. Pepper contended that the appeal was "a flagrant and deliberate waste" (p. 73 of Booklet of Pleadings) of legal resources and further state they wrote to the appellants in December 2021 urging them to withdraw the appeals.

65. Pepper relies on *Lofinmakin v Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274 citing Denham C.J. who quoted at p. 279 the Supreme Court of Canada in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 that "[a]n appeal is moot when a decision will not have the effect of resolving some controversy ... such a live controversy must be present ..." and emphasise that the contempt orders were discharged a fortnight prior to the initiation of this appeal. Furthermore, they submit that the appellants' contention a party is entitled to have an order nullified despite it already being discharged entertains no precedent.

66. The appellants contend that the issues in the appeal are not moot, because the finding of contempt on which the order of attachment was predicated hangs over their clients as well as a significant costs order. They argue that the making of an order of attachment trenches

on the constitutional right to one's good name. They asserted a public interest in determining whether Pepper was entitled to insist on pursuing the appellants as "persons unknown" never at any time named as parties to the proceedings. It was argued that no inference should be drawn from the consent by the appellants to Pepper vacating of the Attachment Orders on 12th October, 2021 since they had vacated the premises as of that date. They further submit that the attachment order was analogous to a civil bench warrant and they did not thereby lose the right to appeal since as a contempt order carries potentially grave consequences even if vacated.

Determination on preliminary point

67. As Murray J. observed in this Court in *FA v. International Protection Appeals Tribunal & ors* [2021] IECA 296:

> "51. A case is moot when the issue it presents is hypothetical or abstract and when, therefore, the decision of the court will not have the effect of resolving a controversy affecting a real and concrete dispute between the parties (*Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274 at para. 82). If a case requires the court to deliver an advisory opinion on an issue that does not affect the rights or interests of one or both of the parties at the relevant time, it is moot (see *G v. Collins* [2004] IESC 38, [2005] 1 ILRM 1). It has been said that mootness is the doctrine of standing set in a time frame: as with standing it goes to the character of the dispute and interests of the parties in the outcome, but not to the merits of the position of either party. The fact that the case is weak, governed by existing precedent or for that matter bound to fail does not mean that it is moot, it just means that it is hopeless. Even hopeless cases involve real rights or interests and, until they are actually determined, present real controversies."

68. The respondent sought to rely on an observation in the judgment of Donnelly J.'s in this Court in an appeal by Mr. Beades against Pepper ([2021] IECA 277) wherein she mentions that "[t]he orders made on 8th October 2021 have been discharged, insofar as they refer to those named persons. Accordingly, any appeal against the attachment orders by any party or indeed by any non-party is now manifestly moot." However, the appellants were not parties to that appeal and it is not clear whether the Court was aware of this pending appeal when it gave its judgment. I am quite sure that Donnelly J. did not intend to suggest how these appeals, which had yet to be heard, ought to be determined, in circumstances where the appellants were not before it and did not have a chance to be heard. In any event, those observations cannot bind the appellants or, for that matter, this Court in dealing with the appeals before it now.

69. I am satisfied that the respondent is not correct is asserting that merely because the order of attachment of 1st October, 2021 was discharged by consent on 12th October, 2021, the issues in this appeal are rendered moot. In our system of justice, a finding of contempt in the form of wilful disobedience of an order made by the High Court is a serious matter, both in its own terms and by reason of the fact that such a finding exposes the person concerned to the risk of attachment and committal. If, as the appellants say, that finding of contempt was not lawful or valid, they ought not to be shut out from challenging it by way of appeal to this Court.

70. There are significant issues in controversy between the parties include (i) whether the respondents were entitled to refrain from joining the appellants as defendants at a time when their identity was known; (ii) the relevance, if any, of an order made in the Court of Appeal on 15th January, 2021 extending a stay on the orders; and (iii) whether the respondents were entitled to issue a motion for attachment at a time when, as the trial judge has found, the respondents failed to established beyond a reasonable doubt that the appellants

each knew of the making of the orders and at a time in respect of which the High Court judge further found that the respondents had failed to satisfy him to the requisite standard of proof that a conscious decision had been made by the appellants to disobey the orders.

71. Proceedings in which civil contempt is determined are regarded as criminal proceedings for the purposes of Article 6 of the European Convention on Human Rights as was held in *Hammerton v. United Kingdom* (2016) 63 E.H.R.R. 23 (Application No. 6287/10, Judgment of the European Court of Human Rights, 17th March 2016). Even where no penalty was imposed or where any penalty imposed has been discharged, a person convicted of a crime is entitled to appeal their conviction. In my view, the position must be the same as regards a finding of contempt of court. All of the above factors in combination demonstrate that real controversies subsist and there are live disputes between the parties and that it would not be just to regard these appeals as moot.

72. I accordingly conclude that there is a "live controversy" the resolution of which is capable of affecting the rights of the parties and the appeal is effectively not moot: *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274.

Analysis of key aspects of the evidence

73. Before proceeding to analyse the grounds of appeal it is necessary to consider salient aspects of the evidence in the long running litigation between IIB and Mr. Beades which was a precursor to the within proceedings as well as in these proceedings themselves.

The mortgage

74. It appears from the terms of the mortgage granted to Mr. Beades - the appellants' erstwhile landlord - and the Special Conditions subject to which it was granted that the original mortgagee in 2003, IIB, agreed to the mortgagor creating lettings in respect of the

properties. There was not a blanket prohibition on lettings in the mortgage. The said agreement was subject to detailed conditionality.

The 2008 Affidavit of Service on the occupiers

75. At the latest, by the time IIB sought in 2006 to enforce its security and obtain orders for possession of the properties, 21 Little Mary Street had been subdivided into five separate apartments. 31 Richmond Avenue was subdivided into seven separate dwelling units. The mortgagee was fully aware of that fact. The affidavit of service of Maria Kavanagh was filed in the Central Office of the High Court on the 29th January, 2008. It deposed to service of a copy of the special summons together with the grounding affidavit of Shane Reid by ordinary prepaid post on seven named tenants with addresses at seven separate flats situate within 31 Richmond Avenue and in the case of 21 Little Mary Street on five separate apartments. Tenants were identified and named in respect of four of the said apartments. In respect of Apartment No. 2, the fifth dwelling unit at 21 Little Mary Street, service was effected on the "Occupier" at the specified address. The affidavit of service in question offers an approach for how a prudent mortgagee in the position of IIB, or indeed Pepper, acting proportionately, might go about effecting valid service of possession proceedings or orders on the 12 separate domestic units situate in the two properties for the purposes of compliance with the rules of the Superior Courts.

76. This 2008 Affidavit of Service offers material evidence that the original mortgagee either implicitly consented to or actively acquiesced in the laying out in residential units and letting of both properties by the mortgagor. It would be entirely artificial to construe the facts in any other way. The properties were acquired for letting purposes and such activity by the mortgagor was in the contemplation of both IIB and the mortgagor, as the exhibited documentation demonstrates.

77. Further, it is clear that notwithstanding the making of the 2008 Order for Possession by the High Court, IIB and its successors in title took no step to secure vacant possession of the units. It appears that the tenancies subsisting in January 2008 were either continued, renewed or fresh tenancies granted over time by the mortgagor. This continued up to and after 2014 when the Supreme Court dismissed Mr. Beades' appeal and affirmed the Order for possession granted in the High court.

78. Significantly, that state of affairs continued over time up to and after the date of acquisition of the underlying securities by Pepper. Pepper, as successor in title to the original mortgagee, IIB, was fixed with notice regarding the existence of these tenancies and the nature of the properties as comprised their security. There is no evidence adduced by Pepper that IIB or its successors had ever contended that the occupiers were trespassers or objected to the continuation of the tenancies or the creation of new ones. Indeed it is not clear that IIB ever served the 2008 order for possession or the Supreme Court Order of 2014 on the occupiers - or any of them.

Mr. Beades

79. Though not a party to the within proceedings the presence of the mortgagor, Mr. Jerry Beades, has loomed over the proceedings. He was the mortgagor who purchased the properties in or about 2003. The order for possession was obtained against him by IIB in June 2007. He unsuccessfully appealed that order to the Supreme Court which affirmed the original order, in November 2014. Mr. Beades sought to enter an appearance in these proceedings. The High Court and on appeal this court refused those applications. He has sought to intervene in the within litigation at various junctures. All such applications were unsuccessful.

80. The uncontroverted evidence of the appellants is that they went into occupation of the respective units as tenants to Mr. Beades. Some had been in occupation for upwards of 10 years and in one instance a couple have occupied their apartment for 17 years. They paid rent to Mr. Beades in each case. Such tenancies are governed by the provisions of the PRTB legislation. There was no legitimate basis for Mr. Beades' attempts to intervene or interpose himself into this litigation. His repeated applications, both in the High Court and in this court were opposed by the occupiers. Counsel for the appellants reiterated in the course of this appeal that "Mr. Beades … isn't a party to any of … this" (Transcript p. 16).

81. The High Court, in some interlocutory applications brought within these proceedings, may have been left with the impression that the appellants or some of them were persons merely assisting or facilitating Mr. Beades in opposing orders made in other litigation against him. It may have created the impression that Mr. Beades was pursuing defence of the within litigation by proxy for his own ends. The evidence adduced at trial in the High Court did not support such a characterisation of the appellants.

82. The respective units in both properties constituted the dwellings and/or family homes of the appellants. The family home enjoys certain protection both pursuant to Article 40.5 of the Constitution and, in defined circumstances which do not appear to me to be established in this case, also under Article 8 of the European Convention on Human Rights.

Individuals dwelling in units at 31 Richmond Avenue

83. The evidence before the High Court judge was that at the date of institution of the above-entitled proceedings by way of plenary summons on the 8th October, 2020, the following persons were in occupation of individual dwelling units at the said property:

(1) Firuca Puscas and Gavrila Puscas. They had lived in a dwelling unit in the basement of the property for upwards of 11 years at that time.

(2) Flat D comprised the family home of Doina Bartas and Vasile Circu and their two children aged six and nine. In an affidavit sworn on the 19th March, 2021, Doina Bortas deposed, *inter alia*, that she had lived with her partner and two children in the flat for approximately 16 years. She exhibited a tenancy agreement executed between the landlord (Mr. Beades) and same was executed by Vasile Circu. She exhibited various documentation addressed to her at the said Flat D over the years as evidence supporting her claim to have continuously occupied the property for approximately 16 years. Her partner Vasile Circu in his affidavit of the 19th March, 2021 deposed to having lived at the address at 31 Richmond Avenue for approximately 16 years having initially lived at Flat A and from 2005 onward and then moved to Flat D in the premises in 2012.

(3) In respect of Flat C, Gabriel Petrut, who had entered an appearance on the 23rd November, 2020, deposed in an affidavit sworn on the 19th March, 2021 that he had lived at Flat C for one year as tenant. He exhibited a tenancy agreement dated 1st November, 2019 and other evidence in support of his occupation of the property.

(4) In respect of Flat G, Ion Mihali deposed in an affidavit of the 20th March, 2020 that he resided at the said flat with his partner Irina Ucaciu and his brother Nicolae Mihali as tenants. He deposes that around 2011 he signed a tenancy agreement along with his brother. That he had lived in the property for approximately 10 years. His brother Nicolae deposes in similar terms in an affidavit sworn 20th March 2021. Ms. Irina Ucaciu deposes in like terms in an affidavit of the 20th March, 2020 to have been living "at the above address" for approximately 10 years.

(5) Ioan Brat of Flat B swore an affidavit on the 20th March, 2021. He deposed that in or around 2004 he and his wife Dorina Brat entered into a tenancy agreement and that they had been residing at that address ever since. It is clear therefore that he was in occupation and possession of the property approximately one year after the creation of the mortgage with IIB in the first instance and years before IIB obtained an order for possession of the property against the mortgagor, Mr. Beades in June 2007. That position is corroborated by the affidavit of service of Maria Kavanagh sworn in January 2008 confirming that a copy of the summons had been served on him at Flat B by a letter dated and posted on the 19th December, 2007.

84. Each of the said deponents stated that they habitually received post addressed to them at their respective flats at 31 Richmond Avenue and that they had never received any letters, post or communication from Pepper Finance at their respective addresses.

85. It is clear that Mihai Bataraga resided at Flat E along with his sixteen year old child. They had resided there for approximately 12 years.

Occupation of the dwelling units at 21 Little Mary Street

86. 21 Little Mary Street is subdivided into five separate dwelling units as is apparent from the affidavit of service sworn in January 2007 in connection with the original possession proceedings brought by IIB. That continues to be the position.

(6) Margaret Hanrahan of Flat 1 entered an appearance on the 23rd November, 2020. She swore an affidavit on the 8th February, 2021. Hence her identity was known to Pepper prior to the orders made in the High Court on the 25th November, 2020.

(7) Augustin Gabor. Mr. Gabor occupied Flat 4 at the property. He deposes in an affidavit sworn 19th March, 2021 that he had lived at the property for approximately 15 years. That he had received correspondence some time before "in 2009 or thereabouts from IIB Bank in relation to a law case in which our landlord was involved at the time." (para. 11) He deposed that he had not received correspondence addressed to his actual addressed, that he had "never received any letters, post or anything from Pepper Finance and only discovered that my family and myself were at risk of imprisonment just prior to 26 February, 2021 from a neighbour." (para. 8) In fact, Mr. Gabor's long occupation of Apartment 4 is independently corroborated by the affidavit of service of Maria Kavanagh sworn in January 2008 aforementioned where she specifically identifies him as having been the subject of service of a copy of the summons and grounding affidavit by letter dated 19th December, 2007 addressed to the specific apartment he then occupied. Thus it was information with which Pepper as successor in title to IIB was fixed with notice. A copy of the said affidavit was readily procurable by Pepper from the Central Office were it the case that did not have a copy in their possession. They cannot benefit should it be the case that they refrained from considering it or its contents.

(8) In respect of Flat 5, Iosua Striblea deposes on behalf of himself and Mihai Striblea that they had occupied Flat 5 at 21 Little Mary Street, Dublin 7 for approximately two years and they likewise deposed to not having been served with proceedings or "anything from Pepper." (para. 8)

(9) The High Court further noted that in respect of 21 Little Mary Street, Flat/Apartment No. 3 Iuliu Putina and Svetlana Gannokha had occupied at

the said apartment for eight years and that in respect of Flat 5 Vasile Rus had resided there with the Striblea family for two years.

Key steps in the within litigation history

87. Key steps in the litigation history leading to this appeal include:

a. The plenary summonses in both proceedings issued on the 8th October, 2020.

b. Notices of motion seeking interlocutory relief were filed in the Central Office of the High Court on the 14th day of October 2020 against "persons unknown in occupation of the property 31 Richmond Avenue Fairview Dublin 3 and persons unknown in occupation of the property known as 21 Little Mary Street Dublin 7" and both motions were returnable for the 25th November, 2020.

c. On the 23rd November, 2020 both Margaret Hanrahan and Gabriel Petrut entered Appearances.

d. On the 25th November 2020 there was no attendance in court by any person in occupation of any of the units in either property. The court was aware that appearances had been entered on behalf of two individuals.

88. The High Court on the 25th November, 2020 granted a mandatory interlocutory order that the defendants and each of them, their servants and/or agents and all other persons having notice of the said order "(1) immediately surrender possession and control of the property described in the schedule to the Plenary Summons (the "Property") to the Plaintiff." Separate orders were made in respect of each property. The order did not identify that each property comprised a number of separate dwelling units. Neither did it identify any occupier by name.

Service of orders made 25th November 2020

89. With regard to service for reasons that are not entirely clear, the High Court judge gave directions that five copies of a letter together with the order be hand delivered to the property addressed to the occupants. A further copy was to be delivered addressed to Mr. Petrut by name but not addressed to the specific apartment he resided in. It is unclear as to why the number of copies of the orders was less than the number of separate and self-contained dwelling units that existed at 31 Richmond Avenue was directed. There was no suggestion that Pepper was unaware of the number of dwelling units at each premises. It may be that the judge who granted the interlocutory injunctions was not aware of the true number of dwelling units in each property. There were also directions with regard to service on Mr. Beades who had sought unsuccessfully to interpose himself in the litigation.

90. With regard to the property at 21 Little Mary Street, which was laid out in five separate dwelling units, the High Court approved delivery by hand of three hard copies of each of the relevant documents by way of service. Issues concerning the validity of this service does not arise in this appeal.

91. On the face of the orders of the 25th November, 2020 in each case they were made against "persons unknown in occupation of" the respective properties the judge had ordered "the Plaintiff's Solicitor be at liberty to notify the making of this Order to the Defendants their servants and/or agents and all other persons by hand delivery and Ordinary Pre-Paid Post." The court had further ordered in each case that the respective orders be stayed until 5 p.m. on Thursday 14th January, 2021. Thus we see that the number of copies directed to be served at each property were:

a. Less in number than the total number of occupied dwelling units in that property,

b. Not addressed to any named occupant, and

c. Not addressed to any specific identifiable dwelling unit.

92. Affidavits of service filed in the High Court on the 7th January, 2021 and sworn in each case on the 16th December, 2020 depose to purported service of the orders of the High Court.

Order of Court of Appeal 15 January 2021 extending stay

93. On the 15th January, 2021 Mr. Justice Noonan in this court made orders varying the respective orders and in the particular in relation to the stays granted extending the stays in each case for a further period of three weeks. A key issue in this appeal is whether the said respective variations of the stay is granted operated in respect of Margaret Hanrahan and Gabriel Petrut alone. The appellants contend that the order of Mr. Justice Noonan in this court had the effect of varying the order of the 25th November, 2020 and was accordingly required to be served on the persons in occupation of the various dwelling units in both properties with an appropriate penal endorsement in the context of attachment and committal proceedings that were brought by Pepper.

94. It is further contended that there are infirmities in the respective titles of the proceedings and in particular since the identity of most of the occupants was known or ascertainable the title to the respective proceedings ought to have been amended accordingly.

The Nature of the Orders sought

The respondent sought and obtained from Reynolds J. on 25 November 2020, *inter alia*, mandatory orders including to immediately surrender possession and control of the properties "described in the schedule to the Plenary Summons" and to immediately deliver up to the plaintiff all keys alarm codes security and access devices in respect of each property. Additionally, seven interlocutory orders were made "pending the trial of the action." The relationship of landlord and tenant never existed between Pepper and the

appellants. It is not in dispute that the appellants paid rent for occupancy of their respective units to the defaulting mortgagor, Mr. Beades.

Dwelling

95. In *The People (Director of Public Prosecutions) v. Lynch* [2010] 1 I.R. 543, the Court of Criminal Appeal clarified that even a squatter enjoys the protection of Article 40.5 of the Constitution where it is shown that the premises constituted their "dwelling" and they lived there. That decision was cited with approval by the Supreme Court in *Moore v. Dun Laoghaire Rathdown County Council* [2016] IESC 70, [2017] 3 I.R. 42. Both were decisions in the context of public housing. The decision in *Clare County Council v. McDonagh & anor* [2022] IESC 15 is also illustrative of the importance accorded to a dwelling under the law.

96. In light of s.3 of the European Convention on Human Rights Act, 2003, it is appropriate also to recall that in the context of Article 8 of the said Convention the ECtHR held in *Prokopovich v. Russia* (Case 58255/00) [2004] ECHR 642 that:-

> "… the concept of "home" within the meaning of Article 8 is not limited to those which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of Article 8.1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place". (para. 36)

The said dictum of the ECtHR found favour also with the Supreme Court in *Moore*.

'Home' is defined by the ECtHR by reference to use and occupation of any property as a home and does not depend on the occupier having any proprietary right of interest in the property. The European Court of Human Rights recognises the affective nature of a "home."

97. It is to be borne in mind that Pepper is a private corporate entity and, as has been made clear in decisions such as in *FJM v. United Kingdom* [2019] H.L.R. 8, the principle that any person at risk of losing his home should be able to have the proportionality of his eviction determined by an independent tribunal does not apply where possession is sought by a private individual or enterprise. Accordingly, the issue of proportionality does not arise in this case.

98. However, the appellants were entitled to fair procedures and compliance with the relevant rules in the process employed by Pepper to obtain possession of their security especially where the practical consequence of obtaining mandatory and other interlocutory orders was to expel the appellants from their family homes and dwellings.

The arguments

Grounds 1, 2 & 3 – Relevance of Order of 15 January 2021

99. Pepper's motion seeking attachment of the appellants issued on 12th February, 2021. Pepper argued that it was unnecessary to serve on the appellants a copy of the Court of Appeal Order varying the stay since that extension had expired prior to 12th February. Pepper contends that the extension of the stay did not vary the substance of the injunction orders themselves. Reliance was placed on *Laois County Council v. Scully* [2006] IEHC 2, [2006] 2 I.R. 292 as authority supporting an approach of upholding orders and that technicalities should not be relied on to evade obligations thereunder. It was contended that the Court of Appeal Order only applied to Mr. Petrut and Ms. Hanrahan as Noonan J. had observed. It was contended that failure to perfect or serve the Court of Appeal Order was not the fault of the respondents. The Court of Appeal Order was only served long after the motion seeking attachment was heard. It was argued that the appellants were not ignorant as to the terms of the Court of Appeal order since Pepper's solicitors had written to Ms.

Hanrahan and Mr. Petrut in January "confirming the terms" and to the appellants' solicitors in late February 2021.

100. Pepper contended in argument that the obligations under Reynolds J.'s orders were continuing and did not expire on the 15th January, 2021. They submitted that said order was immediate in effect, it restrained the ordered persons "from doing particular things" (p. 85 of Transcript) and had been stayed until 14th January, and therefore, it was not the same as an order that required something to be done by the 15th January. Counsel posited at the hearing that "... there is no time period specified in either numbered paragraph 1 or numbered paragraph 2 on the first page, or in any of the numbered paragraphs between 1 and 7 on the second page of the Order. The only thing that brings time into play is that the Order is set to be stayed until 5:00p.m. on Thursday, 14th January 2021" and "it would be repellent to common sense but also it is repellent to a fair construction of the Order to contend that somehow magically the obligation to comply with the Order dissolves in the event that one doesn't become aware of that Order until after the stay has elapsed." (p. 86 of Transcript)

101. The appellants contend that service of the Court of Appeal Order was vital and that by the time it was received the period of the stay had elapsed. They sought to rely on the decision of *Sheridan v. Gaynor* [2012] IEHC 410 contending that that decision "… sets out that you can't be in contempt of an Order that you can't comply with. By the time it was served on us it was impossible for us to comply with that Order, and that is a fundamental flaw…" (p. 8, Transcript)

Summary in Nature

102. In that context it is noteworthy that it is well settled in this jurisdiction including, *inter alia*, by the Supreme Court in the decision *State (H.) v. Daly* [1977] I.R. 90 that

contempt proceedings are summary in nature. In *National Irish Bank v Graham* [1994] 1 I.R. 215 at page 220 Keane J. (as he then was) observed: -

> "It is clear that before the court takes the serious step of depriving a person of his or her liberty for failure to comply with an order of the court, it must be satisfied beyond reasonable doubt that he or she has in fact committed the alleged contempt."

In that regard the clear scope of the order concerned is of importance.

103. In *Competition Authority v. Licenced Vintner's Association* [2009] IEHC 439 McKechnie J. reiterated the standard of proof observing "[t]here is little doubt in my mind that in proceedings of a criminal or quasi criminal nature the standard must be that of beyond reasonable doubt." (para. 26) He continued –

> "The overwhelming preponderance of case law is to this effect: *Re Bramblevale Limited* is a clear cut example espousing the higher standard: *National Irish Bank Limited* is a clear cut example of the application of this standard in practice; Keane J. as he then was, despite very strong circumstantial evidence of a breach, refused to attach as the required matters had not been established beyond a reasonable doubt. The only contrary view of note is Millett J.'s decision in *Chelsea Man Plc.*, where the standard of 'degree and impression' is suggested. If that view cannot be explained by reference to its own facts, and if the citation of *Bramblevale and Dean* to the court would have made no difference, then, respectfully ,I would have to prefer the alternative view. I believe that the criticisms offered of that decision by Arlidge, Eady and Smith is sound and accords with established practice."

In that case the Competition Authority had contended that once the facts had been established or otherwise admitted to level beyond reasonable doubt, the follow on question of whether, as a matter of law, there had been a contempt can be determined by reference to

the civil standard – namely the balance of probabilities. The defendants argued that before they could be found guilty of contempt all matters before the court, both facts and law had to be proven to a standard beyond reasonable doubt.

104. McKechnie J. rejected the Competition Authority's contentions in that regard, noting at para. 20: -

> "There are several cases which make it quite clear that the relevant standard is beyond reasonable doubt, and that this applies to all matters at issue in the case, both factual and illegal. For example, in *Dean v Dean* [1987] 1 FLR 55 at 61 Neill L.J. stated:
>
> > 'It is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanour. Furthermore, there are many authorities, of which the decision in *Re Bramblevale Limited* [1970] CH 128 is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi-criminal in nature and that the standard of proof to be applied is the criminal standard…'"

In light of the authorities including the decision of Keane J. in *National Irish Bank Limited* McKechnie J. concluded at para. 53: -

> "I therefore reject the arguments of counsel for the authority that this court can sever issues of fact and law in the way suggested; so that a lower standard of proof applies to the latter as opposed to the former. The entirety of the claim as alleged must be proven beyond reasonable doubt.
>
> 54. Nonetheless, the court must be clear as to what it is being asked to find beyond reasonable doubt. Each case must be carefully scrutinised so that the correct questions identified and answer to this standard."

105. That decision has been followed subsequently in a number of cases including, *inter alia*, *Muller v. Shell E&P Ireland* [2010] IEHC 238 where the court observed that it necessarily followed from the application of a standard of proof beyond reasonable doubt that "… if a reasonable doubt arises as to the scope or proper interpretation of an Order, this must be resolved in favour of the person who is alleged to have breached the Order." (p. 4)

106. Clarke J. in *P. Elliott & Co. v. Building and Allied Trades Union* [2006] IEHC 340 at paragraph 3.3 observed on the evidence before him that: -

> "… having regard to the penal nature of the contempt jurisdiction, a party could not be said to be in contempt of a court order where, objectively speaking, there was reasonable doubt as to whether the actions complained of came within or without the scope of the order concerned."

107. As was observed by Ó Dálaigh C.J. in *Keegan v. de Burca* [1973] I.R. 223 at page 227: -

> "Civil contempt, …, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made."

O'Loughlin J. in a dissenting judgment in *Keegan* differed in his analysis in that regard. There is, to an extent, a difference of opinion therefore as to whether a sentence imposed in respect of civil contempt is exclusively rather than primarily coercive in nature in civil proceedings. Hardiman J. in *Irish Bank Resolution Corporation v. Quinn* at [2012] IESC 51 at para. 31 expressed concern as to the potential ensuing uncertainty arising therefrom observing -

> "This 'difference of view' does not suggest the clarity and precision normally required in a procedure which can lead to loss of liberty.
>
> 43. This appears to me to be a very unsatisfactory situation especially from the point of view of one at risk of his liberty."

108. Insofar as relevant I am satisfied that the primary purpose of committal within civil proceedings for civil contempt is coercive in nature. Were any other objective said to be applicable, it is desirable that legislation be introduced to create clarity and certainty in that regard.

Conclusions on Grounds 1-3

109. The order of 15th January, 2021 is clear on its face. It varied the earlier order of 25th November, 2020 which encompassed both mandatory and prohibitory orders in a material respect by extending the stay initially granted.

110. The Supreme Court in *Redmond v. Ireland* [1992] 2 I.R. 362 observed that in deciding whether to grant or refuse a stay the court must "…maintain a balance so that justice will not be denied to either party." (p. 366) It is to be inferred therefore that Noonan J. in granting the extension of the stay on 15th January 2021 was satisfied that such an extension was appropriate to ensure that justice was not denied to either party.

111. It was evident from the face of the order of Noonan J. that it was of general application. That Pepper elected to prefer the comments of Noonan J. over the clear language of that Order cannot confer any procedural advantage upon them. The trial judge erred in finding (at para. 22 of the judgment) that, by reason of observations made by Noonan J. as recorded in the transcript, the extension of the stay only applied to Ms. Hanrahan and Mr. Petrut.

112. That order of the Court of Appeal materially altered a key element of the mandatory orders and interlocutory injunctions. Accordingly, each appellant was entitled to be appraised as to its terms and afforded an opportunity to seek advices in relation to its import. If the respondent believed there was any error on the face of the order an application should have been brought to Noonan J. to amend same. That did not occur. No application for substituted service was made in relation to the court of appeal order. Purported service on Mr Petrut *via* the email address of a third party was not valid service of the said order upon him. It is noteworthy that by an email of 19th January, 2021 the respondent's solicitors stated; "We will serve a copy of the Order of Mr. Justice Noonan as soon as it is to hand." Such service was not effected prior to issuing the Notice of Motion on 19th February, 2021. Service of the relevant Court of Appeal Order was not validly effected on either Mr. Petrut or Ms. Hanrahan, notwithstanding that both had entered appearances.

113. Non-compliance with the terms of the order of 25th November, 2020 by any of the appellants during the operative period for which the stay was extended did not give rise *per se* to rights in Pepper to invoke the coercive jurisdiction based on any alleged breach of the substantive orders. The benefit of the stay enured for all appellants. It follows that each appellant as a party subject to the earlier order ought to have been served with a copy of the later order extending the stay. It was particularly imperative to effect valid service of the order extending the stay since the properties in question were the dwellings of the appellants. Further in my view, prior to invoking the coercive jurisdiction of the High Court, the 15th January, 2021 Order with appropriate endorsement ought to have been served on all appellants. It was served on none.

114. As stated above the trial judge's view as to the validity of service of the relevant November 2020 orders prior to the issuing of the motions for attachment and committal is clear : "… the orders, although served in accordance with the orders of 25th November,

2020, were not served on individual apartments, I do not think it is established beyond a reasonable doubt that the occupants each knew of the making of the orders, or that the circumstances of service outweigh the evidence from the eight deponents across the two properties such as would allow me to conclude beyond a reasonable doubt that a conscious decision was made to disobey the orders." (para. 111)

115. The Affidavit of Gerard McHugh sworn on 11th February, 2021 failed to exhibit any copy of the Court of Appeal Order of 15th January, 2021. It asserted (erroneously) that in relation to 31 Richmond Avenue the order had been granted to Mr Petrut and in relation to 21 Little Mary Street that the order pertained only to Ms. Hanrahan.

Grounds 4 and 5 – "Persons Unknown"

116. Both sets of proceedings and all orders were made against "persons unknown in occupation" of the respective properties. By the date the application for the interlocutory injunctions came on for hearing in the High Court on the 25th November, 2020, two of the occupants had entered appearances - Margaret Hanrahan and Gabriel Petrut. In addition, information was either in the possession of Pepper or was reasonably ascertainable by them the two further occupants of the respective properties, namely Ioan Brat at 31 Richmond Road and Augustin Gabor of 5 Little Mary Street had been in long occupation and possession as tenants of the mortgagor since prior to the making of the order for possession in the High Court at the 23rd June, 2007.

117. It is not clear why no step was taken to join any of those individuals as defendants to the relevant proceedings. Furthermore, Pepper offered no explanation for why it failed or omitted to take any steps to ascertain the identity of the persons in occupation of the various dwelling units or, if their identities had been ascertained, named any of them as defendants

to the proceedings. Even a cursory step such as communicating with the PRTB was not engaged in. Counsel for the respondent observed in the course of the appeal:-

> "… we never had an objection to the amendment of the proceedings in that way. … We never brought an application on affidavit to amend the title of the proceedings. That's an agreed fact. Secondly, it is an agreed fact that the title of the proceedings was never amended. It is also an agreed fact that Mr. Kennedy never brought an application on affidavit to amend the title of the proceedings to name his clients." (p. 101, transcript)

118. Order 4, r. 7 RSC provides:-

> "In any proceeding for the recovery of land any tenant, under-tenant, or other person in actual possession of the property sought to be recovered, or any part thereof, may be named as defendant, and the summons shall be directed to such tenant, under-tenant, or other person, with the addition of the words "and all persons concerned."

119. The position with regard to the requirement to name defendants in plenary proceedings under the rules of the superior courts was outlined by the Supreme Court in *Moore v. Attorney General (No. 3)* [1930] I.R. 471 where Kennedy C.J. observed: -

> "… an injunction can only be granted against the persons actually parties to the action. If it be necessary to obtain relief by way of injunction against a person 'represented' in, but not otherwise a party to the suit, a separate action must, in my opinion, be brought against him upon facts showing that he should be restrained by injunction" (p. 489)

120. That judgment concerned issues in regard to representative orders. It is noteworthy that O'Donnell J. (as he then was) in the Supreme Court decision *Hickey v. McGowan and*

Anor [2017] IESC 6, [2017] 2 I.R. 196 observed at para. 57, in considering the appropriateness of a representative order –

> " … Kennedy C.J. stated bluntly in *Moore v. Attorney General (No. 2)* [1930] IR 471 at page 499 (*sic*) that the almost identical provisions of O. XVI, Rule IX of the Rules of the Supreme Court (IR.), 1905, did not apply to an action in tort.
>
> I am not sure that that is necessarily correct in all circumstances and in particular where a claim is made for the same vicarious liability against a number of parties (something that might not have been conceived possible in 1930)."

121. In my view, having due regard to the principle enshrined in Article 34.1 of the Constitution that "Justice … save in such special and limited cases as may be prescribed by law, shall be administered in public", the public disclosure in pleadings of the true identities of parties to civil litigation is, save in exceptional circumstances, imperative. It is incumbent upon a plaintiff to take reasonable steps to ascertain the names and identities of proposed defendants if justice is to be administered in public. As was observed by Laffoy J., in a slightly different context, in *Roe v. Blood Transfusion Service Board* [1996] 3 I.R. 67: "In a situation where the true identity of a plaintiff in a civil action is known to the parties to the action and to the court, but is concealed from the public, members of the general public cannot see for themselves that justice is done." The manner in which a plaintiff proceeds to plead in litigation, insofar as practicable, ought to be by names that identify each defendant, not by a title that conceals the identity of a defendant known or ascertainable to the plaintiff. The appellants sought to rely on the decision in *Canada Goose UK Retail Ltd. v. Persons Unknown* [2020] EWCA Civ. 303. That decision concerned an ever-changing group of individuals outside a retail premises engaged in ongoing protest concerning the business being conducted at the premises and its facts are distinguishable from those of the instant case.

122. By the time the respondent issued the Motion to attach on 12th February, 2021, I am satisfied that it knew or could, with reasonable diligence, including a perusal of the 2007 Affidavit, have ascertained the names of at least some of the occupiers of the 12 dwelling units comprised within the two properties. They included Ms. Hanrahan, Mr. Petrut, as well as Mr. Gabor and Mr. Brat. I am satisfied that Pepper could have ascertained the numbers and precise addresses of the individual dwelling units within each premises whether through Eircode, voting registers, PRTB or competent inquiry or a perusal of the papers in the possession proceedings initially brought by their predecessors in title against Mr. Beades and which they had taken over. I am satisfied that Pepper had taken no reasonable or adequate steps to ascertain the identities of the other occupiers - such as by attending the door of each dwelling unit or writing a letter addressed to "the occupier(s)" of each specific dwelling unit within both premises.

Device of "persons unknown" as nominative defendant

123. It is not prudent to rely on English jurisprudence in regard to the validity of service on persons unknown in circumstances where the relevant civil procedure rules ("CPR") in England and Wales have been the subject of significant modifications with regard to service on unknown persons, particularly in the past 20 years. No analogous amendments have been effected to the Rules of the Superior Courts in this jurisdiction.

124. This in turn calls for a consideration of service in the context of defendants not being specifically identified in the Plenary Summons.

Order 9 RSC provides:

> " **III. In particular actions**
>
> **8**. In an action brought for recovery of land for non-payment of rent or for overholding, it shall not be necessary to serve the summons upon any person other

than the person or persons in the actual possession of the land or any part thereof, as tenant or under-tenant.

9. In other actions for the recovery of land, it shall be necessary to serve every person in actual possession, or in receipt of the rents and profits, of the lands or any part thereof, unless the Court shall otherwise direct.

10. In actions for the recovery of land service of a summons may be effected either by personal service on the person to be served at any place within the jurisdiction or by delivering a copy of such summons to the wife, husband, child, father, mother, brother, or sister, of such person, at her house, or office, or place of business (the person with whom such copy shall be left being of the age of sixteen years or upwards), and showing to such person the original or duplicate original of such summons, and such service as last aforesaid may be effected whether the person to be served is within the jurisdiction or not." (emphasis added)

Relevant Endorsement – Ground 6

125. Copies of the orders made by the High Court on the 25th November, 2020 came to be served in December 2020 addressed generally to "persons unknown" in occupation of the two premises and not addressed to any particular dwelling unit in either premises.

126. Prior to granting an order of attachment/committal it is imperative that the court ensure that all procedural safeguards have been complied with. Pepper knew the identities and unit addresses of Ms. Hanrahan and Mr. Petrut since 23rd November, 2020 and from 22nd February, 2021 at the latest, the names and addresses of all the occupants. They were not anonymous or unknown or not capable of identification. Pepper fell into error in failing to join the appellants as defendants to the proceedings on the ascertainment of the identity of each.

127. Where the remedies of attachment and/or committal for civil contempt are invoked, with the consequent potential of a deprivation of liberty, it is imperative that all relevant persons known to the moving party be named as parties to the proceedings and be named and specifically identified on the face of a penally endorsed notice or copy order.

128. That requirement must be observed with even greater rigour where a plaintiff seeks to attach/commit individuals for an alleged breach or non-compliance with the terms of, *inter alia*, mandatory interlocutory injunctions which purport to effect, at the interlocutory stage of proceedings, the permanent expulsion of individuals from their family homes or dwellings. A "dwelling" enjoys certain constitutionally recognised protections. As Hogan, Whyte, Kenny & Walsh, *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) state at para. 7.5.10:-

> " In *DPP v Barnes*, [2007] 3 IR 130, 145, [2006] IECCA 165 at [27] Hardiman J held that the protection of the dwelling extended to 'householders', a group that he felt encompassed '… the owner or lawful occupier of every sort of premises from a palace to a shack and regardless of whether he is the full owner, a tenant or a licensee or other form of permissive occupant. According to Hardiman J, lawful occupation, not property rights, determined an individual's entitlement to invoke Article 40.5. Furthermore, Hardiman J held that the guests of such individuals would be able to invoke Article 40.5: householders could bring individuals into their homes and thereby within the ambit of Article 40.5's protection. This approach demonstrates an understanding of the home as a protected sphere that is both private and social in nature." (footnotes included)

It will be for the trial judge in the plenary action to determine - in light of the individual circumstances and facts of each appellant, the apparently long undisturbed occupancy of several occupiers – some predating the institution of the possession proceedings themselves

in 2006 - coupled with any absence of step being taken by IIB or its successors in title to secure vacant possession – to determine the appellants' exact legal status on the properties and whether in each case they had become permissive occupants of any kind, licensees of any kind or otherwise and whether and how their occupancies were validly terminated *quo ad* Pepper.

Civil contempt

129. In *Laois County Council v. Hanrahan* [2014] IESC 36, [2014] 3 I.R. 143 McKechnie J. noted that civil contempt applies to both mandatory and prohibitory orders.

130. Whether such disobedience concerns a mandatory or prohibitory court order it is civil contempt. It is to be recalled that the proceedings whereby civil contempt is determined are regarded as criminal proceedings for the purposes of Art. 6 of the European Convention on Human Rights as was determined by the ECtHR in *Hammerton v United Kingdom* [2016] 63 E.H.R.R. 23.

131. *Hammerton* concerned admissibility. The following extracts from that judgment are relevant and accord with the Irish authorities:

> "3. The applicant alleged, in particular, that his committal to prison for civil contempt, and the subsequent civil proceedings by which he sought to obtain redress, violated his rights under Articles 5 and 6 of the Convention…."

> *"2. Case-law and other relevant legal materials*
>
> **(a) The nature of civil contempt**
>
> 38. In *R v. O'Brien* [2014] UKSC 23, Lord Toulson, giving judgment on behalf of the Supreme Court, observed that English law had long recognised a distinction between "civil contempt", which was conduct not in itself a crime but which was punishable by the court to ensure that its orders were observed, and "criminal contempt." Lord Toulson stated:

> "38. Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt ... However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record."

132. It will be recalled that s. 2 of the European Convention on Human Rights Act, 2003 provides: -

> "2(1) In interpreting and applying any statutory revision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

However, whilst a decision in *Clare County Council v. McDonagh & Anor* [2022] IESC 15 was relied on in written submissions of the appellants and included in the booklet of authority it was not otherwise argued to any extent and a fuller consideration of the issues, if any, arising in the context of the ECHR will fall to be considered on another occasion. I am not satisfied that it has any salience in light of the issues arising in the instant appeal.

133. Order 41, rule 8 of the Rules of the Superior Courts provides: -

> "Every … order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall

be served upon the person required to obey the same …. there shall be endorsed a memorandum in the words or to the effect following, *viz* –

> 'If you the within named A.B. neglect to obey this order this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order.'" (emphasis added)

134. It was argued that the Court of Appeal Order, with memorandum endorsed (penal endorsement), ought to have been personally served on all appellants and that that proof was not satisfied in respect of any appellant including Ms. Hanrahan and Mr. Petrut. They disputed the characterisation of the orders as being prohibitory in nature since the first and second orders expressly mandated the appellants to vacate their homes. Reliance was placed on *Laois County Council v. Scully* [2007] IEHC 212, [2009] 4 I.R. 488 and *Dublin City Council v. McFeely* [2012] IESC 45 in that regard. Service on the appellants' solicitor of a copy of the penally endorsed order after the expiration of term of the stay granted by the court of appeal and after proceedings to attach and commit had issued could not constitute valid service in such circumstances.

135. Pepper contends that there was no requirement to serve any copy of the order of 15th January, 2021 with a penal endorsement since the attachment and committal application was directed towards the injunction orders of 25th November, 2020.

136. The appellants assert several deficiencies in the penal endorsement including the following: it is endorsed on a copy of the 25th November 2020 Order and states "if you do not obey within the time limited in this Order." The time so limited by the High Court had, however, been subsequently varied and therefore effectively superseded by the Court of Appeal Order. The endorsement was therefore erroneous in that respect.

137. They further asserted that the endorsements dated 7th December, 2020 refers in each case to "the within named persons unknown…" and is directed to obeying the order "by the time therein limited." Therefore, it is argued, the Penal Endorsements were ineffective as against both Ms. Hanrahan and Mr. Petrut since their identities were known to the respondents but yet they were not named in the penal endorsement.

138. It is noteworthy that Pepper proceeded with some degree of leisure in purporting to effect service of the mandatory orders. For instance, the penal endorsement is dated the 7th December, 2020, almost two weeks following the making of the orders in the High Court. However, nothing turns on that particular delay save one might expect mandatory orders directing the immediate expulsion of individuals from their homes might be served with due regard to the fact that the trial judge had considered that a stay of about 7 weeks was necessary. Affidavits of service refer to service on or about 7th and 11th December, 2020 to the property addresses - but not in any case to any individual dwelling unit.

139. With regard to the property 21 Little Mary Street, with effect from the 23rd November, 2020 the respondent was aware that Margaret Hanrahan was in occupation of the property. She had entered an appearance. She accordingly could not be said to be "the within named persons unknown." Her identity was actually known both to Pepper and to the court. No valid reason has been identified for failure to name her on the penal endorsement.

140. The purpose of a penal endorsement so called is to put the named person on notice of the potential severe consequence of imprisonment and deprivation of their liberty for failure to comply with the order.

141. In the circumstances the service of the order bearing an endorsement in such terms as outlined above must be taken to have excluded Ms. Hanrahan. She had entered an

appearance, her name was well known to Pepper; she was not a "person unknown" to Pepper. Omitting to name the individual in question when her identity was demonstrably known to the plaintiff does not meet the threshold of effecting service of a copy of the penally endorsed order in a manner which can be said to be compliance beyond reasonable doubt with the procedural requirements in the case of Ms. Hanrahan.

142. Likewise in respect of the property 31 Richmond Avenue, Fairview, Dublin 3, Gabriel Petrut had entered an appearance on the 23rd November, 2020. The failure to specifically identify him on the penal endorsement was a fatal omission which invalidated the penal endorsement *vis-à-vis* Gabriel Petrut.

143. I am also satisfied that the penal endorsements were not valid and did not meet the requisite strict requirement envisaged by O. 41, r. 8 in respect of the terms and tenor of the penal endorsement insofar as Augustin Gabor and Ioan Brat are concerned. Here the primary orders were mandatory in nature - requiring "immediate surrender" of property and "immediately deliver up to the Plaintiffs all keys..." Therefore a valid penal endorsement was required in respect of each order served. As Collins in *Enforcement of Judgments* (2nd ed., Round Hall, 2019) at para. 15-55 observes, citing *Ulster Bank Ireland Ltd v. Whitaker* [2009] IEHC 16 at paras. 4.5 and 4.7 *per* Clarke J. (as he then was) and *H. v Governor of Wheatfield Prison* [2011] IEHC 492 at para. 17, where Hogan J. held that "in the ordinary course, compliance with Ord. 41 r.8 is mandatory" and also referencing *Hampden v Wallis* (1884) 26 Ch. D. 746:-

> "It is clear that when dealing with an application for coercive relief on foot of a mandatory order, the court has no discretion to dispense with the requirement for a penal endorsement."

144. Pepper is successor in title to IIB in those proceedings and cannot project itself as not knowing the averments in the 2007 Affidavit of Service. Whatever the views of the High Court with regard to effecting service, Pepper has not demonstrated beyond reasonable doubt that it was unable to ascertain whether the said respective individuals continued in occupation and possession of the dwelling units in question as of November 2020/ early 2021, over 13 years following the order for possession having been made in the first instance.

Endorsement

145. Collins in the text *Enforcement of Judgments* (*op. cit.*) observes at para. 15-53 –

> "In *Ulster Bank Ireland Limited v Whitaker* [2009] IEHC 16, Clarke J. observed as follows in relation to the requirement for a penal endorsement: at 4.2 'Such a memorandum has (as set out in O. 41, r. 8 RSC) has often in the past been referred to as a penal endorsement. … Even where it is permissible to serve an order on a solicitor (such as an order for discovery in a case such as this) the order must contain the relevant endorsement. In the circumstances I am satisfied that, in order that a party may be subject to a form of enforcement such as attachment, committal … arising out of a failure to comply with an order for discovery, it is, in the ordinary way, necessary that the order concerned should contain what is now described as a memorandum in the form set out in O. 41, r. 8 of the Rules of the Superior Courts." (footnotes included)

The author further observes at para. 15-57 –

> "In *H. v Governor of Wheatfield Prison,* [2011] IEHC 492 at 17 Hogan J. held as follows:
>
> > 'Order 41, r.8 RSC requires that the relevant court order must contain a penal endorsement (*i.e.*, a specific warning that the defendant is liable for potential

> imprisonment) where it [is] sought to invoke the coercive contempt jurisdiction of this Court. While the court has a discretion to dispense with this requirement in cases where the defendant is required by court order to refrain from committing a specific act, in the ordinary course, compliance with Ord. 41. R. 8 is mandatory: see generally *Hampden v. Wallace* (1884) 26 Ch.D. 746 and *Ulster Bank Ltd. V. Whitaker* [2009] IEHC 16. Thus, in the latter case, Clarke J. refused to take any coercive step such as sequestration of assets in the absence of the relevant penal endorsement. *Whitaker* is a powerful reminder of the imperative necessity of adhering to all procedural pre-requisites to the exercise of the contempt jurisdiction.'" (footnotes included)

Conclusion on Ground 6

146. The Orders of 25th November, 2020 included both mandatory and prohibitory terms and as such the Rules required that the orders, with amending orders of 15th January, 2021, be served on the appellants with valid penal endorsement compliant with Order 41, r.8. The Court of Appeal Order of 15th January, 2021 varied the earlier order in a material respect and resulted in the penal endorsement being incorrect in a material respect. I conclude that Ground 6 succeeds in that in respect of the orders as served:

a. The penal endorsement was bad as materially misrepresenting the time limited by an operative order of the court for compliance with its terms.

b. Omitted to disclose material variation of the orders by extension of the stay.

c. Failed to afford any time for compliance with its terms where it sought exclusion of the appellants from their respective dwellings.

d. The order with a valid penal endorsement had not been served prior to the expiration of the time limited for compliance with the orders of the court.

e. The endorsement failed to name known individuals who resided at dwellings in both properties.

f. Failed to identify ascertainable dwelling units at each property.

g. Failed to comply with Order 41, r. 8.

Fall-Back – Ground 7

147. As Senior Counsel for Pepper fairly observed at p. 90 of the appeal transcript, "[t]he purpose of service is obviously to ensure that - in the context of a Court Order of this nature - that persons who may be affected by the Court Order have it brought to their attention in a timely manner. It is not in contention that that was not done prior to the issuing of the Motions to attach and commit."

148. The argument of Pepper to uphold the findings of the trial judge at pp. 90 – 91 of the transcript contends:

> "Now, in this case, to put it at an absolute minimum, whatever views or inferences might have been formed by all the postage prior to February 2021, as a matter of agreed fact, lawyers have been on record since February 2021 - a full year now at this point - and Mr. Kennedy and his solicitor were in a position to advise all of the occupants of the properties that they represented between February and May of the legal implication of Ms. Justice Reynolds's judgment. They obviously had the Order of Ms. Justice Reynolds with the penal endorsement. They indicated very clearly and very helpfully in a schedule who they represented. And obviously ample time was afforded for them to put in replying affidavits and legal submissions. A two day hearing was scheduled in May. So nobody, if I could put it this way in simple terms,

> is in any jeopardy whatsoever of being arrested and imprisoned on the basis of an Order that they weren't at any time familiar with."

149. To invoke the "criminal or quasi-criminal" coercive jurisdiction of the High Court is a serious and significant step. In the instant case since the orders were extensive and included both mandatory and prohibitory terms, the principles governing mandatory orders must apply. As Costello P. made clear in *Fox v. Taher* (Unreported, High Court, 24th January 1996), prior to taking such a drastic step, it is a strict prerequisite that valid service of the order has been effected, "[t]he object of effecting service is to bring home to the defendants the nature of the proceedings and the documents relating to them."

150. No authority was identified for the proposition that a party seeking to attach or commit another can dispense with the procedural requirements or elect to bring such an application and later mend its hand.

151. Clarke J. in *Moore v. Dun Laoghaire Rathdown County Council* emphasised the importance of compliance with the relevant court rules:

> "As pointed out in *Shell E & P Ireland Limited and ors v McGrath and ors* [2013] 1 I.R. 247, rules of court are a form of delegated or secondary legislation and thus form part of the law." (para. 3.4)

He further stated, referring to a requirement to serve notice on a tenant:

> "3.5 It cannot be assumed or accepted that it was intended that no useful purpose could be served by that legally mandated procedure."

I am satisfied that these observations apply to any relevant court rules in the case of both public and private bodies and entities who invoke the coercive powers of the court.

152. The correct procedures which ought to have been followed can be gleaned from the decision of Finlay Geoghegan J. in *Sheridan v Gaynor*. At the very minimum an application

for a fresh mandatory order for possession of the properties ought to have been sought with such applications as were shown to be necessary for substituted service on the solicitors being made in the ordinary way.

Orders of the 15th January, 2021

153. Both Gabriel Petrut and Margaret Hanrahan applied to the Court of Appeal on the 15th January, 2021 for orders staying the respective orders made by the High Court on the 25th November, 2020 pending the determination of two appeals which had brought against the respective orders on or about the 15th December, 2020. Mr. Petrut was not present in court on the day in question but the court had before it his notice of motion and his grounding affidavit filed on the 15th December, 2020 together with the exhibits. Margaret Hanrahan appeared in court and addressed the judge.

154. Mr. Justice Noonan declined to grant a stay on the terms sought pending determination of the respective appeals of Gabriel Petrut and Margaret Hanrahan. However, the court ordered "… that the stay granted in the High Court in the said order be extended for a period of three weeks from the date of this order only." There was a dispute between the parties at the hearing of this appeal as to whether the said order operated exclusively for the benefit of Margaret Hanrahan and Gabriel Petrut respectively or was of general application to the orders made in the High Court on the 25th November, 2020. Before the High Court the stance was adopted that it pertained to Ms. Hanrahan and Mr. Petrut alone. Much was made of the Transcript and the observations of the judge, it being contended on behalf of Pepper that this order was applicable exclusively to Ms. Hanrahan and Mr. Petrut but not to any of the other persons in occupation of the respective properties.

155. However, the order made by Mr. Justice Noonan must be strictly construed on its terms in the context of committal proceedings. The order on its face is of general application

and extends the stays granted in the High Court for a period of three weeks from the 15th January, 2021. It accordingly materially altered and had a material relevance to the committal proceedings since it varied the operation of the orders made on the 25th November, 2020 *vis-à-vis* all occupants of both properties. The order of 15th January, 2021 was perfected on the 23rd June, 2021.

156. Counsel for Pepper contended that the effect of the 15th January, 2021 order operated for the benefit of Ms. Hanrahan and Mr. Petrut alone. This is reflected in its Respondent's Notice to the Appeal filed in this Court on 13th January, 2022, page 3 at (b) and (c). At page 93 of the Appeal transcript, counsel for Pepper observed:

> "The variation in the obligation that was effected by Judge Noonan's Order, firstly only applied to Ms. Hanrahan and Mr. Petrut. And it's very important to say that we were extremely respectful of that, and in truth what happened here procedurally is that we gave everybody the benefit - de facto we gave everybody the benefit of the extension between the 15th of January and the 5th of February."

In response to questions from the court, counsel made the following comment at pages 93-94 of the transcript -

> "**MR. JUSTICE COLLINS:** But the Order made by Mr. Justice Noonan - I'm looking at the Richmond Avenue papers…
>
> **MR. FANNING:** Yes.
>
> **MR. JUSTICE COLLINS:** Now, they're in identical form I think. It says: *"It is ordered that the said motion that is sought be refused but that the stay granted in the High Court on the said Order be extended for a period of three weeks."*
>
> That on its face appears to extend the stay in respect of everybody the subject of the Order.

> **MR. FANNING:** And we ultimately took it that way, if I can put it, we took the view that, in truth, strictly legally, if I could put it that way, that that could only enure to the benefit of the two Appellants, but that de facto if time was being given to Mr. Petrut and Ms. Hanrahan it would be inappropriate for us to, as it were, take differential steps at different times versus different occupants. So as a matter of fact we, as it were, held off on our letter writing until post the 5th February." (emphasis added)

No service of orders of 15 January 2021 prior to issuing Motion for attachment on 12 February 2021

157. I am satisfied that these orders varied the earlier ones and extended without exception to all persons affected by its terms which included all the appellants. The order of 25th November, 2021 had been varied in a material respect. Before invoking the contempt jurisdiction of the High Court, it was incumbent upon the respondent to ensure that all appellants were properly served with same in accordance with the procedural requirements.

158. No copy of the order of Mr. Justice Noonan of the 15th January, 2021 with the endorsement of the memorandum in compliance with O. 41, r. 8 RSC was served on any of the occupants of either property prior to the issuing of the Motion seeking attachment/committal for contempt of court. It was served subsequently in July 2021. I am satisfied that this omission is fatal to an application for attachment or committal as sought in the within proceedings. The service in July 2021 did not cure the fundamental procedural deficiency. That position is well-established in cases such as *Hampden v. Wallis* (1884) 26 Ch. D. 746. In that case the copy of the order served did not have endorsed upon it a notice as required by the Rules warning the person required to obey same that he would be liable to process of execution if he failed to obey it.

159. That position is reinforced by the decision in *Re Bramblevale Limited* [1970] Ch. 128 from which the following principles can be inferred;

> A court of competent jurisdiction can only punish as a contempt of court a breach of an injunction where it is satisfied beyond reasonable doubt:
>
> (i) That the terms of the injunction are clear and unambiguous
>
> (ii) That the alleged contemnor has been validly served with proper notice of all of the terms of the injunction
>
> (iii) Breach of the terms of the injunction are proven to a standard beyond reasonable doubt.

This decision was cited with approval and followed in this jurisdiction on a number of occasions including, *inter alia*, Keane J. in *National Irish Bank v. Graham* [1994] 1 I.R. 215, Kearns P. in *Muller v. Shell E&P Ireland Ltd.* [2010] IEHC 238 and by McKechnie J. in *Competition Authority v. Licensed Vintners Association* [2009] IEHC 439, [2010] 1 I.L.R.M. 374, wherein he stated -

> "27. The overwhelming preponderance of case law is to this effect: *Re Bramblevale Ltd* is a clear-cut example espousing the higher standard: *National Irish Bank Ltd* is a clear-cut example of the application of this standard in practice; Keane J., as he then was, despite very strong circumstantial evidence of a breach, refused to attach as the required matters had not been established beyond a reasonable doubt."

160. Since what was sought in the motions issued on 12th February, 2021 were contempt-based remedies the omission to have validly served in advance a copy of the order of the 15th January, 2021 which had materially varied the orders of the High Court of the 25th November, 2020 was fatal to Pepper's claim for relief by way of attachment or committal.

161. In substance what Pepper contends for is an entitlement to issue a motion seeking remedies for contempt on a *quia timet* basis where fundamental procedural requirements that go to jurisdiction and which are a prerequisite to the invocation of the jurisdiction in the first place can be complied with subsequently - and provided such compliance can be shown by the time the motion comes on for hearing. Such a significant deviation from compliance with the rules unduly undermines the appellants' rights to fair procedures in accordance with the criminal standard.

Effective service of an application for attachment and committal

162. It appears clear to me that for over a century the Rules of the Superior Courts concerning attachment and committal have drawn a clear distinction between cases concerning non-compliance with orders directing interrogatories discovery or inspection on the one hand (O.31, r. 21 and r. 22) and those concerning applications for attachment and committal otherwise. That appears to be acknowledged in decisions such as *Hampden v. Wallis* and indeed the observations of Mr. Justice Clarke at para. 4.2 of his judgment in *Ulster Bank Ireland Limited v. Whitaker* [2009] IEHC 16.

163. The necessary corollary is that service of an application for attachment and committal is to be effected personally save where the rules themselves expressly permit service of such an order on a solicitor such as O. 31, r. 21 RSC provides. It is noteworthy that decisions dating from at least *Re Bennet, ex parte Malachi* (1834) 3 L.J. Bcy 86 and thereafter make clear the necessity to demonstrate a personal demand served upon the alleged contemnor prior to the institution of proceedings seeking attachment. There was no authority identified to the court on behalf of Pepper to demonstrate that the court was entitled to effectively retrospectively deem good an application for attachment and/or committal invalidly or precipitately instituted based on evidence that subsequent to institution of the application,

the alleged contemnor came to be fixed with notice of the making of the order in question through service upon his solicitor and elected to challenge the validity of the proceedings on procedural grounds rather than complying with the terms of the order belatedly shown to have been brought to their attention.

164. It is noteworthy that Order 41, r. 8 of the RSC makes the requirement for service of an order explicit in the case of every judgment or order requiring a person to "do any act thereby ordered." The orders sought to be enforced by attachment and committal include such orders. The rule provides:

> "**8**. Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same, other than an order directing a mortgagor to deliver possession to a mortgagee, or an order under section 62 subsection (7) of the Registration of Title Act 1964, there shall be endorsed a memorandum in the words or to the effect following, viz. -
>
> "If you the within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order." (emphasis added)

165. Order 121, r. 2 provides that: "… in cases where personal service is not required service is to be effected "by leaving the document or a copy thereof (as may be appropriate) at, or sending the document or a copy thereof (as may be appropriate) by registered pre-paid post to, the residence or place of business in the State of the person to be served, or the place of business in the State of the solicitor (if any) acting for him in the proceedings to which

the documents relate." The residence of each appellant was his/her dwelling unit. It is clear that none of the purported acts of service by Pepper was on any named individual appellant. Services effected did not constitute a valid basis on foot of which an order of attachment could be granted.

Service on a solicitor

166. With regard to service on a solicitor O. 121, r. 8 provides: -

> "When a party, who has sued or appeared in person, has by a solicitor given notice in writing to the opposite party that such solicitor is authorised to act in the case or matter on his behalf, any document which has thereafter to be delivered to or served upon such first mentioned party may be delivered to or served upon such solicitor, except where personal service is required." (emphasis added)

It is clear that the provision is not retrospective in its effect.

167. On the issue of service the trial judge was satisfied that the orders of the 25th November, 2020 were required in each case to be served on individual apartments. He correctly held that it had not been established beyond a reasonable doubt that the occupants each knew of the making of the said orders. The court then in turn looked at events since February 2021. The motion seeking attachment/committal for had issued on the 12th February, 2021 and been before the High Court since the 19th February, 2021.

168. Pepper contends that there is no authority for the proposition that "a true copy of an order bearing a penal endorsement must be served before an application for attachment and committal issues." This is premised on a supposition that the criminal or quasi-criminal jurisdiction of the court can be invoked at a point in time prior receipt by a defendant of a copy of the order endorsed with the memorandum specified in Order 41.

Order 41 r. 8

169. In substance it is being contended that a plaintiff is entitled to invoke the jurisdiction of the High Court by issuing a motion out of the Central Office of the High Court seeking an order of attachment against individuals directing that they be brought before the High Court to answer an alleged contempt in respect of compliance with an order of the High Court, notwithstanding that such order has not been served with a valid endorsement and was subsequently varied though the latter order was never served. with, or without endorsement of a memorandum in accordance with O. 41, r. 8 of the RSC. This is a novel proposition for which no authority has been identified.

170. It appears to run counter to the principle that the jurisdiction should be invoked sparingly and only as a last resort, rather than speculatively. Such a proposition is also inconsistent with the principle that such litigation and its proofs be conducted and established to a criminal standard. If the fundamental object of an application for a committal is to punish for a past offence, as was observed by Lord Denning M.R. in *Danchevksy v. Danchevsky* [1974] 3 All E.R. 934 at 937 which has been cited with approval by Henchy J. in the Supreme Court in *The State (DPP) v. Walsh* [1981] I.R. 412 at 438, then it necessarily follows that a fundamental pre-requisite for the institution of such an application in the first instance is that a past offence can be demonstrated to have taken place. Any deviation from this approach is not consistent with the criminal standard of proof.

The purpose of Order 41 r.8

171. The appellants had no solicitors on record at the date of issuing the motion for contempt remedies. In the context of a contempt motion O.41, r. 8 must be considered in light of O.44 and the criminal standard that obtains throughout the process – not merely at the hearing of the motion for attachment/committal.

172. The corollary of Pepper's argument is that an application can be instituted before the High Court by way of notice of motion seeking liberty to issue an order of attachment by reason of alleged failure to abide by orders of the High Court, notwithstanding that a true copy of the operative order/s bearing a valid penal endorsement have never been served on the individuals sought to be attached in the first instance. All procedural steps can be attended to later.

173. In my view that proposition is not correct. It certainly is not correct in the instant case which involved mandatory orders seeking immediate exclusion of the appellants from their respective dwellings.

174. No authority was identified by Pepper to support its contention that it is not necessary to comply with the applicable procedural requirements – including the inclusion of the endorsement specified in O.41, r.8 on the order as served before a party can invoke the "drastic remedy" of attachment/committal that the issuing of such a motion involves.

Requirement that an order be *clear and unambiguous* in its terms

175. As the authors Delany & McGrath note at para. 25.36 in their text *Civil Procedure* –

> "Having regard to the enforcement machinery, including applications for attachment and committal, that may be utilised where there has not been compliance with an order, it is imperative that an order is clear and unambiguous in its terms."

176. The Orders under consideration in this appeal are ones in respect of which an alleged non-compliance has precipitated the issuance of motions seeking coercive orders against the appellants, particularly, in the words of Keane J. in *Phonographic Performance (Ireland) Ltd v. Cody* [1998] 4 I.R. 504, and Clarke J. in *Ulster Bank Ltd v. Whitaker*, seeking the "drastic remedy" of attachment/committal.

177. In the instant case the orders made on the 25th November, 2020 required immediate (subject to the terms of the stay) surrender of possession and control of "the property described in the Schedule to the Plenary Summons" in each case. The relevant "property" is nowhere identified in the curial part of the orders in question. There is no copy of the plenary summons attached to the Order or annexed to it nor are the provisions of the said schedule stated expressly anywhere on the face of either order. The appellants occupied separate individual units or parts of one or other premises. In the instant case where each individual was in occupation and possession of a separate unit it was imperative that the unit occupied by the individual as well as the actual address of the property in question be identified or stated in the face of the order. There could be no contempt or breaches of the orders as regards parts not occupies. Thus the order was neither "clear" nor "unambiguous" in its operative terms to the requisite standard to support an application to the court for an order of attachment by reason of alleged failure to abide by an order of the High Court.

Laois County Council v. Scully

178. With regard to the decision in *Laois County Council v. Scully* [2007] IEHC 212, a case concerning waste management, would suggest that an order coming within the terms of O. 41, r. 8 is not one which the rules require to be served personally where it is made against a defendant for whom a solicitor is on record, a number of observations need to be made; solicitors were not on record for any appellant prior to 22nd February, 2021 and in particular prior to the date of issue of notices of motion alleging contempt on the 12th February, 2021, and returnable for the 19th February, 2021 seeking attachment for failure to abide by orders of the High Court of the 25th November, 2020.

179. The timeline in *Laois County Council v. Scully* supports the fundamental principle that before an application is brought seeking a coercive order such as attachment/committal

in aid of enforcement of an order of the court, the applicant must demonstrate a rigorous assessment of compliance with O.41, r. 8;

- **7 April, 2006** – High Court Order made.
- **7 July 2006** Plaintiff served copy order with Memorandum (penal endorsement) endorsed on the defendants' solicitor.
- **7 July 2006** Plaintiff obtained order from High Court in presence of defendants and their solicitor and counsel deeming service on said solicitors good service.
- ***The Defendants never appealed this order***
- **7 July 2006** The solicitors for the defendants came off record.
- **18 July 2006** The plaintiff, having discovered that the order with penal endorsement served on defendants' solicitor on 7th July 2006 was deficient as missing some pages, served the complete order with penal endorsement endorsed thereon by registered post on both defendants.
- **29 September 2006** Motion issued by Plaintiff seeking attachment/committal of the defendants.

180. The decision in *Laois County Council v Scully* [2007] IEHC 212 is distinguishable in a number of material respects for the following reasons: -

(a) The issues in the suit did not seek to exclude the defendants from their occupancy of a family home/dwelling house.

(b) The orders in question were not mandatory interlocutory orders – they were final orders.

(c) The orders made against the defendants followed upon a full hearing and written judgment delivered by the trial judge.

(d) The litigation did not concern the dwelling or place of abode of any party.

(e) The defendants were legally represented at all material times throughout the litigation including throughout a full oral hearing.

(f) Following the hearing and the case delivery of a reserved judgment the matter was adjourned to enable the parties to agree the terms of the orders that were required to be made.

(g) A copy of the relevant order with a penal endorsement thereon was served on the defendant's solicitors at a time when they were on record and continued to act for the defendants.

(h) A formal order was made in the High Court expressly providing that service of the order on the said solicitors (*i.e.* with a penal endorsement) be deemed good and sufficient in view of the situation then arising and the court proceeded to make that order. No such order was sought or obtained in the instant case.

(i) Further, there was evidence that a further copy of the order with penal endorsement had been served on the defendants by registered post.

(j) The court was satisfied that any defect in the copy order with penal endorsement which had been served on the solicitors had been cured when the further copy of the order with the penal endorsement thereon was sent by registered post to each of the defendants by a letter of the 18th July, 2006.

(k) The Motion for attachment/committal had issued on 17th October, 2006, two months or so subsequent to service by registered post of the penally

endorsed orders having been effected – in marked contrast with the instant case where the motion issued prior to the service on the solicitor sought to be relied upon.

(l) Peart J. observed at page 5, "Order 41, r. 8 RSC makes no reference to personal service being required. There is simply a requirement in relation to an order requiring a person to do an act, to state the time after service by which it has to be done, and that the copy order served be endorsed with a penal endorsement." (emphasis added) The unamended iteration of the Order served on the solicitors on 22nd February, 2021 identified a time-frame for compliance which had expired at 5 p.m. on 14th January, 2021 for compliance with its terms. As such it was not an order which complied with the Order 41, r.8 requirements.

(m) The defendants were named in the penal endorsements in *Scully*. The occupants, however, were not named in the endorsements served on the appellants' solicitors in late February 2021.

(n) Peart J. confined his observations regarding service to Waste Management enforcement cases stating at page 6, "I am dealing only with the general question as to whether an order of the kind in this case is one which must be served personally when there are solicitors on record for the defendant."

(o) Peart J.'s observations regarding service on the solicitor were *obiter* since as the court noted at page 6 that "…it is accepted that the document was not a correct copy of the order…"

This decision is distinguishable from the instant case in several material respects. It does not support a proposition that an applicant seeking attachment or committal can issue a motion

for such relief and thereafter purport to rely on subsequent acts as effecting valid service of the order on the respondent.

Motions seeking Attachment and Committal - Ground 8

Service

181. The Notices of Motion issued on 12th February, 2021 and returnable before the High Court on 19th February, 2021 sought "liberty to issue an Order of attachment on all persons in occupation of the property known as" 21 Little Mary Street and 31 Richmond Avenue respectively. Liberty to issue an order for attachment and also an order of committal "of all persons in occupation of the property" pursuant to Order 44, r. 3 and/or pursuant to the inherent jurisdiction of the court was sought in each of the said notices of motion.

a. 5 copies of the motion and affidavit were served addressed to "persons unknown in occupation of 31 Richmond Avenue" where 12 adults resided in 7 separate apartments occupied as tenants of the mortgagor.

b. 3 copies of the motion and affidavit were served addressed to "persons unknown in occupation of 21 Little Mary Street." where 8 adults resided in 5 separate apartments occupied as tenants of the mortgagor.

c. In each service was not addressed to any named individual or to any particular dwelling unit/apartment within either building.

d. The front doors were left open and personnel from and agents of Pepper appear to have had ready access to the interior of each premises – or at least the Richmond Avenue premises.

"Scrupulous care and caution"

182. In *Cooke v. Cooke* [1919] 1 I.R. 227 (Irish Ct. of Appeal), Ronan L.J. (who had otherwise dissented in part) observed at p. 235 -

> "It cannot be denied, nor indeed has it been questioned before us, that while this jurisdiction of attachment is a most salutary, and in many cases the only effective, method for securing obedience to the orders of a Court, it is at the same time, having regard to its punitive consequences, a jurisdiction to be exercised with scrupulous care and caution upon convincing evidence, and only after the fullest and fairest opportunity has been given to the person sought to be attached of making his defence."

183. O'Connor L.J. said in *Cooke* at p. 248:

> "The power to commit or attach is highly salutary and beneficial, for without it the administration of justice in many cases would be paralysed. It is, likewise, a power of an extraordinary drastic character, for it concerns that which our law holds most sacred, the liberty of the subject. Obviously, therefore, it should be exercised with great care and circumspection, and certainly not without giving the party impeded the fullest opportunity, consistent with the interests of justice, of making his case."

It is clear from that decision, and no relevant contrary judicial view has been identified by Pepper, that where orders mandatory in nature – as the terms of the first and second orders were - are sought to be enforced by means of attachment or committal, it is imperative that the order is served upon the party sought to be attached prior to the institution of an application to attach.

Notice

184. An individual cannot be held guilty of contempt for infringing an order of the court of which he/she has not been validly served. The general rule is that a defendant only

becomes bound by an injunction or order of the court upon being notified of its terms. In *Century Insurance Co Ltd v. Larkin* [1910] 1 I.R. 91, a case which concerned the appellant's dwelling house it was held that in order to attach and commit the person for contempt, the applicant seeking such relief first "must serve the order which compels him to do the act upon him, and it must contain proper endorsement upon it." (p. 91)

185. It appears from *Laois County Council v. Scully* [2007] IEHC 212, that an order coming within the terms of Order 41, rule 8 may not necessarily be one which the Rules require to be served personally where it is made against a defendant for whom a solicitor is on record. However, as stated above, in that case the orders were served by registered post on the appellants two months prior to issuance of the Motion seeking attachment and committal. The case concerned enforcement of an order made in the public law sphere in the context of environmental protection. Peart J. emphasised the limitations of his observations as outlined above. It is not necessary to decide whether his observations might extend beyond the sphere of waste management orders. Defendants in that case never appealed the High Court Order deeming service on the solicitor on 7th July, 2006 good and where they did not dispute that they had been served with full copies of the orders validly endorsed by registered post on 18th July, 2006 - about two months prior to the issuance of the motion seeking coercive orders against them. In my view for the reasons set out above *Laois County Council v. Scully* is distinguishable from the facts in the instant case.

"absolute necessity to comply in every respect"

186. It is to be recalled that in *O'Gorman v. Governor of Cork Prison* [2006] IEHC 236 Peart J. cited *Century* with apparent approval: -

> "45. Even before these rules came into existence it was long held to be necessary to serve upon a person ordered to do a certain act a copy of the order so requiring, and

that it contain an endorsement as to the consequences for failure to comply. Early cases, and to which it is not necessary to refer in any detail, include *Prior v. Johnston* 27 ILTR. 108, and *Century Insurance Co. Ltd v Larkin* [1910] Ch. 91.

46. In England, prior to 1991, the requirement to endorse an order with a penal endorsement similar to the old form in the 1950 Circuit Court Rules existed, but a similar change to that appearing in the 2001 Rules, was made to the wording of the penal endorsement in the Supreme Court Practice 1991, Volume 1, with effect from 1st June 1992. The question of the adequacy of the words used in the penal endorsement following that change to the English Practice Rules has been the subject of judicial determination following the introduction in England of the new wording as provided in Order 47, rule 7(4) of these Rules, and it is useful to refer to same. In *Moerman-Lenglet v. Henshaw*, The Times Law Reports, 23 November 1992, Chadwick J. stated:

> *'It must have appeared to the Supreme Court Rules Committee that the old form of penal notice — with its reference to process of execution — was insufficient to bring home to a person on whom it was served the penalty to which disobedience to the order might give rise, namely imprisonment.*
>
> *In those circumstances I do not think I can take the view that the penal notice, which was endorsed on the copy of the order served, was in terms which complied with the new rule 7(4).'*

47. This was a view with which Lord Bingham in the Court of Appeal (Civil Division) agreed in his judgment in Re O (a minor) 5th May 1994.

48. There can be no doubt about the absolute necessity to comply in every respect with the terms of the wording of the penal endorsement set forth in the current Rules,

> whether in the Circuit Court or the High Court. The current Rules in each jurisdiction make a deliberate alteration to the wording which was previously prescribed. That was deliberate. In fact, my own recollection from daily practice in the High Court prior to the introduction even of the 1986 Rules, was that for some years prior to the new Rules coming into effect it was a requirement, perhaps by virtue of some Practice Direction in this regard, that the words "including imprisonment" be added to the wording of the penal endorsement which appeared in the earlier rules."

187. The order of 15th January, 2021 varied the earlier Order in a material respect. The strict criminal/quasi-criminal standard required that service of same validly endorsed in compliance with Order 41, r.8 ought to have been effected. Given that the orders sought to be enforced were in two clear instances mandatory in nature and the variation extended to all appellants, such service was a prerequisite to invoking the coercive jurisdiction of the court. Pepper was plainly wrong in deciding that the orders of 15th January, 2021 did not avail the appellants other than Ms. Hanrahan and Mr. Petrut. It was not open to Pepper to unilaterally omit to serve the said order on the appellants on a stated basis inconsistent with the clear language of the unamended order itself. The presence of Ms. Hanrahan in court on 15th January, 2021 did not obviate the strict necessity of serving the said order on her and Mr. Petrut in a manner compliant with O.41, r.8 prior to issuing a motion seeking attachment/ committal.

Service of Order with valid penal endorsement on defendant is mandatory

188. In *Prior v. Johnston* (1893) 27 I.L.T.R. 108, the court made no order on an application to attach a defendant for non-compliance with an order to file accounts because of failure to serve the defendant with a copy of the order containing the necessary penal endorsement.

Purpose of service <u>prior</u> to issuing motion for contempt

189. The fundamental importance of strict compliance with the requirement to effect valid service of orders prior to invoking the coercive jurisdiction was emphasised by Laffoy J.in *Airscape Ltd v. Powertech Logistics Ltd & anor* [2007] IEHC 43**:**

> "14. The court was referred to an old Irish decision dating from 1893, *Prior v. Johnston* 27 I.L.T.R. 108 in which the court made no order on an application to attach a defendant for non-compliance with an order to file accounts because of failure to serve the defendant with a copy of the order containing the necessary penal endorsement. The court refused the defendant his costs. Counsel for the applicant sought to draw a distinction between an application for an order of attachment and an application for an order of sequestration, suggesting that O. 41, r. 8 need not be complied with when attachment, that is to say, imprisonment, is not being pursued. No authority was cited in support of that proposition and, in my view, as sequestration against the property of a director of a company is a penal sanction, as a matter of principle, such a distinction is not tenable."

The Standard of Proof

190. Apropos of the standard of proof as identified by the authorities, Laffoy J. observed in *Powertech Logistics* –

> "15. The applicant must prove wilful disobedience of the order beyond reasonable doubt. That conclusion is consistent with the decision of this court (Keane J.) in *National Irish Bank Ltd v Graham* [1994] 1 I.R. 215. On the evidence before the court, I am not satisfied that it has been established beyond reasonable doubt that the failure to comply with the order of the 10th July, 2006 within the time limit specified was wilful."

191. In *National Irish Bank v. Graham*, Keane J. stated at page 221 -

> "It is clear that before the court takes the serious step of depriving a person of his or her liberty for failure to comply with an order of the court, it must be satisfied beyond reasonable doubt that he or she has in fact committed the alleged contempt. (See the observations of Lord Denning M.R. in *In re Bramblevale Ltd.* [1970] 1 Ch. 128.)"

I am satisfied that those observations reflect the law in this jurisdiction.

Personal Service

192. As stated above the mode of service of the 25th November, 2020 order mandated by the High Court was both "by hand delivery and Ordinary Pre-Paid Post" (emphasis added). The trial judge correctly concluded that Pepper had not established beyond reasonable doubt that the appellants each knew of the making of the orders such as would allow him to conclude, to the requisite standard, that a conscious decision was made to disobey the orders. Instead he concluded at para. 114:

> "The occupants have been served with the orders in accordance with the terms of those orders. I am satisfied that the penal endorsement was sufficient and effective. If there is doubt as to whether the occupants were aware of the terms of the orders prior to the end of February 2021 when they acquired legal representation, there can be no doubt in this regard after that point. The order of Reynolds J applies to the occupants and they have chosen not to abide by it, but rather to attempt to persuade the court that it should be set aside, or that compliance with it should be excused."

193. He thus found service of the order of 25th November, 2020 with a penal endorsement effected on the solicitors in late February 2021 subsequent to the date of institution of the application for attachment and committal sufficient. I am satisfied in so concluding he fell into error.

194. The authors of Borrie & Lowe's *Law of Contempt* (4th ed., LexisNexis Butterworths, 2010) comment at pages 552-553: -

> "*(iv)* **The need for strict compliance with the rules of procedure**
>
> **"13.29** The rules concerning an application for committal have normally been strictly construed particularly those designed to protect the alleged contemnor.
>
> As Cross J (as he then was) said in *Re B (JA) (an infant)*1965 Ch. 1112 at 1117-18:
>
> > 'Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations."

The said authors also observe in that section:

> "It is clear that if **safeguards** such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served, the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe [1893] WN 14*." (footnotes included) (emphasis added)

195. In light of the high constitutional value placed on the liberty of the person, a court ought not generally dispense with the requirement to serve personally notice of the motion seeking coercive orders. The dispensing with the requirement of personal service is both exceptional and very rare. No application was made to the High Court prior to the issuing of the committal motion on 12th February, 2021 to deem good the service of the orders for the purposes of invoking the coercive jurisdiction or otherwise seeking directions with

regard to such service. The orders of 15th January, 2021 were not served at all prior to issuance of the Notice of Motion to seeking attachment/committal.

"*Every endeavour" to effect personal service*

196. The authors Borrie & Lowe in *The Law of Contempt* suggest "it has been held that mere knowledge on the part of the defendant of the plaintiff's intention to move to commit does not dispense with the need to effect personal service and, further, the defendant's appearance at the motion does not amount to waiver of this requirement." (p. 204) The decision of Kekewich J. in *Mander v. Falcke* (1891) 3 Ch. 488 is authority for the proposition that:

> "Notice of motion to commit a defendant must be served upon him personally, if practicable, service upon his solicitor being insufficient; and the Court will not make an order for substituted service until it is satisfied that every endeavour has been made to effect personal service. Mere knowledge on the part of the defendant of the plaintiff's intention to move to commit does not dispense with the necessity of endeavouring to effect personal service; and the appearance of the defendant upon the motion is not a waiver of any objection on his part on the ground either of want of personal service or of any irregularity." (p. 488)

197. That judgment also provided that at pages 492 to 493 –

> "The rule in Lord *Eldon's* time was that there must be personal service of a notice of motion to commit. It is not laid down anywhere that you cannot have an order for committal without personal service of the notice of motion; but the Court will not allow the order to go until it is satisfied that every endeavour has been made to effect personal service. I do not find any rule so laid down in terms in the General Orders; but that was certainly the rule of practice in Lord *Eldon's* time, and it is within the

recollection of many of us that it was a rule of the old Court of Chancery. The authority of Vice-Chancellor *Stuart* has been cited to the same effect; and I remember a case in which, as counsel, I endeavoured to obtain an order for committal from the same learned Judge without personal service but he refused it on that very ground. This, then, was the rule of practice down to modern times. Then there crept in, it was said, a difference of practice; but that was challenged by Mr. Justice *Stirling* in *Nelson v. Worssam* W. N. (1890) 216; L. J. Notes of Cases, 1890, p. 151. There Mr. Justice *Stirling* referred to *Ellerton v. Thirsk* 1 Jac. & W. 376 , which is the main authority for the necessity of personal service of a notice of motion to commit; and upon counsel asking whether this was consistent with the modern practice, the learned Judge asked "When has it been altered?" That question challenged the practice, and no answer was given to it. But counsel went on to argue that the object of requiring personal service was to satisfy the Court that the defendant was informed of the proceedings against him, and that the defendant, if he appeared, could not object that he had not been personally served. The question, however, in that case as in this, was one of practice, and I find no authority for altering what is the settled practice, and I do not think a Judge of first instance ought to attempt to alter it.

Then the notice of motion in this case was given admittedly not at the proper time. I have not the slightest hesitation in holding that appearance is not a waiver of an objection on the ground of irregularity in a case affecting the liberty of the subject; but I am not quite clear as to what ought to be done in this case. In another case before me, an order for committal was made and was upheld by the Court of Appeal, notwithstanding the absence of personal service of the notice of motion. When the application comes before me in this case to dispense with personal service, I will

> consider it. Such an application must necessarily be *ex parte,* and I shall not have the advantage of Mr. *Oswald's* assistance. I will not prejudge such an application one way or the other, except so far as to say that it would be impossible and inconceivable, and contrary to common sense and justice, that a man who has rendered himself liable to committal should ultimately be able to evade it by keeping out of the way."

198. A review of the jurisprudence demonstrates that, where the liberty of the individual is at stake, service on the solicitor after the issuing of a motion for attachment/committal is not valid service to invoke the coercive jurisdiction of the court against an individual. No authority was identified by Pepper to support such a proposition. The language of Order 41, r. 8 does not support it. That principle must operate with still greater force where a plaintiff seeks to expel the individual in question from his/her constitutionally recognised dwelling/family home and place of habitation on foot of a mandatory order irrespective of that legal status or nature of such occupation.

"Fall-back position" - conclusions

199. I am satisfied that the trial judge fell into error in adopting what he described at para. 112 of his judgment as the "fall-back position" advanced by Pepper at para. 40 of their High Court submissions. At para. 113, he distilled Pepper's arguments down to four net points outlined above. This ignores the critical context of the high burden on Pepper prior to engaging the coercive jurisdiction of the Court. Occupancy of the property *per se* could never in the context be a basis for invoking the coercive jurisdiction of the court particularly where the trial judge had already found that a conscious decision to disobey orders had not been established to the requisite standard. Secondly, the judge noted that Pepper contended that "the occupants are now aware of the orders and the consequences of breaching them, having been represented by solicitors since at least 22 February 2021." The motion to commit the appellants had issued before 22nd February, 2021. There was no proof of service

of validly endorsed orders on the appellants in a manner compliant with the Rules prior to the motion seeking coercive orders having issued. The issuance of the motion invoking the coercive powers of the court lacked a valid basis since service of the orders of 25th November, 2020 endorsed in accordance with O.41, r.8 had not taken place and valid service of the orders of 15th January, 2021 had never been effected. Thirdly, Pepper offered no authority for its proposition that it was entitled to issue a motion to commit for contempt of court even **before** a copy of the relevant court order/s endorsed with O.41, r. 8-compliant memorandum (penal endorsement) had ever been served – a proposition which is unstateable. Fourthly, the judge apparent approval of Pepper's assertion that "…[T]here is no authority for the proposition that a true copy of an order bearing a penal endorsement must be served before an application for attachment and committal issues", insofar as it implies that such service is not a prerequisite of seeking attachment/committal misunderstands the gravity attendant on the invocation of the "drastic remedy" of attachment which envisages potential loss of liberty of the alleged contemnor.

200. The constitutional protection conferred on the individual's right to liberty necessarily predicates that the compliance with Order 41, r. 8 must in all cases be satisfied prior to issuing a motion invoking the coercive powers of the court over the person of an alleged contemnor.

201. The trial judge accordingly erred in finding, at para. 114, that the occupants were validly served with the orders of 25th November, 2020 for the purposes of the attachment/committal motion by virtue of their solicitor having received a copy of same in late February 2021. The names of all the appellants were known to Pepper months before the hearing date and it was incumbent on them to amend the title of the proceedings in accordance with the rules.

202. He further erred in finding that the penal endorsements were either valid or effective in respect of the said orders. No valid reason was identified for the omission to name Ms. Hanrahan and Mr. Petrut, who had entered appearances on 23rd November, 2020, on the penal endorsements. Consideration or surmise as to the level of awareness by the appellants of the terms of the said orders was wholly misplaced and could not on any basis validate the fundamental deficiencies identified above. The finding of the judge at the last line of para. 114 that: "The order of Reynolds J applies to the occupants and they have chosen not to abide by it, but rather to attempt to persuade the court that it should be set aside, or that compliance with it should be excused.", overlooks the fact that none of these points engages with the crucial fact that Pepper had sought impermissibly to invoke the coercive jurisdiction of the High Court against the appellants without proper compliance with the rules as to service of a mandatory coercive order on the individual affected and based instead on service on the solicitors without first seeking leave of the High Court or any order by way of substituted service of the order of the order of 25th November, 2020. Such service did not constitute a legal basis either the invocation or the exercise of the coercive jurisdiction of attachment/committal. No basis is identified for the implicit finding underpinning the judge's fall-back position that the trial judge could have been satisfied that such service satisfied him beyond reasonable doubt that a conscious decision had been made to disobey the orders prior to the "drastic step" of issuing of the motion seeking coercive orders on 12 February, 2021.

203. The proposition that service of the relevant order(s) with penal endorsement at any stage <u>after</u> issuing a motion provided it is served <u>before</u> the hearing of the motion to commit for contempt is not established and is incompatible with the Rules, including O. 41, r. 8 and the jurisprudence. No authority for such a proposition was advanced.

Was there sufficient *prima facie* evidence to establish contempt beyond reasonable doubt on a "fall-back" basis?

204. In *IBRC v. Quinn and Others* [2012] IESC 51, Fennelly J. addressed the question of sufficiency of evidence for the purpose of contempt, as follows:-

> "The correct approach to resolution of this issue is to ask whether there was sufficient evidence before the High Court to enable it, as the forum with the exclusive role of determining the facts, to decide beyond reasonable doubt that the appellant was guilty of contempt. The first stage is whether there was sufficient prima facie evidence which, if taken at its highest, was accepted by the court, to permit the court to go to the second stage and consider whether the case is proved beyond reasonable doubt. It was a matter for the learned trial judge to decide whether or not she believed the witnesses. Likewise, only she could determine whether the case had been proved to the criminal standard. This Court performs the appellate function of deciding whether there was sufficient prima facie evidence." (para. 65)

205. As to the requisite standard of proof for a finding of contempt, there is no dispute but that the matter must be determined on a beyond reasonable doubt basis. This is also set out by Keane J. in *National Irish Bank v. Graham* [1994] 1 I.R. 215 and by Laffoy J. in *Brightwater v. Allen* [2005] IEHC 155. In *P. Elliott and Co. Ltd. v. Building and Allied Trades Union and others* [2006] IEHC 340, Clarke J. addressed the issue in the following terms:

> "3.1 … It is accepted that the facts alleged to constitute contempt of the court order must be established beyond reasonable doubt. Reference was made to *National Irish Bank v. Graham* [1994] 1 I.R. 215 where the dicta of Lord Denning MR in *Re Bramblevale Limited* [1970] 1 Ch. 128 was approved. The same principle is clear

> from *Bridgewater v. Jemma Allan and Robert Walters Limited* (Unreported, High Court, Laffoy J. 12th May, 2005)."

For all the reasons outlined above, I am satisfied that there was not sufficient *prima facie* evidence before the trial judge to establish contempt to the standard beyond reasonable doubt on any basis as against any of the appellants.

206. Pepper's fall-back position, which found favour with the trial judge, in substance contends for entitlement to issue a precautionary/pre-emptive motion for attachment and/or committal at a point in time when valid service has not yet been effected on the defendants of the orders of the High Court of 25th November, 2020 with proper penal endorsements thereon. This in effect contends for an entitlement to invoke a *quasi*-criminal jurisdiction of the court on a *quia timet* basis. No authority for such a proposition is identified. *Laois County Council v. Scully* does not support this approach and is distinguishable on a number of material respects as already stated. Deficiencies in service in such a context cannot be retrospectively cured.

207. The court will have regard to whether compliance with the terms of an order was possible subsequent to its service. The Order of 25th November, 2020 effectively specified 14th January, 2021 at 5 p.m. as the deadline for compliance with its terms. The service sought now to be relied upon was effected on the appellants' solicitors on or about 22nd February, 2021 – after the original stay and its extension had both expired. The decision in *Sheridan v Gaynor* illustrates the correct approach in such circumstances.

208. In *Sheridan v. Gaynor,* an order was made on July 26th, 2010 requiring the defendant to deliver up possession of certain lands on or before September 17th, 2010. Vacant possession was not delivered up by that date. Having unsuccessfully attempted in January 2011 to effect personal service of the said order with a penal endorsement on the defendant,

the plaintiffs obtained an order for substituted service from the High Court on January 23rd, 2012 and effected service of the order with penal endorsement compliant with O.41, r. 8 on the defendant on January 31st, 2012. The plaintiff in *Sheridan* subsequently applied by way of notice of motion dated 8th February, 2012 for an order of attachment and committal by reason of the defendant's failure to comply with the order dated July 26th, 2010. Finlay Geoghegan J. observed:

> "At an early stage … I indicated that I was unwilling to make an order for attachment and committal as the order required the delivery up of vacant possession on or before 17th September, 2010, and it had not been served on the defendant until 31st January, 2011, and therefore he did not have an opportunity of complying with the terms of the order subsequent to its service on him."

This merely illustrates the high degree of vigilance and oversight to be exercised by the court where it is sought to obtain orders of attachment/committal for non-compliance with a court order.

209. By contrast, in the instant case no application was ever made to the High Court for substituted service nor was the order served to the requisite standard for committal in a manner affording a reasonable opportunity to the appellants to comply with its terms as the trial judge envisaged when granting the stay on 25th November, 2020. Compliance with the orders of 25th November was to be effected by 14th January, 2021 and with the order of 15th January, 2021 within three weeks – i.e. on or about 5th February, 2021. However, these orders were only served on the solicitors on or after the Motion to Attach had issued. Service of mandatory orders made with stays envisages the defendant being afforded an opportunity of complying with their terms subsequent to such service. That did not occur.

In the instant case service of the order with valid penal endorsement naming the individuals Gabriel Petrut and Margaret Hanrahan, who had both entered appearances on 23rd November, 2020, was never validly effected on either of them. Entry of an appearance did not and could not cure such a deficiency.

210. The Order with required memorandum endorsed thereon did not identify the property the subject of the said order – but merely referred to the Schedule to the Plenary Summons which was not served therewith. This was not consistent with the Supreme Court in *Dublin City Council v. McFeely;*

> Denham C.J.: "Given the importance of the potential sanctions available, some level of formality is essential in a contempt application such as this" (para. 56)
>
> Hardiman J.: "It is important that the court order allegedly breached should be indicated with absolute clarity and precision in the motion for attachment and committal and that the evidence alleged to establish breach of that order should be led in proper form after due and timely service of the motion for attachment and committal. This motion will normally be issued by a party and adjudicated upon, quite independently, by a judge" (para. 65)

211. The Order of the Court of Appeal on the 15th January, 2021 varied both High Court orders in a very material respect – namely with regard to the duration of the stay (and therefore the time for compliance). Failure to serve the said order with valid penal endorsement thereon on either Margaret Hanrahan, Gabriel Petrut or the persons in occupation of the apartments in both properties prior to issuing the motion for attachment/committal was a fatal procedural omission which cannot be retrospectively cured.

212. The judgment of Laffoy J. in *McCann v. Monaghan District Judge* [2009] IEHC 276, [2009] 4 I.R. 200, appears to proceed on the basis that service upon the defendant of the order with a valid endorsement thereon had been effected.

Laffoy J. observed:

> "Peart J. held that, in a situation where a person was at risk of losing his liberty in the event of not complying with an order of the court directing him to do some act, it was essential that he was fully aware of that possibility and that strict compliance with the service of the relevant order and the terms of the penal endorsement could not be overlooked (*JO'G. v. Governor of Cork Prison* [2007] 2 I.R. 203). Surely a debtor who is the subject of an instalment order and may be the subject of an application, at the suit of the creditor, to imprison him or her for a period of three months for non-compliance with the instalment order must, as a matter of constitutional justice, be entitled to be afforded the same protection. In my view, he is." (para. 165)

CONCLUSIONS

213. The issues are not moot. I would accept the appellants' arguments under Grounds 1-3 insofar as that the orders of the Court of Appeal of 15th January, 2021, which amended the earlier order of 15th November, 2020, ought to have been served on all the appellants prior to the issuance of the Motion to attach and commit. Failure to effect such service was a material omission. The appellants ought to have been named as defendants. The penal endorsements were invalid. Service of the orders was not validly effected in a manner sufficient to form the basis of a valid application to invoke the contempt jurisdiction of the High Court. The trial judge erred in granting the orders of 1st October, 2021 and same fall to be set aside for the reasons stated.

214. Article 40.4.1° of the Constitution provides: "No citizen shall be deprived of his personal liberty save in accordance with law." Contempt proceedings affect the liberty of the individual. As such they are to be instituted and prosecuted only as a last resort and with an appropriate degree of care.

215. Every application for committal for civil contempt must be considered in its own context and on the basis of the facts as determined to have obtained. Here the critical factual context was that Pepper sought by the mechanism of mandatory injunctions the eviction/expulsion of the appellants from the 12 dwelling units within the two properties it had lawfully recovered from a defaulting mortgagor. The properties were not two single dwelling units but rather comprised in all 12 individual dwelling units together with a common entrance area. The 12 individual dwelling units comprised the separate family homes and dwellings of the appellants.

216. Whereas Pepper, *inter alia,*:

a. Had no direct legal relationship with the appellants which conferred a right to occupy their respective dwelling units.

b. Was a private owner of the security and not subject to the proportionality test and allied principles pursuant to the European Convention on Human Rights.

c. Was entitled to apply for mandatory relief for the purposes of determining their claim to vacant possession of the properties.

d. Acquired their interest under a security instrument which granted a limited right to the mortgagor to create tenancies but failed to establish that the tenancies of Ioan Brat and Augustin Gabor, which predated the original institution of possession proceedings in 2006, were void as against the mortgagee.

e. Took no or no adequate steps to ascertain the number of units and/or the identity of occupiers prior to service of the order institution of proceedings.

f. Failed to join two persons who entered Appearances on 23rd November, 2020 as parties to the proceedings. Once the said Appearances had been entered representative orders ought to have been sought in the circumstances.

g. Did not serve the Order of 25th November, 2020 penally endorsed and compliant with O.41, r.8 such as entitled Pepper to issue motions on 12th February, 2021 seeking attachment/committal for non-compliance with same.

h. Failed – apart from the appellants Ms. Hanrahan and Mr. Petrut - to serve the mandatory injunction order made on 25th November, 2020 until after the date specified on the fact of that order for compliance with its terms. See *Sheridan v. Gaynor* (p. 10 of transcript)

i. Failed to serve a complete copy of the order of 25th November, 2020 – which had expressly incorporated by reference the Schedule to the Plenary Summons.

j. Failed to serve on any of the appellants the order of 15th January, 2021 of Noonan J. varying the High Court Order of 25th November, 2020 (perfected on 2nd June 2021) until **July** 2021.

k. The Penal Endorsement was invalid as regards Ms. Hanrahan and Mr. Petrut since they had entered an appearance and were known to the respondent. That being so it was not in compliance with the standard envisaged in *Moore v. Attorney General.*

l. The Order of 15th January, 2021, on its face, extended to each appellant. If the respondent contended otherwise an application to amend that order ought to have been brought.

m. The impact is that if the respondent sought to avail of the extension of time for compliance with the mandatory interlocutory injunctions provided for on the face of the Order 15th January 2021, a copy of that order penally endorsed ought to have been served on the appellants. Such service was not effected on any basis prior to the **issuing** of the Motion to attach and was accordingly bad.

217. A Motion for Attachment/Committal invokes the prospect of loss of liberty. It is predicated on the claimed wilful conduct of a party in failing to comply with a court order. All aspects of same must be proven to the criminal standard. Thus, prior to issuing a motion to attach/commit occupier/s and "immediately" and, apparently, permanently expel them from occupation of a constitutionally recognised dwelling/s/family home/s for alleged non-compliance with the terms of a mandatory injunction, it is imperative that the moving party has served the Orders personally on the individuals concerned in compliance in all material respects with the terms of the mandatory/interlocutory order itself. The high value accorded to the inviolability of the dwelling and home of the individual by the Constitution as interpreted by the Supreme Court precludes, save in circumstances of exceptionality not disclosed by the facts of this case, the retrospective rectification by a moving party of their proofs to meet the necessary standard for the granting of an order of attachment.

218. The trial judge fell into error in concluding that service of the penally endorsed orders on the solicitors for the appellants on 22nd February, 2021 cured deficiencies which subsisted as at the date the Motion issued on 12th February, 2022. He erred in finding at para. 22 that the transcript of the statement of Noonan J. on 15th January, 2021 trumped the clear language of the order extending both stays granted on 25th November, 2020 for three weeks. He erred in finding that the orders of 15th January, 2021, duly endorsed, had been validly served on the appellants. He erred in granting the orders sought on the stated basis.

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

Costs

220. The appellants having succeed in their appeals, my preliminary view is that they appear to be entitled to the costs of these appeals. The appellants are also presumptively entitled to their costs of the proceedings in the High Court. If either party contends for a different order in respect of costs, a written submission no longer than 2,000 words identifying the basis for the application to be delivered to the other side and filed in the Court of Appeal Office within 21 days of the date of this judgment. Thereafter, if necessary, the court will fix a date to consider arguments of the parties pertaining to costs.

221. Collins and Pilkington JJ. have authorised me to record their agreement with the within judgment which is being delivered electronically.