



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 258

Appeal Number: 2020/278

**Whelan J.
Ní Raifeartaigh J.
Binchy J.**

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

- AND -

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

DEFENDANTS

Appeal Number: 2020/279

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

- AND -

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

DEFENDANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of October 2021

Introduction

1. These two appeals are brought by Jerry Beades against the judgment and orders of Reynolds J. made in the above entitled proceedings on 25 November 2020. Though not

named as a defendant in the proceedings, the appellant appeared at the hearing of two motions which had issued in the proceedings seeking as against the persons in occupation of the said respective properties orders, *inter alia*, for the immediate surrender of possession and control of the properties to the respondent and orders for the immediate delivery up to the respondent of all keys, alarm codes and/or security and access devices in respect of each property together with interlocutory orders as against the persons in occupation of the said respective properties pending the trial of the said actions.

2. The appellant does not reside at either premises. He attended before the court at the hearing of the interlocutory applications on 25 November 2020. The appellant contended that the High Court had no jurisdiction to deal with the applications before it. In particular, the appellant argued that, in circumstances where there were five appeals before the Court of Appeal in respect of which judgment was then pending in connection with the possession orders made in favour of the respondent's predecessor in title, IIB Homeloans Ltd. ("IIB"), on 23 June 2008, "if the possession orders fall in the appeals court, there is no possession order to be transferred in this case and, therefore, this court has no jurisdiction until the appeals court actually rules on that matter" (p. 15, lines 4 to 8). Reynolds J. rejected these submissions and concluded that the appellant had no right of audience in respect of the two motions for interlocutory orders before her. From the said determinations, the appellant appeals.

Background

3. Under and by virtue of a mortgage dated 12 June 2003, the appellant created a mortgage in favour of the predecessor in title to the respondent by way of security in respect of his outstanding liabilities to IIB including, *inter alia*, those arising pursuant to a loan facility letter dated 20 May 2003 whereby a sum of €1,200,000 was advanced to the appellant. The said mortgage was secured over the properties known as 21 Little Mary Street, Dublin 7 and 31 Richmond Avenue, Fairview, Dublin 3 – both properties in the City of Dublin.
4. Thereafter, defaults having arisen in relation to compliance with the terms of the said mortgage, IIB instituted proceedings by way of special summons on 29 November 2006 seeking possession of the said secured properties.
5. The possession proceedings came on for hearing before Dunne J. in the High Court and on 23 June 2008 an order was made requiring the appellant to surrender possession of the said respective properties to IIB, the mortgagee.
6. By notice of appeal dated 16 July 2008, the appellant appealed the said order for possession to the Supreme Court. That appeal was ultimately heard on 29 April 2014 and judgment in respect of same was delivered on 12 November 2014, dismissing the said appeal and affirming the order for possession previously made in the High Court on 23 June 2008.
7. There are persons in occupation and possession of both properties. No such person was in occupation and possession of the property at the date that the order for possession was made by Dunne J. in the High Court on 23 June 2008. There was a clause in the IIB facility letter which provided:-

- “34. The Lender consents to the Borrower creating a tenancy in respect of the premises on the following terms:
- (i) The term of the tenancy must not under any circumstances exceed 1 year. No options to extend such a tenancy will be permitted.
 - (ii) The tenancy must be in writing and at an arms [*sic*] length transaction between the parties.
 - (iii) The rent reserved must represent the open market rental of the premises.
 - (iv) A solicitor’s certified copy of the tenancy agreement must be furnished to the Lender once executed by the tenant. Any extension of a new tenancy must comply with the above provisions.”
8. As a matter of law, once the order for possession was made on 23 June 2008, the appellant as mortgagor ceased to have the right to remain in possession or to be in receipt of the rents and profits from the said properties. His status in law was and remains that of trespasser.
9. In respect of the proceedings seeking possession against the occupiers of the said respective properties, it appears that the premises at 21 Little Mary Street is divided into five units. It further appears that the persons in occupation pay rent to the appellant. All of them went into occupation subsequent to the making of the order for possession in the High Court aforesaid.
10. As regards the premises at 31 Richmond Avenue, it appears to be divided into seven separate units occupied by various persons, having been put into possession by the appellant who is allegedly in receipt of rent from the said occupiers. Again, all of the occupiers went into possession subsequent to the making of the order for possession.

Ruling of the High Court

11. The determination of the High Court was succinctly outlined by the High Court judge at p. 27, line 23 *et seq.* of the transcript of 25 November 2020:-

“Judge: Mr. Beades, if you’re asking for clarification as to whether or not I was of the view that you had a right of audience, I am satisfied that you don’t. These proceedings are not addressed to you in any way. They are addressed to the occupants of the property, two of whom seem to have chosen to enter an appearance... [interjection]

Mr. Beades: But I am the owner of the properties”

The judge then continued:-

“Judge: Just one moment, Mr. Beades – two of whom appear to have chosen to enter an appearance but not attend before this court here today, when they were clearly made well aware of that by the plaintiff. So, as I say, you have no right of audience [in] respect of these matters.

Mr. Beades: I am the owner of the property." (p. 28, lines 2 to 8)

Notices of appeal

12. The notices of appeal in respect of both matters are identical and contend as follows:

- (1) that the judge "erred in fact and in law in not taking in consideration that [the appellant] was properly before the court despite a notice of appearance being filed at the Central Office";
- (2) that the judge erred in refusing to allow the appellant to address the court;
- (3) that the judge erred in denying the appellant his constitutional right to defend his economic and property rights;
- (4) that the judge displayed a significant degree of bias towards the appellant who is the owner of the property the subject matter of the proceedings whom this judge treated with disdain and as "*persona non grata*";
- (5) that the judge erred in law and in fact in denying the appellant a proper and fair hearing in accordance with his constitutional right;
- (6) that the judge erred in law and in fact in denying the appellant *locus standi* to matters that are already before the court regarding the property;
- (7) that the judge breached the fundamental human rights of the appellant by not allowing him to defend his rights and deprived him of any opportunity to challenge the assertions made by the respondent; and,
- (8) that it is "a fundamental right of an individual enshrined in the condition [*sic*] and the European human rights chapter [*sic*] not to be deprived of a property without due process of the courts being followed, which in the current case the learned judge refused to entertain and allow any application to be made."

13. In addition to the eight specified grounds of appeal advanced in each notice of appeal which are identical, the appellant sought to expand the appeal in his written and oral submissions to the court. In written submissions prior to the hearing of the appeal, he advanced the contention that the signature on the mortgage instrument of 2003 was a forgery.

14. The respondent opposes the appeal and notes that no application has been brought by the appellant to be joined as a party, in particular as a defendant, to the proceedings. Notwithstanding, the respondent submits that the appellant does not satisfy the criteria to be joined against the wishes of the respondent. The respondent further contends that the appellant has articulated and sought to agitate additional grounds of appeal (including that the signature appended to the mortgage instrument of 2003 was a forgery) without any application being brought before the court in the ordinary way to amend the grounds of appeal. It is further contended that it is not open to the appellant to advance new grounds in circumstances where an order for possession has been made against him and continues to be fully operational. The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is invoked

together with the doctrine of *res judicata* and the doctrine of issue estoppel, it being contended that the appellant is prohibited from purporting to advance new arguments at this juncture in light of same.

15. The respondent places reliance on jurisprudence including the decision of the Court of Appeal of Northern Ireland in *Kelly v. Rafferty* [1948] N.I. 187 where Andrews L.C.J. observed at p. 194:-

“...no case has been cited, and in my opinion no case is to be found, except in a representative action, in which a person, not a party, and against whom no relief is claimed by the plaintiff, was joined as a defendant at his own request, and solely on his own application, against the will of the plaintiff who had deliberately refrained from making any claim or seeking any relief against him.”

16. With regard to the ground of bias, the respondent contends that since the appellant was not entitled to be heard on the injunction applications in the first instance his arguments concerning bias are moot. It is otherwise contended that is settled law that “a judge should be permitted, in appropriate circumstances, to comment on the conduct of parties to litigation and indeed the merits of their respective arguments without automatically giving rise to an allegation of bias” (para. 39 of submissions).

The possession order

17. In wide ranging oral submissions and written submissions before this court and in an affidavit sworn on 25 November 2020, the appellant made a myriad of allegations against the respondent and its predecessors in title. He contended that the possession order made by Dunne J. in the High Court on 23 June 2008 was obtained by IIB “by fraudulent means” on the basis that “IIB was not a licenced bank between 2002 and 2008”. He contended that IIB “swore and filed affidavits as a bank and misled the courts and the public with many disguises at this time.” The appellant further asserted that the underlying mortgage deed was never executed by him; that the ownership of the security was unclear and that he was overcharged on the loan accounts.
18. It is noteworthy that the appellant appealed the possession order to the Supreme Court. There were considerable delays in the Supreme Court disposing of that appeal. Indeed, approximately six years elapsed before the appeal came on for hearing before the Supreme Court in April 2014. It is significant that no step whatsoever was taken by the appellant to amend his notice of appeal in any way to address any of these matters notwithstanding that the Central Bank Act 1971 (Approval of Scheme of Kbc Mortgage Bank and Kbc Bank Ireland Plc) Order 2009 (S.I. 125 of 2009) was readily procurable by him and, further, other enquiries that appear recently to have been undertaken by him could readily have been undertaken during those years but were not.
19. It is not now open to the appellant to seek to impugn the order for possession by generating novel points and arguments which were not advanced or agitated by him before the Supreme Court in 2014. I am satisfied that here we have a clear “cause of action estoppel”

established. This operates as a form of estoppel which precludes the appellant from challenging the order for possession in any fresh, new or subsequent proceedings.

20. As was observed by Wigram V.C. in *Henderson v. Henderson* at p. 115:-

“The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

In that sense, the statement of Wigram V.C. in *Henderson v. Henderson* exemplifies *res judicata* in its wider sense as an integral part of the law pertaining to abuse of process. Lord Sumption in *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.* [2013] UKSC 46, [2014] A.C. 160 observed at para. 24:-

“...The principle in *Henderson v. Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the *Yat Tung case* [1975] A.C. 581. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v. Gore-Wood & Co.* [2002] 2 A.C. 1, in which the House of Lords considered their effect.”

As Lord Sumption observed at para. 25:-

“...*Res judicata* and abuse of process are juridically very different. *Res judicata* is the rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers. In my view, they are distinct although overlapping legal principles with a common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.”

21. None of the allegations now raised by the appellant were advanced before the High Court when the order for possession was made over thirteen years ago, nor did he seek to raise them before the Supreme Court which disposed of the appeal over six and a half years ago. The order for possession and the right to execute it stand vested in the respondent, subject only to an appeal on a net issue which falls to be dealt with by this court and is the subject of a separate judgment herein. In all the circumstances, it is not now open to the appellant to seek to re-litigate the issue of the order for possession or otherwise to seek to use the within proceedings to launch a collateral attack on the order of the High Court as affirmed by the order of the Supreme Court made in November 2014 by attaching himself to this litigation.

22. The appellant's reliance on caselaw outlining the circumstances in which new evidence may be adduced on appeal (including *Allied Irish Banks plc v. Ennis* [2021] IESC 12) is misplaced in circumstances where, for the reasons outlined below, he is not a party to these proceedings and has no entitlement to insist he be heard.

Application to be joined as defendant against the wishes of the plaintiff

23. In his first ground of appeal, the appellant bases his entitlement to be a party to the within proceedings on the fact that he entered an appearance. However, he was not specifically named as a defendant in the proceedings. The proceedings are persons unknown in occupation of the said respective properties. Indeed in the course of the hearing before the High Court, at p. 8, line 27 of the transcript, the appellant made clear to the High Court judge that he was not residing in either property and stated "I reside out of the city". The appellant alleged at the hearing of the within appeals that he was an occupier of the properties. At pp. 110 to 111 of the transcript of the appeal hearing, he asserted as follows:-

"...I say that for the purpose of proceeding against I am the owner occupier of a portion of land at the front of 31 Richmond Avenue and also - so I am an occupier. They have never produced a map of what they are claiming 31 to be. Therefore, I am fully [inaudible] since they got that injunction and enforce it, they would be able to get committal proceedings against me.

I also am the occupier of 21 Little Mary Street. I use the ground floor as an office. When I said to you today regarding 23 Richmond Avenue when you asked me about - that's a business address. I actually reside out of the state and I was up to [inaudible] chief executive of a company in the Middle East."

He did not make any such assertions of occupying either or both mortgaged properties in his affidavit sworn herein on 25 November 2020. They are at variance with the lists of occupiers in respect of both properties exhibited in the other related proceedings which were also before the court and which nowhere make reference to the appellant as being in occupation of any part of either property.

24. The entry of an appearance does not in and of itself empower or entitle an individual not otherwise named as a defendant in the proceedings to thereby foist himself on an unwilling plaintiff as a defendant and thereby constitute himself as a defendant. In the ambit of the proceedings, no right to any relief is alleged to exist against the appellant such as would warrant him being joined as defendant and neither does the respondent contend that the appellant is a party who ought to have been joined or whose presence before the court "may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter" such as would engage O. 15, r. 13 of the Rules of the Superior Courts ("RSC"). The principles appear to be most succinctly set forth in the judgment of Lynch J. in *Fincoriz S.A.S. Di Bruno Tassan Din e C v. Ansbacher & Co. Ltd.* (Unreported, High Court, Lynch J., 20 March 1987) which held:-

"In order that a person may be joined as a defendant without the consent and, *a fortiori*, against the wishes of the plaintiff there must be some exceptional

circumstances. The exceptional circumstances must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance or alternatively even if it was not unreasonable that they were not joined as defendants by the plaintiff in the first instance it is shown at the time of the application to the court to join them that their presence before the court will as a matter of probability be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter.”

25. It is clear in light of the authorities that such a joinder could only be permitted in circumstances of exceptionality such as:

- (1) where a proposed defendant is a person who ought to have been joined as defendant by the plaintiff in the first instance (*Fincoriz S.A.S. Di Bruno Tassan Din e C v. Ansbacher & Co. Ltd.*);
- (2) where it is demonstrated at the time of the application to be joined that the proposed defendant’s presence before the court will as a matter of probability be necessary to enable the court effectually and completely to adjudicate upon and determine all questions in the cause or matter (O. 15, r. 13 and *Fincoriz S.A.S. Di Bruno Tassan Din e C v. Ansbacher & Co. Ltd.*);
- (3) where the proposed defendant’s proprietary or pecuniary interests are or may be directly impacted by the proceedings either legally or financially by any order which may be made in the suit (*Barlow v. Fanning* [2002] 2 I.R. 593); or,
- (4) where the proposed defendant is at risk of being rendered liable to satisfy any judgment either directly or indirectly and therefore has an immediate economic interest in the outcome of the litigation (*Barlow v. Fanning*),

provided that, in all instances:

- (a) the interests of justice are served by adding the proposed defendant; and,
- (b) joining the proposed defendant serves the court’s interests in seeing that litigation is properly conducted and the processes of the court are operated in a manner that is just and fair.

26. A useful analysis of the jurisprudence was carried out by Barrett J. in *Sun v. Price* [2018] IEHC 201. I am satisfied that the appellant has not met the threshold of exceptionality such as would warrant his joinder as defendant against the wishes of the respondent in all the circumstances. He is not an individual who ought to have been joined as defendant by the plaintiff in the first instance. Neither would his presence before the court be necessary to enable the court to effectually and completely adjudicate upon the issues in the case, this being proceedings by the mortgagee for possession against third parties who have been put into occupation and possession by the appellant or with his assent or acquiescence at

a time when he was a trespasser against whom an order for possession existed pertaining to the said properties.

27. All issues pertaining to the appellant's proprietary or pecuniary interests are governed by the mortgage instrument and the order for possession – the earlier order of 23 June 2008 having been affirmed by the Supreme Court in November 2014. The matters in issue between the respondent and the persons in occupation of the two properties the subject matter of the mortgage are wholly discrete and distinct issues. It is a further relevant factor that it appears the appellant has been in receipt of the entirety of the rents and profits derived from both properties since the date of the original order for possession on 23 June 2008 and he has to date failed to account to the mortgagee in respect of same and in particular has failed to discharge any portion of the said monies in and towards satisfaction of the outstanding balance due and owing on foot of the said mortgage.
28. Accordingly, I am satisfied that the appellant had no entitlement to insist that he be heard on the interlocutory injunction applications which were returnable before the High Court on 25 November 2020. He had no *locus standi*.
29. Since the making of the possession order, as stated above, the appellant had the status of a trespasser. Grounds two, three, five, six and seven of the notice of appeal substantially overlap. The opportunity for the appellant to “defend his economic and property rights” as mortgagor was afforded within the substantive possession proceedings and he availed of his right to appeal to the Supreme Court and raise such grounds as he saw fit. Contrary to his contention that he was “deprived of a property without due process of the courts being followed” at ground eight of his notice of appeal, the matter was fully and comprehensively dealt with in the High Court and he lodged a notice of appeal identifying and agitating each and every ground of appeal as he saw fit. The matter was fully and comprehensively dealt with by McKechnie J. in his ruling and in the order of the Supreme Court made in November 2014 which, *inter alia*, expressly affirmed the order for possession and dismissed all grounds of appeal.

Allegation of bias

30. Notwithstanding the aforesaid, it is appropriate to proceed to address the issue of bias. It should be noted that a wide range of lurid allegations were made against a broad spectrum of individuals by the appellant in the course of the appeal hearing.
31. It appears there are two strands to this allegation in relation to the trial judge. Firstly, in his submissions, the appellant alleged that the fact that the trial judge had heard previous proceedings involving him demonstrated objective bias. Secondly, on his feet at the hearing of the appeal, he separately alleged that the trial judge had a “personal bias” against him (p. 120 of transcript).
32. Insofar as the appellant alleged bias during the hearing on the part of the trial judge towards him, a review of the transcript of the hearing does not support such an assertion.

33. Of course, objective bias is not an assertion that a decision maker was actually biased. It is rather an assertion that a reasonable and fair-minded objective observer in possession of all of the relevant facts would reasonably have apprehended that there was a risk that the decision maker would not be fair and impartial in all the circumstance of the case (see *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, p. 449).
34. Beyond a bare assertion liberally repeated that the judge displayed bias towards him, the appellant did not demonstrate how such an observer could have determined the existence of such a risk in all the circumstances. A perusal of the High Court transcript does not support the assertion at any level. There is nothing to suggest that the judge was treating the appellant with disdain or as "*persona non grata*". As was made clear by the Supreme Court and in particular by Charleton J. in *Talbot v. Hermitage Golf Club* [2014] IESC 57, judicial resources are limited and the court must foster its resources. The trial judge had due regards to the salient facts, particularly the existence of the possession order made against the appellant and its subsistence. She was quite correct in her conclusion that he did not have a right of audience and was not entitled to intervene in the proceedings or to be constituted as a defendant which in substance is what he was seeking to do. The assertion that the judge was "personally biased" against him was not shown to be maintainable either. The gratuitous entry by him of an appearance could not enlarge his rights or confer any especial status upon him in the context of the proceedings which concerned persons in occupation of the two properties. The trial judge correctly applied the law to the facts that presented. That that decision was not the preferred outcome of the appellant is not a basis for alleging bias.

Conclusion

35. Both appeals fall to be dismissed.
- (1) The entry of an appearance did not confer rights on the appellant to be a party to the proceedings or to be heard in respect of either set of proceedings. The judge did not err in refusing to allow the appellant to address the court.
 - (2) The judge in all the circumstances did not deny the appellant a constitutional right to defend economic or property rights; neither of which were the subject matter of the within proceedings.
 - (3) The judge did not display bias of any kind towards the appellant. The appellant did not establish an entitlement to a hearing in respect of either set of proceedings, nor did he establish *locus standi* to be a party to either set of proceedings.
 - (4) The appellant has been a trespasser upon the said properties and each of them since 23 June 2008 by act and operation of law. The respondent holds an order conferring upon it the right to recover possession of the properties as against the appellant. As such it is an order *in personam* directed against and binding only upon the appellant. That is the reason why it is necessary for the respondent to bring the within proceedings against parties who have been put into occupation or possession of the property by or with the acquiescence of the appellant subsequent to the said order

for possession having been made and who are refusing to vacate the property. The proposition that the appellant should be allowed re-litigate all issues through the medium of having himself made a defendant in the within possession proceedings is contrary to the rule in *Henderson v. Henderson*.

Costs

36. The appellant failed on all grounds and the respondent has been entirely successful in opposing these appeals. Mr. Beades filed a notice of appeal and actively accepted the role of appellant, and arguably can be regarded as a party to the appeal even though he was unsuccessful in his contention that he was entitled to be heard or joined as a party to the underlying proceedings. The question arises as to the proper basis for the determination of the issue of costs in respect of these appeals, particularly having regard to s. 168(1)(a) of the Legal Services Regulation Act 2015 Act and its applicability.
37. The jurisdiction to order costs against non-parties was considered by Clarke J. (as he then was) in *Moorview Developments Ltd. v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615. The authors of *Delany and McGrath on Civil Procedure* (4th Ed., Round Hall, 2018) observe at paras. 24-232 and 24-233 that Clarke J. considered:-

“...the question of whether costs could be awarded against a non-party without its prior joinder. The first defendant contended that such a jurisdiction derived from s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 which provides that ‘the costs of and incident to every proceeding in the High Court of Justice and the Court of Appeal respectively shall be in the discretion of the Court’ and Clarke J. reviewed a number of decisions from other jurisdictions where equivalent wording had been considered:

‘There has been a consistent tendency in the courts in common law jurisdictions to interpret both rules of court and underlying legislation, which confer a cost awarding function on the court in broad terms, to be such as to confer, in an appropriate case, a jurisdiction to award those costs against a non-party. I see nothing in the language of the Irish Judicature Act to lead to a different view. Like Tomkins J. in *Carborundum Abrasives Ltd. v. Bank of New Zealand (No.2)* [1992] 3 N.Z.L.R. 757, I find no reason for limiting the courts’ jurisdiction to award costs to confine same to parties to the proceedings (by implying into the relevant provisions such a limitation). I agree that the reason for such an approach is as expressed by Lord Goff of Chieveley in *Aiden Shipping Ltd. v. Interbulk Ltd.* [1986] A.C. 965. Like Tomkins J., I agree that such an approach accords with the view that the court should have full control over proceedings before it.’

He, therefore, concluded that there was a jurisdiction under s. 53 to make an order for costs against a non-party.”

38. However, it is noteworthy that the said authors also note at para. 24-247:-

"...the decision in *Moorview* was based, in part, on the wording of s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 which states that: 'the costs of and incident to every proceeding in the High Court of Justice and the Court of Appeal respectively shall be in the discretion of the Court'. That wording can be contrasted with that used in s. 168(1)(a) of the Legal Services Regulation Act 2015 which provides that a court may, on application by a party to civil proceedings, 'order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings'. This subsection appears to clearly limit the power to award costs to one that is exercisable against a party to proceedings only and it is difficult to see how, consistent with that section, the power could be exercised to award costs against a person who was not a party to the proceedings. Thus, it would seem that it will be a precondition to the making of a costs order against a third party funder that the person is first joined as a party to the proceedings."

39. Whilst it could be contended that the respondent is entitled to an order for costs against the appellant in respect of this appeal, in light of the above considerations, it is necessary that, if an order for costs is sought, the court should be provided with submissions identifying the legal basis for such an entitlement. If either party contends for an order regarding costs, written submissions no longer than 2,000 words should be filed in the Office of the Court of Appeal within 14 days following electronic delivery of this judgment; the other party being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days thereafter. The court will thereafter consider same and furnish a ruling on the issue of costs. Otherwise, in default of any submission seeking costs being filed as above provided and within the time specified, there will be no order as to costs.
40. Ní Raifeartaigh and Binchy JJ. agree with this judgment which is being electronically delivered.