

APPROVED

[2026] IEHC 499



**THE HIGH COURT
CIRCUIT APPEAL**

2023 221 CA

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

ROBERT BURKE
CIARA DOGGETT

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 July 2026

INTRODUCTION

1. This judgment is delivered in respect of an appeal against an order of the Circuit Court granting leave to issue execution in respect of an order for possession. For the reasons explained herein, the appeal is being allowed on a narrow ground. It is unnecessary, for the resolution of these appeal proceedings, to address the

large number of ancillary issues raised by the parties. It remains open to the parties to reagitate these elsewhere.

PROCEDURAL HISTORY

2. These proceedings seek to enforce a mortgage originally entered into between First Active plc and the two defendants. The mortgage is in respect of a residential apartment at Chancery Court, Bride Street, Dublin (*“the mortgaged property”*).
3. First Active plc’s relevant banking business, including mortgages, loan agreements and charges, was subsequently transferred to Ulster Bank Ireland Ltd pursuant to the Central Bank Act 1971 (Approval of Scheme of First Active plc and Ulster Bank Ireland Limited) Order 2009 (S.I. No. 481 of 2009).
4. Ulster Bank commenced these proceedings before the Circuit Court by way of civil bill for possession in 2014. The proceedings ultimately came before the County Registrar on 18 February 2016. On that date, the County Registrar made an order for possession directing the defendants to deliver up possession of the mortgaged property (*“the order for possession”*). The first defendant, Mr Burke, contends that the order for possession was improperly made in circumstances where, or so it is said, he had attended before the County Registrar and had indicated an intention to defend the proceedings.
5. The County Registrar’s jurisdiction to make an order for possession under the Courts and Court Officers Act 1995 is confined to proceedings in which an appearance has not been entered, or a defence has not been delivered. This is provided for at Section 34 and the Second Schedule of the Act; see, generally,

Mars Capital Finance Ireland v. O'Halloran [2025] IEHC 307 (at paragraphs 60 to 71).

6. The first defendant sought to pursue an appeal against the order for possession. An appeal from an order of the County Registrar lies to a judge of the Circuit Court: *Promontoria (Field) DAC v. Mahon* [2019] IEHC 218. Unfortunately for him, the first defendant filed an appeal to the High Court instead (“*the purported appeal*”). This procedural error seems to have gone unnoticed by the Master of the High Court who mistakenly made orders extending the time for the bringing of the purported appeal.
7. Pepper Finance Corporation (Ireland) DAC (“*Pepper Finance*”) applied to be substituted as plaintiff in lieu of Ulster Bank in the purported appeal. That application was granted *ex parte* by the High Court (Murphy J.) on 21 December 2020. The order contained the standard proviso granting liberty to any affected party to apply to set aside or vary the order.
8. The purported appeal ultimately came on for hearing before the High Court (Barr J.) on 21 January 2022. The court struck out the appeal and set aside the orders made by the Master of the High Court extending time. The reasons for the court’s *ex tempore* ruling are recorded as follows in the transcript exhibited in the present proceedings:

“The Court is satisfied that the provisions of sections 37 and 38 [of the Courts of Justice Act 1936] only relate to orders that are made by a judge of the Circuit Court. This is due to the fact that there was no provision in the law at that time for county registrars to make orders of the type that are the subject matter of appeal in this case, and that jurisdiction was conferred on county registrars by section 34 of the Courts and Court Officers Act 1995, and that Act explicitly provides that orders of a county registrar shall be subject to appeal to the Circuit Court. So, an avenue for appeal is very clearly given in section 34(2) of the 1995 Act. The Court is satisfied that the decision reached by Judge Simons in the

Promontoria v Mahon case is correct in law, and while this Court is not obliged to follow it, this Court is more than content to follow that decision and indeed holds itself bound by the conclusions in that case because the Court is satisfied that Judge Simons correctly analysed the statutory provisions and the law and reached the correct conclusion in relation to the absence of a jurisdiction in the High Court to entertain an appeal from an order of the county registrar.”

9. Following the disposal of the purported appeal, Pepper Finance brought a motion before the Circuit Court seeking leave to issue execution of the order for possession. The notice of motion was filed on 21 July 2023 and was returnable before the Circuit Court on 13 November 2023. The principal relief sought was an order pursuant to Order 36, rule 9 of the Circuit Court Rules granting leave to issue execution. The notice of motion erroneously described the order for possession as having been made by Her Honour Judge Linnane on 18 February 2016. In fact, it had been made by the County Registrar.
10. By letter dated 8 November 2023, Pepper Finance’s solicitors informed the first defendant that the motion was listed before His Honour Judge O’Connor on 13 November 2023 and that Pepper Finance “*will be seeking a hearing date*” for the motion.
11. In the event, the motion was heard and determined on its first return date, 13 November 2023. The hearing took place in Mr Burke’s absence. The Circuit Court granted Pepper Finance leave to issue execution of the order for possession, subject to a four-month stay. The perfected order repeated the error in the notice of motion by reciting that the order for possession had been made by Her Honour Judge Linnane.
12. On 22 November 2023, the first defendant lodged an appeal to the High Court against the order granting leave to issue execution. The appeal process was

prolonged, with a number of motions and countermotions being filed in the context of the appeal.

13. The appeal ultimately came on for hearing before me on 24 June 2026. Four matters were listed for hearing on that date: first, Mr Burke’s appeal from the order granting leave to issue execution; second, Pepper Finance’s motion seeking to amend the Circuit Court notice of motion by substituting a reference to “*the County Registrar*” for the erroneous reference to “*Judge Linnane*”; third, Mr Burke’s motion seeking to set aside the order of 13 November 2023; and fourth, Mr Burke’s motion seeking orders for the production of documentation said to be relevant to Pepper Finance’s standing and proofs.

DISCUSSION

14. The parties agreed that the first question to be addressed on the appeal was whether Pepper Finance should be permitted to amend the notice of motion to correct the error in the identity of the office-holder who had made the order for possession. It will be recalled that the notice of motion incorrectly describes the order as having been made by Judge Linnane rather than the County Registrar. It is necessary therefore to consider the High Court’s jurisdiction to allow an amendment.
15. The High Court, in hearing an appeal from the Circuit Court, is exercising a statutory appellate jurisdiction rather than its original jurisdiction: *ACC Loan Management v. Fagan* [2021] IESC 20, [2021] 1 IR 781 (at paragraphs 22 and 23). One consequence of this is that certain procedural matters on an appeal are governed by the Circuit Court Rules (rather than the Rules of the Superior Courts).

16. Order 65, rule 1 of the Circuit Court Rules provides as follows:

“The Judge or the County Registrar as appropriate may, on such terms as he considers just, at any stage of the proceedings, allow any party to amend or alter his pleading or other document, or may disallow any amendment already made, or may amend any defect or error in any proceeding, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

17. Section 40(e) of the Courts of Justice Act 1936 provides that the High Court Judge hearing the appeal shall have full powers of amendment in respect of summonses, civil bills, pleadings, notices, and other documents.
18. It follows from these two provisions that the Circuit Court, and the High Court on appeal, have power to amend a notice of motion so as to correct an error. Although there may be some debate as to whether a notice of motion is a “*pleading*”, it is certainly a “*notice*” for the purposes of section 40(e) and is, in any event, a “*document*” within the meaning of Order 65, rule 1.
19. The general position is that an amendment which is necessary for the purpose of determining the real questions in controversy between the parties will ordinarily be allowed where the amendment can be made without prejudice to the other party, or where any prejudice can be addressed by the imposition of appropriate terms (such as terms as to costs). See, generally, *Stafford v. Rice* [2022] IECA 47.
20. The proposed amendment in the present case is one which fulfils the criterion of being necessary for the purpose of determining the real questions in controversy between the parties. It is essential to the proper adjudication of the application for leave to issue execution that the order to be executed is properly identified. It is next necessary to consider whether the amendment can be made without irreparable and material prejudice to Mr Burke.

21. Had the application to amend been moved at first instance before the Circuit Court, and in the presence of Mr Burke, an amendment could have been made without irremediable and material prejudice. The attention of the judge hearing the motion would have been brought to the fact that the order had been made by the County Registrar rather than by a Judge. Mr Burke would then have had an opportunity to make submissions to the motion judge as to what he says is the significance of that distinction. In the event, however, the error in the notice of motion went unnoticed and was replicated in the Circuit Court's order of 13 November 2023. It follows that an order, which is bad on its face, was made against Mr Burke in his absence in circumstances where the solicitors' letter of 8 November 2023 had implied that the motion would not be heard that day, i.e. that it was only listed to fix a date.
22. The Courts of Justice Act 1936 contemplates a hearing before the Circuit Court followed by the right to an appeal by way of a rehearing before the High Court. Exceptionally, the hearing and determination at first instance may be so deficient that it cannot be said to amount to a proper hearing at all. In such a scenario, the affected party will have been deprived of the benefit of the two-stage process provided for by the legislation. Here, the Circuit Court purported to grant leave to issue execution of an order for possession said to have been made by Her Honour Judge Linnane, but no such order existed. The Circuit Court did so in Mr Burke's absence in circumstances where the solicitor's letter had implied that the motion would not be heard that day. The result was that an order which is bad on its face was made in the absence of the affected party.

23. Having regard to the very particular circumstances of the case, the granting of leave to amend would render irremediable the material prejudice caused to Mr Burke by the loss of the benefit of a fair and effective hearing at first instance.
24. Counsel for Pepper Finance accepted, very properly, that the appeal must succeed unless the amendment is permitted. The principal relief sought in the unamended version of the notice of motion could not lawfully be granted because no order for possession made by Judge Linnane exists.
25. I discussed with the parties whether a *via media* might be adopted, whereby an amendment to the motion would be permitted, in conjunction with an order remitting the motion, as amended, for a proper hearing before the Circuit Court. Neither party had much enthusiasm for this potential compromise. Having reflected on the matter, I am satisfied that the appropriate order is to allow the appeal and set aside the Circuit Court order of 13 November 2023 *simpliciter*. This proposed form of order has the benefit of being dispositive of the present appeal and making it unnecessary to engage with the plethora of ancillary motions. It protects the procedural rights of both parties. It remains open to Pepper Finance to issue a fresh motion before the Circuit Court seeking leave to execute; Mr Burke's right to a proper hearing at first instance will be vindicated in the context of such a fresh motion. The parties would have a full right of appeal to the High Court against whatever order might issue.

CONCLUSION AND PROPOSED FORM OF ORDER

26. To avoid the risk of subsequent disagreement in what has already been protracted and heavily contested litigation, it is appropriate to identify the matters which this judgment does not decide. The judgment makes no determination as to the

underlying merits of the application for leave to issue execution. In particular, it does not address whether there is a reasonable explanation for the lapse of time between the date of the order for possession and the date on which leave to issue execution was sought. Nor does the judgment determine whether, by reliance on the proviso contained in the High Court order of 21 December 2020, it might remain open to Mr Burke to apply to have the substitution of Pepper Finance as plaintiff in lieu of Ulster Bank set aside.

27. It is open, in principle, to Pepper Finance to bring a fresh motion before the Circuit Court seeking leave to issue execution. Any such motion should identify accurately the order on foot of which leave is sought. Nothing in this judgment is intended to restrict the arguments which any party may advance on such a putative motion. Pepper Finance remains free to contend that it has standing to seek leave to issue execution, that the requirements of the applicable rules have been satisfied and that leave should be granted. The defendants remain free to raise any properly arguable objection to the relief sought, including an objection based on delay, prejudice, notice, standing, the sufficiency of the proofs or the proposed form of order.
28. Mr Burke's motion to set aside the Circuit Court order of 13 November 2023 does not require separate determination because it has been overtaken by the substantive order on the appeal. Nor is it necessary for the resolution of the appeal to determine Mr Burke's motion for the discovery or the production of specified documents. Again, this motion has been overtaken by the substantive order on the appeal.
29. If Pepper Finance brings a fresh motion for leave to issue execution, Mr Burke may make any procedurally permissible application for documents and may raise

any properly arguable objection concerning the sufficiency of Pepper Finance's standing and proofs, before the Circuit Court.

30. For completeness, nothing in this judgment should be understood as expressing any view on the validity of the order for possession made by the County Registrar on 18 February 2016, or on whether, and by what procedure, that order may now be challenged. Those questions are separate from the narrow procedural ground on which the present appeal is allowed.
31. Accordingly, the following orders will be made:
 - (i) Pepper Finance's application to amend the notice of motion will be refused;
 - (ii) The appeal will be allowed and the order of the Circuit Court made on 13 November 2023 will be set aside;
 - (iii) Mr Burke's motion to set aside the order of 13 November 2023 will be struck out by reason of its having been overtaken by the allowance of the appeal; and
 - (iv) Mr Burke's application for the production of documents will not be determined, without prejudice to his entitlement to make any procedurally permissible application in the event that Pepper Finance brings a fresh motion before the Circuit Court.
32. As to costs, my *provisional* view is that Mr Burke, having been entirely successful in his appeal, should recover the costs of the appeal against Pepper Finance, such costs to be adjudicated by the Legal Costs Adjudicator in default of agreement. No order as to costs is proposed in respect of the ancillary motions.

33. Having regard to *Corcoran v. Permanent TSB plc* [2026] IECA 116, the proposed costs order would not be limited on its face to outlay and expenses. Mr Burke's status as a litigant in person would nevertheless remain relevant to the adjudication of those costs. In particular, an order for costs would not entitle him to recover remuneration for legal work personally undertaken by him. In default of agreement, it will be for the Legal Costs Adjudicator to determine whether each item claimed is properly recoverable.
34. I will list the matter before me on 15 October 2026 to hear submissions on costs and to make final orders.

Appearances

Rudi Neuman for the plaintiff instructed by AMOSS LLP

The first defendant appeared in person

The second defendant did not appear and was not represented