

THE HIGH COURT

[2007/848 SP]

BETWEEN

START MORTGAGES DAC

PLAINTIFF

-AND-

BERNARD M WARD

DEFENDANT

-AND-

MARY T WARD

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered 11 September 2020

1. The core relief sought by the plaintiff in this application is an order pursuant to Order 42, rule 24 of the RSC granting the plaintiff leave to issue execution in the proceedings on foot of an Order for Possession of 28 April 2008 (the "Order for Possession") in respect of the defendants' family home in Donagh Patrick, Headford, Co. Galway. The defendants live there with their two daughters and grandson.
2. The plaintiff also seeks additional relief to the effect that the order of 25 November 2019 granting the plaintiff to leave to issue execution on foot of the Order for Possession is not an Order to which s. 11(6)(a) of the Statute of Limitations 1957 applies.

Approach of the Central Office

3. The curiosity in this case is that the plaintiff already has, by way of the aforementioned Order of 25 November 2019 of Simons J., an order giving the plaintiff leave to issue execution in respect of the Order for Possession for a period of 12 months pursuant to Order 42 of the RSC.
4. However, when the execution set was lodged with the Central Office in the usual way and a request was made on 4 June 2020 to the Central Office to issue the execution order authorised by the Order of 25 November 2019, in the words of Mr. Nevin, litigation manager for the plaintiff, in his grounding affidavit of 21 July 2020:

"By reply dated 11 June 2020 the plaintiff was informed that the Order for Possession was statute barred and an application for the leave of the Court would be required to determine whether or not the Plaintiff was still within the time-limits prescribed by the statutory provisions to obtain the Execution Order".
5. The precise wording of the response of the Central Office of 11 June 2020 was as follows:

"The registrar has considered the contents of your letter dated 4th June 2020. You will need to apply to the Court to determine whether still within the time – statutory provision".
6. This response was presumably prompted by the fact that the date of request by the plaintiff was in excess of 12 years from the Order for Possession. Unfortunately, the precise statutory provision of concern to the Central Office was not identified. It may have been s. 11(6)(a) of the Statute of Limitations which provides as follows:

An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.

7. Alternatively, it may have been s. 13(2) of the Statute of Limitations Act which provides as follows:

The following provisions shall apply to an action by a person (other than a State authority) to recover land—

- (a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;*

8. In any case, given the approach of the Central Office, it was necessary for the plaintiff to bring the within application to obtain the execution order.

Protective Certificate

9. The plaintiff's core contention is that, as of the date of its request, the Order for Possession should be treated as being in existence for less than 12 years in circumstances where the defendants had obtained a protective certificate under the Personal Insolvency Act 2012 on 11 December 2019. That certificate was renewed on two occasions and ultimately expired on 9 May 2020. It was for that reason that the plaintiff did not act on foot of the Order of 25 November until 4 June 2020. The plaintiff makes the case that any reckoning of time for seeking to enforce any Order against the defendants was placed on hold pending the expiration of the protective certificate, having regard to the provisions of s. 96(7) of the Personal Insolvency Act 2012 as amended.

10. Section 96(1) identifies that a creditor on notice of the issue of a protective certificate shall not while it remains in force take steps against the debtor including executing or enforcing a judgment or order of a court or tribunal against the debtor. Section 96(3) provides that while a protective certificate remains in force, no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor against a debtor save with the leave of the court. Section 96(7) provides as follows:

In reckoning any period of time for the purpose of any applicable limitation period in relation to any proceedings or process to which subsection (1) or (3) applies (including any limitation period under the Statute of Limitations 1957), the period in which the protective certificate concerned is in force shall be disregarded.

11. The wording of s. 96(7) necessitates a consideration of the nature of the application under Order 42(24) before the court. Order 42 of the RSC deals with execution. Order 42(23) provides that as between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order. However, a different regime applies after the elapse of six years. Order 42(24) provides inter alia:

Where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; ...

the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just.

12. In my view, Order 42(24) is a process to which subsection 1 and 3 of s. 96 of the Personal Insolvency Act apply, since it may be described both as an application to execute a judgment or order against the debtor (subsection 1) and – in this case - as a process of execution in respect of a debtor's property (subsection 3). As noted above, the Central Office have taken the view that an execution order may not be issued unless the underlying Order for Possession was made less than 12 years prior to the issuing of the execution order having regard to one or more requirements of the Statute of Limitations.
13. In those circumstances, I am satisfied that s. 96(7) applies such that, in reckoning the applicable limitation period under the Statute of Limitations (assuming that a limitation period applies) where an execution order is sought from the Central Office on foot of a court order granting it leave to issue execution, the period in which the protective certificate concerned is in force shall be disregarded. When this period is disregarded in the instant case, the 12 year period does not expire until 24 September 2020. The formula for calculating this date is set out at paragraph 23 of the Affidavit of Mr. Nevin and is not controverted by the defendants and I accept same.

Order granting leave to issue execution

14. Although the plaintiff seeks an Order from this court granting it leave to issue execution, there is no need to make such an Order in circumstances where the plaintiff already has an Order from Simons J. made on 25 November 2019 granting it leave to issue execution. There is no basis for the Central Office to refuse to issue an execution order on foot of this Order (even assuming its approach is correct and the Possession Order must have been made no more than 12 years from the date of the execution order) given that, when one disregards the period of time during which the protective order certificate was in force, the plaintiff still has until 24 September to obtain the execution order. Having regard to my findings in this regard and the date of this judgment, I expect that the Central Office shall expedite any application for an execution order if an execution set is presented to them by the plaintiff in a timely manner following this judgment and the plaintiff has liberty to apply in this regard. I think it is unnecessary in the circumstances to grant the relief sought at paragraph 5 of the Notice of Motion directing the Chief Registrar to issue an execution order pursuant to the Order of the High Court.

Leave to issue execution and Statute of Limitations

15. As I noted at the start of this judgment, the plaintiff also sought a declaration that the Order of 25 November is not an Order to which s. 11(6)(a) applies i.e. that it is not an action brought upon a judgment. The plaintiff has cited case law and provided detailed written submissions in support of its contention in this respect, relying in particular on the High Court and Supreme Court decisions of *Ulster Investment Bank Ltd v. Rockrohan Estate Ltd* [2015] 4 I.R. 37 and the High Court decision of *Start Mortgages v. Piggot* [2020] IEHC 293, which it asserts are analogous to the present situation and suggest that, by analogy with the principles identified in those judgments, no limitation period applies when enforcing an order for possession by seeking leave to issue execution on the basis that an execution order is not an “action brought upon a judgment”. In *Rockrohan*, the court had made a well charging order and the question was whether a limitation period was applicable in respect of the obtaining of an order for possession on foot of the well charging order. Irvine J. in the High Court as she then relied upon the UK case of *Ezekiel* where the court was also concerned with an application for possession on foot of a well charging order. There, Millett J. concluded there was a difference between an application for possession in those circumstances and an application for leave to issue execution as in the latter case further consideration or investigation was required by the court when deciding whether to direct execution. Irvine J. concluded that no limitation period applied to an order for possession in those circumstances and was upheld by the Supreme Court. In *Start Mortgages v. Piggot*, Gearty J. was concerned with the renewal of an execution order already obtained, pursuant to Order 42, rule 20. She followed the decision in *Rockrohan* and held no limitation period applied in that situation.
16. However, neither of those cases deal with an application for leave to issue execution where, in the words of Millett LJ, further consideration or investigation by the court is required. Indeed, the test to be applied in that respect is set out in *Smyth v. Tunney*. The plaintiff submits that there is no binding Irish authority on the question of the applicability of limitation periods to an application seeking leave to issue execution. In fact, as noted by Geoghegan J. in *Smyth v. Tunney* [2004] IESC 24, there is an old Irish case, *Evans v. O'Donnell* [1886] 18 LR Ir. 170 where it was held that leave could not be granted to issue execution on a judgment which was more than 12 years old. I note that Canney on *Limitation of Actions* 2nd Ed. observes that the Irish courts have not yet had to decide whether limitation periods apply to execution on a judgment, noting that *Smyth v. Tunney* considered the issue but arrived at no concluded opinion, that Irvine J. followed the U.K. approach in *Rockrohan* but that the decision of Finlay Geoghegan J. in *AIB v. Dormer* [2010] 2 I.R. 491 appeared to be contrary to the English approach (see para. 5-07).
17. In this case, the difficult question of whether a limitation period applies to an application for leave to issue execution does not yet arise for determination and may never arise. If the execution order is obtained and executed prior to the expiry of 24 September 2020, it will not arise. It is only if the execution order is not obtained by 24 September 2020 that it will arise and having regard to the terms of this judgment, it is unlikely that this will arise. If an issue does arise at that stage, it can be heard and determined at that stage in respect of a real factual controversy as opposed to a hypothetical problem. It is trite law

that the courts should avoid pronouncing on hypotheses. Accordingly, I do not propose to adjudicate on the relief sought at paragraph 4 of the Notice of Motion.

Conclusion

18. Having regard to the foregoing, I will grant a declaration in terms of paragraph 3 of the Notice of Motion to the effect that the period 11 December 2019 to 27 April 2020, being the time for which the Protective Certificate in respect of the defendants was in force until the expiration of the Order for Possession, is not to be reckoned for in the calculation of the limitation period for the Order for Possession.

19. There is no necessity to grant the relief sought at paragraph 1 giving the plaintiff leave to issue execution since they are entitled to rely on the extant Order of Mr. Justice Simons 25 November 2019 to this effect.