

**APPROVED**

**[2021] IEHC 288**

THE HIGH COURT

2008 No. 953 SP

BETWEEN

CARLISLE MORTGAGES

PLAINTIFF

AND

JOHN SINNOTT

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 20 May 2021**

**INTRODUCTION**

1. This matter comes before the High Court by way of an application for an extension of time within which to issue execution. The application is made pursuant to Order 42, rule 24 of the Rules of the Superior Courts. The plaintiff seeks to issue execution in the form of an order of possession under Order 47 directed to the County Registrar of Wexford.

**RULES GOVERNING APPLICATION FOR LEAVE TO EXECUTE**

2. A party who has the benefit of an order or judgment is generally required to execute same within a period of six years. If this is not done, then it is necessary to make an application for leave to issue execution pursuant to Order 42, rule 24. That rule provides as follows.

NO REDACTION NEEDED

“24. In the following cases, viz.:

- (a) 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;
- (b) where a party is entitled to execution upon a judgment of assets in futuro;
- (c) where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company;

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. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgment or order made in a matrimonial cause or matter, an order of fieri facias may be issued as of course upon an affidavit of service of the judgment or order and non-payment.”

3. The grant of leave to issue execution under Order 42, rule 24 is discretionary. The criteria governing the exercise of this discretion have been set out in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512. The Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time, provided that there is some explanation at least for the lapse of time. Even if a good reason is given, the court must consider counterbalancing allegations of prejudice.
4. The discretionary nature of the relief has recently been reaffirmed by the Court of Appeal in *KBC Bank plc v. Beades* [2021] IECA 41 (at paragraph 67).

“It is clear from the jurisprudence, particularly the decision of the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512, that O. 42, r. 24 is a discretionary order and reasons must be given for the lapse of time since the judgment or order during which execution did not occur. Even where a good reason is identified for the delay, the court can take into account counterbalancing arguments of prejudice. It is

noteworthy that in *Smyth v. Tunney*, as in the instant case, orders sought to be executed had been made in the course of long running litigation, and leave to issue execution pursuant to O. 42, r. 24 had been made some twelve years or so later. It is also noteworthy that the reasons identified for lapse in time in *Smyth v. Tunney* included that the applicants had made a number of unsuccessful attempts to execute.”

5. The cases in which leave to execute has been granted can conveniently be considered as falling into three broad categories. The first category is where the delay has been caused by the conduct of the indebted party. For example, on the facts of *Smyth v. Tunney*, the indebted party had, by their conduct, contributed to the delay in the execution of the relevant costs orders. In particular, they had previously demanded that execution be deferred until *all* proceedings between the parties were disposed of. Other examples would include cases where the indebted party has evaded earlier attempts at execution.
6. The second category is where there has been a change in the financial circumstances of the indebted party. In *Mannion v. Legal Aid Board* [2018] IEHC 606, for example, the High Court (Noonan J.) granted leave in a case where the party seeking execution had, at all material times during the initial six year period, believed that the indebted party did not have the capacity to pay the judgment debt and that, accordingly, there was no point in attempting execution. The application for leave to execute outside the six year period was allowed in circumstances where the court was satisfied that the judgment creditor had reasonable grounds to conclude that the indebted party’s financial circumstances had significantly improved as a result of her having settled other legal proceedings.
7. The third category is where execution has been deferred pending an attempt by the parties to reach an accommodation whereby alternative arrangements for the payment of the underlying debt might be entered into. There is a public interest in ensuring that creditors are not deterred from engaging positively with judgment debtors for fear that they may be precluded thereafter from enforcing their judgment in the event that the engagement

does not bear fruit. There is now an established line of case law where leave to issue execution, in the form of orders of possession, has been granted in mortgage proceedings where the explanation for the delay is that the creditor had sought to negotiate a resolution with the debtor. See, for example, *Start Mortgages DAC v. Gawley* [2020] IECA 335; *Start Mortgages DAC v. Piggott* [2020] IEHC 293; and *Ulster Bank Ltd v. Quirke* [2021] IEHC 199.

8. The categories of cases are, of course, not closed. I am satisfied that cases where the delay in execution is attributable to circumstances outside the control of the person seeking to enforce the judgment represent a fourth category. In the absence of any prejudice to the indebted party, leave to execute should not normally be refused unless there has been some culpable delay by the party seeking to execute.
9. An example of a case of culpable delay is provided by *Hayde v. H & T Contractors Ltd* [2021] IEHC 103. This case was decided by reference to the slightly differently worded provision under the Circuit Court Rules. Leave to execute was refused in circumstances where the delay had been attributable solely to inaction by the party seeking to execute.

“The objective of Order 36, rule 9 [of the Circuit Court Rules] is that there should be some expedition in the execution of judgments. A generous period (six years) is allowed during which the party seeking to enforce a judgment may obtain an execution order from the Office, i.e. without any necessity to apply to court. If, however, a party allows that period to expire, then a good reason must be provided for the delay to date. The threshold is not particularly high: it is not necessary to give some unusual, exceptional or very special reasons for the delay. It is nevertheless a threshold which has to be satisfied: the threshold albeit minimal is not meaningless. The threshold has not been met in the present case where the delay is attributable solely to inaction by the party seeking to execute.”

10. Finally, for the sake of completeness, brief reference should be made to Order 42, rule 20. This rule provides that an execution order (including, relevantly, an order of possession) shall remain in force for one year only from its issue, unless renewed. An application to renew an execution order may be made at any time before its expiration. On the facts of

the present case, two orders of possession were issued pursuant to Order 47, but each expired without any application for renewal having been made.

## PROCEDURAL HISTORY

11. These proceedings are taken pursuant to section 62(7) of the Registration of Title Act 1964. This provision allows the holder of a registered charge to apply to the High Court for an order that possession of the land subject to the charge be delivered to it, in circumstances where repayment of the principal money secured by the charge has become due. (Section 62(7) has since been repealed but that does not affect the continuation of these proceedings).
12. The plaintiff (“*the lender*”) and the defendant (“*the borrower*”) had entered into a short-term loan agreement secured on the borrower’s family home. The borrower failed to repay the loan within the period allowed.
13. These proceedings were instituted on 24 March 2009. The borrower did not defend the proceedings, and the High Court (McGovern J.) ultimately made an order on 27 July 2009 in the following terms.

“IT IS ORDERED that the Defendant do forthwith upon service of this order upon him deliver up to the Plaintiff or to some person duly authorised by it in writing in that behalf possession of All That and Those the hereditaments and premises situate in the Townland of Ballinroad and Barony of Ballaghkeen North in the County of Wexford comprised in Folio 6319 County Wexford”.

14. The usual procedure for enforcing orders of this type is to apply for an “order of possession” pursuant to Order 47, rule 2 as follows.

“Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out an order of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed.”

15. An order of possession is directed to the Sheriff or County Registrar, as appropriate, and commands them to enter the lands and “without delay cause” the judgment creditor “to have possession of the said lands and premises with the appurtenances”.
16. The solicitors then acting for the lender issued an order of possession on 30 April 2010 pursuant to Order 47. An attempt was made to execute this order of possession in November 2010. This was unsuccessful and an application for attachment and committal was issued. The borrower ultimately gave certain undertakings to the High Court (Dunne J.) in July 2012.
17. It has been explained on affidavit that, during the years 2012 to 2017, the borrower made a series of proposals whereby he offered to surrender lands, other than those subject to the charge, in satisfaction of his liability to the lender. These offers did not result in a concluded settlement between the parties.
18. The lender made its first application under Order 42, rule 24 on 21 March 2017 (“*the first application*”). This order was granted by the High Court (Barrett J.) on 24 April 2017.
19. A second order of possession subsequently issued on 23 May 2017. The order of possession was addressed to the County Registrar and reads as follows.

“To the County Registrar for the County of Wexford greeting.

Whereas lately in the High Court it was adjudged that the Plaintiff recover possession of ALL THAT AND THOSE the hereditaments and premises situate in the Townland of Ballinroad and Barony of Ballaghkeen North in the County of Wexford being all of the lands comprised in Folio Number 6319 County Wexford, with the appurtenances in your bailiwick. You are hereby commanded to enter the same and without delay cause the plaintiff Carlisle Mortgages Limited to have possession of the said lands and premises with the appurtenances. And in what manner you have executed this Order, make appear to the High Court immediately after the execution hereof, and have you then there this Order.”

20. This order of possession was not executed for the reasons set out in an affidavit dated 16 April 2019 grounding the lender's second application pursuant to Order 42, rule 24 ("*the second application*"). The reasons included concerns as to whether the order could be safely executed.
21. The second application came before me on 8 July 2019. The borrower appeared on that occasion as a litigant in person. I granted leave to execute in circumstances where I was satisfied that the legal test as per *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512 had been met. A stay of two months was placed on the order.
22. Thereafter, the High Court (Murphy J.) made an order for substituted service on 13 January 2020. The lender was given leave to serve the order of 8 July 2019, and all further documentation related to the proceedings, by way of ordinary prepaid post and by leaving a copy of the said documentation at or affixed to the mortgaged property.

### **THIRD APPLICATION PURSUANT TO ORDER 42, RULE 24**

23. This judgment is delivered in respect of a further application for leave to execute. This is the third such application in these proceedings ("*the third application*"). The application is made pursuant to a notice of motion issued on 30 March 2021. Such an application would normally be made returnable to the Chancery Special Summons List, but this list has not yet resumed. Counsel on behalf of the lender applied for leave to make this motion returnable before me in circumstances where there was a concern that almost twelve years have elapsed since the original order was made on 27 July 2009.
24. The lender has filed an affidavit explaining the practical difficulties which arose in respect of issuing an execution order. In brief, these relate to restrictions on access to the Central Office of the High Court imposed as part of the public health measures introduced

in response to the coronavirus pandemic; and difficulties in obtaining a letter of authorisation.

25. It has also been explained on affidavit that the practice of the Central Office is that—once six years has elapsed from the date of the original, substantive order in proceedings—an execution order may only be issued within twelve months of the date of the making of an order granting an extension of time. The practical consequence of this is that once twelve months had elapsed from 8 July 2019 without an execution order having been obtained, it became necessary for the lender to make a further application pursuant to Order 42, rule 24.
26. The motion came on for hearing before me on Monday, 17 May 2021. The borrower was represented on this occasion by his solicitor. The solicitor made a concise submission in opposition to the application for leave to execute. First, it was said that the application was not urgent. If and insofar as the lender cited concerns in respect of the Statute of Limitations, these were said to be misplaced. Reference was made to the judgment of the High Court (Gearty J.) in *Start Mortgages DAC v. Piggott* [2020] IEHC 293 in support of the proposition that the making of an application under Order 42, rule 24 is not subject to the twelve year limitation period. Secondly, reference was made to the fact that the borrower's spouse is in ill-health, and it was suggested that it was inappropriate to make an application at this time. It is also said that it would be harsh to grant leave to execute having regard to the ongoing coronavirus pandemic. Thirdly, and more generally, it was suggested that efforts are being made to reach some form of resolution in relation to the proceedings. I understand that this is intended as a reference to a possible settlement. In response, counsel on behalf of the lender submitted that the discussions over the years have not borne fruit and are not going anywhere.



**DECISION**

27. The fact that more than twelve months have elapsed since the order of 8 July 2019 has the consequence that the Central Office, as a matter of practice, now require a *further* order pursuant to Order 42, rule 24 before an order of possession will be issued pursuant to Order 47. (The lender queries the correctness of this interpretation of the Rules, but makes this application on the working assumption that a further order is required).
28. The principles governing the court's discretion to grant leave to execute outside the initial six year period from the date of judgment or order are well established. The leading authority remains that of the Supreme Court in *Smyth v. Tunney* (cited above). The Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time, provided that there is some explanation at least for the lapse of time.
29. An earlier order granting leave to issue execution had been made in favour of the lender on 8 July 2019. In deciding whether or not there is an explanation for the delay in execution, the focus will be principally, but not exclusively, on the period between the date of that earlier order and the date of the motion seeking a further extension of time.
30. As appears from the affidavit grounding this motion, the delay during this period is attributable, in the first instance, to a difficulty in serving the order of 8 July 2019. This order was ultimately served on 28 January 2020 by way of substituted service in accordance with an order dated 13 January 2020. The delay thereafter is attributable to logistical difficulties presented by the public health measures introduced in response to the coronavirus pandemic. The Central Office returned the initial set of papers and it was necessary to obtain a further letter of authorisation. This could not be done prior to 7 July 2020.

31. I am satisfied that all of this represents good reason for allowing a further extension of time. It is evident that the lender made reasonable efforts to obtain an execution order within the twelve-month period but was unable to do so. The delay is attributable to matters outside the control of the lender. More generally, the delay since 27 July 2009 is attributable to concerns as to whether an order of possession could be effected safely and to negotiations with the borrower.
32. It is next necessary to consider the question of prejudice to the borrower. In truth, the lapse of time since 8 July 2019 has not caused any prejudice whatsoever to the borrower. Rather, the borrower and his spouse have been allowed to remain in occupation of the mortgaged property for a further period of time, notwithstanding that no payments have been made in respect of the outstanding loan since May 2009.
33. Whereas the court has, of course, great sympathy for the borrower's spouse given her ill-health, the fact remains that the High Court order of 27 July 2009 remains unexecuted. The interests of justice are met by imposing a short stay (two months) on the effect of the order granting leave to execute.
34. Finally, the lender cannot fairly be criticised for having sought to bring its motion on for hearing as a matter of urgency, so as to ensure that the application for leave to execute was moved within *twelve years* of the original substantive order (27 July 2009). Whereas the question of whether the *renewal* of an extant execution order under Order 42, rule 20 is subject to the twelve year time-limit is settled at High Court level (*Start Mortgages DAC v. Piggott*), it does not appear to have been conclusively determined at appellate level. The application in the present case is an application for *leave to execute* pursuant to Order 42, rule 24. Even if this application is similarly not subject to section 11(6)(a) of the Statute of Limitations 1957, the figure of twelve years still has some significance. The Supreme Court has suggested that were leave to execute to be

sought *more than* twelve years after judgment, this might result in leave being refused on discretionary grounds. See *Smyth v. Tunney*, at paragraph 27 of the reported judgment, as follows.

“[...] the fact that the statutory period has run must surely be a major factor to be considered by a court in considering whether to grant or refuse leave as a matter of discretion”.

35. It was reasonable, therefore, for the lender in the present proceedings to pursue the application at this time.

### **CONCLUSION AND FORM OF ORDER**

36. Accordingly, I propose to make an order for leave to execute pursuant to Order 42, rule 24. A stay will be placed on this order for a period of two months. I will hear the parties further on the question of costs.
37. This matter will be listed before me on Friday, 21 May 2021 at 11 a.m.

Approved  
SARAH J. MANS