

THE HIGH COURT

[2021] IEHC 761

[Record No. 2008/1036 SP]

BETWEEN:-

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

OLIVER MOLONEY

DEFENDANT

JUDGMENT of Ms. Justice Egan delivered on the 3rd day of December, 2021

Introduction

1. By special summons issued on the 3rd November, 2008, the plaintiff, then known as "G.E. Capital Woodchester Homes Ltd" ("Woodchester"), sought an order for possession on foot of a charge dated 19th December, 2006 created by the defendant in favour of the plaintiff ("the Charge") over a dwelling house known as Cloonmaglasia, Tuam, Co. Galway ("the Property") and registered as a burden on folio 31892F County Galway ("the Folio"). These proceedings were heard and determined by McGovern J. who granted an order for the delivery up of possession ("the Original order for possession") on 11th October, 2010. To date, for various reasons, the defendant has not delivered possession of the property. The plaintiff intends to execute the Original order for possession, and now requires leave, pursuant to Order 42, rule 24 of the Rules of the Superior Courts, to issue execution on foot of thereof. That is the principal relief sought in the motion, issued on the 3rd November, 2017 with which this court is concerned ("the present motion").
2. The parties are in dispute before this court as to whether or not the plaintiff is entitled to issue execution:
 - a) The defendant's primary argument, concerns the sale on 28th September, 2012 by the plaintiff, then known as Woodchester, to Windmill Funding Ltd ("Windmill") of the plaintiff's entire mortgage portfolio and associated rights ("the loan book") which included the Charge. There is a dispute between the parties as to the nature and effect of this transaction. The defendant argues that, as a result of this sale, the plaintiff does not have a right to enforce the Charge. The plaintiff contends that the loan book was merely securitised, that the beneficial interest only passed to Windmill; and that the legal interest in the Charge remains vested in the plaintiff.
 - b) The defendant also maintains that, as his contract was with Woodchester and not with Pepper DAC, the latter entity cannot enforce the Charge. In this respect, it should be noted that, as mentioned at paragraph 1 above, in 2006 when the Charge was created the plaintiff was known as Woodchester; that, on 28th September, 2012 Pepper Netherlands Holding Cooperative UA purchased the entire share capital of the plaintiff which, on 11th October, 2012 changed its name to Pepper Finance Corporation Ireland Ltd ("Pepper Ltd."); and that on 29th October, 2015, the plaintiff changed its legal status to a Designated Activity Company or DAC pursuant to the Companies Act, 2014 and is now re-registered as Pepper Finance Corporation Ireland DAC ("Pepper DAC").

Reliefs sought in the present motion: Order 42, rule 24 and Order 42, rule 20

3. It is convenient to outline the reliefs sought in the present motion, to set out the Rules in relation thereto and to refer to the relevant legal principles governing their application.

First relief sought

4. A party who has the benefit of an order or judgment is generally required to execute such order within a period of six years. As this was not done within six years of 11th October, 2010, the plaintiff seeks an extension of time to execute the Original order for possession. In this respect, Order 42, rule 24 of the Rules provides:

"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..." (emphasis added)

5. To obtain such relief, the plaintiff must satisfy the court that it is the party entitled "to issue execution". Thereafter, the court's decision to grant leave to execute is discretionary. The principles governing the exercise of this discretion are set out in the Supreme Court decision, *Smyth v. Tunney* [2004] 1 IR 512 and can be summarised in the following terms:
- a) It is not necessary to show the existence of unusual, exceptional or very special reasons for a successful application for leave to issue execution more than six years after the date of such order or judgment.
 - b) There must be some explanation, grounds or good reason for the lapse of time in enforcing the judgment.
 - c) Even if a good reason is given, the court must consider counterbalancing allegations of prejudice.
6. For the reasons set out hereunder, I find that there is insufficient evidence to satisfy the court that the plaintiff is entitled to issue execution. It is therefore not strictly speaking

necessary to consider whether, were this otherwise, the court would exercise its discretion in favour of the plaintiff. For the sake of completeness, however, I will do so.

Second relief sought

7. Order 42, rule 5 provides that "[a] judgement for the recovery or for the delivery of the possession of land may be enforced by order of possession." In practical terms, a High Court judgment or order for the delivery of possession of land, also known as an order for possession, is enforced by a creditor by way of an order of possession which is issued by the Central Office and then directed to the sheriff for enforcement. If unexecuted, orders of possession remain in force for one year from date of issue.
8. In this case, various orders of possession have been issued by the Central Office on foot of the Original order for possession. The most recent such order of possession issued from the Central Office on 2nd April, 2014 and has now expired. The plaintiff therefore also seeks an order, pursuant to Order 42, rule 20 of the Rules granting leave to renew the order of possession dated 2nd April, 2014.
9. In this respect, Order 42, rule 20 provides:

"An execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such order may, at any time before its expiration, by leave of the Court, be renewed by the party issuing it for one year from the date of such renewal and so on from time to time during the continuance of the renewed order, either by being marked with the seal of the High Court, bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal; and an execution order so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof."

10. In *Carlisle v. Canty* [2013] 3 IR 406 the High Court (Dunne J.) held that a second or subsequent renewal of an order of possession must be made during the continuance of the order so renewed, in other words within one year of the first renewal. In the present motion, the plaintiff argues that this does not apply to the order of possession issued by the Central Office on 2nd April, 2014, as this was the first application for its renewal and so does not need to be made within the one-year period. For reasons explained below, I do not accept this argument.

Third relief sought

11. As originally drafted, the present motion also sought a third relief, namely an order amending the plaintiff's name in the title of the proceedings to Pepper DAC in lieu of Woodchester. This relief was previously granted by Eagar J. on the 12th February, 2018 and was not therefore before this court.

Factual background and prior applications in the proceedings

12. Although the background facts are not complex, the proceedings have had a long and intricate procedural history, which it is necessary to summarise, as it would be of

relevance to the exercise of the court's discretion pursuant to Order 42, rule 24, were I otherwise satisfied as to the plaintiff's entitlement "to issue execution". In the interests of a coherent chronology, it will be necessary to briefly recap on aspects of the chronology already set out above.

13. On the 19th December, 2006 the defendant created the Charge in favour of the plaintiff, then known as Woodchester as security for his indebtedness to them. The amount advanced was €125,000 repayable by monthly instalments of €756.45 for a period of 25 years. The Charge was registered as a burden on the Folio on the 11th February, 2008.
14. Unfortunately, the defendant was unable to meet the monthly repayments and first defaulted on 1st March, 2007. Arrears accrued thereafter, Woodchester issued the within proceedings, and on 11th October 2010, McGovern J. granted the Original order for possession with a stay of execution for four months. There was no appearance by the defendant at the hearing before McGovern J. On foot of the Original order for possession, an order of possession, issued from the Central Office on 14th September, 2011. Thereafter, reduced monthly payments were agreed, but in due course, the defendant again defaulted and a decision was therefore made to enforce the Original order for possession.
15. As by this time, the order of possession, dated 14th September, 2011 had expired, Woodchester applied for a renewal pursuant to Order 42, rule 21 for a period of one year. This order was renewed by Dunne J. on the 4th February, 2013. It is relevant to note that there was no attendance by the defendant and therefore I assume that no argument was made as to the entitlement of Woodchester to renew the order of possession after the expiry of the one-year period.
16. Shortly thereafter, the plaintiff applied for an order pursuant to Order 42, rule 24 for liberty to execution of the Original order for possession dated the 11th October, 2010. This was thought to be necessary as a "*change [had] taken place by death or otherwise in the parties entitled or liable to execution*" by reason of the events described at paragraph 2 b) above. The affidavit grounding that application, sworn in February 2013 exhibited a copy of the certificate of incorporation on the change of name from Woodchester to Pepper Ltd and a letter to the defendant informing him thereof. The grounding affidavit made no reference to the sale on 28th September, 2012 by the plaintiff to Windmill of the loan book. On 15th April, 2013 Dunne J. made the order sought, in default of any appearance or defence by the defendant.
17. The order of possession dated 14th September, 2011, which had been renewed by order of Dunne J. on 4th February, 2013, was not executed. Rather, a temporary repayment arrangement was negotiated. After an initial period of compliance, the defendant defaulted, and the plaintiff made another application for liberty to renew this order of possession pursuant to Order 42, rule 20. Once again, the grounding affidavit made no reference to the sale by the plaintiff to Windmill of the loan book. On 10th February, 2014, McGovern J. refused the relief sought because this was a second application for renewal of the order of possession dated 11th September, 2011, which therefore ought to

have been made within one year of the first renewal. In light of this, the plaintiff obtained a fresh order of possession from the Central Office on 2nd April, 2014. (As noted at paragraph 8 above, the second relief sought by the plaintiff in the present application is for the renewal of this order of possession dated 2nd April, 2014).

More recent background to the present motion

18. The affidavit grounding the present motion avers that in the period February 2014 to May 2015 efforts were made to reach an alternative repayment arrangement with which the defendant could comply. Unfortunately, these efforts were fruitless and, in May of 2015, the defendant authorised the plaintiff, then known as Pepper Ltd, to discuss restructuring plans with his son Mr. Neil Moloney Jnr (who was then in his early twenties and employed by a local factory). Mr. Moloney Jnr proposed that he would buy the property from his father funded by a mortgage to be obtained from a third party lender and suggested a repayment schedule to commence pending mortgage approval. Repayments were made between September 2015 and early to mid-2016. However, by September of 2016 Mr. Moloney Jnr had fallen three months behind on the agreed payments. During this period both assisted voluntary surrender of the Property and assisted voluntary sale were discussed but declined by Mr. Moloney Jnr. In October 2016 Mr. Moloney Jnr was warned that without payments on the account, the plaintiff would seek to enforce the order for possession.
19. In March 2017 Mr. Moloney Jnr proposed that he would purchase the Property for €50,000 in full and final settlement. He indicated that he was seeking loan approval but was awaiting an engineer's report on the Property. In July 2017 the plaintiff's management team made a decision to proceed with the present motion because (a) no repayments had been made since July 2016; (b) Mr. Moloney Jnr had not produced any evidence of proof that he had been approved for a mortgage; (c) information and documentation requested in November 2016 necessary to enable the plaintiff review the proposal made on behalf of the defendant had not been received; and (d) there was no clear evidence of any viable alternative, given the defendant's own financial circumstances.
20. In September 2017, Mr. Moloney Jr. informed the plaintiff that he was trying to fix the chimney of the Property, and that once this was completed he would be in a position to have his engineer issue a report to Ulster Bank and was still hopeful of loan approval. To date, it appears that loan approval has not been obtained.
21. On 12th February, 2018, Eagar J. granted an order in pursuant to the present motion amending the plaintiff's name to Pepper DAC in the title to the proceedings.
22. After an exchange of affidavits over the course of 2 years, the present motion was listed for hearing in the Chancery List on 22nd January, 2020. It appears that it was only at this time that an error in the formal order of 10th February, 2014 came to the attention of the parties. Inadvertently it appeared that the plaintiff had sought the same relief as in the present motion, namely liberty to issue execution pursuant to Order 42, rule 24, which relief McGovern J. had refused. As a result, the present motion was adjourned in order for

the plaintiff to seek to amend this order under the “slip rule”, Order 28, rule 11 of the Rules. As explained in the judgment *Pepper Finance Corporation (Ireland) DAC v. Moloney* [2020] IEHC 105 of Simons J. delivered in February 2020, the court was satisfied that the reference to Order 42, rule 24 in the order was obviously mistaken, there being no requirement to make any application pursuant to Order 42, rule 24 because six years had not then elapsed since the making of the Original order for possession. It was therefore clear that what was refused by McGovern J. was an application to renew the order of possession a second time and Simons J. amended the order accordingly.

Hearing of the present motion

23. The plaintiff was represented by counsel at the hearing. The defendant did not attend in person. His son attended and requested to be heard on his father’s behalf and produced a letter from his father’s general practitioner indicating that the defendant had neither the mental nor physical capacity to attend court and speak on his own behalf. The plaintiff objected to this, observing that Mr. Moloney, not being a lawyer, did not have a right of audience on behalf of his father. This is correct. However, Mr. Moloney Jnr has a particular connection with the Property, in that it is his family home where he resides, and in respect of which he has discharged certain mortgage repayments. In addition, virtually all recent engagement between the parties has been with Mr. Moloney Jnr, rather than with the defendant personally. The three replying affidavits in the present motion were sworn by Mr. Moloney Jnr, rather than by the defendant. Further, I noted that Mr. Moloney Jnr has been permitted to address the High Court on several prior occasions and accordingly allowed him to make a short submission *de bene esse*. I have also had the benefit of written legal submissions from both parties.

Issue 1: Is the plaintiff entitled to issue execution?

24. This judgment will first consider the defendant’s primary argument that the plaintiff is not entitled to issue execution in respect of the mortgage the subject matter of these proceedings.
25. Mr. Moloney Jnr has sworn three affidavits in this matter. In his first affidavit, sworn in April, 2018, he avers to the effect that the Charge was granted to an entity known as Woodchester and not to an entity known as Pepper DAC; and that Woodchester “*never sold*” the Charge to Pepper DAC.
26. More importantly, Mr. Moloney Jnr avers to the effect that in September 2012 Woodchester sold the loan book including the Charge in a “*true sale*” to Windmill; that such true sale terminated any interest of the plaintiff as mortgagee in the Charge and to that end exhibits, inter alia, a Determination of the Tax Appeals Commission (“the Determination”). The Determination is anonymised and does not specifically refer to the plaintiff or Windmill. However, the plaintiff’s replying affidavits and written legal submissions, accept that the Determination refers to the plaintiff. Indeed, the plaintiff invokes certain extracts from the Determination.
27. The plaintiff relies on two affidavits of Caroline Loftus, the plaintiff’s Senior Operations Manager, in in the first of which, Ms. Loftus deals with the purchase of the plaintiff’s share

capital and the subsequent changes of corporate name and legal status. For reasons explained below, I am satisfied that these events do not adversely impact on the plaintiff's entitlement to issue execution.

28. Ms. Loftus also avers to the effect that immediately after the purchase of the loan book, including the Charge, were securitised by means of a sale to Windmill of the beneficial interest in the loan book. Thereafter, it appears that the plaintiff continued to service the loan book, including the Charge, on behalf of Windmill pursuant to a portfolio management agreement.
29. Ms. Loftus also avers that the defendant's loan documentation expressly confirmed that the plaintiff was entitled to securitise the Charge, warned the defendant that this might occur and confirmed his prior irrevocable consent to securitisation. Ms Loftus exhibits the relevant letter of offer and the Charge, which I have reviewed and am satisfied that they contain terms to that effect.
30. Ms. Loftus repeatedly avers that "*pursuant to the securitisation transaction*" the plaintiff alienated only the beneficial interest in the Charge and remains possessed of the legal interest in the Charge. Ms. Loftus does not identify her means of knowledge in this regard. She does not state that she has read the relevant transaction documents, among them the mortgage sale instrument and the portfolio management agreement, which would govern this issue; nor does she suggest that she is legally trained or, alternatively, that she has been appropriately advised as to the alleged meaning of the relevant transaction documents. Crucially, the transaction documents were not exhibited in any of the plaintiff's affidavits.
31. Instead, Ms. Loftus's affidavit draws the attention of the court to certain paragraphs of the Determination and avers that the statements and findings contained therein are "*consistent with*" the position advanced; i.e. that the plaintiff remains possessed of the legal interest in the Charge. Ms. Loftus thus avers that "*it is evident from the Determination that only the beneficial interest was sold as part of the securitisation transaction with the plaintiff retaining the legal interest...*". Ms. Loftus further avers that "*it is evident from a reading of the Determination that there is no factual or legal basis for the statement that there has been a 'true sale leaving no residual rights in [the plaintiff]'*".
32. In this respect, it must be said that the approach of the plaintiff towards the Determination is somewhat inconsistent. On the one hand, the plaintiff repeatedly states that this court is not bound by any finding in the Determination as it related to a different issue to that arising in these proceedings. On the other hand, Ms. Loftus urges the self-same findings on the court.
33. Ms. Loftus thus refers to para. 8 of the Determination:

"The Appellant agreed to sell the beneficial interest in its mortgage loan book to a special purpose vehicle ('SPV') for consideration in the amount of approximately

€177,000,000. The purchaser, SPV, was established solely for the purposes of acquiring the beneficial interest in the loan book from the Appellant with the proceeds of the loan notes issued by SPV to a global investment bank group company ('Investment Bank Co.'). The terms of the sale are set out in the Mortgage Sale Agreement dated 28 September 2012. As part of the sale arrangements, the Appellant agreed, inter alia, to hold the legal title to the mortgage loans on trust for SPV." (emphasis added)

34. However, it is notable that Ms. Loftus also refers to paras. 79 and 119 of the Determination which state as follows:

79. "The position is that the beneficial interest in the loan assets belonged to SPV post 28 September 2012 with the Appellant retaining the legal interest on terms that were heavily qualified and conditional, for a finite period under the agreement (subject to renewal)..."

119. "The beneficial interest in the loan assets was transferred to SPV, a bankruptcy remote special purpose vehicle. While the Appellant retained legal title, they retained it on terms that were heavily qualified and conditional."

35. Although I fully accept that this court is not bound by the findings of the Tax Appeals Commission, the Determination is relied upon by the plaintiff as supportive of its case. It is therefore hard to ignore the fact that the very paragraphs invoked by the plaintiff recite that the retention by the plaintiff of the legal interest in the mortgage book was on terms that were "heavily qualified and conditional, for a finite period under the agreement (subject to renewal)". I also note that paragraph 37 of the Determination states that the "SPV was entitled to terminate the agreement prior to its five-year expiry if the Appellant breached the agreement and if the agreement was terminated, the Appellant would lose its legal title to the loans.". I also observe that the same paragraph of the Determination states that the portfolio management agreement contained a lengthy list of circumstances in which the agreement could be terminated and that, if the agreement were terminated, this would end the plaintiff's relationship with the mortgage loans and end its legal title to the loan book.
36. That precise point is taken up in the affidavit of Mr. Moloney Jnr sworn in October, 2019. He refers to these particular extracts from the Determination. He avers that, as the initial time limit of five years of the portfolio management agreement had expired, there can be no presumption that the agreement remained in place, or that none of the lengthy list of circumstances, in which the agreement could have been prematurely terminated, had arisen. No affidavit has been sworn by the plaintiff in response. Therefore no evidence has been put before the court of the renewal of the portfolio management agreement or that the heavily qualified and conditional right to the legal interest in the Charge remains vested in the plaintiff.
37. It is important to note that the plaintiff has exhibited a certified copy of the Folio which discloses the existence and ownership by the plaintiff of the Charge. Ms. Loftus also

exhibits a copy of the Property Registration Authority Legal Notice No. 1 dated January, 2014 which provided to the effect that the plaintiff may apply, under its name and legal status as changed, to be registered as the owner of the Charge on payment of a fee of €40. It does not appear that the plaintiff made any such application.

Discussion of issue 1

38. In this case, two separate legal processes occurred within a short time of each other; first, the acquisition of the plaintiff by Pepper Netherlands Holding Cooperative UA and change of the plaintiff's name and secondly the sale of the loan book.

39. The court has the benefit of the certificate of incorporation and change of name dated 9th January, 2014 issued by the Companies Registration Office demonstrating that the entity known as Woodchester is one and the same as that known as Pepper Ltd, namely the plaintiff. The court also has the benefit of the certificate of incorporation dated 29th October, 2015 issued by the Companies Registration Office on the conversion of the plaintiff to a Designated Activity Company. It is clear from this documentation that Woodchester, Pepper Ltd and Pepper DAC, all of which bear the same company registration number 34927, are one and the same legal entity, namely the plaintiff.

40. Section 30 (6) of the Companies Act, 2014 provides that:

"A change of name by a company under this section shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

41. Further, s. 63 (12) of the Companies Act, 2014 provides that:

"The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status."

42. If matters were confined to the defendant's argument set out at paragraph 2 b) above, there would be no reason to refuse the first relief sought in the present motion.

43. There is however a dispute between the parties as to the nature and effect of the sale by the plaintiff to Windmill of the loan book including the Charge. The defendant avers that this was a sale of both the legal and the beneficial interest. The plaintiff's deponent, Ms. Loftus avers that the plaintiff retained the legal interest in the loan book including the Charge and the exclusive legal right to exercise the powers thereunder and recites certain parts of the Determination to support that case. It is not sufficient for the plaintiff to rely upon the characterisation in the Determination of the transaction documentation. Rather, it should have exhibited the mortgage sale instrument, and if necessary, the portfolio management agreement (even in redacted form if same is considered to be commercially

sensitive) so that the court may be satisfied that the legal interest in the loan book remains vested in the plaintiff.

44. The plaintiff's legal submissions refer to an ex tempore decision of Ní Raifeartaigh J. in *Pepper Finance Corporation (Ireland) DAC v. Hanlon and Anor* (unreported High Court, 11th January, 2018.) In the course of her judgment granting an order for possession, Ní Raifeartaigh J. commented on aspects of the same sequence of events as are under discussions in the present motion, i.e. the acquisition, change of name and legal status of the plaintiff and the sale of the loan book to Windmill. In *Pepper v. Hanlon*, Ní Raifeartaigh J. was satisfied that the plaintiff, also the plaintiff in these proceedings, retained the legal interest in the loan book and had the exclusive right to exercise the powers thereunder. In so concluding, Ní Raifeartaigh J. cited established legal authority to the effect that a securitisation transaction does not invalidate or affect the entitlement of the holder of the legal interest in the security to enforce that security to the benefit of the beneficial owner.

45. Thus in *Wellstead v. Judge Michael White* [2011] IEHC 438 Peart J. stated:

"But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors."

46. Furthermore, in *Freeman v. Bank of Scotland* [2014] IEHC 284, McGovern J. held at para. 8 that:

"It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank. Where customers have provided their consent as part of the standard mortgage terms and conditions, they are not specifically notified that their mortgage has been securitised."

47. In *Pepper v. Hanlon*, applying those authorities, Ní Raifeartaigh J. concluded that the plaintiff had retained a legal entitlement to seek an order for possession.

48. However, there are distinctions between the evidence presented to Ní Raifeartaigh J. in *Pepper v. Hanlon* and that before this court. First, in *Pepper v. Hanlon* the plaintiff had exhibited the relevant mortgage sale instrument (referred to in that judgement as a mortgage sale deed). As appears from the judgment, this documentation was examined in detail by Ní Raifeartaigh J., who was therefore in a position to independently confirm that it provided that the vendor retained the legal interest. This is not the case in respect of the present motion. Secondly, in *Pepper v. Hanlon*, the Folio entry had been amended

shortly before the hearing to record that the plaintiff, re-registered as Pepper Finance Corporation Ireland, DAC, was the owner of the relevant charge. Again this is not the case here. Apart altogether from these distinctions, *Pepper v. Hanlon* was determined on the basis of the evidence presented to the court. The plaintiff clearly cannot rely on the evidence of fact given in another case, as evidence of fact in the proceedings before this court.

49. No explanation has been given by the plaintiff for its failure to exhibit the relevant transaction documents in these proceedings. It was not contended that the plaintiff could not lawfully produce even a copy of the relevant document, or indeed that doing so would be inconvenient.
50. Overall, it is hard to disagree with the averment of Mr. Moloney Jr (in his affidavit sworn in July, 2018) to the effect that the plaintiff ought to be in a position to provide the court with some evidence to support its position rather than simply making assertions as to the nature of the transaction documents. The plaintiff was afforded in excess of one year to reply to this affidavit. In her replying affidavit of September, 2019 Ms. Loftus refers expressly to Mr. Moloney Jr's observation in relation to the lack of evidence. She thus acknowledges his clear invitation to place the transaction documents before the court. Yet, this invitation is not taken up and, instead, the deponent merely states "*I can confirm that the legal title to the loans and security the subject matter of the within proceedings is vested in the plaintiff*". This is not a sufficient answer to the point.
51. Without prejudice to the plaintiff's assertion to the effect that the transaction documents do not affect its entitlement as the holder of the legal interest to enforce the Charge, the plaintiff argues that, as it is the registered owner of the Charge, this is determinative of the matters before the court. In this regard the plaintiff relies upon s. 31 (1) of the Registration of Title Act, 1964 which provides that:

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon."

52. The Court of Appeal in *Tanager v. Kane* [2018] IECA 352 held that a court hearing an application for possession may not determine a challenge to the correctness or conclusiveness of the Register in repossession proceedings. Thus, Baker J. states at para. 67 that:

"A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the Court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the Court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification."

53. *Tanager v. Kane* considered the basis for the system of registration of title in Ireland as expressed in s. 31 (1) of the 1964 Act. The primary objective of registration of title is to ensure that past defects of title no longer affect successive owners after the date of the first registration. As Baker J. observed in her judgement, after the date of first registration of absolute title, it is neither necessary nor permissible to go behind the "impenetrable curtain of the register" (see McAllister, *Registration of Title in Ireland*).
54. However, the defect in title which the defendant alleges does not arise from prior or historical dealings with the Property but instead from events subsequent to the registration of the Charge in 2008. The defendant does not maintain that in 2008 the plaintiff was not the owner of the Charge, but rather that, as a result of the sale of the loan book, it is no longer entitled to be registered as the owner of the Charge. In this respect, I emphasise that the extract from the Folio produced was issued over two years ago (on the 13th August, 2019).
55. In light of the issue raised by the defendant in these proceedings, I am not prepared to find that an extract from the Folio over two years old is sufficient to resolve the issues in dispute before me.

Conclusion on issue 1:

56. In the circumstances it seems to me, the defendant's point that the plaintiff does not presently own the legal interest in the Charge has been fairly made. The substance of the plaintiff's response to that point is illustrated by the following averment in Ms. Loftus' affidavit dated... May, 2018: "*it is evident from [a] reading of the Determination that there is no factual or legal basis for the statement that there has been a 'true sale leaving no residual rights in the plaintiff'*". I am not prepared to make the order sought by the plaintiff on the basis of an inference to be drawn from the Determination when no explanation has been offered as to why the relevant transaction documentation has not been put before the court. This is particularly so given that the plaintiff relied on certain passages in the Determination which, although reciting that the legal interest in the Charge was retained, noted that this retention was heavily qualified, conditional and for a finite period (subject to renewal).
57. There is clearly an issue between the parties as to whether the plaintiff retains the legal interest in the mortgage and it is by no means straightforward. It has been clear since Mr. Moloney Jr swore his affidavit in April, 2018 that the true nature of the sale of the loan book to Windmill and of the nature of the interest retained by the plaintiff are in issue in these proceedings. The plaintiff has had a considerable time in which to place before this court the necessary proofs and has not done so. The relevant mortgage sale instrument has not been exhibited (even in redacted form); the portfolio management agreement was not exhibited; an up to date copy of the Folio, evidencing that the plaintiff, appropriately re-named and registered as a Designated Activity Company, and is the owner of the Charge was not produced to the court (which could have been obtained on payment of a fee of €40); and finally, there has been no response to the defendant's affidavit of October, 2019 calling upon the plaintiff to furnish proof of the various matters asserted, and to demonstrate that the portfolio management agreement was renewed

and has not been terminated. Had the plaintiff placed even some of the above evidence before the court, the outcome might have been different.

58. I have given due consideration to relisting the present motion before the court to enable the plaintiff to exhibit further documentation should it wish to do so. However, this is something which the plaintiff ought to have done prior to now and indeed has seen fit to do in other litigation. I do not believe that the court's scarce resources are best used by facilitating the presentation of applications based upon incomplete proofs such as those in the present case.

Issue 2: Court's discretion under Order 40, rule 24

59. In the light of the court's decision on issue 1, it is not strictly speaking necessary to consider issue 2. For the sake of completeness, however, I will briefly do so.
60. The plaintiff submits that its affidavits provide a comprehensive explanation as to why it has not executed the Original order for possession since 11th October, 2010. It is argued that the primary reasons for the lapse of time are; the plaintiff's wish to give as much time as possible to the defendant to discharge the mortgage arrears and to the defendant's son to purchase the property or refinance the Charge.
61. It is entirely reasonable for a mortgagee to engage with a mortgagor to ascertain if measures short of enforcement can be agreed. There were extensive discussions and correspondence, between the plaintiff and the defendant, exploring whether a repayment schedule or arrangement could be put in place with which the defendant could comply. Agreement was reached on several different occasions that particular sums would be payable on a regular basis but the defendant was unable to maintain these payments. Furthermore, the option of both an assisted voluntary sale and a supported voluntary surrender were discussed. In addition, the plaintiff engaged with the defendant's son, to see if he could purchase the Property. As appears from the affidavits, efforts were being made by the plaintiff and indeed by the defendant and his son to arrive at a workable agreement in relation to repayments until very shortly prior to the issue of the within motion in October 2017.
62. Having regard to the evidence, I accept that the lapse of time in enforcing the Charge is reasonable and I am satisfied with the plaintiff's explanation in this regard. Indeed a refusal by the court to now allow execution of the Original order for possession in circumstances such as this might create a disincentive for mortgagees to engage with mortgagors which would not ultimately be in the public interest. In this case, not only has there been significant engagement by the plaintiff with both the defendant and his son, but also on occasion there has been part payment of the debt which demonstrated the defendant's bona fides and further encouraged the plaintiff to defer execution.
63. In short, the explanation proffered by the plaintiff meets the threshold of a good reason, as understood in the Supreme Court in *Smyth v. Tunney*. In addition, The defendant has not identified any specific legal prejudice as a result of the lapse of time.

64. I am therefore satisfied that the test in *Smyth v. Tunney* has been met.

Issue 3: Leave to renew the order of possession pursuant to Order 42, rule 20.

65. The plaintiff also seeks leave to renew the order of possession issued by the Central Office on 2nd April, 2014. In the light of the court's decision on issue 1, it is not strictly speaking necessary to consider issue 3. As the court is not granting leave to execute the Original order for possession, the renewal, or otherwise, of the order of possession dated 2nd April, 2014 is moot. For the sake of completeness, however, I will briefly consider that issue.

66. The question is should a party wishing to renew an order of possession for the first time apply for renewal before the expiration of that order; in other words during the first year after the issue of the order of possession.

67. On a plain reading of Order 42, rule 20, it seems to me that the question must be answered in the positive. Thus, the first sentence of Order 42, rule 20 provides that an execution order "... if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided". Rule 20 provides, in effect, that by leave of the court such order may be renewed for one year at any time "before its expiration", and thereafter successively renewed for one year at any time during the continuance of the renewed order.

68. The plaintiff relies upon the following paragraph from Dunne J.'s judgment in *Carlisle* at page 416:

"The plaintiff in these proceedings was entitled to obtain an order of possession. Subsequently, that order not having been executed, it was open to the plaintiff to seek to have that order renewed. Once the order was so renewed, it was necessary thereafter, in order to retain the priority of the original order of possession obtained pursuant to O. 42, r. 5 to seek the renewal of the order during the continuance of the renewed order. In other words, a second or subsequent renewal of the order of possession must be obtained during the continuance of the order so renewed."

(emphasis added)

69. The plaintiff argues that the phrase "*it was open to the plaintiff to seek to have (an) order renewed*" governs an application for a first renewal and that Dunne J. does not qualify the time within which this first application for renewal may be made. It is correct to say that Dunne J. does not expressly so qualify this statement. However the time within which to apply for a first renewal was not before the court in *Carlisle* and did not require to be commented upon in the case. The plaintiff also refers to Dunne J.'s observation that once the order was so renewed it was necessary "*thereafter*" to seek renewal during the continuance of the renewed order. Emphasis is also placed by the plaintiff on Dunne J.'s reference to the requirement that a "*second or subsequent renewal of the order*" must be obtained during the continuance of the order so renewed and the plaintiff argues that the one year time limit does not apply to the first renewal.

70. There is in nothing in the judgment of Dunne J. which seeks to determine the time within which a first renewal might be permitted. Absent such authority, it is incumbent upon this court to apply Order 42, rule 20, which clearly requires that the first application to renew is made before the expiration of the one-year period.
71. I am also influenced by the fact that, if the plaintiff's interpretation is correct, there is no limit whatsoever on the period within which a first renewal could be sought. An order of possession might therefore be renewed for the first time at any time during an indefinite number of years, no matter how many, after its issue. This cannot be the intended meaning and effect of Order 42, rule 20.
72. In short, I find that, as the application to renew the order of possession dated 2nd April, 2014 is made more than seven years after its issue, such order cannot be renewed pursuant to Order 42, rule 20.
73. It is relevant to note that, if this court had been prepared to grant the first and principal relief sought in this application (i.e. renewing the Original order for possession of 11th October, 2011), then it would have been open to the plaintiff to seek to have a fresh order of possession issued by the Central Office in the usual way. Thus, in *Carlisle Dunne J.* observed:

"There is absolutely nothing to prevent the plaintiff from seeking to have another execution order in the form of an order of possession issued in the usual way in the Central Office. It should be remembered that the only reason why the order of possession in this case was not executed during its continuance was because of the conduct of the defendant. The only penalty, if that is the appropriate word to use, for the plaintiff is that it does not have priority in respect of its execution over any other execution order that might be in existence in respect of the same property."

Conclusion

These proceedings concern the repossession of the defendant's family home. This is clearly a matter of the utmost seriousness for the defendant and his family. Were it not for the issue raised and insufficiently answered, as to the entitlement of the plaintiff to enforce the Charge, the test for granting leave to execute outside the original six-year period pursuant to Order 42, rule 24 as set out by the Supreme Court in *Smyth v. Tunney* would have been met and the court would have exercised its discretion in favour of the plaintiff. However, for the reasons set out, I am not satisfied that the plaintiff is entitled to issue execution and therefore the court's discretion is not engaged. The first relief sought pursuant to Order 42, rule 24 is therefore refused. For the reasons set out above, the second relief sought pursuant to Order 42, rule 20 is also refused.

I will list the matter for mention on 16th December, 2021 at 10:30 am to deal with the question of costs.