

APPROVED

[2023] IEHC 11



THE HIGH COURT

2009 No. 921 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

JAMES HENDRICK
EILEEN HENDRICK

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 16 January 2023

INTRODUCTION

1. This matter comes before the High Court by way of an application for an extension of time within which to issue execution of an order for possession. The application is made pursuant to Order 42, rule 24 of the Rules of the Superior Courts.

NO REDACTION REQUIRED

PRINCIPLES 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.
3. That rule provides as follows:

“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.”

4. 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. There, the Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute following the lapse of six years from

the date of the judgment or order, provided that there is some explanation at least for the lapse of time. The Supreme Court went on to state that, even if a good reason is given, the court must consider any counterbalancing allegations of prejudice.

5. The discretionary nature of the relief has 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.”

6. The Court of Appeal provided further elaboration on the legal test as follows in *Ulster Bank Ireland Ltd v. Quirke* [2022] IECA 283 (at paragraphs 59 and 60):

“I do not think that it is open to doubt that the threshold set by *Smyth v Tunney* is a low one, but it is nonetheless a threshold that must be met. As Simons J. said in *Hayde v H & T Contractors*, at para.21, ‘*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.*’

As to whether or not any reason is required to explain the lapse of time for the period of six years from the date of the relevant judgment or order, I consider that this must be so. Once the period of six years from the date of the judgment or order has expired, an application is required for leave to issue execution, and the applicant, in order to succeed with an application, must explain the ‘lapse of time’ up to that point. If the application is made six years and one day after the judgment/order, the lapse of time in such a scenario can only refer to the period of time beginning on the date of the

judgment or order and ending on the date of the application, because there has been no other lapse of time at that point, and yet an application is required. That being the case, the lapse of time during that period must always require explanation, regardless as to when the application is ultimately advanced. Following upon the expiration of six years from the date of judgment, every day before an application is made also forms part of the ‘lapse of time’ which in an overall sense must be explained.”

7. The Court of Appeal also expressed full agreement with earlier *dicta* from the High Court to the effect (i) that 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, and (ii) that to require a judgment creditor to execute promptly could be counter-productive in many instances, not least in a case where that would have entailed execution during a severe economic recession.

PROCEDURAL HISTORY

8. The High Court (McGovern J.) made an order on 11 October 2010 directing the defendants to deliver up possession of the property comprised in Folio 23512F, County Wexford (“*the order for possession*”). The order for possession was subject to a stay on execution for a period of six months.
9. The High Court (Gilligan J.) made an order on 25 April 2016 substituting Start Mortgages Ltd as plaintiff in the proceedings and giving that company leave to issue execution on foot of the order for possession.
10. The proceedings subsequently came before me on 14 October 2019. On that date, counsel for the plaintiff applied for leave to issue execution pursuant to Order 42, rule 24. I was satisfied that the legal test for the grant of leave, as per

Smyth v. Tunney [2004] IESC 24, [2004] 1 I.R. 512, had been met, and, accordingly, I granted leave to issue execution. I also made an order reflecting the fact that the plaintiff was now a designated activity company.

11. The defendants lodged an appeal against my order with the Court of Appeal. The appeal was, ultimately, struck out on 10 September 2020 because of the failure of the defendants to file books of appeal.
12. The plaintiff made an *ex parte* application on 3 October 2022 for directions in respect of a further application for leave to issue execution. The plaintiff was anxious to ensure that the application for leave should be made returnable before the High Court prior to the expiration of twelve years from the date of the order for possession of 11 October 2010. I directed that the motion be made returnable to 10 October 2022. On the return date, the motion was adjourned for hearing to 7 November 2022.
13. The motion duly came on for hearing on 7 November 2022. On that date, an application for an adjournment was made on behalf of the first named defendant. The motion was put back to 12 December 2022, with a direction that it be listed peremptorily for hearing on that date. The purpose of the adjournment had been to allow the defendants one final opportunity to make a proposal for a personal insolvency arrangement pursuant to the Personal Insolvency Act 2012.
14. On the scheduled hearing date, the first named defendant indicated to the court, through a *McKenzie* friend (William Murphy), that whereas progress had been made, an application for a protective certificate pursuant to Part 3, Chapter 4 of the Personal Insolvency Act 2012 had not yet been made. It was explained that the personal insolvency practitioner was seeking clarification as to whether an earlier, unrelated mortgage had been released. The application for a protective

certificate could not be made until the status of this mortgage had been determined.

15. On this basis, the first named defendant sought a further adjournment to allow time for the application for a protective certificate to be pursued. It was submitted that an adjournment would not prejudice the plaintiff. In particular, it was accepted on behalf of the first named defendant that the application for leave to execute could not be statute-barred, if at all, until March 2023. (More generally, the position of the first named defendant is that the Statute of Limitations is not relevant to an application for leave to issue execution).
16. I refused the application for an adjournment and directed that the hearing of the motion should proceed. However, I also indicated that, in the event that I ultimately reached a decision to grant leave to issue execution, the parties would be afforded an opportunity to address me on whether a stay should be placed on any such order. Put otherwise, any order which this court might be persuaded to make on the motion might be tempered by the imposition of a stay. If this occurred, then the first named defendant would have a further window of time within which to pursue a proposal for a personal insolvency arrangement.
17. Having heard submissions on the motion, I reserved judgment until today's date.

DISCUSSION

18. The Court of Appeal has confirmed in *Ulster Bank Ireland Ltd v. Quirke* [2022] IECA 283 that a party moving an application pursuant to Order 42, rule 24 must address and explain the lapse of time in the execution of the judgment or order concerned, commencing from the date of the judgment or order and continuing up to the date on which the application is made. The

explanation need not disclose exceptional circumstances, but some reasonable explanation is required.

19. In the present case, this court has already had cause to consider the lapse of time between the date of the order for possession on 11 October 2010 and the making of an earlier application for leave to issue execution on 14 October 2019. I was satisfied that the legal test for the grant of leave, as per *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512, had been met, and, accordingly, I granted leave to issue execution. An appeal against that order has since been struck out by the Court of Appeal.
20. Having regard to this procedural history, the focus of the court's assessment of the present application should be directed to the events *subsequent* to 14 October 2019. The court should carefully consider the explanation given for the failure to issue execution in the two years between (i) the order granting leave to issue execution, and (ii) the bringing of the motion seeking fresh leave to issue execution.
21. This is not to say that the court should not examine the explanation for the *overall* delay in executing an order for possession which dates from October 2010. Rather, the only point being made is that, in circumstances where the court's earlier finding that there had been an explanation for the delay up to 14 October 2019 is now *res judicata* between the parties, particular attention should be paid to the events since that date.
22. The two principal reasons advanced to explain the lapse of time since 14 October 2019 are as follows. First, there was an appeal outstanding in respect of the order until 10 September 2020. Secondly, the plaintiff had sought thereafter to engage with the defendants in relation to alternative methods of addressing the debt. In

particular, the plaintiff had written to the defendants on 24 May 2021 in relation to the mortgage to rent scheme. The first named defendant confirmed by telephone call on 24 June 2021 that the defendants were not interested in the mortgage to rent scheme. Thereafter, the first named defendant indicated in February 2022, through an authorised third party, that the defendants wished to discharge the debt by the sale of other lands.

23. I am satisfied that the explanation for the failure to execute the order for possession meets the threshold of a reasonable explanation. Much of the delay is attributable either to time expended on attempts to resolve the debt by methods other than repossession or to time lost as a result of the outstanding appeal.
24. More generally, the overall delay since October 2010 is similarly explained by time expended on various attempts to resolve the debt.
25. The legal test requires the court to consider whether there is any countervailing prejudice to the other side which might justify the refusal of leave to execute. No such prejudice has been asserted in the present case. The first named defendant has acknowledged, through his *McKenzie* friend, that the plaintiff has shown considerable forbearance.
26. Accordingly, I propose to grant leave to issue execution. As explained under the next heading, the making of such an order is not precluded by the Statute of Limitations.

STATUTE OF LIMITATIONS

27. For completeness, it is necessary to refer briefly to the implications, if any, of the Statute of Limitations for the making of an order granting leave to issue execution.

28. Section 11(6)(a) of the Statute of Limitations 1957 provides that an action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.
29. The term “*action*” is defined under the Statute of Limitations 1957 as including any proceeding (other than a criminal proceeding) in a court established by law. There has been some debate as to whether this limitation period is confined to new actions upon a judgment, or whether, alternatively, it also applies to the execution of a judgment. See, generally, M. Canny, *Limitation of Actions* (Round Hall, 3rd ed., 2022) at §5–01 to §5–05; §5–09; and §5–12.
30. The prevailing view, at the level of the High Court, is that the taking of procedural steps to execute a judgment is not subject to the limitation period. In *Start Mortgages DAC v. Piggott* [2020] IEHC 293, the High Court (Gearty J.) held that the renewal of an order of possession did not constitute an action upon a judgment. This approach has since been approved of by the High Court (Allen J.) in *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12.
31. The issue remains open, however, at the appellate level: *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512.
32. The plaintiff in the present case has sought to avoid any potential objection based on the Statute of Limitations by taking the following precautionary step. The plaintiff sought and obtained leave to issue a notice of motion returnable before the High Court on 10 October 2022, i.e. prior to the expiration of twelve years from the date that the order for possession was pronounced on 11 October 2010. This ensured that the application for leave to issue execution was “*brought*” within twelve years of the date upon which the order for possession was pronounced in open court.

33. The approach on behalf of the plaintiff, although understandable, would appear to be overly cautious. This is because, even if the twelve-year limitation period were applicable to an application for leave to issue execution, time would not have begun to run until, at the very earliest, 23 March 2011. This is the date upon which the order for possession was perfected. Indeed, it is probably more accurate to say that the limitation period could not have begun to run until after the six-month stay of execution had elapsed. It seems that the earliest date on which the order for possession could be said to have become “*enforceable*” within the meaning of Section 11(6)(a) of the Statute of Limitations 1957 was 11 April 2011.
34. Having regard to the chronology of the present case, there is no question of the plaintiff being barred from executing the order for possession. First, the order granting leave to issue execution will have been made within twelve years of the judgment having become enforceable. Secondly, even if the order granting leave to issue execution were not made until after twelve years had expired, it is sufficient that the motion seeking leave has been made returnable before the court within twelve years. The application has been “*brought*” within the twelve-year period. It is not necessary that the motion be heard and determined within the twelve-year period.
35. In summary, the application for leave to issue execution is not statute-barred for the following reasons. First, an application for leave to issue execution does not constitute an action upon a judgment and thus does not trigger the twelve-year limitation period prescribed by Section 11(6)(a) of the Statute of Limitations 1957. Secondly, even if this first reason is incorrect, both the application for leave to issue execution, and the order granting leave, will have been made prior

to the expiration of twelve years from the date of the judgment becoming enforceable.

CONCLUSION AND PROPOSED FORM OF ORDER

36. For the reasons explained herein, I am satisfied that the plaintiff has met the threshold of establishing a good reason which explains the failure to execute the order for possession. I am also satisfied that the delay in executing the order for possession has not caused any prejudice to the defendants. The legal test for granting leave to issue execution, as per *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512, has therefore been met.
37. Accordingly, I propose to grant the plaintiff leave to issue execution, pursuant to Order 42, rule 24 of the Rules of the Superior Courts, in respect of the order for possession of 11 October 2010.
38. As flagged earlier, I will hear the parties further on the question of whether a stay should be imposed on the proposed order so as to allow the defendants to progress the intended application for a personal insolvency arrangement. I will also hear the parties on the question of costs. The matter will be listed before me, physically, on Monday 23 January 2023 at 3 o'clock.

Appearances

Eoin Coffey for the plaintiff instructed by BHSM LLP
The first named defendant appeared as a litigant in person