APPROVED **[2023] IEHC 155**

THE HIGH COURT

2009 No. 1463 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

WILLIAM McINERNEY
(OTHERWISE BILL McINERNEY)
MARY McINERNEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 28 March 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.

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;
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> (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;
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> the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly.
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> 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 (Dunne J.) made an order on 28 March 2011 directing the defendants to deliver up possession of the property comprised in Folio 6287F, County Clare ("***the order for possession***"). The order for possession was subject to a stay on execution for a period of six months.

9. On 10 February 2020, counsel for the plaintiff made an application before me 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.

10. The plaintiff issued a second notice of motion seeking leave to issue execution on 15 November 2022. The motion had been listed for hearing on 30 January 2023. On that date, an application for an adjournment was made on behalf of the first named defendant. The purpose of the adjournment had been to allow the defendants an opportunity to make a proposal for a personal insolvency arrangement pursuant to the Personal Insolvency Act 2012.

11. During the course of the adjournment application, reference was made to the provisions of Section 2 of the Land and Conveyancing Law Reform Act 2013. This section confers an express power on a court to adjourn proceedings, which have been brought by a mortgagee seeking an order for possession, for a period not exceeding two months to enable the relevant person (i) to consult with a personal insolvency practitioner with a view to the making of a proposal for a personal insolvency arrangement, and (ii) where appropriate, to instruct the personal insolvency practitioner to make such a proposal. This section is directed to *ongoing* proceedings and does not apply to a scenario, such as the present case, where an adjournment is being sought post-judgment.

12. At all events, I was satisfied to grant an adjournment to the first named defendant pursuant to the court's inherent jurisdiction. The proceedings were adjourned until 27 March 2023. The length of the adjournment mirrors the maximum period referred to under Section 2 of the Land and Conveyancing Law Reform Act 2013. Whereas that section is not directly applicable, it is indicative of the fact that the legislature considered that two months was a reasonable period within which a defendant to a mortgage suit might progress an application for a personal insolvency arrangement.

13. On the adjourned date, the first named defendant was again permitted to address the court with the assistance of a *McKenzie* friend, Mr. Brennan. An application was made for a further adjournment. For the reasons which follow, the application for a further adjournment was refused. The first named defendant has already been afforded a reasonable period of time within which to pursue a proposal for a personal insolvency arrangement. It is now some four months since the motion seeking leave to execute was first issued. The plaintiff is entitled to have its motion heard and determined on the merits. The competing interests of the parties are best balanced by ruling on the motion, and by imposing a short stay in the event that the motion is successful. Put otherwise, any order which this court might be persuaded to make on the motion would be tempered by the imposition of a short 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.

14. Having heard submissions on the motion, I reserved judgment overnight.

DISCUSSION

15. 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.

16. 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 28 March 2011 and the making of an earlier application for leave to issue execution on 10 February 2020. On that latter date, I had been 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.

17. 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 10 February 2020. The court should carefully consider the explanation given for the failure to issue execution during the period of some two years between (i) the order granting leave to issue execution, and (ii) the bringing of the motion seeking fresh leave to issue execution.

18. 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 March 2011. 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 10 February 2020 is now *res judicata* between the parties, particular attention should be paid to the events since that date.

19. The two principal reasons advanced to explain the lapse of time since 10 February 2020 are as follows. First, it is said that the plaintiff had sought to engage with the defendants with a view to avoiding the forced sale of the mortgaged property. Reference is made to the plaintiff having written to the defendants in February and March 2021. Reference is also made to the fact that the defendants continued to make regular repayments (albeit that these are not sufficient to cover the monthly instalments due). Secondly, the plaintiff points

to the agreed moratorium on repossessions and to the fact that throughout the majority of 2020 and 2021, County Sheriffs were not executing orders of possession due to the coronavirus pandemic.

20. I am satisfied that the explanation for the failure to execute the order for possession meets the threshold of a reasonable explanation. In particular, it was reasonable for the judgment creditor to show forbearance while repayments, albeit modest, were being made.

21. 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.

22. The first named defendant has not filed a replying affidavit to the motion and has not sought to engage in a meaningful way with the type of matters which are relevant to an application for leave to issue execution. Instead, the following two points were made in opposition to the motion. First, it was alleged that the order for possession of 28 March 2011 was invalid by reference to the statutory lacuna which had existed prior to the enactment of the Land and Conveyancing Law Reform Act 2013. The lacuna related to the repeal of the statutory power to seek an order for possession pursuant to Section 62(7) of the Registration of Title Act 1964. Secondly, it was submitted that the first named defendant had been making regular payments pursuant to the loan facility in the last number of years.

23. As to the first point, it is not open to the first named defendant to seek to challenge the validity of the order for possession more than a decade after it had been made. The first named defendant had a right of appeal to the Supreme Court against the order for possession granted on 28 March 2011. The first

named defendant did not exercise his constitutional right of appeal at the time and cannot now seek to make a collateral attack against the validity of that order in response to a procedural motion brought by the plaintiff. There is a public interest in the finality of litigation and a party, such as the plaintiff in the present proceedings, is entitled to rely on a final unappealed order of the High Court. See, by analogy, *Start Mortgages DAC v. Kavanagh* [2023] IEHC 37.

24. As to the second point, it is apparent from the statement of accounts which have been exhibited that such payments as have been made by the first named defendant have not reduced the overall arrears: these continue to grow and now stand at a sum of €164,899.12. There is nothing to suggest that the defendants will be in a position to clear these arrears in a reasonable period of time.

CONCLUSION AND PROPOSED FORM OF ORDER

25. 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.

26. 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 28 March 2011. As flagged earlier, a stay of two months will be imposed on the proposed order so as to allow the first named defendant a further opportunity to progress the intended application for a personal insolvency arrangement.

Appearances

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

Approved
Garrett Simons