

APPROVED

[2023] IEHC 176



THE HIGH COURT

2009 No. 1283 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

**PETER GAWLEY
SANDRA GAWLEY**

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 April 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:

“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 (Dunne J.) made an order on 7 March 2011 directing the Defendants to deliver up possession of the property comprised in Folio 141614F County Dublin (“*the order for possession*”). To date, the order for possession remains unexecuted. This judgment is delivered in respect of an application for leave to issue execution made by Start Mortgages DAC (“*Start Mortgages*”). Start Mortgages has, since 15 January 2015, been registered as the owner of the charge pursuant to which the order for possession had been made.
9. The original plaintiff in the proceedings had been a different company, namely Nua Mortgages Ltd. The High Court (Baker J.) made an order on 17 October 2016 in the following terms:

- “1. An Order pursuant to Order 42, rule 24 of the Rules of the Superior Courts granting Start Mortgages Limited, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, liberty to issue execution on foot of the Order of this Honourable Court made on 07 March 2011.
 2. If necessary, an Order pursuant to Order 17, rule 4 of the Rules of the Superior Courts substituting Start Mortgages Limited, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, in place of Nua Mortgages Limited as Plaintiff to the within proceedings.”
10. As appears, the wording of the second part of this order is somewhat unusual in that it is prefaced by the qualifying words “*if necessary*”. The order also omits any direction that the amended title of the proceedings be duly entered in the Central Office of the High Court.
11. These matters were clarified on a subsequent application made on 12 June 2018. That application arose in circumstances where Start Mortgages had changed its status to a “*Designated Activity Company*” or a “*DAC*”. The High Court (Baker J.) made an order in the following terms:
 - “IT IS ORDERED pursuant to Order 17, rule 4 of the Rules of the Superior Courts that Start Mortgages Designated Activity Company, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, be substituted in place of Nua Mortgages Limited as Plaintiff to the within proceedings.The title thereof to be duly entered in the Central Office of the High Court with the proper officer.”
12. As appears, Start Mortgages DAC had been substituted in place of Nua Mortgages Ltd as plaintiff, and the necessary direction issued.
13. Start Mortgages issued a motion on 7 August 2019 seeking leave to issue execution. The motion came on for hearing on 11 November 2019. Leave to issue execution was granted for the reasons explained in a reserved judgment delivered on 9 December 2019, *Start Mortgages DAC v. Gawley*

[2019] IEHC 830. Mr. Gawley exercised his right of appeal against that judgment and order. The appeal was dismissed by the Court of Appeal for the reasons explained in a reserved judgment delivered on 30 November 2020, *Start Mortgages DAC v. Gawley* [2020] IECA 335. As discussed presently, many of the grounds relied upon by Mr. Gawley in opposition to the current application are the same as those rejected by the Court of Appeal.

14. The current application for leave to issue execution has been brought before the High Court by way of notice of motion issued on 27 October 2022. The motion came on for hearing on 20 March 2023 and judgment was reserved until today.
15. The motion is grounded on the affidavit of Eva McCarthy filed on 27 October 2022. The affidavit sets out the procedural history. The two principal grounds relied upon in explanation for the delay in execution since the resolution of Mr. Gawley's appeal in November 2020 are as follows.
16. First, it is said that Start Mortgages had made efforts to contact the Defendants with a view to avoiding a forced sale of the mortgaged property as follows:

10 December 2020	A letter issued to the Defendants asking them to contact Start Mortgages regarding their account;
22 March 2021	Start Mortgages attempted to contact Mr. Gawley by telephone but there was no answer;
26 April 2021	Start Mortgages sent correspondence to the Defendants inviting them to engage in the personal insolvency process and enclosing an information booklet regarding same;
25 June 2021	Start Mortgages spoke briefly with Mr. Gawley by telephone. Mr. Gawley is reported to have stated

that he did not have a mortgage with Start Mortgages and the call was ended.

17. It is then averred that, on a monthly basis thereafter between 27 July 2021 and 13 April 2022, Start Mortgages again issued letters to the Defendants asking them to make contact regarding their mortgage.
18. The second explanation offered for the delay relates to the impact of the Covid-19 pandemic. Reference is made on affidavit to the Banking and Payments Federation Ireland's moratorium on repossessions which expired in September 2020 and to the fact that "Level 5" restrictions remained in place until April 2021. It is further averred that County Sheriffs were not executing orders of possession due to the impact of the pandemic.
19. The affidavit concludes by stating that, as of 30 September 2022, the balance outstanding on the Defendants' loan account is in the sum of €485,833.23, with an arrears balance of €226,748.63. These figures are updated in a second affidavit sworn by Ms. McCarthy on 5 December 2022. The last payment made by the Defendants was on 30 June 2014 in the sum of €600.
20. Mr. Gawley has filed two affidavits in opposition to the application for leave to issue execution. The first affidavit is dated 4 November 2022; the second, 27 February 2023. I have carefully considered the content of both affidavits in preparing this judgment.
21. The principal points raised in the affidavits can be summarised as follows. First, Mr. Gawley makes a number of points disputing the ownership of the mortgage or charge which gave rise to the order for possession. Reference is made to a deed dated 4 December 2014 between Investec Bank plc and LSF IX Java Investments Ltd. It is said that LSF IX Java Investments Ltd have never made

themselves known to the Land Registry. It is further said that Start Mortgages only hold the legal title and that the beneficial interest in the loan assets was transferred to a special purpose vehicle (“*SPIV*”). Secondly, reference is made to the Consumer Credit Act 1995. It is said that the sale of the mortgage makes the mortgage a commercial transaction. Thirdly, it is said that Mr. Gawley has sought to have an audit performed on his mortgage. It is suggested that Start Mortgages are well known for recapitalising the arrears and overcharging.

22. I will return to consider these points at paragraph 33 *et seq.* below. However, it is convenient to address, at this point, two procedural objections raised by Mr. Gawley. The first procedural objection concerns the position of the second named defendant. Mr. Gawley asserts that the second named defendant, Sandra Gawley, has never been served with any paperwork and has never been in court. I am satisfied on the basis of the affidavits of service which were opened by counsel in relation to this application that Ms. Gawley has, in fact, been put on notice of same. The notice of motion was served by registered post to the mortgaged property and was signed for.
23. I am also satisfied that Ms. Gawley had been served with the original proceedings. Moreover, it is to be noted that a memorandum of appearance was entered by a solicitor on behalf of both defendants on 4 February 2014. This postdates the making of the order for possession and the memorandum of appearance was, presumably, entered in the context of the belated attempt to make an appeal to the Supreme Court. The fact of the appearance having been entered on her behalf confirms that the second named defendant has been on notice of the proceedings since, at the very latest, 4 February 2014. A notice of discharge was filed on 8 July 2014.

24. The second procedural objection concerns the exchange of affidavits in respect of the motion. Mr. Gawley complains, in his affidavit of 4 November 2022, that he had not been given adequate notice of the motion. In the event, however, the motion did not come on for hearing until 20 March 2023. This allowed Mr. Gawley ample time to prepare for the application and to file a further affidavit, which he did on 27 February 2023.

DISCUSSION AND DECISION

25. 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.
26. 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 7 March 2011 and the earlier application for leave to issue execution which was granted by order dated 9 December 2019. This order was subsequently upheld by the Court of Appeal by judgment dated 30 November 2020. The appeal order was perfected on 28 May 2021.
27. 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 9 December 2019. The court should carefully consider the explanation given for the failure to issue execution during the period of some three years between

(i) the order granting leave to issue execution, and (ii) the bringing of the motion seeking fresh leave to issue execution.

28. 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 9 December 2019 is now *res judicata* between the parties, particular attention should be paid to the events since that date.
29. The three principal reasons advanced to explain the lapse of time since 9 December 2019 are as follows. First, the practical effect of the appeal to the Court of Appeal was that no steps could be taken towards execution until November 2020. Secondly, it is said that Start Mortgages had made efforts to contact the Defendants with a view to avoiding a forced sale of the mortgaged property. Thirdly, Start Mortgages 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.
30. I am satisfied that the explanation for the failure to execute the order for possession meets the threshold of a reasonable explanation. It would have been inappropriate for Start Mortgages to have attempted to enforce the order for possession prior to the determination of the appeal. This is so notwithstanding that there was no formal stay on the order of 9 December 2019. It would have undermined the effectiveness of Mr. Gawley's right of appeal were Start Mortgages to have attempted to undertake the very thing that the appeal was intended to prevent, i.e. the enforcement of the order for possession.

31. Thereafter, it was reasonable for Start Mortgages to attempt to contact the Defendants with a view to avoiding, if possible, a forced sale of the mortgaged property. There is a public interest in judgment creditors seeking to engage with debtors in this way. It seems that ultimately these attempts were unsuccessful. Mr. Gawley seeks to maintain the position that Start Mortgages do not have any rights in respect of the mortgage. It was also reasonable for Start Mortgages to refrain from attempting to execute during the period in which the moratorium was in place and repossessions were not being carried out.
32. The legal test also 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. Indeed, it seems that Mr. Gawley has continued to reside in the mortgaged property and that no payments have been made pursuant to the mortgage since June 2014.
33. Mr. Gawley 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. For the reasons which follow, I have concluded that none of the objections raised by him in his two replying affidavits provide a basis for refusing leave to issue execution. Moreover, most of the objections raised have been the subject of previous court rulings and are now *res judicata* as between the parties. This is apparent, in particular, from the judgment of the Court of Appeal.
34. The first ground upon which Mr. Gawley seeks to resist the application for leave to issue execution is predicated on an allegation that Start Mortgages are not entitled to ownership of the mortgage or charge. With respect, this allegation is untenable. The affidavit evidence demonstrates that Start Mortgages is the registered owner of the charge on the relevant folio. This registration is

conclusive: see, generally, *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraphs 53 to 56). Moreover, Start Mortgages has been substituted as plaintiff in these proceedings in lieu of the original plaintiff, Nua Mortgages Ltd, since 12 June 2018, having previously been given leave on 17 October 2016 to execute the order for possession. Mr. Gawley never sought to exercise his right to challenge this substitution at the time and the matter is now *res judicata* between the parties. This precise point was made by the Court of Appeal in its judgment of 30 November 2020: see, in particular, paragraphs 33 to 37.

35. Mr. Gawley has sought to raise some form of objection by reference to the Consumer Credit Act 2005. It has to be said that it is difficult to understand the precise nature of the objection being made. The gist of the objection seems to be that the mortgage had been entered into by the Defendants as “consumers” and that this status has been adversely affected by the subsequent transfer from Nua Mortgages Ltd to Start Mortgages. With respect, this objection is not well founded. The fact that the mortgage, charge and loan facility were subsequently transferred to Start Mortgages does not affect any rights which the borrowers would otherwise have enjoyed under the Consumer Credit Act 2005. The question of whether or not a particular housing loan is a consumer transaction is determined by reference to the dealings between the borrower and the lending institution. The fact that the mortgage may subsequently be transferred by the lending institution to another entity, as part of a commercial transaction between those two entities, does not affect the rights of the borrower as a consumer.
36. Mr. Gawley makes a separate objection that the original “*order of possession*” was not renewed within one year. With respect, this objection would appear to

misunderstand the precise nature of the application before the court. Start Mortgages are seeking leave to issue execution pursuant to Order 42, rule 24. The application to renew an earlier “*order of possession*” pursuant to Order 42, rule 20 is sought in the alternative only. As to the distinction between an order for possession and an order of possession, see the judgment of the High Court in *Start Mortgages DAC v. Rogers* [2021] IEHC 691.

37. Next, Mr. Gawley seeks to imply that there may have been overcharging on his loan account. No evidence has been advanced in support of this allegation. Mr. Gawley does not deny that the housing loan is in significant arrears; nor is it suggested that “*but for*” the alleged overcharging, Mr. Gawley would have been able to make repayments as they fell due. If and insofar as Mr. Gawley wishes to dispute the allocation of the proceeds of sale following a disposal of the mortgaged property, this is a matter which can be raised before the Examiner.
38. Finally, Mr. Gawley has sought to resurrect complaints in relation to the transfer of the proceedings from the Master of the High Court to a Judge of the High Court. This occurred more than a decade ago. It is said that the Master of the High Court had made certain criticisms of the documentation put forward by the then plaintiff, Nua Mortgages Ltd. These matters are largely irrelevant to the application currently before the court. The proceedings had been transferred from the Master’s List to the Judge’s List, and the High Court (Dunne J.) had made an order for possession on 7 March 2011. The Defendants did not bring a valid appeal against the order for possession. (An application for an extension of time to bring an appeal against the order for possession was refused by the Supreme Court on 28 July 2014). The making of the order for possession is, therefore, *res judicata* and the Defendants are estopped from agitating issues

which could and should have been raised at the time of the original application for an order for possession.

39. It is not open to Mr. Gawley, in the context of an application to issue execution, to seek to challenge the validity of the order for possession more than a decade after it had been made. 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.
40. Mr. Gawley alleged, in his oral submission on 20 March 2023, that the signatures on the deed of mortgage had been forged. The proper course for a party who alleges that an earlier judgment has been obtained by fraud is to institute separate proceedings seeking to set aside the judgment. Mr. Gawley explained that he has, in fact, instituted separate proceedings against Start Mortgages: High Court 2022 No. 6020 P. Mr. Gawley further explained that he intends to have the original deed of mortgage forensically examined in circumstances where he alleges forgery. Mr. Gawley asked if this court could direct the production of the original deed. Any application for the production of the deed of mortgage will have to be brought in the context of the separate proceedings referenced by Mr. Gawley, rather than in the context of an application for leave to issue execution.

CONCLUSION AND PROPOSED FORM OF ORDER

41. 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.

42. 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 7 March 2011.
43. As to costs, my *provisional* view is that the plaintiff, having been entirely successful in what was a contested application is entitled to recover the costs of the motion as against the first named defendant. If either side wishes to contend for a different form of costs order, they should file written legal submissions in the Central Office of the High Court within two weeks of today's date.

Appearances

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

Approved
Gerrit S. Mans