APPROVED **[2023] IEHC 356**

THE HIGH COURT

2012 No. 780 S

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

SEAMUS (OTHERWISE SHAY) SWEENEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 3 July 2023

INTRODUCTION

1. This ruling is delivered in respect of two related applications as follows. First, Pepper Finance Corporation (Ireland) DAC ("***Pepper Finance***") seeks to have itself substituted for ACC Bank plc ("***ACC Bank***") as the plaintiff in these proceedings. Secondly, Pepper Finance then seeks an order, pursuant to Order 42, rule 24 of the Rules of the Superior Courts, granting it leave to issue execution in respect of a judgment entered on 12 September 2012.

2. One of the principal issues to be addressed in this ruling is whether an adjournment should be granted so as to allow Pepper Finance to file a further affidavit remedying the shortcomings in its proofs (if possible).

PROCEDURAL HISTORY

3. The within proceedings take the form of summary proceedings. Judgment was entered against the defendant in the Central Office of the High Court on 12 September 2012 in circumstances where he had failed to enter an appearance to the proceedings. Judgment was entered in the sum of €646,913.72. It appears, although this is not stated on affidavit, that a judgment mortgage may have been certified on 10 December 2012.

4. There were no further steps taken in the proceedings until the year 2022. On 13 April 2022, the motion the subject-matter of this ruling was issued. Pepper Finance seeks to have itself substituted for ACC Bank as the plaintiff in these proceedings; and then seeks an order, pursuant to Order 42, rule 24, granting it leave to issue execution in respect of the 2012 judgment.

5. The motion initially came on for hearing before the High Court (Coffey J.) on 4 July 2022. The motion was one of a number of similar applications listed before the High Court on that date. Most, if not all, of the applications were adjourned in circumstances where the court considered that the grounding affidavits in each case did not provide an adequate explanation for the delay in seeking to execute the respective judgments. The motions were adjourned to allow Pepper Finance to file further affidavits remedying the shortcomings in its proofs.

6. The motion in the present proceedings was adjourned until 19 December 2022, with directions as to the filing of further affidavits. On the adjourned date, the defendant was given liberty to enter an appearance to the proceedings in order to contest the motion. (It will be recalled that judgment had previously been entered against the defendant because of his failure to enter an appearance in 2012). The motion was transferred to the Non-Jury List; thereafter, in March 2023, the motion was allocated a hearing date of 26 June 2023. The motion came on for hearing before me on that date.

ORDER 42, RULE 24

7. 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 of the Rules of the Superior Courts.

8. 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.

9. 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."

10. 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*.'
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> 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."

11. 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.

12. In *ACC Bank plc v. Joyce* [2022] IEHC 92, the High Court (McDonald J.) rejected a submission that it had been necessary to await the transmission of the interest in a judgment debt to an assignee before taking steps to enforce that judgment. McDonald J. also observed that the assignee of a judgment debt cannot absolve itself of any inactivity on the part of the original judgment creditor.

DISCUSSION AND DECISION

13. As appears from the case law considered above, a party who seeks leave to issue execution outside the six year period allowed must provide some explanation for the delay in failing to enforce the judgment within time. The Court of Appeal has confirmed in *Ulster Bank Ireland Ltd v. Quirke* that it is necessary to address the entirety of the delay, i.e. not just the delay which occurs following the expiration of the initial six year period allowed under Order 42, rule 24.

14. In the present proceedings, the only explanation offered for the failure to enforce the 2012 judgment in the initial six year period is as follows (see paragraphs 7 and 8 of the grounding affidavit):

> "The original lender of the loan monies was ACC Bank plc, the Plaintiff herein. In June 2014 the Plaintiff ceased to provide banking services and was re-registered as a private company under the name 'ACC Loan Management Limited' ('ACCLM'). I beg to refer to a true copy of the Certificate of Incorporation on re-registration as a private company dated 27 June 2014 and of the Certificate of Incorporation on change of name dated 27 June 2014, upon which pinned together and marked with the letters and number 'MC 2' I have signed my name prior to the swearing hereof.
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> By special resolution dated 13 July 2016, ACCLM converted to a Designated Activity Company and a Certificate of Incorporation on Conversion to a designated activity company was issued by the CRO on 23 August 2016. I beg to refer to a copy of the said Certificate of Incorporation on conversion to a designated activity company, upon which marked with the letters and number 'MC 3' I have signed my name prior to the swearing hereof."

15. This explanation does not meet the threshold prescribed in *Smith v. Tunney* and subsequent case law. The fact that the plaintiff may have ceased to provide banking services to *new* customers does not explain a failure to pursue judgments against existing or former customers. Indeed, the very name of the re-registered company, i.e. ACC Loan Management Ltd, implies that the principal activity of the company is now the management of its existing loan book. This would, presumably, include the pursuit of enforcement action against defaulting debtors.

16. Similarly, the subsequent change in status from a limited company to a designated activity company cannot represent a proper explanation for the delay in enforcing the 2012 judgment. This change in status cannot have had any impact on the ability of the company to seek to enforce judgments which it had previously obtained. See, generally, *Start Mortgages DAC v. Kavanagh* [2019] IEHC 216 (at paragraphs 15 to 25).

17. Insofar as the delay *subsequent* to the initial six year period is concerned, there is very little offered by way of explanation in the grounding affidavit. Reference is made to transactions in 2018 and 2019 whereby, or so it is alleged, the legal title to the defendant's loan and judgment debt were ultimately transferred to Pepper Finance. Moreover, there is no explanation provided as to how it is that a further period of three years elapsed before the motion was issued.

18. A supplemental affidavit has been filed on behalf of Pepper Finance on 8 November 2022. This seeks to identify three reasons for the delay as follows: first, time had been required to verify the identity of the defendant in accordance with the anti-money laundering legislation; secondly, time had to be allowed for the defendant to engage in respect of his loan; and thirdly, enforcement action could not have been taken during part of this time because of the public health restrictions introduced in response to the coronavirus pandemic.

19. In circumstances where Pepper Finance has failed to provide any explanation for the delay up until, at the very earliest, 2018 or 2019, the application cannot succeed in its present form having regard to the judgment in *Ulster Bank Ireland Ltd v. Quirke*. Confronted with this reality, counsel on behalf of Pepper Finance applied for an adjournment so as to allow his side file a further supplemental affidavit addressing the delay.

20. The principles governing an application for an adjournment have been set out in two recent judgments of the Court of Appeal as follows. The first in time is *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93. The Court of Appeal set aside the High Court's decision to refuse to allow a corrective affidavit to be filed. The Court of Appeal attached particular weight to the following factors. First, the grant of an adjournment for the purpose of filing a further affidavit

would not have undermined the effective management of the High Court's list, nor would it have given rise to any additional delay in the determination of the proceedings. Secondly, the significant prejudice caused by the *refusal* of the adjournment had to be weighed against the absence of any material prejudice to the other side in granting the adjournment.

21. The second judgment is *Minogue v. Clare County Council* [2021] IECA 98. There, the Court of Appeal summarised the factors to be considered in adjudicating upon an adjournment application as follows (at paragraph 138):

> "Modest and all as the adjournment application procedure is, the interests of justice do come in to the analysis very strongly. Among the major factors to be considered are:
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> (i). whether the party seeking the adjournment has already had adequate previous opportunities to deal with the matter and in particular had the benefit of previous adjournments;
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> (ii). the lateness of any step sought to be taken by a party;
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> (iii). the possibility of the adjournment being tactical;
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> (iv). the extent of real prejudice to the other side;
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> (v). the views and position of the other side more generally;
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> (vi). the amount of time that had been allocated to the matter and the extent if any of disruption to the orderly conduct of business by the court;
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> (vii). the extent of dislocation and inconvenience to other litigants by time of the court being unnecessarily absorbed - in that regard there is a huge difference between a case that will take one or more days or even a substantial portion of a day and a short matter listed on a Monday; and
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> (viii). all other relevant circumstances."

22. Having regard to the principles identified in these two judgments, I have concluded that the appropriate approach in the present case is to adjourn the

application in order to allow Pepper Finance an opportunity to file a further affidavit addressing, if it can, the evidential deficits in its papers.

23. My rationale is as follows. The grant of a brief adjournment will not adversely impact on the efficient management of the court's list. This is because the hearing time required for this motion is short, and a hearing slot for the resumed hearing can be accommodated in early course without too much disruption. The motion had initially been listed for 20 minutes. The resumed hearing is unlikely to take more than 15 minutes: the parties have already opened the relevant case law and the court will have read the further affidavits in advance. Whereas it would be preferable had the hearing of the motion concluded on the scheduled hearing date (26 June 2023), it will be possible to allocate a further 15 minute hearing slot between now and the end of July.

24. The grant of a brief adjournment will not cause any material prejudice to the responding party, i.e. the defendant. The additional delay incurred will be minimal, measured in weeks only. The defendant will be afforded an opportunity to reply to any affidavit filed. I address the question of legal costs at paragraph 28 below.

25. By contrast, the *refusal* of a brief adjournment would cause significant prejudice to Pepper Finance. The application for leave to issue execution cannot succeed in its current form, having regard to the decision in *Ulster Bank Ireland Ltd v. Quirke*. Put shortly, the refusal of an adjournment would be fatal. It is proportionate to allow a brief adjournment in circumstances where any countervailing prejudice caused to the defendant, and more generally to the efficient administration of the court's list, is minimal. In carrying out this balancing exercise, I have also taken into account the fact that the defendant

himself sought to deliver an affidavit belatedly. The defendant swore an affidavit on 15 June 2023, that is, a matter of days before the scheduled hearing date, and well outside the time allowed by the court in its previous directions.

26. The interests of justice dictate that the defendant's affidavit be admitted, and that Pepper Finance be permitted to file a further supplemental affidavit. The defendant will have a right to reply in respect of same. It is preferable that all evidence relevant to the test in *Smyth v. Tunney* be put before the court.

27. For the avoidance of doubt, Pepper Finance is entitled to address, in its supplemental affidavit, the issues raised by the defendant in his affidavit in respect of supposed omissions in the proofs relied upon to establish the transfer of the judgment debt from ACC Bank. See, generally, *Mars Capital Finance Ireland DAC v. Temple* [2023] IEHC 94.

28. It is correct to say that the defendant will have incurred additional legal costs unnecessarily as a result of the adjournment. This prejudice can be remedied, however, by directing that Pepper Finance is to pay the costs of the motion irrespective of the ultimate outcome of same. This is a proportionate order in circumstances where Pepper Finance has already been afforded an opportunity by the court to address its proofs: the motion was adjourned from July 2022 to December 2022 for this precise purpose. Whereas it would be disproportionate to refuse another brief adjournment, the court is entitled to take this litigation conduct into account when allocating legal costs under Section 169 of the Legal Services Regulation Act 2015. The need for a further adjournment could have been avoided had Pepper Finance filed a more comprehensive affidavit in November 2022.

CONCLUSION AND FORM OF ORDER

29. Pepper Finance has liberty to file a further supplemental affidavit by 14 July 2023. The defendant has liberty to file a replying affidavit by 28 July 2023. The hearing of the motion will resume on Monday 31 July 2023 at 11.30 am.

30. It is a condition of the adjournment that Pepper Finance is to pay the costs of the motion irrespective of the ultimate outcome of same: see paragraph 28 above.

31. Finally, for the avoidance of doubt, the fact that Pepper Finance is to be permitted to file further evidence to address the requisite proofs does not imply that it will necessarily succeed in its motion. Even with additional affidavit evidence, Pepper Finance may fail to establish the transmission of interest or to satisfy the threshold under *Smyth v. Tunney*. The present judgment goes no further than to decide that it would be disproportionate to deny Pepper Finance the opportunity to file further evidence.

Appearances

Neil Rafter for the moving party instructed by OSM Partners
Darragh Haugh for the defendant instructed by David Punch & Co. Solicitors