THE HIGH COURT

[2023] IEHC 460

[Record No. 2010/4853S]

BETWEEN:-

ACC BANK PLC

PLAINTIFF

AND

BRENDAN TOUHY

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 27th day of July, 2023.

Introduction.

1. This is an application by Pepper Finance Corporation (Ireland) DAC (hereinafter 'the applicant') for an order pursuant to O.17, r.4 of the RSC, substituting the applicant for the plaintiff in the proceedings and for an order pursuant to O.42, r.24, granting it liberty to issue execution of a judgment obtained by the plaintiff against the defendant in the Central Office of the High Court on 22 August 2011, pursuant to an order of the Master of the High Court dated 3 March 2011.

2. The defendant resists these applications on a large number of grounds, which will be outlined later in the judgment.

Chronology of Relevant Dates.

3. A brief chronology of the most relevant dates, is set out hereunder. Other matters which arose during these dates, will be outlined in more detail in the summary of the evidence.

11 October 2010	Summary summons issued by plaintiff seeking judgment against the defendant on foot of various loans.
8 November 2010	Order of Peart J. allowing for service of the summary summons on the defendant by ordinary prepaid post.
3 March 2011	Order of the Master of the High Court, giving the plaintiff liberty to enter final judgment for €1,350,409.30 against the defendant.
22 August 2011	Plaintiff obtains judgment in the Central Office against the defendant for the said sum, together with costs.
31 October 2018	Sale of loans by plaintiff to Cooperatieve Rabobank UA (hereinafter 'Rabobank').

17 December 2018	Deed of transfer from plaintiff to Rabobank.
12 April 2019	Agreement for sale of loans and other matters from Rabobank to Otterham Property Finance DAC (hereafter "Otterham").
23 August 2019	Transfer date when Rabobank and ACCIL transferred all their rights to the applicant, as nominee for Otterham.
28 November 2022	Notice of motion issued by applicant, returnable to 13 February 2023, seeking to be substituted as plaintiff in the action and seeking liberty to execute on foot of the judgment obtained by the plaintiff against the defendant.
24 April 2023	Order of the High Court allowing the defendant's solicitor to come off record, and allowing Owen Swaine, Solicitors, to come on record for the defendant. Motion adjourned with directions to 15 May 2023.
7 July 2023	Applicant's motion comes on for hearing in the non-jury list.

The Evidence.

4. As the defendant has raised a large number of objections to the granting of the reliefs sought by the applicant in this motion, it is necessary to set out in some detail, the extensive evidence that was put before the court on the hearing of this application.

5. The applicant's application was grounded on the affidavit sworn by Ms. Margaret Cafferty on 23 November 2022. She is a portfolio manager in the applicant company. She stated that the applicant's application arose in circumstances where the applicant had acquired all the rights, title and interest in a portfolio of loans, which included the loan facilities the subject matter of the within proceedings.

6. She referred to the order of the Master of the High Court dated 3 March 2011, in which the plaintiff was granted liberty to enter final judgment against the defendant in the sum of €1,350,409.30. That order provided that having read the summary summons, the notice of motion, and the grounding affidavit sworn by Mr. Gerard Ryan, and having heard the solicitor for the defendant, the Master ordered as follows:

> "It is ordered that the plaintiff be at liberty to enter final judgment in this action for the sum of €1,350,409.30 together with the costs of the proceedings herein when taxed and ascertained."

7. Ms. Cafferty referred to the judgment which had been obtained by the plaintiff against the defendant in the Central Office of the High Court on 22 August 2011, which provided as follows:

> *"Pursuant to the Order of the Master of the High Court dated 3rd day of March 2011 whereby it was ordered that the plaintiff be at liberty to enter final judgment in this action for the sum of €1,350,409.30 together with the costs of the proceedings herein when taxed and ascertained. It is this day adjudged that the plaintiff do recover against the defendant, Brendan Touhy, the sum of €1,350,409.30 and costs, when taxed and ascertained."*

8. Ms. Cafferty stated that on 27 June 2014, the plaintiff reregistered as a private company and changed its name to ACC Loan Management Limited (hereinafter 'ACCLM'). She exhibited a copy of the certificate of incorporation on reregistration as a private company and the certificate of incorporation on change of name. She went on to state that by resolution dated 13 July 2016, ACCLM converted to a designated activity company, in accordance with ss. 56(1) and 63 of the Companies Act 2014. She exhibited a copy of the certificate of incorporation on conversion to a designated activity company.

9. Ms. Cafferty stated that on 31 October 2018, ACCLM agreed to sell and Rabobank agreed to buy ACCLM's loan portfolio. By Deed of Transfer dated 17 December 2018 ACCLM unconditionally, irrevocably and absolutely granted, conveyed, assigned, transferred and assured to Rabobank, all their rights, title, interest and benefit in and under each mortgage asset, underlying loan, and finance document thereto. She exhibited a copy of the Deed of Transfer dated 17 December 2018.

10. By order of Haughton J., dated 28 January 2019, all the residual assets of ACCLM were deemed to be conveyed, assigned and transferred to and vested in ACC Investments Limited ('ACCIL') without the need for any other conveyance, assignment or transfer. She exhibited a copy of that order.

11. Ms. Cafferty stated that on 12 April 2019, Rabobank agreed to sell and Otterham agreed to buy the contractual rights of Rabobank under the finance documents, including those relating to the loan assets the subject matter of the within proceedings. On 23 August 2019, being the 'transfer date' pursuant to the terms of a Deed of Transfer between Rabobank and ACCIL as transferors, and the applicant, as transferee, as the nominee of Otterham; Rabobank and ACCIL granted, conveyed, assigned, transferred and

assured to the applicant all their right, title, interest, benefit and obligation in and under each of the underlying loans set out in part I of the schedule thereto, each of the finance documents and all other related rights. She exhibited a copy of the Deed of Transfer dated 23 August 2019.

12. The exhibited Deed of Transfer established the mechanism by which the loan facilities the subject of the proceedings herein, the security, and all other rights connected therewith, were transferred to the applicant. The said loan facilities were identified in the schedule to the Deed of Transfer. Ms. Cafferty went on to state that the copy of the Deed of Transfer, which had been exhibited by her, was a true copy of the original deed (or the relevant extracts thereof); she stated that it had been redacted by reasons of commercial sensitivity, bank and client confidentiality, and on the basis of irrelevance.

13. Ms. Cafferty stated that by letter issued on 28 August 2019, Rabobank notified the defendant in writing that the said loans, together with the related security, guarantees and other rights, had been transferred to the applicant on the transfer date. She exhibited a copy of that letter. She went on to state that by letters issued on or about 6 September 2019 and 30 September 2019, the applicant notified the defendant that the loans and security documents had been sold and transferred to the applicant. She exhibited copies of those letters.

14. Ms. Cafferty stated that as a result of the transfers as outlined by her in the affidavit, it had become necessary and expedient that the applicant should be made a party to the within proceedings. She stated that an appropriate means to give effect to the change of interest that had occurred, was by substituting the applicant for the plaintiff in the within proceedings and thereafter the proceedings should carry on as between the defendant, as continuing party, and the applicant, as a new party, in place of the plaintiff. She also asked the court for an order dispensing with the need for reservice of such amended proceedings upon the defendant.

15. At para. 18 of the affidavit, Ms. Cafferty stated that by reason of the change in ownership effected by the loan sales and transfers, as described in her affidavit, the applicant was now the party entitled to issue execution on foot of the judgment dated 22 August 2011. She stated that it was her belief that there were good grounds for making an order granting leave to the applicant to issue execution on foot of the judgment for the reasons she would outline in the affidavit.

16. Ms. Cafferty went on to state that the letters previously exhibited by her in the affidavit, had invited the defendant to make payments to the applicant and had warned that the loan would otherwise go into arrears. The letter had informed the defendant that the applicant would need to complete customer due diligence checks for individuals and companies to comply with its obligations under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended. She stated that the applicant then proceeded to carry out its own investigation to verify the identity of the defendant and ensure compliance with the Act. She went on to state that having carried out the due diligence investigations, the applicant made the decision to apply to be substituted as plaintiff in the action and to seek leave to execute on the judgment already obtained by the plaintiff. The applicant invited tenders to carry out the requisite legal work, which resulted in solicitors being appointed by the applicant to make the applications in this case, and in a large number of other related proceedings. The files in respect of the various proceedings had to be obtained from the several solicitors originally instructed by the plaintiff, which took a significant amount of time.

17. Ms. Cafferty stated that that coincided with the Covid-19 Pandemic, which caused delays in the progression of the substitution applications. Due to the pandemic, there was a need to reorganise the systems of work to facilitate secure remote working, particularly given the sensitive financial information involved, which created unavoidable delays. There were also limitations on the ability of staff to attend the offices of the applicant and the offices of its solicitors, which caused inevitable delays in progressing the applications.

18. Ms. Cafferty stated that throughout 2021, the Central Bank of Ireland, had encouraged lenders to engage in a period of forbearance in respect of outstanding loans, due to the pressure caused to people by the pandemic. She stated that in these circumstances, it was her belief that it was right for the applicant not to seek to execute the judgment at that time, as to have done so, would have caused prejudice to the defendant during a difficult time.

19. Ms. Cafferty stated that she believed that there was no prejudice to the defendant by the delay described above, which arose as a result of the applicant seeking to comply with its customer due diligence requirement; time being given to the defendant to engage with the applicant in respect of the loan the subject matter of the judgment, prior to the applicant seeking to execute same; and the delays caused by the Covid-19 Pandemic and

the forbearance shown by the applicant during that time. Ms. Cafferty stated that in these circumstances, it was appropriate for the court to make the order sought by the applicant in its notice of motion herein.

20. A replying affidavit was sworn by the defendant on 18 May 2023. He began the affidavit by stating that he made no admission of debt. He stated that he had not acknowledged the debt, in writing or at all. He had paid no monies to the judgment creditor in respect of the said judgment sum, either at the time of judgment, or at any time.

21. The defendant stated that he had not received the letters exhibited at MC6 and MC7 in the affidavit sworn by Ms. Cafferty. The defendant stated that it was now some twelve years since the original judgment had been obtained. He stated that it appeared from Court Service records, that his solicitor had remained on record in the proceedings, although he had had no contact with him for many years, as he had had no need for the services of a solicitor.

22. The defendant stated that a notice to inspect documents, dated 12 May 2023, pursuant to O.31, r.15 had been delivered to the applicant.

23. The defendant stated that he had been advised that the various transfers of interests referred to by the applicant, did not appear to comply with s.64(2)(b)(ii) of the Land and Conveyancing Law Reform Act 2009. He stated that it was for this reason, that inspection of the said documents was necessary.

24. The defendant stated that it would be argued that no adequate explanation had been given by the applicant for the non-execution of the judgment since 2011. He stated that he could not understand how Ms. Caffery could state that he would suffer no prejudice as a result of this delay. He stated that it was more than twelve years since the judgment had been obtained. He was then 52 years of age. He stated that it would cause him enormous disruption to be faced with an execution process after so many years. He stated that he lived and worked on the land. Since 2011, he had expended time and money on the land, to include reclaiming the land, erecting fencing thereon and planting trees and hedges, in order to qualify for a herd number. He asked the court to refuse the reliefs sought in the applicant’s notice of motion.

25. A second affidavit was sworn by Ms. Cafferty on 1 June 2023. She stated that although the defendant had denied receiving the “hello” and “goodbye” letters of

notification with respect to the transfer of his loans and associated security, he clearly had, at that stage, received copies of the said notifications, as they had been exhibited in her grounding affidavit. She went on to state that in her belief, this was not a material issue, as the lender had at all material times a contractual right of assignment of the defendant's loan facilities and all security therefor, without the need for further consent, or notice to the defendant. In this regard she referred to clause 4.22.2 of the general terms and conditions of the facility letter dated 16 March 2006 and clause 4.24.3 of the general terms and conditions of the facility letter dated 5 July 2007, which provided that the bank could assign the whole or any part of its rights, benefits and obligations in respect of a facility and all security therefor without the need for any further consent or notice to the borrower. She exhibited copies of the facility letters dated 16 March 2006 and 5 July 2007.

26. She stated that she understood that the defendant would take issue with the authority of the signatories on behalf of Rabobank to execute the Deed of Transfer dated 23 August 2019, wherein the defendant's loans were transferred to the applicant. In this regard, she referred to a copy executed power of attorney dated 8 April 2019, which she exhibited.

27. Insofar as the defendant had taken issue with the lapse of time from the date of judgment, until the issuing of the within application for leave to issue execution on foot thereof, she relied on the explanation for the period from the date of the applicant's acquisition of the loans until the date of the issuing of the motion, as set out in her previous affidavit. She stated that the judgment debt was secured by mortgages of an "all sums due" nature over properties in Galway. She exhibited copy mortgages in respect of the said properties. She stated that having failed to secure voluntary disposal of the said asset, on 28 January 2014, the plaintiff had appointed Declan Tate and Ann O'Dwyer as joint receivers over certain assets of the defendant. In this regard she referred to an instrument of appointment of a receiver dated 28 January 2014, which she exhibited.

28. Ms. Cafferty stated that it was her belief and she had been advised by the receivers, that they had been obstructed by the defendant in obtaining possession of the properties over which they had been appointed. In paras. 10-13, Ms. Cafferty set out details of a number of documents that had been allegedly sent by one Charles Allen, purporting to act under a power of an attorney issued by the defendant, in relation to

trusts that had been allegedly created in respect of the said properties. She referred to a number of documents that appeared to have been issued by Mr. Allen relating to trusts concerning the said properties, which documents had been sent to the receivers. These were exhibited at exhibits MC7-MC10 to her affidavit.

29. Ms. Cafferty stated that on one occasion on 22 September 2018, the receivers had reached agreement to sell a particular asset secured by the mortgage, but the property was withdrawn from sale, due to the defendant's interference with the potential purchaser. She referred to an affidavit sworn by the defendant on 25 March 2016, exhibiting various documents, such as a document entitled "Notice of Dishonour, a Notice of Fault and Opportunity to Cure", together with an invoice which the defendant had sent to the plaintiff in respect of his loan accounts, which appeared to arise out of the said notices. It claimed a sum in excess of €11m from the plaintiff.

30. Ms. Cafferty stated that on or about 30 September 2020, the receivers again tried to sell one of the secured assets, pursuant to the powers contained in the mortgage, but despite receiving a contract deposit, the sale did not complete, as the receiver was unable to obtain vacant possession. She exhibited a copy contract deposit receipt, together with evidence of the purchaser's withdrawal from the sale.

31. Ms. Cafferty stated that it was her belief that in these circumstances, the delay in executing the judgment herein by the applicant's predecessors in title, was excusable and understandable, in circumstances where it was endeavouring to realise the secured assets in full or partial discharge of the judgment debt, to avoid the need for recourse to further legal proceedings to execute the entire judgment debt.

32. An affidavit was sworn by Mr. Richard O'Sullivan, the applicant's solicitor, on 22 May 2023. He stated that on 15 May 2023, this Court had directed the applicant's solicitor to deliver to the defendant's new solicitor copies of the documents exhibited in the affidavit sworn by Ms. Cafferty, which was to be done before the close of business on 17 May 2023. The court had further directed the applicant to deliver their replying affidavit on or before close of business on 18 May 2023. Mr. O'Sullivan stated that pursuant to the court's direction, he had served a copy of the affidavits sworn by Ms. Cafferty, together with the exhibits thereto, by email at 17.23 hours on 17 May 2023. He stated that the defendant's solicitors served the defendant's further affidavit, which had not been filed, at 11.23 hours on 18 May 2023 and served a filed copy thereof at 13.54 hours on 19 May 2023.

33. Mr. O'Sullivan stated that insofar as the defendant stated that he had not received a copy of the letters exhibited at MC6 and MC7 in the first affidavit sworn by Ms. Cafferty, he submitted that there was no obligation on the applicant to notify the defendant of the assignment. He referred to the contractual terms that had already been referred to by Ms. Cafferty in this regard.

34. Insofar as the defendant had claimed that the various transfers did not comply with s.64(2)(b)(ii) of the 2009 Act, he stated that the defendant had failed to produce evidence to support this claim, beyond mere assertion. He stated that by email dated 19 May 2023, he had written to the defendant's solicitor and called upon him to clarify on what basis it was alleged that the transfers did not comply with s.64 of the 2009 Act. He stated that at the time of swearing of the affidavit, no reply had been received to that request. He exhibited a copy of his email that had been sent to the defendant's solicitor.

35. The defendant swore a second affidavit in the proceedings on 9 June 2023. He stated that the submissions made by Mr. O'Sullivan in his affidavit were not accepted. He stated that legal submissions would be made on a range of matters at the hearing of the application.

36. The defendant stated that the power of attorney, which had been exhibited in Ms. Cafferty's affidavit, was not under the seal of the company granting the power of attorney. He stated that due to that omission, it was not accepted as being effective to grant a power of attorney under Irish law.

37. The defendant stated that the mortgage deed exhibited at MC5, did not contain his signature. He stated that what purported to be his signature on that document, was a forgery. He stated that it had been reported in the press, that a named person, who was formerly an employee of the plaintiff, had been charged and convicted of twenty-five counts of the forgery of documents.

38. The defendant stated that he had engaged with Mr. Charles Allen at a time when he was vulnerable and suffering from depression. He stated that he was now aware that documents that Mr. Allen drew up and induced him to sign, were nonsensical. He stated that he was very unwise to have had any dealings with Mr. Allen. He exhibited medical certificates which dealt with his health at that time.

39. The defendant denied that he had ever obstructed the receivers in attempting to sell any properties. He denied that he had ever spoken to the intending purchaser of a

property at No. 3, The Courtyard, Loughrea, Co. Galway. He stated that the property was rented and the receiver was entitled to the rent. The purchaser appeared to have concluded that the vendor was not a mortgagee in possession for the purposes of a sale.

40. The defendant stated that the affidavit sworn by Ms. Cafferty and Mr. O'Sullivan contained exhibits, without stating what person (whether or not he or she so compiled it and was identifiable) who had, or may reasonably be supposed to have had personal knowledge of the matters dealt with therein. He stated that submissions would be made in this regard. The defendant stated that it was not accepted that the within application was made within time, or that any delay had been adequately explained; much less that the applicant had proven its entitlement to bring the application at all. He repeated his prayer to the court to refuse the reliefs sought in the notice of motion.

41. The final affidavit in the application, was sworn on 28 June 2023, by Mr. Robert Ryan, a senior portfolio manager in the applicant. He stated that the power of attorney that had been executed in relation to Rabobank, had been executed in the Netherlands in accordance with the legal requirements of that jurisdiction governing execution of deeds by a body corporate. In this regard he referred to a stamped and certified power of attorney dated 8 April 2019, together with certification of authenticity of the grant of signature and confirmation of their authority and further certification for the purposes of The Hague Convention, which documents he exhibited to the affidavit.

42. Mr. Ryan stated that the validity of the execution of the power of attorney was further certified by a signed certificate dated 8 April 2019, which he also exhibited to the affidavit.

Submissions on behalf of the Defendant.

43. Mr. Dixon BL on behalf of the defendant raised a total of nine objections to the granting of reliefs in this matter. First, it was submitted that in purchasing a portfolio of loans, the applicant had carried on the business of banking within the State. As such, it was submitted that it was required to hold a banking licence, as required by s.7 of the Central Bank Act 1971. It was submitted that in the absence of any evidence that the applicant held such a licence, it was not entitled to the reliefs sought in its notice of motion.

44. Secondly, it was submitted that the defendant had averred in his affidavit that he had never received the correspondence exhibited at MC6 and MC7 to the affidavit sworn by

Ms. Cafferty. He had never received any notification of the transfer of the loan from the plaintiff to Rabobank. It was submitted that in order for an assignment of a debt to be valid, it was necessary for the debtor to be given prior notification of the proposed assignment: see s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877. Counsel submitted that as no notice of the assignment of the debt had been given to the defendant, it was not actionable at the suit of the assignee.

45. It was further submitted that, insofar as the applicant had purported to rely on clauses in the facility letters, which obviated the need to give notice of an assignment, such clauses did not remove the need to give prior notice of the assignment to render the debt actionable at law at the suit of the assignee: *AIB Mortgage Bank v. Thompson* [2018] 3 IR 172, at paras. 27-30.

46. Thirdly, counsel submitted that both the assignments that were relied upon by the applicant to establish their title to recover on foot of the judgment and the power of attorney relied upon by the applicant in relation to Rabobank, were of no effect at law, due to non-compliance with s.64 of the Land and Conveyancing Law Reform Act 2009 and/or s.21 of the Power of Attorney Act 1996; in that it was not apparent from the documents exhibited to the applicant's grounding affidavits, that the deeds were executed under seal. It was submitted that in the absence of proof of the affixing of the corporate seal to the various deeds, they were of no legal effect. Therefore the applicant's chain of title to sue on the judgment debt, had not been properly established.

47. Fourthly, it was submitted that in this case the applicant was seeking to rely on redacted documents. The applicant had been served with a notice requiring inspection of the original documents by the solicitor acting for the defendant pursuant to the provisions of O.31, r.15. It was submitted that as the defendant had not been afforded inspection facilities in relation to the originals of the various documents exhibited to the grounding affidavits, the copies exhibited thereto, could not be relied upon for the purposes of this application. It was further submitted that the applicant had not adequately justified the extensive redactions that had been made to the copies that had been exhibited to the grounding affidavits.

48. Fifthly, it was submitted that the applicant could not seek liberty to execute upon the judgment, until it had first been substituted as plaintiff in the action. It was submitted that it followed as a matter of logic that the applicant had to seek to be substituted as

plaintiff in the action first; followed by an application in such capacity to execute upon the judgment that had been obtained by the original plaintiff. It was submitted that it was not permissible for the applicant to seek the two reliefs in the same motion, due to the fact that it did not have *locus standi* to seek the second relief in relation to execution on the judgment, unless and until it was substituted as plaintiff in the proceedings.

49. Sixthly, it was submitted that the applicant was out of time to seek execution on foot of the judgment, as same had been delivered more than twelve years from the date of the application to the High Court. This was due to the fact that, the judgment was effective as and from the date of the Order of the Master of the High Court on 3rd March 2011, when the plaintiff was given liberty to enter final judgment. As that was the last judicial involvement, prior to the formal issuing of judgment out of the Central Office, it was submitted that that was the operative date from which time ran under the Statute of Limitations, 1957. It was submitted that s.11(6) thereof provided that no action could be taken on a judgment after twelve years. It was submitted that the applicant's application herein, seeking liberty to execute on the judgment, became statute barred as and from 3rd March 2023.

50. Counsel accepted that there was some debate on the authorities as to whether leave to execute on a judgment, constituted an action upon a judgment, such as to come within the provisions of s.11(6) of the 1957 Act. Counsel stated that the question was somewhat at large at Irish law: see *Smyth v. Tunney* [2004] IR 512; *Ulster Investment Bank v. Rockrohan Estate Limited* [2009] IEHC 4, *AIB v. Dormer* [2009] IEHC 586; *Start Mortgages v. Piggott* [2020] IEHC 293; *Start Mortgages v. Ward* [2020] IEHC 444.

51. Seventhly, it was submitted that on a proper construction of O.42, r.24, as applied in *Irish Nationwide v. Heagney* [2022] IEHC 12, it was incumbent upon the person seeking liberty to execute the judgment more than six years after its delivery, to explain the delay in executing same, from the date of its issuance, down to the date of the application seeking leave to execute the judgment. It was submitted that in this case, the applicant had not adequately explained the very considerable lapse of time that had occurred since the date of issuance of the judgment to the plaintiff. It was submitted that the excuses put forward for this inaction by the applicant; namely, its delay in retaining the services of a solicitor to act in a large number of cases; the alleged forbearance as a result of recommendations issued by the Central Bank and the alleged difficulties in pursuing such

an application, due to the restrictions imposed due to the Covid-19 Pandemic, were in effect nothing more than an attempt *ex post facto*, to justify their inaction during that period. It was submitted that the applicant had not justified the excessive delay in seeking execution of the judgment and therefore should not be granted the reliefs sought in this application.

52. The defendant's eighth ground of submission was that the applicant should not be allowed to execute on the judgment, as the defendant was unaware of the mortgage which was allegedly furnished in his name as security for the loan. He stated that his signature thereon was a forgery. It was submitted that in these circumstances, it would be both inappropriate and unjust, to allow the applicant to execute on the judgment.

53. Finally, it was submitted that the documents exhibited by the applicant were not admissible in evidence, as they did not come within s.14 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. This was due to the fact that the deponent had not set out by whom the documents had been compiled, nor that they had been compiled in the ordinary course of business of the plaintiff, or of any other relevant entity.

54. It was submitted that having regard to all of these grounds, the court should refuse the reliefs sought by the applicant herein.

Submissions on behalf of the Applicant.

55. On behalf of the applicant, it was submitted by Mr. Powell BL that none of the grounds of objection raised on behalf of the defendant were of any substance. In relation to the first issue, concerning the lack of proof that the applicant held a licence to carry on banking business within the State, it was submitted that the applicant was not seeking to be substituted in the proceedings with the aim of carrying on banking business with the defendant. The applicant simply sought to execute on a judgment that had already been obtained by the plaintiff against the defendant. There was no question of the applicant carrying on any banking business with the defendant. It was submitted that in these circumstances, s.7 of the Central Bank Act 1971 was not relevant.

56. In relation to the lack of notification point, it was submitted that there was evidence before the court that the defendant had been properly notified in advance of each of the relevant assignments of the original loan and underlying securities. There was evidence that the requisite letters had been sent to the defendant. It was further submitted that even if the defendant had not received those letters, he had received

notification of the assignments when the relevant letters had been exhibited in the grounding affidavit sworn by Ms. Cafferty.

57. Finally, it was submitted that having regard to the terms of the facility letters on which the loans were given to the defendant, the facility letters which had been exhibited to Ms. Cafferty's affidavits, clearly provided that the plaintiff was entitled to assign the loans and the underlying securities without notice to the defendant. Accordingly, it was submitted that even if notice had not been given to the defendant, the assignments still took effect in law and equity, having regard to the terms of the contract between the parties.

58. Insofar as the defendant had relied on the decision in *AIB Mortgage Bank v. Thompson*, it was submitted that that case related to the assignment of a loan, the repayment of which remained outstanding. In the present case there was no outstanding debt due on the loan, because the fact of indebtedness had been definitively determined in the judgment that had already been obtained by the plaintiff. In this application, the applicant was simply seeking leave to execute on a judgment that had already been obtained against the defendant. It was submitted that this was an essential difference between this application and the circumstances that arose in the *Thompson* case.

59. Thirdly, in relation to the assertion that the proofs were defective, because the photocopies of the deeds that had been exhibited in Ms. Cafferty's affidavits did not show the seal of the company on the relevant assignments, or on the power of attorney that had been exhibited in the applicant's affidavits, counsel submitted that the 2018 deed had been executed in the Netherlands under the power of attorney, in accordance with the legal requirements of that jurisdiction. That had been certified by a lawyer as being valid under Dutch law, which certification had been evidenced in the affidavits sworn by Ms. Cafferty and Mr. Ryan. The documents also stated in their heading that they were deeds. It was submitted that it was not surprising that the documents did not show the seal, as that would be embossed on the original document and would not be apparent on the photocopy documents that were exhibited to the grounding affidavits.

60. It was submitted that the documents that had been exhibited, from their content and from the certifications issued by the Dutch lawyers, were sufficient to ensure compliance with s.64 of the 2009 Act; in particular having regard to the provisions of s.64(2)(b)(iv), which provided that if an instrument was made by a foreign body

corporate, it would suffice if it was shown that it had been executed in accordance with the legal requirements governing execution of the instrument in question by such body corporate in the jurisdiction where that body was incorporated. It was submitted that this had been established in evidence in this case.

61. Insofar as the defendant had complained that the applicant was purporting to move on documents that had been exhibited in a redacted form and/or that he had not been given inspection of the original documents, while it was accepted that he had served a notice seeking inspection of the original documents; when this matter was mentioned before the court on 15 May 2023, the defendant's solicitor had accepted that redacted copy documents were normally a true reflection of the original documents. He had not pressed for a right to inspect the originals at that stage. The court had directed that further copies of the exhibits be delivered to the defendant's new solicitor, who had only recently come on record. That had been done in accordance with the directions of the court.

62. It was submitted that if the defendant had wished to press his right to inspect the original documents, he could have issued a motion seeking inspection of the documents prior to the hearing of the application. He had not done that. It was submitted that in these circumstances, he had no valid objection to the court proceeding with the matter on the basis of the documents that had been exhibited to the grounding affidavits.

63. Insofar as those documents had been redacted, it was submitted that such redactions were common place in such applications, in order to protect the identity of the holders of other loans, which may have been transferred at the same time as the defendant's loan, the holders of which loans enjoy a right to privacy in relation to their commercial affairs. It was submitted that the information that had been redacted was not relevant to the issues between the parties; and the plaintiff and the applicant were entitled to redact commercially sensitive information that was not relevant to the within application. It was submitted that all relevant parts of the documents and in particular those portions which showed that the defendant's loan and underlying securities had been transferred from the plaintiff to Rabobank, and ultimately to the applicant, had been clearly set out in the exhibits to the grounding affidavits. The applicant was not seeking to rely on any parts of the documents that had been redacted.

64. Fifthly, insofar as it had been asserted that the applicant could not seek liberty to execute on the judgment until it had first been joined into the proceedings, or had been substituted as plaintiff, it was accepted that that was a necessary first step that had to be taken prior to the applicant being given liberty to execute on the judgment. However, it was submitted that there was no bar to such reliefs being sought in the same application. It made eminent sense that that should be done with resulting savings in both time and costs.

65. Sixthly, in relation to the Statute of Limitations point, Mr. Powell BL submitted that that did not arise, as the judgment had not issued until 22 August 2011; therefore the application was within twelve years of the delivery of the judgment.

66. On the seventh ground of objection, which was to the effect that the applicant had not adequately explained the delay in seeking liberty to execute on the judgment; it was accepted that the caselaw had established that on an application such as this, the applicant had to explain the entire period that had elapsed from the date of entry of judgment to the date on which the motion was issued seeking liberty to execute the judgment.

67. It was submitted that the explanations that had been set out in the grounding affidavits, adequately explained the delay that had occurred in seeking to execute on the judgment. It was submitted that the caselaw established that the threshold in this regard was a relatively low threshold: see *Smyth v. Tunney*; *Ulster Bank v. Quirke* [2021] IEHC 199.

68. In relation to the eighth ground of objection, which was to the effect that the applicant should not be given liberty to execute on the judgment, due to the fact that the defendant alleged that his signature had been forged on the mortgage that had been created by him as security for the loan; it was submitted that that was an argument that might arise on another occasion, if and when the applicant was given liberty to execute on the judgment and if it sought to move on foot of the mortgages that had been created by the defendant. It was submitted that these assertions were not relevant to the within application.

69. Finally, in relation to the admissibility of the documents that had been exhibited to the grounding affidavits, it was submitted that there was clear evidence before the court, both from the content of the grounding affidavits, which explained how the documents had

come into existence and from their content, that they were documents compiled in the ordinary course of business. As such, they came within the provisions of s.14 of the 2020 Act, and were admissible in evidence.

70. It was submitted that none of the numerous objections which had been raised by the defendant were of any substance; and that in these circumstances, the court should grant the reliefs sought by the applicant herein.

Relevant Rules of the Superior Courts.

71. The applicant moves its application to be substituted as plaintiff in the action under O.17, r.4, which is in the following terms:

> "*4. Where by reason of death or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.*"

72. The applicant moves its application for liberty to execute on the judgment pursuant to O.42, r.24, which is in the following terms:

> "*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;*
>
> *[…]*
>
> *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.*"

The Law.

73. Prior to coming to my conclusions on this application, it will be helpful to give a brief summary of the legal principles that apply on applications such as this. Many of the issues which arise for consideration in this application, were considered by Butler J. (then sitting as a judge of the High Court), in *Ulster Bank Limited v. Quirke* [2021] IEHC 199. In considering the application by Promontoria (Oyster) DAC to be substituted as plaintiff in the proceedings pursuant to O.17, r.4, Butler J. referred to the judgment of Meenan J. in *Friends First Finance v. Moloney* [2019] IEHC 844, as reflecting the relatively low threshold to be met on an application under that provision in the rules. In the *Moloney* case, Meenan J. identified the relevant conditions that had to be met by a party seeking to be substituted as a plaintiff in an action at para. 10:

> *"10. In each application to the court for a 'global' or 'omnibus' order there should be an affidavit, from a solicitor instructed in the matter, deposing that in respect of each action listed in the schedule he/she has personally satisfied himself/herself that: (i) there has been a valid transfer of the loan and/or security involved to the party being substituted as plaintiff; and (ii) valid notice has been given by way of 'goodbye' and 'hello' letters to the persons involved. The documentation evidencing the above should be exhibited in the grounding affidavit. In making an order the court may rely on the aforesaid."*

74. In considering the test to be applied where parties seek to execute upon a judgment that is more than six years old, pursuant to O.42, r.24, Butler J. noted that the applicant had contended that the threshold to be met by it was a relatively low one. She referred to the decision in *Smyth v. Tunney*, where Geoghegan J. had held that in relation to the onus of proof on the parties seeking leave to execute to explain their delay in so doing, that "no very strong or exceptional reasons" were required (unless the application was being made *ex parte*); rather "some reason for delay had to be shown but no more".

75. Butler J. also referred to the decision of the Court of Appeal in *Pepper Finance v. Beades* [2021] IECA 41, where Whelan J. stated as follows at para. 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.*"

76. Butler J. further noted that in the course of her judgment, Whelan J. had quoted, without demur, from the academic text: Collins, Enforcement of Judgments (2nd Ed, Round Hall, 2019) at para. 3-47:

> "*…The combination of a light onus on a judgment creditor to provide reasons for the delay, coupled with a general difficulty in establishing prejudice on the part of the judgment debtor, suggests that for such applications brought 6–12 years after the date of the order or of recovery of the judgment the court will generally extend time.*"

77. Finally, Butler J. dealt with two other issues which arise in this case. Firstly, she dealt with the status of orders made by the Master of the High Court. She held that the Master of the High Court is not a judge and an order made by him is not a judgment. She held that the granting by the Master of liberty to enter final judgment was not itself a judgment. It was, at most, a determination that no defence had been raised to a summary claim. Had a *bona fide* defence been shown, then the Master would have been required to adjourn it for plenary hearing before a judge of the High Court. As no defence had been shown, the original plaintiff in that action had been granted liberty to enter final judgment, but crucially, had had to proceed to do so, before it could be said to be in possession of a judgment against the defendants. She held that the Master of the High Court had not granted judgment in that case and the date of the order granting liberty to enter final judgment, should not be treated as if it were a judgment or order of the High Court subject to O.41, r.6(4); see paras. 31 and 32 of the judgment.

78. Secondly, when looking at the issue of delay in the execution of a judgment, Butler J. held that such issue was not the same as an allegation of inordinate and inexcusable delay in the prosecuting of proceedings. Delay in the prosecuting of proceedings impacts on the ability of the court to conduct a fair trial. Evidence and witnesses may become unavailable and the recollection of those witnesses who remain available, would doubtless be impacted by the lapse of time. Butler J. held that where judgment had been granted, a court had already adjudicated upon any disputed issues between the parties, or a party had admitted liability for the claim made by the other. Absent an appeal, or at the conclusion of the appeal process, the rights and obligations of the parties *inter se* will have been finally determined. She held that because of the fundamental difference between a judgment and an unadjudicated dispute, there was no obligation on a judgment creditor to execute a judgment promptly equivalent to that on a litigant to prosecute proceedings promptly.

79. Butler J. noted the dicta of Gearty J. in *Start Mortgages DAC v. Piggott*, that public policy would likely run counter to the imposition of such an obligation. She noted that after judgment has been obtained, parties to litigation frequently resolve matters between themselves on a more satisfactory basis, than mere execution of the judgment might permit. She held that requiring a judgment creditor to execute promptly, could be counterproductive in many instances, not least in cases that would have entailed execution during a severe economic recession, which would hardly have led to a particularly beneficial outcome for either side. She held that while there must be a reason explaining the delay, that reasoning requirement is not predicated on the assumption that lengthy delay in execution, is in itself inimical to the interests of justice (see para. 34).

80. In argument at the bar, Mr. Dixon BL submitted that, as his client had not received the notification letters as exhibited in the affidavit sworn by Ms. Cafferty, the provisions of s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877 had not been complied with. The relevant provisions of that section are as follows:

> *"Any absolute assignment, by writing under the hand of the assignor… of any debt or other legal chose in action, of which express notice in writing shall be given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law … to pass and transfer the legal right to such debt or*

chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…"

81. In *AIB Mortgage Bank v. Thompson*, Baker J. (then sitting as a judge of the High Court) held that the purpose of s.28(6) of the 1877 Act, that a debtor be given notice of the assignment of a debt or chose in action, was important for practical and legal reasons. She stated that a debtor must know to whom the debt is due, and from what date a debtor may, with certainty, pay a debt to an assignee. Even where the debtor had in the underlying contract document, given a general waiver or consent to assignment, that did not of itself operate to obviate the need for proof of notice (see para. 30). She went on to consider whether a debtor could contract out of the requirement that he be given notice under s.28(6) of the 1877 Act. She stated as follows at para. 33:

"*I do not consider that the matter is to be considered by a reference to a question of whether a debtor or an obligor may contract out of or waive an entitlement to be notified of the assignment. The provisions of s. 28(6) of the 1877 Act fix the date at which an assignment is effective and the legal import of such an assignment thereafter, namely that an absolute discharge may be given by the assignee. It is not so much that the right to such notice may be waived, but rather that in the absence of such notice, as a matter of law, the debtor or obligor remains indebted to the original contracting party and will at his peril perform the obligations owed to the debtor by payments to another.*"

82. Having considered the formalities that may be necessary in relation to the giving of notice, Baker J. summarised these in the following way at paras. 48/51 and 53:

"*48. The authorities suggest that a court will look to the substance and not the form of a notice.*

49. I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is relevant, and this must be so because s. 28(6) expressly

provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law.

50. The 1877 Act does not make provision for who is to give the notice in writing of the assignment.

51. The contract between Allied Irish Banks plc and the defendant provided expressly that her debt and security could be assigned without notice to her and without her concurrence. That is the effect and purpose of clause 14 of the loan facility by which the defendant irrevocably and unconditionally consented to the transfer of her loan to another party without prior notice to her. As a matter of statute a person acquiring that asset from the original owner cannot give a discharge to the defendant, nor be capable of suing at common law unless the requirements of s. 28(6) are met. The defendant therefore may not object to the fact that her debt was assigned, but the assignee may not sue her without showing that she was expressly notified of the transaction by which her obligations lay with a new person or entity.

[…]

53. While a notice does not have to be sent with the intention of constituting a statutory notice, a notice must be sufficiently clear as the legislation requires that the notice be express. This precludes the argument advanced by the plaintiff that it is sufficient that documents sent to a debtor by implication identify an assignment, and I do not consider that s. 28(6) leaves open an argument that a notice which impliedly identifies an assignment can be sufficient, or that a prior general consent performs the statutory function of a notice. A notice must be given, it need not be formal, it need not refer to the statute, but it must be an express notice of an assignment and not merely a claim to the debt by another party. The existence of a prior assignment ought not to be implied. There is nothing in the statute to my mind which suggests that the notice must be contained in one document and for that reason the joinder of documents may be sufficient to constitute a notice of assignment. Costello J. described the process of the sending of "goodbye" and "hello" letters by assignor and assignee to a debtor or obligor which taken together amount to an assignment and she had no doubt that the debtor had as a matter of fact sufficient notice for the purposes of her judgment in LSREF III Stone

Investments Limited v. Morrissey [2015] IEHC 603, (Unreported, High Court, Costello J., 5 October 2015)."

83. Finally, in the *Ulster Bank v. Quirke* case, Butler J. considered whether an application under O.42, r.24 could be considered "an action" upon a judgment coming within the provisions of s.11(6)(a) of the Statute of Limitations 1957, which 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. While she held that that issue did not arise on the facts before her, she noted for the record, that most recent Irish decisions suggested that, whatever about subsequent steps, an order under O.42, r.24 did not come within s.11(6)(a); citing in support *Ulster Investment Bank Limited v. Rockrohan* [2015] 4 IR 37 and *Start Mortgages DAC v. Piggott* [2020] IEHC 293.

Conclusions.

84. In giving its conclusions herein, the court will deal with the matter by looking at the objections in the same order as they were raised in argument at the bar. The first argument raised on behalf of the defendant, was to the effect that the applications herein should not be granted due to the fact that there was no proof that the applicant was the holder of a banking licence. The court accepts the arguments that were made by Mr. Powell BL on behalf of the applicant in this regard. In this case, the applicant's application is not based on any banking activities, that may or may not be carried out by it. It is seeking the reliefs set out in its notice of motion, on the basis that it is the assignee of the underlying loans owed by the defendant to the plaintiff; together with the underlying securities and the judgment already obtained by the plaintiff against the defendant. The primary basis of their application is as an assignee of the judgment. In these circumstances there is no requirement on the applicant to establish that it is the holder of a banking licence. The court finds that there is no substance in this ground of objection.

85. The defendant's second ground of objection was to the effect that he had not been given notification of any of the assignments of his original loan, and in particular, he had not received the "goodbye" and "hello" letters as exhibited in Ms. Cafferty's first affidavit. The defendant stated in his affidavit that he had not received the two letters exhibited therein. On this account, it was argued that the applicant had not established compliance with the provisions of s.28(6) of the 1877 Act and therefore, they should not be granted leave to execute upon the judgment obtained by the plaintiff against the defendant. The

court does not regard this submission as being well founded for a number of reasons. First, the court is satisfied that the averments made by Ms. Cafferty and the documents exhibited therein, establish *prima facie* that the requisite notice of assignment was given to the defendant.

86. Furthermore, the court notes that clause 4.24 of the terms and conditions of the original loan between the plaintiff and the defendant, provided that any notice in relation to a facility could be delivered by ordinary prepaid post to the borrower at the address of the borrower last known to the bank. It further provided that any such communication would be deemed to have been validly given when delivered by hand, or twenty-four hours after dispatch by post or fax or via any other electronic system. In these circumstances, the court holds that the defendant was deemed to have received notice of the assignment twenty-four hours after the date of the two letters exhibited at MC6 and MC7 to the first affidavit sworn by Ms. Cafferty.

87. While the defendant's counsel relied on the dicta of Baker J. in the *Thompson* case to support the argument that a general waiver of notice will not be sufficient to comply with the provisions of s.28(6) of the 1877 Act, and while the applicant asserted in argument that there was no obligation to give such notice, having regard to the provisions of clause 4.22.2 of the general terms and conditions of the facility letter dated 16 March 2006 and clause 4.24.3 of the general terms and conditions of the facility letter dated 5 July 2007; the court holds that this is irrelevant, having regard to the fact that there is proof that the said notification letters were sent and the contract itself provides that notification will be deemed to have been given after twenty-four hours of proof of dispatch by ordinary prepaid post.

88. Even if the court is wrong in that, the court holds that notice of the various assignments was given by the exhibiting of such letters in the grounding affidavit sworn by Ms. Cafferty on 23 November 2022. The significance of this is that in the affidavit sworn by the defendant on 18 May 2023, he specifically stated at para. 3 thereof, that he made no admission in respect of the debt; he had not acknowledged the debt in writing or at all; and he had paid no monies to the judgment creditor in respect of the said judgment sum, either at the time of judgment, or at any time. Thus, it is clear that even if he only received those letters when he received the affidavit and exhibits to the affidavit sworn by Ms. Cafferty, he had received such notification prior to him making any payment on foot of

the judgment obtained by the plaintiff against him. In these circumstances, I hold that there is no substance in this second ground of objection.

89. Thirdly, the defendant objected that the applicant was not entitled to rely on the various documents concerning the assignment of the debt and underlying securities due to non-compliance with s.64 of the Land and Conveyancing Law Reform Act 2009, the relevant provisions of which provide as follows:

> *64.— (1) Any rule of law which requires—*
>
> *(a) a seal for the valid execution of a deed by an individual, or*
>
> *(b) authority to deliver a deed to be given by deed,*
>
> *is abolished.*
>
> *(2) An instrument executed after the commencement of this Chapter is a deed if it is—*
>
> *(a) described at its head by words such as "Assignment", "Conveyance", "Charge", "Deed", "Indenture", "Lease", "Mortgage", "Surrender" or other heading appropriate to the deed in question, or it is otherwise made clear on its face that it is intended by the person making it, or the parties to it, to be a deed, by expressing it to be executed or signed as a deed,*
>
> *(b) executed in the following manner:*
>
> *[…]*
>
> *(ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association;*
>
> *(iii) if made by a body corporate registered in the State other than a company, it is executed in accordance with the legal requirements governing execution of deeds by such a body corporate;*
>
> *(iv) if made by a foreign body corporate, it is executed in accordance with the legal requirements governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated,*
>
> *[…]*

90. The court is satisfied having regard to the affidavits sworn by Ms. Cafferty, Mr. O'Sullivan and Mr. Ryan and the documents exhibited therein, and in particular having regard to the documents exhibited concerning the assignments between Rabobank and the applicant and the certification of the legal validity thereof under Dutch law, that it has been

established in evidence, that the said assignments were executed in accordance with the legal requirements governing the execution of such instruments under the law of the Netherlands. Accordingly, the court is satisfied that the documents exhibited comply with the provisions of the 2009 Act.

91. Fourthly, insofar as the defendant submitted that the applicant should not be entitled to the reliefs sought in its notice of motion due to the fact that it was relying on redacted documents, the court is satisfied having regard to the nature of the redactions and the having regard to the reasons proffered therefor, that such redactions were necessary to protect the privacy rights of individuals, who are not connected to this litigation, or were necessary to preserve the legitimate commercial interests of both the assignor and the assignee. The court is satisfied that insofar as the applicant only seeks to rely on those parts of the documents that have not been redacted, which sections relate to the inclusion of the defendant's loan and securities, having been included in the loans and securities transferred by the plaintiff to Rabobank and by Rabobank to the applicant, there has been no prejudice whatsoever caused to the defendant in the conduct of his defence, due to the redactions to the documents exhibited in the grounding affidavits.

92. Insofar as the defendant objected to the granting of reliefs on the grounds that he had not been permitted to have inspection of the originals of the documents exhibited in the various affidavits sworn by Ms. Cafferty, the court is satisfied that when this matter was mentioned before the court on 15 May 2023, when the defendant's present solicitor was coming on record on his behalf, he was satisfied to accept copy documents, as long as they were provided to him. The court is satisfied having regard to the averments made by Mr. O'Sullivan in his affidavit sworn on 22 May 2023, that the applicant's solicitor complied with the directions of the court given on 15 May 2023, to supply further copies of the grounding affidavits and documents exhibited thereto, to the defendant's solicitor. Had the defendant continued to have any legitimate concern in relation to the documents furnished to him, he could have brought a motion seeking to have inspection of the original documents; he did not do that. Accordingly, he cannot now complain that he was not provided with inspection of the original documents.

93. The fifth ground of objection raised by the defendant was to the effect that the applicant could not seek liberty to execute on a judgment, until it had first been substituted as a plaintiff in the proceedings. While it is certainly true that the applicant

must first be successful in having itself substituted as plaintiff in the proceedings, before it can seek leave to execute upon the judgment, the court is satisfied that there is nothing to prevent the applicant seeking both of these reliefs in a single application. It is entirely consistent with the dictates of justice and with the saving of court time and costs, that such applications be heard at the same time, if at all possible. There is no possible prejudice to the defendant in having the applications dealt with at the same time. Accordingly there is no substance in this ground of objection.

94. The sixth ground of objection was to the effect that the applicant was out of time to seek execution of the judgment, as more than twelve years had elapsed from the date of the Order of the Master of the High Court giving the plaintiff liberty to enter final judgment, which Order had been made on 3 March 2011. In these circumstances it was submitted that the applicant's application was statute barred, having regard to the provisions of s.11(6) of the Statute of Limitations 1957.

95. The court is satisfied that, having regard to the dicta of Butler J. in the *Ulster Bank v. Quirke* case, that there is no substance in this ground of objection. The Order of the Master of the High Court was not a judgment. It merely gave the plaintiff liberty to enter final judgment against the defendant. That was not done until 22 August 2011, at which time the plaintiff obtained judgment against the defendant, which judgment issued out of the Central Office of the High Court. In these circumstances, there is no question that the judgment is statute barred. For this reason, the court does not have to decide the thorny issue as to whether an application seeking leave to execute upon a judgment constitutes "an action" on a judgment which comes within s.11(6) of the 1957 Act.

96. The seventh ground of objection raised by the defendant was that the applicant should not be granted liberty to execute on the judgment because it had not adequately explained its delay by it and by its predecessors in seeking to execute the judgment. The court accepts that the onus rests on the applicant to explain the delay from the date of issue of the judgment on 22 August 2011, to the date of issuance of its notice of motion seeking liberty to execute on the judgment, which issued 28 November 2022.

97. The court is satisfied having regard to the decisions in *Smyth v. Tunney* and *Ulster Bank v. Quirke* that the applicant faces a fairly low threshold in explaining its delay in seeking leave to execute upon the judgment. The court is satisfied having regard to the matters averred to by Ms. Cafferty in her two affidavits, that a reasonable excuse has been

given for the delay in seeking leave to execute upon this judgment. Firstly, it was reasonable for the plaintiff to seek to recover on foot of the judgment by appointing receivers and seeking to have various secured properties sold in satisfaction of the debt. There is clear evidence before the court that the defendant, his servants or agents, actively engaged in thwarting the receivers in their attempts to sell various secured properties. It is all very well for the defendant now to regard the various communications and documents sent by his agent, Mr. Allen, as being "nonsensical"; that does not mean that such documents could be dismissed out of hand and ignored by the plaintiff and/or the receivers, at the time that they were received by them.

98. The court also accepts the reasons as given by the applicant for its delay in issuing the notice of motion herein. The court accepts that it had to carry out due diligence in respect to the entire portfolio of loans that it had taken from Rabobank. It was reasonable that it then set about hiring a firm of solicitors to look after their interests. It would have taken a considerable period of time to obtain all the relevant files from the solicitors, who had been acting for the previous assignors. The court also accepts that during the period of the Covid restrictions, there were severe impediments to all businesses, including the applicant and its solicitors, in carrying out their usual business. It was not possible to have all staff in an office at the same time. This meant that work had to be carried out on files, both in the office and remotely. It was inevitable that there would have been delays in processing files during this period.

99. The court also accepts the averments made on behalf of the applicant, that it had regard to the recommendations of the Central Bank of Ireland that banks and other institutions seeking recovery of debts and similar facilities, should show forbearance during the unprecedented circumstances that arose in 2020 and 2021. The court accepts that it was reasonable for the applicant to hold off actively seeking to execute on the judgment during that period. Having regard to all the matters averred to in the affidavits sworn by Ms. Cafferty, the court is satisfied that the applicant has provided a reasonable explanation for its delay in seeking to execute upon the judgment.

100. The eighth ground of objection raised by the defendant was to the effect that the applicant should not be allowed to execute on the judgment, as the defendant was unaware of the mortgage which had been allegedly provided by him as security for the loan, as he maintains that his signature was forged thereon. The court accepts the

submission made by Mr. Powell BL in this regard, that that argument is not relevant to the reliefs sought by the applicant in this application. That defence may arise, if and when the applicant seeks to take steps upon the mortgage created by the defendant as security for the loan. The court is satisfied that the existence of this alleged defence is not a bar to the reliefs sought by the applicant in its application herein.

101. Finally, it was asserted by the defendant, as his ninth ground of objection, that the documents exhibited by the applicant were not admissible as they did not come within s.14 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. The court does not regard this submission as being well-founded. The court is satisfied that the documents exhibited to the various grounding affidavits sworn by Ms. Cafferty, Mr. O'Sullivan and Mr. Ryan, were compiled in the ordinary course of business, were supplied by a person (whether or not he or she so compiled it) and is identifiable, who had, or who may reasonably be supposed to have had, personal knowledge of the matters dealt with in the document. The court is satisfied that all of the documents exhibited to the grounding affidavits were properly admitted in evidence before the court.

102. For the reasons set out herein, the court is satisfied that there is no substance to any of the grounds of objection raised by the defendant to the applicant's application herein.

Decision of the Court.

103. For the reasons set out herein, the court is satisfied that the applicant is entitled to be substituted as plaintiff in the proceedings and is entitled to an order giving it liberty to execute upon the judgment already obtained by the plaintiff against the defendant. Accordingly, the court hereby makes orders in the terms of paras. 1, 2 and 3 of the applicant's notice of motion dated 28 November 2022. For the avoidance of doubt, the orders are made as of the date of this judgment.

104. As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

105. The matter will be listed for mention at 10.30 hours on 4 October 2023 for the purpose of making final orders.