

**APPROVED**

**[2023] IEHC 503**



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 16 August 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. The hearing of the applications had been adjourned to allow Pepper Finance to file a supplemental affidavit addressing, if and insofar as possible, a shortcoming

NO REDACTION REQUIRED

identified in its proofs: *ACC Bank plc v. Sweeney* [2023] IEHC 356. An affidavit was duly filed, and the hearing resumed on 31 July 2023. Judgment was reserved until today.

#### **ORDER 42, RULE 24**

3. 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.
4. The grant of leave to issue execution under Order 42, rule 24 is discretionary. The criteria governing the exercise of this discretion have been set out in *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512. There, the Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute following the lapse of six years from the date of the judgment or order, provided that there is some explanation at least for the lapse of time. The Supreme Court went on to state that, even if a good reason is given, the court must consider any counterbalancing allegations of prejudice.
5. The discretionary nature of the relief has been reaffirmed by the Court of Appeal in *KBC Bank plc v. Beades* [2021] IECA 41 (at paragraph 67):

“It is clear from the jurisprudence, particularly the decision of the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512, that O. 42, r. 24 is a discretionary order and reasons must be given for the lapse of time since the judgment or order during which execution did not occur. Even where a good reason is identified for the delay, the court can take into account counterbalancing arguments of prejudice. It is noteworthy that in *Smyth v. Tunney*, as in the instant case, orders sought to be executed had been made in the course of long running litigation, and leave to issue execution pursuant to O. 42,

r. 24 had been made some twelve years or so later. It is also noteworthy that the reasons identified for lapse in time in *Smyth v. Tunney* included that the applicants had made a number of unsuccessful attempts to execute.”

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

“I do not think that it is open to doubt that the threshold set by *Smyth v Tunney* is a low one, but it is nonetheless a threshold that must be met. As Simons J. said in *Hayde v H & T Contractors*, at para.21, ‘*The threshold is not particularly high: it is not necessary to give some unusual, exceptional or very special reasons for the delay. It is nevertheless a threshold which has to be satisfied: the threshold albeit minimal is not meaningless.*’

As to whether or not any reason is required to explain the lapse of time for the period of six years from the date of the relevant judgment or order, I consider that this must be so. Once the period of six years from the date of the judgment or order has expired, an application is required for leave to issue execution, and the applicant, in order to succeed with an application, must explain the ‘lapse of time’ up to that point. If the application is made six years and one day after the judgment/order, the lapse of time in such a scenario can only refer to the period of time beginning on the date of the judgment or order and ending on the date of the application, because there has been no other lapse of time at that point, and yet an application is required. That being the case, the lapse of time during that period must always require explanation, regardless as to when the application is ultimately advanced. Following upon the expiration of six years from the date of judgment, every day before an application is made also forms part of the ‘lapse of time’ which in an overall sense must be explained.”

7. The cases in which leave to execute has been granted can conveniently be considered as falling into four broad categories. It should be emphasised that the categories of cases are, of course, not closed. The illustrative list that follows is not intended to be exhaustive.
8. The first category is where the delay has been caused by the conduct of the indebted party. For example, on the facts of *Smyth v. Tunney*, the indebted party

had, by their conduct, contributed to the delay in the execution of the relevant costs orders. In particular, they had previously demanded that execution be deferred until *all* proceedings between the parties were disposed of. Other examples would include cases where the indebted party has evaded earlier attempts at execution.

9. The second category is where there has been a change in the financial circumstances of the indebted party. In *Mannion v. Legal Aid Board* [2018] IEHC 606, for example, the High Court (Noonan J.) granted leave in a case where the party seeking execution had, at all material times during the initial six year period, believed that the indebted party did not have the capacity to pay the judgment debt and that, accordingly, there was no point in attempting execution. The application for leave to execute outside the six year period was allowed in circumstances where the court was satisfied that the judgment creditor had reasonable grounds to conclude that the indebted party's financial circumstances had significantly improved as a result of her having settled other legal proceedings.
10. The third category is where execution has been deferred pending an attempt by the parties to reach an accommodation whereby alternative arrangements for the payment of the underlying debt might be entered into. 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. There is now an established line of case law which acknowledges that leave to issue execution, in the form of orders of possession, may be granted in mortgage proceedings where the explanation for the delay is that the judgment creditor had

sought to negotiate a resolution with the debtor. See, for example, *Ulster Bank Ireland Ltd v. Quirke* [2022] IECA 283; *Start Mortgages DAC v. Gawley* [2020] IECA 335; and *Start Mortgages DAC v. Piggott* [2020] IEHC 293.

11. The fourth category is where the delay in execution is attributable to circumstances outside the control of the person seeking to enforce the judgment. An example is provided by *Carlisle Mortgages v. Sinnott* [2021] IEHC 288. There, leave to issue execution had been granted where the delay had been caused, initially, by a difficulty in serving the order and, thereafter, by logistical problems presented by the public health measures introduced in response to the coronavirus pandemic. Similarly, in *Bula Ltd (In Receivership) v. Tara Mines Ltd* [2008] IEHC 437, the High Court (Dunne J.) held, on the facts, that the judgment debtor was not culpable for delay in the process of having an award of legal costs taxed, i.e. measured. See also *Gaultier v. Registrar of Companies* [2023] IEHC 461.
12. In the absence of any prejudice to the indebted party, leave to execute should not normally be refused unless there has been some culpable delay by the party seeking to execute. There are a number of recent judgments which provide useful illustrations of what constitutes culpable delay. In *Hayde v. H & T Contractors Ltd* [2021] IEHC 103, the judgment creditor had made a deliberate decision not to take up a certificate of taxation, which would have been a necessary proof for any application to enforce the relevant judgment, for a period of some six years. Leave to issue execution was refused on the grounds of delay. In *ACC Bank plc v. Joyce* [2022] IEHC 92, the High Court (McDonald J.) rejected a submission that it had been necessary for the judgment creditor to await the finalisation of the debtor's bankruptcy process before

seeking a well charging order in respect of a judgment mortgage. A submission that it had been necessary to await the transmission of interest to the assignee was also rejected. McDonald J. observed that the assignee of a judgment debt cannot absolve itself of any inactivity on the part of the original judgment creditor. In *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12, the High Court (Allen J.) held that the existence of parallel plenary proceedings did not constitute an excuse for non-execution in circumstances where the self-same plenary proceedings had not been a bar to obtaining the order for possession in the first instance.

#### **PROCEDURAL HISTORY**

13. 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. A judgment mortgage had been certified on 10 December 2012.
14. 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 filed. 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. The motion was adjourned twice to allow supplemental affidavits to be filed by the moving party. The procedural history of the motion has been detailed in *ACC Bank plc v. Sweeney* [2023] IEHC 356 and need not be repeated here.

## THE EXPLANATIONS OFFERED FOR THE DELAY

15. The reasons put forward in an attempt to explain the delay in executing the judgment of 12 September 2012 can conveniently be considered under the following categories.
16. The first category of reasons relates to the status of ACC Bank. It is said that ACC Bank was going through a “*complex restructuring*” as a consequence of the global financial crisis. Reference is made to the fact that ACC Bank returned its banking licence to the Central Bank in June 2014. It is suggested that the surrender of the banking licence had created “*further administrative difficulties*” in the execution of loans due to the “*disentitlement*” of ACC Bank to provide banking activities. ACC Bank was re-registered as a private company under the name ACC Loan Management Ltd on 27 June 2014. (For the purpose of this judgment, the shorthand “*ACC Bank*” should be understood as referring to the bank even after its name change).
17. It is said that, thereafter, the sole focus of ACC Bank was on dealing with live legal actions and consolidating losses on its existing loan books. This is said to have led to very few, if any, enforcements occurring during that time. Reference is also made to the very significant reduction in the number of employees following a redundancy programme. It is explained that day-to-day management of all loans had been outsourced to Capita Asset Services (since known as Link ASI and now BCMGlobal ASI).
18. The second category relates to the Code of Conduct on Mortgage Arrears (CCMA) which is described as having placed “*severe limitations on banks in contacting delinquent borrowers*”. Reference is also made to the decision in

*Start Mortgages Ltd v. Gunn* [2011] IEHC 275, which identified a lacuna in the transitional provisions under the Land and Conveyancing Law Reform Act 2009.

19. The third category relates to the sale of a property owned by the defendant. It appears that ACC Bank held a mortgage over a property in County Limerick and that the property was sold by a receiver in July 2020.
20. The final category relates to the transfer of the loan portfolio to Rabobank on 17 December 2018 and the subsequent transfer, on 23 August 2019, to Newgrange Loan Acquisitions DAC with Pepper Finance Ireland as nominee. The delay of some two and a half years between the transfer of the loan portfolio and the filing of the motion seeking leave to issue execution is explained 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 period because of the public health restrictions introduced in response to the coronavirus pandemic.

## **DISCUSSION AND DECISION**

21. None of the reasons offered amounts to a good explanation for the delay. Many of the supposed obstacles cited relate to procedural requirements which are only relevant pre-judgment. Here, ACC Bank had already secured a judgment against the defendant as of 12 September 2012 by way of summary proceedings. The proceedings were unaffected by the decision in *Start Mortgages Ltd v. Gunn* [2011] IEHC 275. It was not necessary for ACC Bank to await the introduction



of the Land and Conveyancing Law Reform Act 2013 before enforcing the judgment debt.

22. No explanation has been provided as to how the Code of Conduct on Mortgage Arrears could have affected the enforcement of the judgment. The Code of Conduct is concerned, primarily, with procedural requirements which must be observed *prior* to the institution of legal proceedings. It does not purport to regulate the enforcement of court orders.
23. The fact that ACC Bank did not hold a banking licence from June 2014 onwards would not have affected its legal capacity to enforce a judgment which it had already secured from the High Court. It has never been the case that a banking licence is required to enforce a judgment. (See *ACC Bank plc v. Tuohy* [2023] IEHC 460). The most that might possibly be required nowadays, following the amendments introduced by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018, is that the holder of the legal title to credit granted under a “*credit agreement*” might have to be authorised as a “*credit servicing firm*”. There is no suggestion that ACC Bank did not hold an appropriate authorisation from the Central Bank at all material times.
24. The fact that ACC Bank 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 had been the management of its existing loan book. This would, presumably, include the pursuit of enforcement action against defaulting debtors.
25. There is a suggestion that the delay in seeking to enforce the judgment debt may have been the result of staff shortages. This suggestion has not been

substantiated: even allowing that there may have been redundancies in ACC Bank itself, it has not been suggested that the credit servicing firm engaged by the bank was under resourced. At all events, the fact, if fact it be, that neither ACC Bank nor the credit servicing firm engaged by it may have had sufficient staff to enforce this judgment debt would not be a good reason for the purposes of *Smyth v. Tunney*. A failure to dedicate adequate human resources to the enforcement of judgment debt is not a circumstance which is outside the control of the judgment debtor. Rather, it represents a form of culpable delay. It is important to emphasise that there is no suggestion that ACC Bank was engaging with the judgment debtor during this period in the hope of resolving matters by steps short of enforcement.

26. The fact that ACC Bank was pursuing a parallel form of enforcement against the defendant, i.e. by the appointment of a receiver over a mortgaged property, does not constitute a good reason for the delay. There was nothing to preclude ACC Bank from seeking to pursue both procedural routes in parallel, i.e. to seek to enforce the judgment of 12 September 2012 and to seek to enforce its rights, as mortgagee, in relation to the property at Limerick. There is nothing in the papers before me which suggests that it was anticipated that the net proceeds of the sale of the mortgaged property would be sufficient to discharge the entire debt owed to ACC Bank. Put otherwise, there is no suggestion that ACC Bank was holding off enforcement of the judgment of 12 September 2012 in the hope that the sale of the mortgaged property might render it unnecessary to enforce the judgment. The mortgaged property is recorded as having been sold for a gross sum of €140,000 (with disposal costs and other costs amounting to approximately €41,000). Even without making any allowance for costs, the gross value of the

property was far below the overall balance said to be owing by the defendant to ACC Bank. (As of August 2019, the balance had been €441,320.94).

27. The sale and transfer of the loan portfolio in 2018 and, again, in 2019 does not constitute a good reason for the delay. The fact of the transfer does not affect the right to issue execution: the original holder would be entitled to issue execution up and until the date of transfer; thereafter the transferee would, on application for leave, be entitled to issue execution in its own name. (There is some suggestion in the supplemental affidavit that the loan portfolio was in a state of limbo in the interregnum between the agreement being executed and same being approved by the High Court. Assuming, without deciding, that this is the correct analysis, the supposed interregnum only lasted for a matter of weeks. It cannot explain the delay of years).

#### **CONCLUSION AND PROPOSED FORM OF ORDER**

28. The moving party has failed to meet the threshold for the grant of leave to issue execution as per *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512. 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. None of the reasons for the delay prior to March 2020, i.e. prior to the introduction of public health restrictions in response to the coronavirus pandemic, represents a good explanation for the delay. This amounts to a period of unexplained delay of approximately eight years.
29. Accordingly, the application for leave to issue execution pursuant to Order 42, rule 24 of the Rules of the Superior Courts is refused. This finding makes it

unnecessary to consider the detail of the related application to substitute Pepper Finance Corporation (Ireland) DAC for ACC Bank plc as the plaintiff in these proceedings. This is because a substitution order would be of no practical benefit in circumstances where the judgment of 12 September 2012 cannot now be enforced. All reliefs sought in the motion of 13 April 2022 stand refused.

30. As to costs, for the reasons explained in *ACC Bank plc v. Sweeney* [2023] IEHC 356, the defendant is entitled to recover his costs of the motion as against the plaintiff pursuant to Section 169 of the Legal Services Regulation Act 2015. Such costs to include all reserved costs. The costs are to be adjudicated under Part 10 of the LSRA 2015 in default of agreement between the parties. The costs order is stayed in the event of an appeal.

*Appearances*

Neil Rafter for the moving party instructed by OSM Partners

Darragh Haugh for the defendant instructed by David Punch & Co. Solicitors

Approved  
Gemma S. Mans