APPROVED **[2024] IEHC 244**

THE HIGH COURT
CIRCUIT APPEAL

2023 24 CA
2023 25 CA

BETWEEN

PATRICK O'CONNOR
TANYA SHANNON

PLAINTIFFS

AND

LACKABEG LTD
T/A THE ARC BAR & RESTAURANT

DEFENDANT

FRANK TOWEY
KIERAN TOWEY

RESPONDENTS TO THE MOTION

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 April 2024

INTRODUCTION

1. This decision is delivered in respect of two related appeals from the Circuit Court (His Honour Judge O'Connor). The appeals raise a net issue of statutory interpretation in relation to the Circuit Court Rules. The issue is whether—in the absence of an express provision to like effect in the Circuit Court Rules—it

is permissible for a judgment creditor to rely on the provisions of the Rules of the Superior Courts in relation to examination and discovery in aid of execution of a monetary judgment. Order 67, rule 16 of the Circuit Court Rules provides, in essence, that the practice and procedure in the High Court may be followed by the Circuit Court where same is not governed by the CCR.

PROCEDURAL HISTORY

2. These appeals arise in the context of two related defamation actions. The defamation actions were taken against the defendant company by the plaintiffs. In each case, judgment was entered against the defendant company by the Circuit Court on an undefended basis on 8 March 2018. Each plaintiff was awarded damages in the amount of €10,000, together with legal costs on the Circuit Court scale to be taxed in default of agreement. These costs have since been "*taxed*", i.e. measured, by the County Registrar in the amounts of €24,793.37 and €16,011.99, respectively.

3. The plaintiffs applied, by motion on notice, to the Circuit Court for an order that the directors of the defendant company attend for oral examination before the Circuit Court and make discovery in execution of the two judgments. The directors are Frank Towey and Kieran Towey. The directors had not been parties to the underlying defamation actions but were named as respondents to the motion. The stance adopted by the directors before the Circuit Court—and maintained before the High Court on this appeal—is that the Circuit Court Rules preclude examination and discovery in aid of execution of a *monetary* judgment. The directors of the defendant company contend that, in circumstances where the Circuit Court Rules make detailed provision for execution, there is no lacuna

in the law which requires to be filled by reliance on the provisions of the Rules of the Superior Courts.

4. The Circuit Court rejected this jurisdictional objection. The Circuit Court went on, however, to refuse the applications on the grounds of delay. In each case, the plaintiff filed an appeal to the High Court against the Circuit Court's order.

5. The appeals came on for hearing before me. I granted special leave to the plaintiffs, pursuant to Section 37 of the Courts of Justice Act 1936, to adduce further affidavit evidence setting out the procedural history in greater detail. This was done in circumstances where the Circuit Court's rationale for refusing the relief had included an own-volition finding that there had been delay on the part of the plaintiffs, by reference to the lapse of time between (i) the date of the incident giving rise to the defamation actions (18 September 2010), and (ii) the date upon which judgment was obtained (8 March 2018).

6. The question of delay had not been raised by the company's directors, and the plaintiffs had not, accordingly, needed to address same in their motion papers. The purpose of permitting the plaintiffs to rely on further affidavit evidence was to ensure, first, that the parties had an opportunity to address the question of delay (which had been raised by the Circuit Court for the first time in its decision on the motion), and, secondly, that the High Court would be fully apprised of the events between the two dates (if and insofar as relevant). The company's directors were permitted an opportunity to file a replying affidavit but chose not to do so.

7. Both sides exchanged, on a staggered basis, written legal submissions addressing the proper interpretation of the relevant rules of court. The submissions are dated

30 January 2024 and 19 February 2024, respectively. I am grateful to both counsel for these very helpful submissions.

DECISION ON QUESTION OF STATUTORY INTERPRETATION

8. Order 36, rule 7 of the Circuit Court Rules ("***CCR***") provides as follows:

> "If any difficulty arises in or about the execution or enforcement of any judgment or order other than a judgment or order for the recovery or payment of money, any party interested may apply to the Court, and the Judge may make such order thereon for the attendance and examination of any party or otherwise as he may think just."

9. There is no express provision made under the CCR for examination or discovery in aid of execution in the case of a monetary judgment. There is, however, express provision made to this effect under the Rules of the Superior Courts ("***RSC***"). Order 42, rule 36 RSC provides as follows:

> "When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, or that any other person be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court shall appoint; and the Court may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

10. The High Court has jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross-examination under Order 42, rule 36 in advance of the hearing so as to enable the hearing to be focused on issues of real inquiry (*Moorview Developments Ltd v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615).

11. Order 67, rule 16 of the Circuit Court Rules provides as follows:

> "Where there is no Rule provided by these Rules to govern practice or procedure, the practice and procedure in the High Court may be followed."

12. The principal issue for determination in the present proceedings is whether the foregoing rule permits a judgment creditor, with the benefit of a monetary judgment from the Circuit Court, to rely on the provisions of the Rules of the Superior Courts which allow for examination and discovery in aid of execution of a monetary judgment. It does not appear that this specific issue has previously been the subject of a written decision of the High Court. This issue has, however, been considered by the Circuit Court in *Aerospan Board Centre (Dublin) Ltd v. Dean Furniture Ltd* (1989) 7 ILT 79 ("***Aerospan***"). There, it was held that the Circuit Court Rules Committee must be understood to have "*deliberately excluded judgments or orders for the recovery or payment of money*" from the benefit of examination in aid of execution in circumstances where the CCR only made express provision for examination in aid of execution in the context of a *non-monetary* judgment.

13. For the following reasons, I am satisfied that the approach adopted in *Aerospan* is erroneous. First, the decision in *Aerospan* draws the incorrect inference from the absence from the Circuit Court Rules of a rule equivalent to that found under what is now Order 42, rule 36 RSC. It is inappropriate to apply the principle *expressio unius, exclusio alterius* to the operation of Order 67, rule 16 CCR. The precise purpose of this rule is to address the contingency of an *omission* from the CCR as compared to the RSC. The fact that there is no rule in the CCR which governs examination and discovery in aid of execution of a monetary judgment—far from being an exclusionary factor—is the factor which triggers

Order 67, rule 16 CCR. It is only in circumstances where reliance on the RSC would be inconsistent with or contradict the provisions of the CCR that reliance on Order 67, rule 16 CCR is impermissible. Here, reliance on Order 42, rule 36 RSC legitimately supplements the CCR.

14. Secondly, the approach in *Aerospan* fails to honour the requirement that a court, in engaging upon statutory interpretation, must consider the context of the legislative provision being interpreted, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible (*Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313). The decision in *Aerospan* makes no reference to the primary legislation which governs practice and procedure before the Circuit Court. There is no reference, for example, to section 22 of the Courts (Supplemental Provisions) Act 1961 which conferred upon the Circuit Court all jurisdiction which had been vested in or capable of being exercised by, *inter alia*, the former County Court. This transferred jurisdiction would have included a jurisdiction to summons a debtor for examination in aid of execution of a monetary judgment. More specifically, the County Courts had jurisdiction to compel the attendance of the debtor in aid of execution pursuant to the Debtors (Ireland) Act 1872. This Act remains operative by virtue of the Statute Law Revision Act 2007.

15. Section 22(7) of the Courts (Supplemental Provisions) Act 1961 provides that the Circuit Court shall have powers of attachment, garnishee and interpleader, and shall have all powers (including the power to appoint a receiver) ancillary to any jurisdiction exercisable by it. The power to enforce its own judgments and orders by compelling the attendance of a judgment debtor (or, in the instance of

a company, the directors or other officers) to provide oral and documentary evidence in relation to the means of satisfying the judgment represents an ancillary power of the Circuit Court.

16. To interpret the CCR as now excluding a power to order examination and discovery in aid of the execution of monetary judgments would be to *subtract* from the jurisdiction conferred by statute upon the Circuit Court. There is nothing in the language of the CCR which evinces such an intention on the part of the Circuit Court Rules Committee.

17. Thirdly, the decision in *Aerospan* is inconsistent with the more modern approach to the interpretation of procedural rules. This is usefully illustrated by the decision of the High Court (Clarke J.) in *Moorview Developments Ltd v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615 which emphasises that procedural rules should be interpreted in a manner which is efficient, practical, and does not entail a wasteful use of court resources. This is best achieved by an interpretation of the CCR which allows for examination and discovery in aid of execution.

18. In summary, therefore, a judgment creditor who seeks to execute a monetary judgment of the Circuit Court is entitled, by virtue of Order 67, rule 16 CCR, to invoke the procedures prescribed, under Order 42, rule 36 RSC, for the examination of debtors and for the production of any relevant books and documents.

APPLICATION TO CIRCUMSTANCES OF THE PRESENT CASE

19. The threshold to be met by the party invoking Order 42, rule 36 RSC has been described as follows by the Court of Appeal in *Allied Irish Bank plc v. O'Reilly* [2015] IECA 209 (at paragraph 18):

> "[…] A person who has obtained a judgment which the judgment debtor leaves unsatisfied appears to me *prima facie* entitled to orders which may be made pursuant to O. 42, r. 36 and the connected orders envisaged by [*Moorview Developments Ltd v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615] pursuant to the inherent jurisdiction of the court. The obligation is on the judgment debtor to pay the amount due under the judgment. If there is proof he has not done so, there is no further evidential obligation on the judgment creditor to establish a *prima facie* entitlement to the order. There may, however, be special circumstances established by the judgment debtor which might require evidence in response, to avoid a court being persuaded that it should not exercise its discretion to make the orders sought."

20. In the present case, there is no contest on the question as to whether the threshold for directing examination and discovery in aid of execution has been met. The judgment debt remains outstanding. There has been a significant delay in complying with the Circuit Court judgment and order of 8 March 2018. The defendant company's directors have failed to make any meaningful attempt to explain this delay. It is apparent from the exhibited correspondence that the plaintiffs' solicitor has been making diligent efforts throughout this period to seek to have the defendant company satisfy the judgment. The examination and discovery sought are necessary to allow the plaintiffs to execute the judgment by ascertaining what property or other means are available to enforce against. Accordingly, the threshold for invoking Order 42, rule 36 RSC has been met.

21. The plaintiffs' solicitor has put before the court evidence, by way of affidavit and exhibits, which suggests, *prima facie*, that there might have been an attempt by the defendant company to avoid the judgment debt by putting its assets beyond the reach of the plaintiffs. The hearing of the appeals before the High Court was adjourned for the specific purpose of allowing the company's

directors an opportunity to file an affidavit in reply. The company's directors ultimately chose not to avail of that opportunity.

CONCLUSION AND PROPOSED FORM OF ORDER

22. A judgment creditor who seeks to execute a monetary judgment of the Circuit Court is entitled, by virtue of Order 67, rule 16 CCR, to invoke the procedures prescribed, under Order 42, rule 36 RSC, for the examination of debtors and for the production of any relevant books and documents. The Circuit Court has jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross-examination under Order 42, rule 36 in advance of the hearing so as to enable the hearing to be focused on issues of real inquiry.

23. Having regard to the fact that the judgment debt of 8 March 2018 remains outstanding, and in the absence of any explanation having been offered on behalf of the defendant company by its directors for the inordinate delay, it is appropriate to order examination and discovery in aid of execution. Accordingly, the Circuit Court order of 1 February 2023 will be set aside, and orders in terms of paragraphs (1), (2) and (3) of the notice of motion issued on 9 September 2022 will be substituted in lieu thereof. The plaintiffs are entitled to the discovery sought and to pursue their examination, before the Circuit Court, of the two directors of the defendant company.

24. For completeness, any suggestion that the motion for examination and discovery in aid of execution should be refused by reference to the lapse of time between (i) the date of the incident giving rise to the defamation actions (18 September 2010), and (ii) the date upon which judgment was obtained (8 March 2018) is incorrect. The time-limits governing the taking of steps in aid of execution of

judgments and orders of the Circuit Court are prescribed by Order 36 CCR. The lapse of time is measured from the date of the judgment and order to be enforced, not from the earlier date of the accrual of the cause of action. If and insofar as the Circuit Court purported to hold otherwise in the present case, it erred in law.

25. As to the legal costs of the application, my *provisional* view is that, in each case, the respective plaintiff, having been entirely successful, is entitled to recover their costs above and below, i.e. the costs of the motion before the Circuit Court and the costs of the appeal before the High Court. The proposed costs order would be against the defendant company's two directors personally; and would include the costs of the written legal submissions and all reserved costs. All such costs to be taxed and/or adjudicated in default of agreement.

26. I will list these proceedings before me at 10.30 o'clock on 16 May 2024 to hear submissions on the final form of order, including any submissions as to why the proposed costs order should not be made. I will also hear the parties on the logistics of having the matter re-listed before the Circuit Court for the purpose of the compelled attendance and oral examination of the two directors, Frank Towey and Kieran Towey.

27. If this has not already been done, the written legal submissions dated 30 January 2024 and 19 February 2024, respectively, should be filed in the Central Office of the High Court in accordance with Practice Direction HC 101.

Appearances

Ruadhán Ó Ciaráin for the plaintiffs instructed by Eugene Smartt Solicitors
Sarah Kearney for the defendant instructed by Brannigan Cosgrove Finnegan LLP