

THE HIGH COURT

2009 No. 1238 SP

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

PETER GAWLEY
SANDRA GAWLEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 December 2019

INTRODUCTION

1. This matter comes before the High Court by way of an application pursuant to Order 42, rule 24 of the Rules of the Superior Courts seeking leave to issue execution in respect of an order for possession made by the High Court on 7 March 2011.
2. The application for leave to issue execution is made by Start Mortgages DAC ("*Start Mortgages*"). The original plaintiff in the proceedings had been a different company, namely Nua Mortgages Ltd. Start Mortgages has, since 15 January 2015, been registered as the owner of the charge pursuant to which the original order for possession had been made. As explained presently, Start Mortgages has since been substituted as plaintiff in the proceedings in place of Nua Mortgages Ltd. by order of the High Court.
3. Notwithstanding this procedural history, Mr. Peter Gawley, the first named defendant, has sought to resist the application for leave to issue execution on the basis of an argument that Start Mortgages are not entitled to ownership of the charge. An argument in identical terms had been run before the High Court previously and had been rejected. Orders substituting Start Mortgages Ltd. and Start Mortgages DAC as plaintiff were made on 17 October 2016 and on 12 June 2018, respectively. No valid appeal has been taken against either of these orders. This issue is, therefore, *res judicata* and Mr. Gawley is estopped from rearguing arguments which have previously been rejected by the High Court.
4. The only issue remaining to be determined on the present application is whether leave to issue execution should be granted by reference to the principles set out in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512.
5. The application was heard on 11 November 2019, and judgment was reserved until today (9 December 2019). Mr. William Hamilton, BL, appeared on behalf of Start Mortgages DAC; Mr. Gawley appeared as a litigant in person. Proof of service of the motion on the second named defendant, Sandra Gawley, has been established by an affidavit of service sworn herein on 7 November 2019.

APPLICATION FOR LEAVE TO EXECUTE

6. A party who has the benefit of an order 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. That rule provides as follows.

24. In the following cases, viz.:

- (a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;
- (b) where a party is entitled to execution upon a judgment of assets in futuro;
- (c) where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company;

the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly.

The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgment or order made in a matrimonial cause or matter, an order of fieri facias may be issued as of course upon an affidavit of service of the judgment or order and non-payment.

- 7. 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. The Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation at least for the lapse of time. Even if a good reason is given, the court must consider counterbalancing allegations of prejudice.

THE EXPLANATION OFFERED FOR THE DELAY

- 8. An earlier order granting leave to issue execution had been made in favour of Start Mortgages on 17 October 2016. In deciding whether or not there is an explanation for the delay in execution, the focus will be principally, but not exclusively, on the period between the date of that order and the date of the motion seeking a further extension of time in August 2019.
- 9. The explanation for the delay has been set out in the affidavit of Mr. Justin Nevin sworn herein on 7 August 2019. Mr. Nevin sets out the procedural history, including the making of certain orders amending the title of the proceedings, in detail. I will return to these orders under the heading "Findings of the Court".
- 10. The affidavit also explains the difficulties which had occurred in executing a writ of execution in the year 2014.

- "9. On 4 December 2013, a writ of execution issued out of the High Court in the form of an order of possession regarding the property. And I beg to refer to a true copy of the order of possession dated 4 December 2013, when produced.
10. I say that thereafter Nua took steps to execute the possession order and in that regard arrangements were made with the Sheriff to take possession of the property. The Sheriff intended to take possession of the property on 2nd July 2014 but details of his scheduled attendance at the property were published on anti-eviction group websites. In the circumstances, the Sheriff's attendance at the property was postponed. Subsequent scheduled dates to take possession of the property were similarly postponed by the Sheriff due to the publication of his intended attendance on anti-eviction social media sites. Furthermore, Nua were threatened with injunctive proceedings seeking to restrain execution of the possession order by an organisation providing assistance to distressed borrowers."
11. It is then averred that Start Mortgages acquired all right, title and interest in the defendants' loan, security and all ancillary rights and claims related to the loan and security on or about 4 December 2014. It is further averred that on, 15 January 2015, Start Mortgages had been registered as the owner of the charge in the Land Registry. A copy of the up-to-date folio (County Dublin, Folio 141614F) is exhibited as part of the affidavit. Start Mortgages' ownership of the charge appears at Entry 12.
12. Returning to Mr. Nevin's affidavit, it addresses the period from 2016 onwards as follows.
- "15. In circumstances where the mortgage account was deemed unsustainable, Start sought to engage with the Defendants by inter alia offering a voluntary surrender or assisted voluntary sale of the property, by way of letter dated 7 February 2018. On 14 March 2018, the first named Defendant advised that he would not be surrendering the property and maintained that Start are not his mortgage provider. A further offer of voluntary surrender or assisted voluntary sale was made on 28 June 2018. No response was received to that correspondence. [...]"
13. The relevant correspondence in this regard has been exhibited.

MR. GAWLEY'S OPPOSITION TO THE APPLICATION

14. Mr. Gawley's grounds for opposing the application for leave to issue execution have been set out in an affidavit sworn by him on 4 November 2019. The affidavit sets out the history of the proceedings *prior* to the making of the order for possession on 7 March 2011. In particular, reference is made to certain events before the Master of the High Court. These matters are largely irrelevant to the application currently before the court. The proceedings had been transferred from the Master's List to the Judge's List, and the High Court (Dunne J.) had made an order for possession on 7 March 2011. The defendants did not bring a valid appeal against the order for possession. (An application for an extension of time to bring an appeal against the order for possession was refused by the Supreme Court on 28 July 2014). The making of the order for possession is, therefore, *res judicata* and the defendants are estopped from agitating issues which could

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

15. The affidavit next alleges that Start Mortgages were not entitled to be registered as the owners of the charge. Although not entirely clear from the affidavit, the implication seems to be that a third company, Investec Bank plc, should first have been registered as the owner of the charge before any onward transfer to Start Mortgages.
16. The reference to Investec Bank plc arises in circumstances where it had been explained in the affidavit filed on behalf of Start Mortgages at the time of the first substitution application in 2016 that there had been two transfers involved as follows: (i) Investec Bank plc transferred its security interests and contractual rights in the "Finance Documents" as defined to LSA IX Java Investments Ltd.; and (ii) Nua Mortgage Ltd. had agreed to transfer its security interests and contractual rights under the "Finance Documents" as defined to Start Mortgages Ltd. See the affidavit of the Company Secretary of Start Mortgages Ltd. sworn herein on 2 June 2016.

FINDINGS OF THE COURT

17. The principal matter to be addressed on an application for leave to issue execution is whether the moving party has put forward a good reason or explanation for its delay in execution. It is not necessary to give some unusual, exceptional or very special reasons.
18. The affidavit of Mr. Nevin indicates that Start Mortgages had sought to engage with the defendants during the period between the date of the High Court order of 17 October 2016 and the filing of the motion seeking leave to issue execution on 7 August 2019. The affidavit has also recited the previous difficulties encountered by the Sheriff in enforcing a writ in the year 2014.
19. It is reasonable for a mortgagee (creditor) to engage with a mortgagor (debtor) to ascertain whether measures short of the enforcement of an order for possession can be agreed between the parties. Start Mortgages had written to the defendants on 28 June 2018 and had offered the option of an assisted voluntary sale or supported voluntary surrender. One of the issues which could be addressed in such an arrangement was, seemingly, an "agreed shortfall balance". It appears that the defendants were being offered an opportunity to at least discuss a form of "debt forgiveness", whereby any outstanding balance owing over and above the proceeds of sale of the mortgaged property might be written down in part.
20. The "delay" in seeking to execute against the mortgaged property pending this approach to the defendants was reasonable. Were the court to refuse to issue leave to execute in circumstances where the lapse of time in seeking to enforce an order for possession is explicable, in part at least, by the taking of such steps, it would create a disincentive for mortgagees to engage with mortgagors. This would not be in the public interest, and would, ultimately, be to the detriment of mortgagors.

21. Mr. Gawley has not identified any prejudice which he has suffered as a result of the lapse of time between 17 October 2016 and the issuing of the motion on 7 August 2019. Indeed, it seems that Mr. Gawley has been in residence in the mortgaged property during that period, and that no payments have been made pursuant to the mortgage since June 2014.
22. In the circumstances, I am satisfied that the test in *Smyth v. Tunney* has been met. There is a good explanation for the delay in executing the order for possession, and there is no countervailing prejudice to the defendants.
23. Turning now to the allegations made by Mr. Gawley in his affidavit of 4 November 2019, I am satisfied that these allegations do not represent a valid basis for refusing the application for leave to issue execution for the following two reasons.
24. First and foremost, the very issues now relied upon by Mr. Gawley, i.e. the entitlement of Start Mortgages to maintain the proceedings, and to enforce the order for possession, have been dealt with by the High Court previously, and are *res judicata*. More specifically, the High Court (Baker J.) made an order in 2016 in the following terms.
 - “1. An order pursuant to Order 42, rule 24 of the Rules of the Superior Courts granting Start Mortgages Limited, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, liberty to issue execution on foot of the Order of this Honourable Court made on 07 March 2011.
 2. If necessary, an Order pursuant to Order 17, rule 4 of the Rules of the Superior Courts substituting Start Mortgages Limited, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, in place of Nua Mortgages Limited as plaintiff to the within proceedings.”
25. As appears, the wording of the second part of this order is somewhat unusual in that it is prefaced by the qualifying words “if necessary”. The order also omits any direction that the amended title of the proceedings be duly entered in the Central Office.
26. These matters were clarified on a subsequent application made on 12 June 2018. That application arose in circumstances where Start Mortgages had changed its status to a “Designated Activity Company” or a “DAC”. The High Court (Baker J.) made an order in the following terms.

“IT IS ORDERED pursuant to Order 17, rule 4 of the Rules of the Superior Courts that Start Mortgages Designated Activity Company, of Trimleston House, Beech Hill Office Campus, Clonskeagh, Dublin 4, be substituted in place of Nua Mortgages Limited as Plaintiff to the within proceedings.

The title thereof to be duly entered in the Central Office of the High Court with the proper officer.”

27. As appears, Start Mortgages DAC had been substituted in place of Nua Mortgages Ltd. as plaintiff, and the necessary direction issued.
28. The 2016 application to substitute Start Mortgages Ltd. as plaintiff had been opposed by Mr. Gawley on almost identical grounds to those upon which he now relies to resist the present application. This is evident from the terms of the affidavit of 28 June 2016 which he had filed in response to the 2016 substitution application. The content and structure of the affidavit of 28 June 2016 is substantially the same as Mr. Gawley's affidavit of 4 November 2019. Crucially, the allegation that Start Mortgages are not entitled to be registered as the holder of the charge under the Registration of Title Act 1964 is made in terms in both the 2016 and the 2019 affidavits.
29. It is evident from the existence of the orders of 17 October 2016 and 12 June 2018 that Start Mortgages DAC has been substituted as plaintiff in the proceedings. This issue is now *res judicata*, and Mr. Gawley is estopped from rearguing the arguments which he had made (unsuccessfully) in opposition to the application on 17 October 2016.
30. Even if the matter was not *res judicata*, there is a second, separate reason for finding that Mr. Gawley's opposition to the (2019) application for leave to issue execution is not well founded. The core of Mr. Gawley's argument appears to be that Start Mortgages is not entitled to be registered as the owner of the charge, i.e. the mortgage entered into by Mr. and Mrs. Gawley on 2 April 2008. Yet, the evidence before the court establishes that Start Mortgages DAC has been registered as owner of the charge since 15 January 2015. As noted earlier, the relevant extract from the up-to-date folio has been exhibited.
31. Mr. Gawley's argument entails an implicit challenge to the correctness of the Register of Title. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 held that the correctness of the Register of Title cannot be challenged in possession proceedings. See paragraphs [67] and [68] as follows.

"A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification.

The challenge to registration is brought by other types of proceedings inter partes, or where the PRA is respondent, and in the manner I have described."

32. Leave to appeal to the Supreme Court was refused by Determination dated 12 April 2019, *Tanager DAC v. Kane* [2019] IESCDT 80.

33. Mr. Gawley's challenge to the correctness of the Register of Title, and, in particular, to the entry which indicates that Start Mortgages is the registered owner of the charge, is therefore inadmissible. It cannot be raised in these possession proceedings.

CONCLUSION AND FORM OF ORDER

34. For all of the reasons above, I am satisfied that the test for granting leave to execute outside the original six-year period, as set out by the Supreme Court in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512, has been met.
35. Accordingly, I make an order pursuant to Order 42, rule 24 of the Rules of the Superior Courts granting Start Mortgages DAC leave to issue execution on foot of the order for possession made by the High Court in the within proceedings on 7 March 2011.