

APPROVED

[2023] IEHC 387



THE HIGH COURT

2009 No. 1544 SP

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

SHANE HANLEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 July 2023

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to issue execution made by Start Mortgages DAC (“*Start Mortgages*”). The application is made pursuant to Order 42, rule 24 of the Rules of the Superior Courts.

PROCEDURAL HISTORY

2. The High Court (Dunne J.) made an order on 12 March 2012 directing the Defendant to deliver up possession of the property comprised in Folio 26497F

NO REDACTION REQUIRED

County Galway (“*the mortgaged property*”). To date, the order for possession remains unexecuted. Start Mortgages is the registered owner of the charge pursuant to which the order for possession had been made. The relevant entry in the folio is dated 11 September 2008.

3. Start Mortgages issued a motion on 26 September 2019 seeking leave to issue execution (“*the first motion*”). The motion came on for hearing before me on 13 January 2020 and I made an order granting leave to issue execution. The Defendant, as is his right, filed and served a notice of appeal against that order to the Court of Appeal on 13 February 2020. The Court of Appeal subsequently made an “*unless order*” on 20 November 2020, extending time for the Defendant to file his written submissions until 2 December 2020. The appeal was ultimately dismissed as a result of the Defendant’s failure to comply with that order.
4. Start Mortgages’ solicitors caused an order of possession to be issued out of the Central Office of the High Court on 9 November 2020. This order of possession was not enforced within the one year period allowed. The following explanation for the failure to enforce this order of possession has been provided on affidavit: see paragraphs 13 and 14 of Ms. McCarthy’s affidavit filed on 11 April 2022:

“I say that due to the unprecedented impact of the Covid-19 pandemic, the Plaintiff did not progress executing the Order for Possession as part of an agreed moratorium with the Banking and Payments Federation Ireland.

I had been advised by my solicitor that whilst the Order of Possession was in force during the coronavirus pandemic, the local Sherriff for Galway was not executing Orders of Possession for understandable public health and safety reasons. Accordingly, it was not practicable for the Plaintiff to execute the Order of Possession whilst it was enforceable in the period 9 November 2020 to 8 November 2021.”

5. Start Mortgages issued a fresh motion seeking leave to issue execution on 11 April 2022 (“*the second motion*”). The hearing of the motion was adjourned, from time to time, to allow the Defendant to pursue a data subject access request. I made an order on 3 October 2022 directing that a hard copy of the data request pack be furnished to the Defendant.
6. The Defendant filed a first affidavit in response to the second motion on 14 March 2023. At a subsequent hearing, the Defendant was invited to file a further affidavit which engaged with the type of considerations relevant to an application for leave to issue execution. The Defendant duly filed a second affidavit on 12 June 2023. The content of these two affidavits is considered below, at paragraphs 20 and onwards.
7. The second motion was heard, remotely via the Pepix platform, on 26 June 2023 and judgment was reserved until today.

ORDER 42, RULE 24

8. 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.
9. 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.

10. 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.”

11. 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.”

12. The Court of Appeal also expressed full agreement with earlier *dicta* from the High Court to the effect (i) that there is a public interest in ensuring that creditors are not deterred from engaging positively with judgment debtors for fear that they may be precluded thereafter from enforcing their judgment in the event that the engagement does not bear fruit, and (ii) that to require a judgment creditor to execute promptly could be counter-productive in many instances, not least in a case where that would have entailed execution during a severe economic recession.

DISCUSSION

13. The Court of Appeal has confirmed in *Ulster Bank Ireland Ltd v. Quirke* [2022] IECA 283 that a party moving an application pursuant to Order 42, rule 24 must address and explain the lapse of time in the execution of the judgment or order concerned, commencing from the date of the judgment or order and continuing up to the date on which the application is made. The explanation need not disclose exceptional circumstances, but some reasonable explanation is required.
14. In the present case, this court has already had cause to consider the lapse of time between the date of the order for possession on 12 March 2012 and the earlier application for leave to issue execution which was granted by order dated 13 January 2020. This order had been the subject of an appeal to the Court of

Appeal, but the appeal was ultimately dismissed by way of an “*unless order*” in December 2020.

15. Having regard to this procedural history, the focus of the court’s assessment of the present application should be directed to the events *subsequent* to 13 January 2020. The court should carefully consider the explanation given for the failure to execute the order for possession during the period of some two and a half years between (i) the order granting leave to issue execution, and (ii) the bringing of the second motion seeking fresh leave to issue execution.
16. This is not to say that the court should not examine the explanation for the *overall* delay in executing an order for possession which dates from March 2012. Rather, the only point being made is that, in circumstances where the court’s earlier finding that there had been an explanation for the delay up to 13 January 2020 is now *res judicata* between the parties, particular attention should be paid to the events since that date.
17. The two principal reasons advanced to explain the lapse of time since 13 January 2020 are as follows. First, the practical effect of the appeal to the Court of Appeal was that no significant steps could be taken towards execution until the appeal was dismissed in December 2020. Secondly, Start Mortgages points to the agreed moratorium on repossessions and to the fact that, during the currency of the order of possession, i.e. the period between 9 November 2020 and 8 November 2021, the County Sheriff in Galway was not executing orders of possession due to the coronavirus pandemic.
18. I am satisfied that the explanation for the failure to execute the order for possession meets the threshold of a reasonable explanation as per *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512. It would have been inappropriate for

Start Mortgages to have taken active steps to enforce the order for possession prior to the dismissal of the appeal by the Court of Appeal in December 2020. Thereafter, Start Mortgages were frustrated in seeking to execute the order of possession during the period 9 November 2020 to 8 November 2021. Accordingly, Start Mortgages were required to issue a fresh application for leave to issue execution. This was done within a reasonable period of time: the motion issued on 11 April 2022. The delay in the motion coming on for hearing is explicable, in part, by the time taken up by a data subject access request.

19. The legal test also requires the court to consider whether there is any countervailing prejudice to the other side which might justify the refusal of leave to execute. No such prejudice has been asserted in the present case. Indeed, it seems that the Defendant has continued to reside in the mortgaged property and that no payments have been made pursuant to the mortgage since July 2011.
20. The Defendant has put forward the following points in his two affidavits. First, the Defendant makes certain complaints in respect of the response to a data subject access request. These complaints were addressed by way of my order of 3 October 2022 directing that a hard copy of the data request pack be furnished to the Defendant. Secondly, the Defendant makes reference to a complaint which he has made to the Financial Services and Pensions Ombudsman. The fact of such a complaint having been made does not preclude the beneficiary of an order for possession, such as Start Mortgages, from enforcing that order in the interim. Thirdly, the Defendant refers to certain proposals which he has put to Start Mortgages and to earlier settlement discussions. Whereas there is a public interest in parties resolving disputes amicably if they can, the court cannot direct the parties to reach a settlement. Nor can the court refuse an application

for leave to issue execution simply because a judgment creditor has declined to compromise its claim.

21. The Defendant advances the following two points in his second affidavit. First, reference is made to the judgment of the High Court (McDonald J.) in *ACC Bank v. Joyce* [2022] IEHC 92. On the facts of that case, it was held that the assignee of a judgment debt cannot absolve itself of legal responsibility for inactivity on the part of the original judgment creditor. The judgment in *Joyce* is consistent with the subsequent judgment of the Court of Appeal in *Ulster Bank Ireland Ltd v. Quirke* [2022] IECA 283. The facts of the present case are distinguishable from both of these precedent judgments: as discussed at paragraphs 13 to 16 above, the court's earlier finding that there had been an explanation for the delay up to 13 January 2020 is now *res judicata* between the parties.
22. The second broad point advanced by the Defendant involves an allegation to the effect that the Defendant's loan with Start Mortgages has been purchased by an unknown third party. It is further alleged that Start Mortgages will have suffered no loss as the result of it having the benefit of a "*derivative of insurance*". These allegations are set out, in particular, at paragraphs 7 to 10 of the affidavit of 12 June 2023:

"I say and know to be true the Plaintiff claims to hold a vested interest in this defendant's family home, while the Plaintiff is a servicing agent to an unknown third party who financed the Purchase of this Defendant's mortgage and Asset, such actions in purchasing a debt with the intent to profit through litigation is representative of litigation Trafficking.

I say and know to be factually true the normal trading practices of the Original Bank being the Start Mortgages Designated Activity Company was to attach a derivative of insurance in the event of default by a mortgagor, the accounts

of the Start Mortgages Designated Activity Company will demonstrate the said bank traded in the practice of Securitisation where such practice carried safeguards. protections (*sic*) in the event of a default the said Start Mortgages Designated Activity Company could avail of restoration of loss.

I say and believe to be true, on reimbursement and or indemnification of loss to Start Mortgages Designated Activity Company with the standard derivatives applied in the ordinary practice of banking no loss was suffered or substantially diminished, thereafter Start Mortgages Designated Activity Company did or can apply to the Revenue Commissioners of Ireland seeking a capital loss made up of the principal Sum and Profit (Interest) together with any legal costs incurred and thereafter Start Mortgages Designated Activity Company sell the said loan to the herein Plaintiff's contractor.

I say and know to be true such aforementioned actions are defined as civil fraud where deception, dishonesty and or misrepresentation to seek a gain or to place this defendant at a disadvantage, such grave issues demand clarification by An Garda Siochanna, the Central Bank of Ireland, the Security Exchange Commission and the European Securities Markets Authority.”

23. None of these various allegations are corroborated. Moreover, even if it were true to say that Start Mortgages had transferred the beneficial interest in the debt and the judgment to a third party, this would not justify the refusal of leave to issue execution. The affidavit evidence in these proceedings demonstrates that Start Mortgages is the registered owner of the charge on the relevant folio. This registration is conclusive: see, generally, *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381 (at paragraphs 53 to 56) and *Pepper Finance Corporation (Ireland) DAC v. Moloney* [2023] IECA 161 (at paragraphs 65 and 66). The affidavit evidence also establishes that Start Mortgages continues to hold the legal title to the loans it services.
24. The fact, if fact it be, that the beneficial interest in the underlying debt and security may be held by another entity does not preclude Start Mortgages, as the

registered owner of the charge and as the plaintiff in the proceedings, from seeking to execute the order for possession granted on 12 March 2012. See, generally, the discussion of the legality of the securitisation of debt in *Start Mortgages DAC v. Ryan* [2021] IEHC 719 (Woulfe J.) (at paragraphs 29 to 31).

25. Similarly, the fact, if fact it be, that some form of insurance or indemnification may have been put in place in respect of loan defaults does not affect the fact that the Defendant is in breach of his *contractual obligations* under the loan agreement and that Start Mortgages, as the registered charge holder, is therefore entitled to recover possession of the mortgaged property.

CONCLUSION AND PROPOSED FORM OF ORDER

26. For the reasons explained herein, I am satisfied that the Plaintiff, Start Mortgages, has met the threshold of establishing a good reason which explains the failure to execute the order for possession. I am also satisfied that the delay in executing the order for possession has not caused any prejudice to the Defendant. The legal test for granting leave to issue execution, as per *Smyth v. Tunney* [2004] IESC 24, [2004] 1 I.R. 512, has therefore been met.
27. Accordingly, I propose to grant the Plaintiff leave to issue execution, pursuant to Order 42, rule 24 of the Rules of the Superior Courts, in respect of the order for possession of 12 March 2012.
28. As to costs, my *provisional* view is that the Plaintiff, having been entirely successful in what was a contested application is entitled to recover the costs of the motion as against the Defendant. If either side wishes to contend for a different form of costs order, they should file written legal submissions in the Central Office of the High Court within two weeks of today's date. Any such

submissions should be served on the other side and a copy sent to the Registrar assigned to this case.

Appearances

Rudi Neuman for the plaintiff instructed by Lavelle Partners LLP
The defendant appeared as a litigant in person

Approved
Gerrit S. Moss