THE COURT OF APPEAL

Court of Appeal Record Number: 2021/94
High Court Record Number 2006 106 S

Murray J.
Edwards J.
Binchy J.

Neutral Citation Number [2022] IECA 283

BETWEEN/

ULSTER BANK IRELAND LIMITED

PLAINTIFF

- AND –

(BY ORDER) PROMONTORIA (OYSTER) DAC

PLAINTIFF/
RESPONDENT

-AND-

TIMOTHY QUIRKE AND JOAN QUIRKE

DEFENDANTS/
APPELLANTS

JUDGMENT of Mr. Justice Binchy delivered on the 12th day of December 2022

1. This is an appeal from two orders of the High Court made on the 22nd March 2021. The first order was one made pursuant to Order 17, r.4 of the Rules of the Superior Courts, whereby the Court ordered that the plaintiff/respondent herein ("Promontoria") be joined as a co-plaintiff in the within proceedings, and further directed that the within proceedings shall thenceforth be carried on as between the original plaintiff, Ulster Bank Limited ("Ulster

Bank") and Promontoria as co-plaintiffs and the defendants/appellants. The second order was made pursuant to Order 42, r. 24 of the Rules of the Superior Courts whereby the Court granted Promontoria leave to issue execution to Promontoria of a judgment (the "Judgment") dated 27th March 2009 previously obtained by Ulster Bank.

Background

2. The uncontested background facts are that the appellants borrowed money from Ulster Bank and fell into arrears with repayments. The precise date on which funds were first advanced by Ulster Bank to the appellants is unclear, but what is clear is that by reason of falling into arrears, the appellants' loan facilities were restructured leading to the issue by Ulster Bank to the appellants of revised loan facilities by letter of 21st November 2003, which letter was signed by the appellants on 22nd November 2003 by way of acceptance. This letter provided for a review date of 28th February 2004. It referred to a loan amount in the sum of €89,000 and the purpose of the loan was stated to be the taking over of existing loan and overdraft facilities, and to provide for planning fees.

3. A further offer letter issued from Ulster Bank to the appellants on 10th September 2004. This provided for a loan in the sum of €56,100 (described as "*continuation of existing farm loan*"). It appears this letter was not signed by the borrowers. There is no reference at all in this letter to the overdraft facility, although in an affidavit sworn by Mr Chris Benson, a bank official in Ulster Bank on 13th March 2008 (for the purpose of grounding an application for summary judgment) Mr. Benson avers that "*in addition, the plaintiff continued to permit the defendants to operate an overdrawn joint current account numbered XXXXX054 at the same branch on terms which required them to make repayment in the event of demand*". In the same affidavit, Mr. Benson avers that the loan account to which the letter of 10th September 2004 relates is account number XXXXX138.

4. The appellants fell into further arrears with repayment of the loan and the overdraft facility and Ulster Bank wrote to the appellants on 3rd March 2005 demanding repayment of a total sum of €58, 868.17, and provided details in the letter as to the breakdown in respect of the amount due in respect of the loan, the current account and interest. The appellants were unable to make repayment of the sums due, and Ulster Bank caused a summary summons to issue on 26th January 2006, claiming the total sum of €62,857.11, inclusive of principal (€58,713.95) and interest (€4,143.16). The summary summons also identified the amount of the overdraft (€3,641.58) and the loan account (€55,072.37).

5. Following the issue of a motion for judgment, the matter came on for hearing before the Master of the High Court on 29th May 2008, when it was ordered that Ulster Bank should be at liberty to enter a final judgment in the action for the sum of €73,635.32, together with interest from 19th January 2008 on (a) the principal sum of €55,072.37 at the rate of 9.75% per annum and (b) the principal sum of €3,641.58 at the rate of 10.95% per annum until judgment or prior payment. The difference between the combined total of the two principal sums (€58,713.95) and the amount of the judgment is explained by interest accrued between the date of the issue of the summary summons and the date of the order made by the Master. It was also ordered that the appellants should pay Ulster Bank its costs of the proceedings, and the proceedings were then adjourned to 30th June 2008, with a stay pending further order. That stay was vacated by the Master of the High Court on 3rd July 2008, and replaced by a three month stay on execution which expired on 2nd October 2008. The amount in respect of which liberty was granted to Ulster Bank to enter final judgment was also amended slightly to €73,784.32.

6. Between the date on which liberty to enter final judgment was originally granted (29th May 2008) and the date on which the last order was made by the Master of the High Court (3rd July 2008) the second named appellant swore an affidavit on 2nd July 2008 in which she

acknowledged the principal sum claimed in the summary summons in the sum of €62,857.11 as being due to Ulster Bank. She made no comment on the amount claimed in respect of interest. She proceeded to explain the efforts made to raise funds to discharge the amount due to Ulster Bank, and asked for a further adjournment so that those efforts might be continued. It is apparent therefore that the appellants accepted the amount claimed by Ulster Bank as being due and owing.

7. Thereafter, Ulster Bank, on foot of the order of the Master of the High Court, applied for judgment in the Central Office of the High Court, and on 27th March 2009, judgment issued in favour of Ulster Bank in the total sum of €77, 889.07, together with costs to be taxed in default of agreement. The dates of 2nd October 2008 (when the stay of three months imposed by the Master on his order expired) and the 27th March 2009 are relevant to arguments advanced in the High Court regarding the applicability of the Statute of Limitations to the enforcement of the judgment.

8. These matters rested and there were no further developments in the proceedings until 26th February 2021 when an application was made on behalf of Promontoria pursuant to Order 17, r.4 of the Rules of the Superior Courts ("RSC") directing that the proceedings shall be carried on between Promontoria as plaintiff, and the appellants. At the same time, Promontoria also sought an order pursuant to Order 42, r. 24 of the RSC and/or the inherent jurisdiction of the Court granting it leave to issue execution in the proceedings on foot of the order of the High Court granted on 27th March 2009. These applications were sought consequent upon the execution by Ulster Bank of a global deed of transfer on 19th December 2016 to which Promontoria is also a party. While I will address the precise wording of the relevant clauses of this deed in due course, in general terms by this deed Ulster Bank sold the loans described in the deed, together with the benefit of all securities provided in connection with those loans, to Promontoria. So far as the appellants are concerned, they

are expressly identified in a schedule to the deed by name, and the deed also identifies their loan account, the folio number of lands registered in the sole name of the first named appellant (folio 21631F, Co. Limerick) and a lien registered over those lands on 18th September 2009 by Ulster Bank .The Schedule also refers to the facility letter dated 21st November 2003 issued by Ulster Bank to the appellants, but there is no reference to the facility letter of 10th September 2004, a fact upon which the appellants place significant reliance.

9. The motion by which Promontoria advanced the applications referred to above was grounded upon an affidavit sworn by Mr. Michael Lynam, a partner of O'Brien Lynam Solicitors, acting on behalf of Promontoria. Mr. Lynam deposed that he had access to the books and records of Promontoria for the purposes of the application. He summarised the history of the proceedings between the parties. Apart from the summary judgment proceedings, Mr. Lynam also referred to other proceedings issued by Promontoria way of special summons on 16th October 2018, for the purpose of enforcing the lien referred to above. He avers as to an entry on the folio made on 9th March 2017 whereby the interest of Promontoria in the lien was registered. He refers to and exhibits a copy of the global deed of transfer and to notifications issued to the appellants informing them of the assignment of their loan facilities and related security to Promontoria. These notifications comprised a letter issued by Ulster Bank on 6th January 2017 to the appellants, and another letter issued, on behalf of Promontoria, by its agent, Link ASI (formerly known as Capita Asset Services (Ireland) Limited). Mr. Lynam exhibits copies of those letters.

10. Mr. Lynam proceeds to explain that on 21st August 2017, Promontoria wrote to the appellants demanding payment of all sums due and owing on foot of the "loan agreement" which he avers then stood at a total of €78,752.58. He refers to a further letter of demand issued by Promontoria to the appellants on 6th December 2019, demanding payment of the

then total sum due of €86,838.44 (claimed as being due as of 2nd December 2019). He avers that in despite of the demands, the appellants have failed to discharge the amount due and owing. These letters make no reference to the Judgment.

11. At paragraph 23 of his affidavit, Mr. Lynam avers that:

> *"23. As a consequence of the deed of transfer an event has now occurred since the commencement of the within proceedings whereby the interest of Ulster Bank in (i) the loan facility and related loan account(s), the subject matter of the within proceedings and (ii) the within proceedings and the order for judgment, has been wholly transferred unto [Promontoria], in such a manner that it has become necessary and expedient that [Promontoria] should now be made a party to the within proceedings by order of this Honourable Court.*
>
> *24. I say and believe that an appropriate means to give effect to the change of this interest to [Promontoria] is by the direct substitution of [Promontoria] as plaintiff in the within proceedings in place of and by removal of the current plaintiff, Ulster Bank.*
>
> *25. I further say and believe that an appropriate means to give effect to the change of this interest to [Promontoria] is by way of order for leave to execute the order for judgment."*

12. Mr. Lynam then avers as to the urgency of the application. He avers that in order to avoid any difficulties posed by the Statute of Limitations 1957, Promontoria would need to be in a position to issue an action on the judgment in advance of 27th March 2022. Mr. Lynam avers that the parties have been engaging with one another since Promontoria took over ownership of the loan account from Ulster Bank with a view to resolving the debt owing. For that reason, it had not sought to execute the order for judgment, but it had come to the attention of Promontoria that if engagement continued without seeking to act upon the order for judgment, there would be a real risk that Promontoria may face difficulties in terms

of limitation periods for execution for judgment. He avers that Promontoria would be prejudiced if it was not in a position to enforce the order for judgment and /or further by registering it as a judgment mortgage within twelve years from the date of the order for judgment. He concludes that in order to ensure that Promontoria can recover the monies due and owning, it is necessary and appropriate to seek that Promontoria be substituted in lieu of Ulster Bank as the plaintiff in the title to the proceedings, that the proceedings be carried on between Promontoria in place of Ulster Bank and that Promontoria be granted leave to issue execution of the order for judgment, in circumstances where there has been a change in the party entitled to execution and where more than six years has elapsed since the date on which the order for judgment was made.

13. The first named appellant swore an affidavit on 11th March 2021 in reply to that of Mr. Lynam. Mr. Quirke contends that enforcement of the judgment obtained by Ulster Bank is statute barred from no later than early October 2020. This contention is based on the dates of orders made by the Master of the High Court 29th May 2008 and 3rd July 2008.

14. Mr. Quirke avers that Ulster Bank did not advance any monies to the appellants pursuant to a facility letter dated 21st November 2003. He avers that this offer letter was intended to restructure both a loan account and a current account in overdraft, as well as to provide additional planning fees by way of a single facility. However, he contends that that facility was not implemented by the parties, and the accounts were not consolidated into a single loan account and no additional funding was advanced.

15. Mr. Quirke avers that:

> *"The defendants have long acknowledged that we have had a banking relationship with Ulster Bank and have also openly admitted the validity of the security granted to Ulster Bank which is recorded in Folio 21631F. The defendants have further admitted that Promontoria is the lawful successor to Ulster Bank's interest in that security"*

16. Mr. Quirke then refers to the other proceedings between the parties which he describes as the *"lien proceedings"*, i.e. the proceedings issued by Promontoria pursuant to the special summons referred to above. He avers that those proceedings have been compromised and refers to a separate affidavit of his solicitor in this regard.

17. Moreover, Mr. Quirke says that it is not accepted that Ulster Bank could ever or did assign its interest "*in this action or any order of judgment to Promontoria*". He further avers that if in fact such a transfer took place, on January 2017 as claimed, it is remarkable that no step was taken until 3rd March 2021 in reliance upon the transfer.

18. Mr. Quirke contends that if the applications are granted, the defendants will suffer prejudice. He avers that his wife had received an extremely upsetting diagnosis in relation to her health. Furthermore, the grant of the applications would be used by Promontoria as a justification to renege on the compromise which he claims was reached between the parties.

19. The appellants' solicitor, Mr. Cooke, swore an affidavit on 11th March 2021. He refers to the special summons proceedings (High Court Record No. 2018 500 SP) and claims that those proceedings have been compromised. He exhibits documentation in support of his contention. It is claimed, in effect, that the settlement of those proceedings operates so as to release the appellants from any liabilities they have pursuant to the Judgment.

Judgment of the High Court

20. The applications came on for hearing in the High Court before Butler J. on 16th March 2021, and she handed down judgment on 19th March 2021. Having summarised the background to the proceedings, the trial judge first considered the admissibility of without prejudice correspondence, in the context of the argument made by the appellants that the related special summons proceedings had been settled, thereby obviating the need to determine these applications. The trial judge stated (at para.9): *"However, these are not proceedings brought to enforce the agreement alleged to have resulted from the*

negotiations, nor are they the proceedings in which the negotiations took place. Thus, the defendants are attempting to rely on the assertion that a concluded settlement reached in negotiations in separate (albeit related) proceedings has given rise to an issue estoppel which precludes the applicant proceeding with this application. No authority was advanced for that proposition." The trial judge concluded on this issue that it would not be appropriate to consider the without prejudice communications in circumstances where the court would not be proceeding to determine whether, as a matter of fact, such a settlement was reached.

21. The trial judge then went on to consider the application made pursuant to Order 17, r r.4. That rule, which the trial judge quoted in full, provides:

> *"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."*

22. The trial judge then summarised the arguments of the parties. Promontoria contended that there is a low threshold to be met on such applications and relied upon the decision of Meenan J. in the High Court in *Friends First Finance v. Moloney* [2019] IEHC 844. In this regard, Promontoria submitted that that threshold is met by the global deed of transfer which, it was submitted, has caused a change of transmission of interest of liability as a result of which Promontoria should be made a party to the proceedings. However, counsel for Promontoria accepted that the overdraft facility of the appellants with Ulster Bank (the

balance of which formed part of the Judgment sum) had not been transferred by the global deed of transfer, and accordingly it would be more appropriate for Promontoria to be added as a co-plaintiff to the proceedings, rather than be substituted in lieu of Ulster Bank.

23. The appellants raised four objections to the application. Of these, just two are relevant for the purposes of this appeal. The first is that it contended that the judgment granted to Ulster Bank was granted on the basis of, *inter alia,* the facility letter of 10th September 2004. However, the global deed of transfer makes no reference to this facility, but rather refers to the facility letter of November 2003, which had not been acted on or implemented by the parties.

24. The trial judge did not consider it necessary to decide whether or not what she described as the *"correct"* facility letter was transferred to Promontoria under the global deed of transfer. She concluded this because, regardless as to which facility letter was transferred, it is clear that the appellants' loan account number XXXXX138 is listed as a Security Document in Schedule 1 (section 2B Part 02) of the global deed of transfer, and therefore that loan account and all of the rights and interests of Ulster Bank in it were transferred to Promontoria pursuant to the global deed of transfer.

25. Secondly, the appellants argued that, as a matter of law, it is not possible to assign the benefit of part only of a judgment. This is a reference to the fact, admitted by Promontoria, that the global deed of transfer was effective to transfer the loan account only to Promontoria, and did not effect a transfer of the current account (i.e. the overdraft account) of the appellants, and since the Judgment relates to both liabilities, there has been no effective assignment of it to Promontoria. In support of this argument, the appellants relied upon the authority of *Chung Kwok Hotel Company Limited v. Field* [1960] 3 AER, but the trial judge noted that in a number of recent cases, the courts in this jurisdiction have declined to follow *Chung Kwok Hotel,* and the trial judge referred in this regard to the decisions of Whelan J.

in this Court in *Everyday Finance DAC v. Beades* [2021] IECA 48 and *Pepper Finance v. Beades* [2021] IECA 41. Ultimately however, the trial judge did not consider that she had to decide definitively whether part of a judgment for a liquidated amount is assignable as a matter of law in circumstances where Promontoria sought to be joined as a co-plaintiff to the proceedings, with Ulster Bank (rather than being substituted as sole plaintiff). She stated: *"The test to be met under O. 17, r.4 is that there has been a change or transmission of interest or liability such that a person who is not already a party should be made a party to proceedings."* She considered that Promontoria had demonstrated that such a change did occur.

26. Having addressed the two other arguments that I have mentioned are not relevant for the purposes of this appeal, the trial judge concluded that she was satisfied that Promontoria had established *"to the requisite civil standard of proof that it falls within the terms of [Order.17, r.4] in that an event has taken place involving the change or transmission of an interest to it, as a result of which it should be made a party to the proceedings. The applicant has also established that the conditions identified by Meenan J.in Friends First Finance v Moloney (albeit in respect of a global application of this nature) have been met."* The trial judge therefore made an order joining Promontoria as a co-plaintiff to the proceedings.

27. The trial judge then went on to consider the application under Order 42, r. 24 which provides as follows:

> *"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."

28. The trial judge noted that Promontoria contends that the threshold to be met for the purposes of succeeding with such an application is a relatively low one. She considered the decision of the Supreme Court in *Smyth v. Tunney* [2004] 1IR 512. In that case, the applicants had delayed for more than six years in executing costs orders made in their favour because they were awaiting the outcome of other proceedings between the parties, and the plaintiffs had demanded that the defendants defer execution until all proceedings were disposed of. However, the applicants became concerned that, if they delayed any longer, the execution of the orders made in their favour might be hindered by the statute of limitations.

29. Giving the judgment of the court, Geoghegan J. observed that the order made by the High Court was a discretionary one, and the [Supreme] Court would be slow to interfere with the High Court judge's exercise of that discretion. Having noted that applications made under the equivalent rule in England are made (at least in the first instance) *ex parte*, and that that would suggest that no very strong or exceptional reasons were required for the purposes of such an application, Geoghegan J. held that, while it is necessary for a party advancing an application under Order 42, r. 24, to advance reasons for the delay in execution of the judgment concerned, there was no requirement to give an exceptional or very special reason. He said that: *"Some reason for delay had to be shown but no more"*. Geoghegan J. then considered the adequacy of the reason offered in that case and concluded that it was entirely reasonable for the High Court judge to exercise his discretion in favour of the applicants, and whether or not that perception was correct in law was irrelevant.

30. The trial judge also considered the judgment of this Court in *Pepper Finance v. Beades* in which Whelan J. stated:

"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."

31. The trial judge referred to the following passage in Collins, *Enforcement of Judgments* (2nd Ed, Round Hall 2019):

"*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*."

32. The trial judge then went on to address the arguments of the appellants in opposition to the application. The appellants submitted that no explanation had been offered by Ulster Bank for the delay prior to the execution of the global deed of transfer in 2016. This was a delay, on the appellants' case, stretching back to October 2008, when the stay of three months on the order of the Master of the High Court (of July 2008) expired. The appellants further submitted that this was also the date by which to assess the application of s.11(6)(a) of the Statute of Limitations, and that the 12-year period for execution of a judgment provided for by that section had expired as of October 2020, at the very latest.

33. The trial judge rejected this argument on the basis that the granting by the Master of the High Court of liberty to enter final judgment was not itself a judgment. She said (at para. 31): *"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 then Ulster Bank was granted liberty to enter final judgment but, crucially, had to proceed to do so before it could be said to be in possession of a judgment against the defendants." As has already been observed, Promontoria did not enter the Judgment until 27th March 2009. The notice of motion seeking an order pursuant to O.42, r.24 is dated 26th February 2021, and it came on for hearing before Butler J. on 16th March 2021, 10 days prior to the expiration of 12 years from the date on which Judgment was entered.

34. The trial judge then considered the reason offered by Promontoria for the delay in making the application. She considered that there was no obligation on a judgment creditor to move immediately or even promptly to execute a judgment and that there are sound public policy reasons for not imposing such a requirement. Therefore, she did not consider the failure on the part of Ulster Bank to explain non-execution of the Judgment in the 7-year period leading up to the global deed of transfer to be of significance. She considered that the reasons offered by Promontoria for the delay post the global deed of transfer i.e. that the parties had been engaging with each other since Promontoria took over ownership of the appellants' loans from Ulster Bank, with a view to resolving the debt owing, to meet the threshold of a good reason, understood in the light of the judgment of the Supreme Court in *Smyth v. Tunney*.

35. Having thus decided, the trial judge went on to consider and reject other objections raised by the appellants, but since these are of no relevance to the grounds of appeal pursued by the appellants, there is no need to address them here. Having considered and rejected all of the appellants objections to the application, the trial judge made an order under O.42, r.24 granting Promontoria leave to execute the Judgment.

36. This Court was informed at the hearing of this appeal that immediately following upon the orders made by the trial judge, Promontoria caused the registration of a judgment

mortgage on the lands of the appellants and thereafter issued a special summons seeking well a well charging order and an order for sale of the lands to satisfy the Judgment.

37. By their notice of appeal of 4th June 2021, the appellants raised 27 grounds of appeal. However, in their written submissions the appellants identified six issues which they contend fall for determination in this appeal as follows. At the hearing of this appeal, the appellants pursued just three issues, which I will address in due course, but first I will address certain matters in respect of which the Court directed supplemental submissions at the conclusion of the hearing of the appeal.

Direction of Supplemental submissions

38. At the conclusion of the hearing, the Court directed the parties to file supplemental submissions on the following issues:

(A) What is the nature of an order made under O.42, r. 24 - is it final or interlocutory? (The answer to this question being relevant to the threshold of proof applicable on both applications).

(B) What must an applicant establish to obtain an order under O.42., r.24?

(C) Does the assignee of a debt obtain an entitlement to rely on a judgment already obtained in respect of that debt, even though the judgment itself has not expressly been assigned? If so, what is the difference between such an entitlement and the assignment of the judgment itself?

(D) Does the decision in *Forster v. Baker* [1910] 2 KB 636 CA represent the law in this jurisdiction, and does it remain the law in England and Wales and other common law jurisdictions?

39. Since the answers to these questions are central to the issues identified as being the key issues for determination in this appeal, I will first address those questions, and thereafter address the grounds of appeal pursued by the appellants at the hearing of this appeal .

A. The nature of orders made under O.42, r.24 – final or interlocutory?

40. Applications under both O.42, r. 24 and O.17, r.4 are procedural in character and, as was observed by Peart J. in *Bank of Scotland Plc v. McDermott* [2019] IECA 142 (in the context of an application under O.17, r.4) *"There can be no question of such an application becoming in the nature of a mini-trial."*

41. In their submissions on this issue, the appellants referred to the decision of the Supreme Court in *Minister for Agriculture v Alte Leipziger A.g.* [2000] 4 IR 32. In that case, the Supreme Court was required to consider whether or not a decision of the High Court on a question of jurisdiction under article 8 of the Brussels Convention on jurisdiction and enforcement of judgments was final or interlocutory, in the context of an application to receive new evidence in the appeal from the decision of the High Court. In his judgment, Hardiman J noted that the question as to whether particular orders are interlocutory or final had troubled the courts in England and Wales for well over a hundred years. He observed that in some cases the approach taken had been to look at the application, and in others the approach was to look at the order made, and in either case to ask the question whether the order or the application (whichever way it is decided), will finally dispose of the case. Hardiman J considered both approaches to be mistaken. He said (at p.50):

"*I think the fundamental flaw in both these approaches lies in the requirement that the order, or the application (depending on which approach one takes) must finally dispose of the case as a whole if it is to be final and not interlocutory. In my view, it is quite sufficient if the order in question finally disposes of a particular issue between the parties, at least where that issue is discretely raised by some proper procedure.*"

42. The appellants submit that the order of the High Court finally disposes of the following particular issues between the parties (i) the issue as to the joinder of the respondent as a co-plaintiff, (ii) the issue as to the amendment of the summary summons and(iii) the issue as to whether the respondent is entitled to leave to issue execution on foot of the judgment dated 29th March 2009. The appellants submit that if an order granting leave pursuant to O.42,r. 24 is made, this *ipso facto* means that the conditions necessary to permit the court to grant leave have been adjudicated upon and held to have been satisfied, and these matters do not fall for further review later on in the execution process.

43. Accordingly, the appellants submit, an order of the High Court granting leave to issue execution is final in the sense that nothing further needs to be ordered by the court before the execution process commences and proceeds to its conclusion. The appellants argue that by reason of the order of the High Court, which was not subject to a stay, Promontoria was ableto register a judgment mortgage on the property of the appellants, and that it is now entitled to it seek a well charging order and an order for sale of their property without further inquiry into its entitlement to seek leave to execute the Judgment.

44. Promontoria, on the other hand, contends that an order under O.42, r. 24 is preliminary to further enforcement steps which may or not ultimately be taken by the party granted leave, and the judgment debtor has a further opportunity to oppose such enforcement steps if and when they are taken, including on the grounds that the party granted leave is not the valid assignee of the judgment debt. Promontoria submits that *National Bank v Cullen* [1894] 2 IR 683I.R. is authority for the proposition that, in exceptional circumstances, applications under O.42.,r.4 may be exercised *ex parte* and therefore an order made under the rule is more akin to an interlocutory order than a final order.

45. In support of its submissions, Promontoria relied upon *Stapleford Finance Limited v. Lavelle* [2016] IECA 104, a decision of Costello J. in this Court relating to an application

under O.17, r.4. The application in that case was also advanced consequent upon a transfer of a debt, and in the course of her judgment, Costello J., having observed that "the rules are intended to be facilitative" cited with approval an extract from the judgment of Peart J. in *Bupa Ireland Ltd. v. Health Insurance Authority & Ors.* [2005] IEHC 29 wherein he stated at p.10 of his judgment:-

> "*In matters of court procedure and rules applicable, I would be of the school of thought that the rules exist so that things can be done rather than so that things can be prevented from being done….*"

46. Promontoria submits that in this case O.42, r.4 should be interpreted and applied in a facilitative manner, which will enable it to take enforcement steps (which Promontoria submits may be fully defended by the appellants should they wish to do so), rather than in a manner which shuts Promontoria out from enforcing the Judgement.

47. In *Bank of Scotland Plc v. McDermott,* [2019] IECA 142 , Peart J. , in considering the test to be applied to applications under O17.,r.4 post judgment said :

> "*Where, as in the present case a substitution application is made after judgment has been granted, and where therefore there is no opportunity at trial to raise any issues in relation to the proofs adduced in support of the application, it seems to me that the prima facie test referred to by Kelly J. in [Irish Bank Resolution Corporation v. Comer [2014] IEHC 671] is not the correct test. In such cases the correct test is that applicable in civil proceedings generally, namely on the balance of probabilities. The evidence will nonetheless be adduced in the normal way in such applications by affidavit, and if necessary any deponent may be cross-examined on their affidavit as provided for by the Rules of the Superior Courts. But such applications remain purely procedural in nature, and there can be no question of such an application becoming in the nature of a mini-trial*."

48. Applications under O.17, r.4 will in some cases be made before judgment, and in others after judgment. In contrast, all applications under O.42, r.24 are, of their very nature, post judgment. There will be no trial of the action at which the title of the assignee can be tested. It is conceivable that it could be tested in subsequent enforcement proceedings, as was submitted on behalf of Promontoria, but that is uncertain, not least because one of the principal methods of enforcing judgments is by way of an order of *fieri facias* , which involves no application to court. This suggests to me that an order made under O.42, r.24 should treated as a final order, and should only therefore be made if the court is satisfied, on the balance of probabilities, that the applicant is entitled to the order sought. This is consistent with the decision of Peart J. in *Bank of Scotland v McDermott*, referred to above in relation to post judgment O.17., r.4 applications. I think that it is also consistent with the views expressed by Hardiman J. in *Minister for Agriculture v Alte Leipziger*, as it is, more likely than not, the case that the disposal of the application will finally dispose of the issue.

B. What must an applicant establish under O.42, r.24 ?

49. The rule itself refers to two circumstances in which an application must be made. Firstly, where six years have elapsed since the judgment or order in respect of which leave to issue execution is sought, and secondly where there has been a change by death or otherwise in the parties entitled to or liable to execution. Both circumstances arise in this case.

50. The appellants submitted that it is necessary for an applicant to explain the entire delay that has elapsed since the date of the judgment, and not merely any delay after the expiry of the six year period referred to in the rule . In this regard they rely on the decision of Palles C.B. in *National Bank v Cullen* [1894] 2 IR I. 683. This concerned rule 25 of Order XLII of the rules of the Supreme Court (Ireland) 1891, which was in similar terms to O.42, r.24. In

his judgment, Palles C.B. traced the history of the rule, observing that prior to the Common Law Procedure Act of 1853 (the "Act of 1853"), execution of judgments could not issue, save in certain exceptional cases, later than a year and a day after the rendition of the judgment. This period was extended to six years pursuant to section 148 of the Act of 1853. After six years, the act provided, an application to court would be required for leave to issue execution, in the same way that before the Act of 1853 an application to court was required, after a lapse in time of a year and a day, to bring a new action - by way of writ of *scire facias* - to enforce the judgment. Palles C.B. explained that at common law, a presumption arose, from the plaintiff's delay beyond a year, that his judgment had either been satisfied, or, from some supervening cause, ought not to be allowed to have its effect in execution. He stated : " *Thus, the restriction upon the period for issuing execution was for the protection of the defendant, and in consequence of a presumption against the right to issue execution, arising from lapse of time; and if a period so short as a year and a day was, at common law, sufficient to raise such a presumption, so, a fortiori, must have been the extended period of six years during which, since 1853, execution can issue without leave……If the case be one in which during the entire six years, it has been impossible to make an execution available, the plaintiff may, immediately after the lapse of that period apply, on notice to the defendant, and obtain an order for liberty to issue execution and this will remain in force for another period of six years*."

51. The appellants also rely on *Smyth v Tunney*, in which the Supreme Court (Geoghegan J.) said that "*Some reason for delay had to be shown but no more*". They also place reliance on the decision of Whelan J. in *Pepper Finance v Beades* in which Whelan J. said :

"*It is clear from the jurisprudence, particularly the decision of the Supreme Court in Smyth v. Tunney ….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*."

52. The parties were specifically requested to provide submissions in relation to the decision of the High Court (Allen J.) in *Irish Nationwide Building Society v Heagney* [2022] IEHC 12, which had been handed down just prior to the hearing of this appeal , and in which this very issue is considered . In that case there had been an order for possession granted on 22nd March 2010. It appears that no effort was made to execute the order, and almost exactly four years later, on 31st March 2014, the loan was sold to the applicant in those proceedings, but the application for leave to issue execution was not brought until 23rd January 2020. In the course of his judgment, at para. 51 Allen J. stated:

> "*In the same way that the applicant is obliged to explain the lapse of time after six years from the date of the order, I do not believe that there is any obligation to explain the fact that the order was not executed within six years, although it may very well be the case that what happened or not within the first six years goes to why execution was not issued thereafter*."

53. Unsurprisingly, Promontoria relies on this passage to submit that there is no obligation on an applicant to provide any explanation as to why a judgment was not executed within six years, while the appellants argue that if this was what Allen J. meant , he was in error, and the appellants submit that it appears that none of the cases of *Pepper*, *Cullen* or *Bula Ltd v Tara Mines* [2008]IEHC 437 appear to have been cited to him. However, the appellants argue this may not be a correct interpretation of the judgment, and refer to a later passage, at para. 76, where Allen J. said : " In the same way that the Statute of limitations bars good and bad claims at the expiration of specified periods of time, the rules of the Superior Courts bar the enforcement of judgment orders after six years unless the party entitled to execution (or an assignee) can offer some explanation why execution was not issued <u>within six years</u> [my emphasis].In this case there was no explanation."

54. In any case, the appellants submit that ultimately Heagney was decided on the basis that the applicant in that case had failed to offer any or any adequate explanation for the delay of four years after the sixth anniversary of the order, and the discretion of the court was not therefore engaged. Accordingly, it was not necessary for the trial judge in that case to consider events in the first six years.

55. The appellants also rely upon the case of *Hayde v H & T Contractors* [2021] IEHC 103 a decision of the High Court (Simons J.) on a Circuit Court appeal, referred to by Allen J. in *Heagney.* In that case, Simons J. stated, at para. 21:

"*The objective of order 36, rule 9 [the corresponding rule in the Circuit Court] is that there should be some expedition in the execution of judgments. A generous period (six years) is allowed during which the party seeking to enforce the judgment may obtain an execution order from the office, i.e. without any necessity to apply to court. If, however, a party allows that period to expire, then a good reason must be provided for the delay to date*."

56. As already mentioned, Promontoria relies on the para. 51 of *Heagney* in support of its submission that no explanation at all is required for the failure to execute within the first six years. The point is made that the holder of a judgment is at liberty to execute the judgment at any time within a period of six years and may do so without any explanation for five years and 360 days, and it can therefore hardly be contended that just a week later he would be required to explain the entire passage of six years.

57. In the course of its submissions Promontoria accepted as correct a statement by Allen J. (at para.47 of his judgment) that an application brought by an assignee of a judgment or order is to be approached on the same basis as an application brought by the party originally entitled to execution of the judgment i.e. an assignee cannot be in a better position than the party originally entitled.

58. Promontoria submits that *Smyth v Tunney* established a low threshold to succeed with an application under O 42, r.24 ("some reason") , and furthermore makes it clear that in the exercise of its discretion the court may also take into account other factors, such as the possible loss of the entitlement to enforce the judgment by reason of section 11(6)(a) of the statute of limitations act, 1957.

59. 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*."

60. 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.

61. I think that this view is consistent with *Smyth v Tunney*, *Pepper v Beades* and *Hayde v H & T Construction*. So, in *Smyth v Tunney*, at para. 30 , Geoghegan J. says : "*Although in*

this case it has not been fully proved that the relevant defendants could not have executed the judgment debt by some means within the six year period , they have nevertheless shown sufficient reasons why they allowed a lapse of time and should still be allowed to execute if they can." In Pepper v Beades, in the passage cited at para. 51, above, Whelan J. said : "*….reasons must be given for the lapse of time since the judgment or order during which execution did not occur*." And finally, in this regard, at para.21 of his judgment in *Hayde v H & T Construction Ltd*., Simons J. said: "*A generous period (six years) is allowed during which the party seeking to enforce a judgment may obtain an execution order from the office, i.e. without any necessity to apply to court. If, however, a party allows that period to expire, then a good reason must be provided for the delay to date*."

62. Having regard to the purpose of the rule, the wording of the rule itself and its interpretation in the authorities referred to above, I am satisfied that a party moving an application pursuant to O.42, r.24 must address the lapse of time in the execution of the judgment or order concerned commencing from the date of the judgment or order up to the date on which the application is made, and not from the expiration of six years from the date of the judgment order. Insofar as Allen J. Appears to suggest otherwise at paragraph 51 of his judgment in Heaney, I must respectfully disagree.

63. In coming to this conclusion I have had due regard to the dicta of Costello J. in *Stapleford Finance v Lavelle* that the rules are "*intended to be facilitative*", and by Peart J in *BUPA Ireland v Health Insurance Authority and ors* that "*the rules exist so that things can be done rather than so that things can be prevented from being done*" , as well as comments made by Simons J. in *Hayde v H & T Contractors Ltd.* that "[t]here *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*." The trial judge made a similar observation

at para.34 of the judgment under appeal where she said: "*Requiring a judgment creditor to execute promptly could be counter-productive in many instances, not least in this case where that would have entailed execution during a severe economic recession which would hardly have led to a particularly beneficial outcome for either side*." I am in full agreement with all of these observations, and have taken them into account in coming to the conclusion that I have above, which I do not consider to be in conflict with any of the sentiments expressed by those observations.

C. Does the assignee of a debt obtain an entitlement to rely on a judgment already obtained in respect of that debt, even though the Judgment itself has not expressly been assigned? If so, what is the difference between such an entitlement and the assignment of the judgment itself?

64. In addressing this question, Promontoria relied on *Allied Irish Banks v. McKeown* [2021] IEHC 499. In *McKeown*, the plaintiff had obtained judgment in the High Court against both defendants on 12th May 2017. Subsequently, the judgment records, the plaintiff transferred to Everyday Finance DAC "*the relevant facilities and guarantees on which judgment was granted against the defendants…*". Everyday then brought an application seeking *"to be substituted for AIB in the portion of the order of Costello J. requiring each of the defendants to pay fixed sums to the original plaintiff"*.

65. The defendants, who were lay litigants, submitted, amongst other things, that "*the order and loans simply cannot co-exist*" and although it is somewhat unclear, it appears that the thrust of their submission was that since that is the case (i.e. that there cannot simultaneously be both a loan and a judgment in respect of the same loan) the effect of the deed of assignment/transfer was to extinguish the judgment.

66. The High Court (O'Moore J.) rejected that submission, stating at para. 26:

"*The order of Costello J. provided for the enforcement of the obligations undertaken by the defendants when they entered into the relevant facilities and guarantees. These facilities and guarantees have, on the evidence before me, been transferred to Everyday. This "change or transmission of interest [….]", as is referred to in O.17, r.4, has taken place after the order was granted. It is on the basis of this transmission of interest (in the underlying facilities and guarantees) that the court can order Everyday to be substituted for AIB in the proceedings (including the order made by Costello J.). To allow such orders to be made, it is not necessary that the court order granting judgment to AIB against the defendants is expressly agreed to be transferred to the benefit of Everyday. It is sufficient if the underlying entitlements are so transferred. That is what has happened here. There is no basis for suggesting that the order ceased to exist when the loans were transferred*."

67. Promontoria relies on *McKeown* as authority for the proposition that, the "underlying loan" continues to subsist after a judgment, and may therefore be assigned; and further that such assignment carries with it the benefit of any judgment obtained prior to the assignment, even though it may not be expressly referred to in the deed of assignment. The appellants on the other hand argue that this Court should be wary about placing any reliance upon *McKeown,* because of the limited treatment of the issue in that case on account of the fact that the defendants were self-represented.

68. However, Promontoria also relies upon the judgment of Whelan J. in this Court in *Permanent TSB & Anor v. Beades* [2021] IECA 48. In that case Permanent TSB (the original mortgagee) had been granted an order for possession of certain properties of the defendant, which order was made pursuant to a deed of mortgage created by the appellant in favour of Permanent TSB by way of security for his liabilities. Thereafter, Permanent TSB transferred, conveyed and assigned to Cheldon all of its rights, title, interest and benefits of

Permanent TSB pursuant to the deed of mortgage. Cheldon sought orders, as in this case, pursuant to O.17, r.4 and O.42, r. 24, as well as an order pursuant to O.28, r.12 amending the order for possession to name Cheldon in place of Permanent TSB as the plaintiff in the title to the order for possession. Amongst the objections raised by the defendant in those proceedings to the orders sought was an objection that the order for possession originally obtained by Permanent TSB could not be assigned and further that part of a court order could not be assigned. In the course of her judgment, Whelan J. undertook a very careful examination of the mortgage sale agreement relied upon by Cheldon and she set out in full the clause providing for the sale and purchase of the facilities in that case, which provided at clause 2.1 thereof:

> "*Subject to the terms of this agreement and subject to the subsisting rights of redemption of the Obligors, the Seller agrees to absolutely and unconditionally sell, and the Buyer agrees to purchase all its right, title, interest and benefit (whether past, present or future) in, to and under the Mortgage Assets, the Underlying Loans and the Finance Documents including the Seller's right, title and interest in and to the Ancillary Rights and Claims, on the Completion Date on the terms of and as provided in the Transfer Documents*."

69. Each of the terms with initial capitals was of course a defined term, and having had due regard to those defined terms and to the terms of clause 2.1, Whelan J. concluded, at para. 39:

> "*39. I am satisfied that all the interest, rights, titles and benefits and claims enuring to Permanent TSB as held or enjoyed by them on 8th July 2015 were captured by the terms of the mortgage sale agreement and were intended to and did pass to the purchaser. I am further satisfied that same included the benefit of the order for*

possession which was obtained by the seller, Permanent TSB, on 6th March 2014 in its capacity as mortgagee.

40. The order for possession, as sought and obtained by the mortgagee pursuant to the terms of the mortgage instrument of 23rd December 2002, travelled with the ownership of the mortgagee's interest. To the extent that the order for possession required (which it clearly did) an enforcement process pursuant to O. 42, r. 24(a), which is a remedy available to a mortgagee who holds an order for possession of the secured property, all rights and entitlements under the possession order travelled with the mortgagee's title and came to vest in the purchaser by operation of law as is clear from the language of the deed of conveyance and assignment which passed the legal interest. Accordingly, the benefit of all extant rights, entitlements and interests under the above entitled litigation including the order for possession, all other orders thereunder obtained and the continuing rights and entitlements pertaining to the execution of same effectively vested in the purchaser, Cheldon, on 14th October 2015."

70. Later in the same judgment, at para. 49, Whelan J. held that:

"*Cheldon demonstrated on the balance of probabilities that it was the party entitled to enforce the possession order of 6th March 2014 since it was the sole owner of the full legal and beneficial interest pursuant to the loan facility, the facility letter and the original mortgage. As such Cheldon had acquired the possession order and all rights thereunder including the entitlement to enforce it which enures for its benefit qua mortgagee*."

71. On the basis of the foregoing authorities, Promontoria submits that there is no necessity for an express assignment of the judgment or orders sought to be executed; it is submitted that it is sufficient if the underlying right is assigned, and such assignment will have the effect of conferring on the assignee the benefit of the order of the court.

72. In the course of exchanges with the court, counsel for Promontoria was asked what then in the difference as between the assignment of a judgment debt and the assignment of the underlying loan contract which, it was argued on behalf of Promontoria, includes (in this case) the right to enforce the Judgment. In reply, counsel for Promontoria referred to the following extract from Halsbury's *Laws of England* (2019, Vol. 22) under the heading: "*Merger in judgment*" wherein it is stated:

> "*The commencement of one action upon a contract is no bar to the commencement of another upon the same contract, but the two actions may be consolidated, or the second struck out as vexatious. However, when the former action has been pursued to judgment in a court of record the original cause of action is merged in the judgment so that a second action cannot be brought in respect of the same cause of action, because the inferior remedy is merged in the higher, the court of record. So long as the judgment remains unsatisfied, however, it does not extinguish any remedy except the particular cause of action in respect of which it was recovered, and the creditor is not precluded by it from enforcing any collateral security which he may have taken*."

73. Counsel submitted that in acquiring the loan facility, Promontoria obtained the panoply of rights that the original holder of the loan facility had, including, amongst others, the entitlement to enforce the Judgment. While it was accepted that Promontoria could not bring a further application for judgment, it was submitted that Promontoria is entitled both to rely upon and enforce the Judgment and to take any other steps available to it in its capacity as the owner of the loan facility. So, for example, it was submitted Promontoria was entitled to take steps to enforce its interest in the lien registered over Folio 21631F, Co. Limerick, as it has already done in the special summons proceedings referred to above.

74. In response to these arguments, the appellants submit that *McKeown* is an unreliable authority since the defendants in that case were personal litigants and no authorities were

opened by them to the court. In particular, it was submitted that no authorities were opened to the court in relation to the merger of a cause of action in a judgment. Moreover (it was submitted) the court was not asked to, and did not consider the terms of the deed of transfer between AIB and Everyday Finance DAC in that case, and specifically whether or not the deed was to be interpreted as encompassing judgment debts in addition to non-judgment debts.

75. As to *Everyday Finance DAC v. Beades*, the appellants submit that that case was concerned with the assignment of a court order for possession, and that Whelan J. expressly considered the terms of the mortgage sale agreement and construed those terms as capturing all the interest, rights, titles and benefits and claims enuring to Permanent TSB, including the benefit of an order for possession which had been obtained by Permanent TSB *qua* mortgagee. The appellants submit that Whelan J. held that having regard to the settled case law in relation to mortgages, an order for possession which is granted in favour of a mortgagee enures for the benefit of the assignee of the mortgagee, in the assignee's capacity as mortgagee. Accordingly, the appellants submit that that case is not authority for the proposition that there is no necessity for the express assignment of a money judgment or order sought to be executed and that it is sufficient if the underlying right is assigned.

76. The appellants submitted that the doctrine of merger, as summarised in the passage from Halsbury cited above, makes it clear that a creditor cannot have a contractual debt due to him at one and the same time as a judgment debt arising from the contractual debt, and accordingly a transfer confined to contractual debts does not transfer a judgment debt. The appellants submit that by reason of the doctrine of merger, the remedy consisting of the particular cause of action is extinguished on the granting of judgment based on that cause of action. That cause of action is the right to sue (being a chose in action in respect of the contractual promise to pay) but that ceases to exist on the granting of judgment, save for the

purpose of the creditor enforcing any collateral security which he may have. If, for example, a creditor has an equitable mortgage over a debtor's land for all sums due, he would be entitled to obtain out of his security payment of the judgment debt, judgment interest and the difference between judgment interest and the interest contracted to be paid.

77. I agree with the submissions of Promontoria on this issue, and I am of the view that the decision of O'Moore J. in *Allied Irish banks v McKeown* is correct. A loan, for as long as it remains unpaid, continues to exist, even though the cause of action is extinguished by the judgment . However, the loan and the judgment are now, in effect, one, and so the assignment of one is effective to assign the other, or as O'Moore J. put it : "*It is sufficient [to transfer the judgment]if the underlying entitlements are so transferred*." This view is supported also by the decision of Whelan J. in this Court in *Permanent TSB & Anor v Beades*, although I recognise that that case did have the added dimension of being concerned with a court order for possession granted pursuant to a deed of mortgage, the assignment of which confers on the assignee the benefit of any order for possession *qua mortgagee*.

78. As to the second part of the question posed, i.e. what is the difference between an assignment of a loan in respect of which judgment has been obtained (but in which there is no reference to the judgment) and an assignment of the judgment itself ? In my view there is no difference.

D. Is *Forster v Baker* good law in this jurisdiction? Does it remain the law in England and Wales? What is the position in other common law jurisdictions?

79. Before addressing this issue, it should be explained that this question arose out of the reliance by the appellants in their submissions to this Court on the decision of the Court of appeal of England and Wales (King's Bench Division) in *Forster v Baker*. While the issue decided by the case (that it is not possible to assign part of a judgment) had been the

subject of extensive submissions by both parties to the court below, this decision was not cited to the trial judge, and hence it is not referred to in her judgment. In saying this, I emphasise that I intend no criticism at all of the appellant's legal team. The case appeared to the Court to be of considerable potential significance in this Court's consideration of the issue it decided, but since it is of some antiquity the Court required further submissions specifically on the question as to whether it represents good law in this jurisdiction.

80. The background to *Forster v. Baker* was that a party by the name of Bowles had obtained a judgment against the defendant, Baker, in the sum of £675,15s.05d (six hundred and seventy five pounds, fifteen shillings and five pence). Subsequently, he purported to assign the benefit of £560 pounds of that sum to Forster, and notice of the assignment was given to Baker. The question arose as to whether or not Forster was entitled to issue execution part only of a judgment debt. In the High Court, Bray J., ruled that this was not permissible, holding that there could not be an absolute assignment, within the meaning of s. 26 (6) of the Judicature Act, 1873 of a definite part of an existing debt. On appeal, the Court of Appeal upheld that decision, although for a different reason to that articulated by Bray J. Vaughan Williams L.J. held:

> "*A judgment creditor could not before the coming into operation of the Judicature Act, 1873, have issued a series of small executions upon his judgment making in the whole the total amount of the judgment debt; he had only one judgment, and upon that judgment he could issue only one execution; he has only the same right now. And if a judgment creditor assigned part of his judgment debt, he could not then, and cannot now, give to his assignee any better right than he had himself. The result is, therefore, that the assignee of part of a judgment debt is not in a position to issue execution upon it, which is what the plaintiff in the issue wishes to do in the present case*."

81. The parties were agreed that *Forster v. Baker* is good law in this jurisdiction, although it appears to have been considered in just one Irish case, namely *Conlon v. Carlow County Council* [1912] 1 IR 535. It should be observed that in *Conlon* the court considered only the judgment of the Bray J. in the High Court in *Forster v Baker*, and not the decision of Vaughan Williams L.J. in the Court of Appeal. *Conlon* concerned the interpretation of s.28(6) of the Judicature (Ireland) Act, 1877 (being the Irish equivalent of the section of the judicature Act 1873, that fell for consideration in *Forster v Baker*) which provided that "*any absolute* [my emphasis] *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 have been 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 deem and be deemed to have been effectual in law…. to pass and to transfer the legal right to such debt or chose in action from the date of such notice*." The question that arose was whether or not subsection 28(6) applied to the assignment of part of a debt. In *Conlon*, Gibson J. held:

> "*The object of the section was to enable the legal assignee to sue and enforce legal and all other remedies without joining the assignor, subject to certain conditions: the assignment must be absolute, in writing, of a debt or legal chose in action, and written notice is required*".

82. Gibson J., in his judgment, then proceeds to ask the following questions, which illustrate the difficulties that may result from the assignment of part of a debt:

> "*Did the enactment authorise the splitting up of rights to enforce a debt or contract in a manner previously unknown? Take a case: A contracts with B to build a house for him for £1,000; he assigns absolutely £500 thereof to C, and gives D another assignment for £500. If B disputed due performance of the contract, is he to be sued twice over, with perhaps different results according to the view taken in each case by*

the jury? What is to happen if it is decided that only £500 is payable? Is D, by suing first, though his assignment is later, entitled to capture all? Is the assignor not to be a party to the action in which the debtor's liability is to be determined?..."

83. Gibson J. resolved the issue in the case before him on the basis that since all persons interested in the debt or in resisting it were parties to the proceedings, it was possible to finally decide all liabilities in one proceeding. He concluded: *"When the entire debt liability is represented in the action, as it is here, I am of the opinion that the assignee of part can compel payment though the proceeding is common law in form."* In effect, Gibson J. resolved the problem on the basis of equitable principles rather than on the basis of s.28(6) of the Judicature Act, which did not apply to the facts of the case (since it did not involve an absolute assignment of a debt or chose in action).

84. I should add that *Conlon* concerned the assignment of a debt, and not a judgment, a distinction relied upon by the appellants.

85. The parties were agreed in their submissions that *Forster v. Baker* remains the law in England and Wales, it being cited in the 2020 edition of the "White Book" (The Civil Procedure Rules and Practice Directions of England and Wales) wherein at para. 83.2.6 it is stated:

"*The assignment of part of a judgment does not effect such a change of parties to enable the assignee to issue execution. Execution can only be levied in respect of the whole judgment (Forster v. Baker [1910] 2 KB 636.)*"

86. In its submissions, Promontoria argues that the subsequent authorities in England and Wales treat *Forster v. Baker* as authority for a general proposition that the assignee of part of a debt has not taken an absolute assignment which is enforceable under statute, but they recognise that such an assignment is nevertheless enforceable as an equitable assignment. Promontoria argues that *Forster v. Baker* should not be considered as authority for the broad

proposition that the assignee of part of a judgment debt can never issue execution; but rather for the narrower proposition that the assignee of part of a judgment debt may be precluded from issuing execution if there is a risk that some other party (e.g. the assignor) might seek to issue execution for another portion of the judgment debt.

87. The appellants argue however that the English decisions referred to in the respondent's submissions relate only to the first instance decision of Bray J. in *Forster v. Baker,* and not to the decision of the Court of Appeal, and therefore those decisions are not relevant to the issue now arising. However, they did not develop this submission. They did, however, submit that the Court of Appeal decision in *Forster v Baker* remains clear authority for the proposition that the assignee of part of a judgment debt can never issue execution. They submitted that there is no basis for the submissions of Promontoria that it is authority for the entirely different proposition that the assignee of part of a judgment debt may be precluded from issuing execution if there is a risk that some other party, for example the assignor, might seek to issue execution for another portion of the judgment debt.

88. The parties were also in agreement that *Forster v Baker* is also good law in both Australia and Canada. Promontoria submits that the Canadian case of *Generous Electric Limited v. Three Point Equipment, John Clifford Julseth and Tyson Creek Hydro Corp* [2012] BCSC 1048 establishes that in that jurisdiction, an equitable assignment is enforceable where all relevant parties are before the court.

89. The facts in that case are somewhat complex, but putting it simply, the first named defendant (Three Point) was owed approximately $1.5m by the third named defendant (Tyson). Three Point owed the plaintiff approximately $0.5m. Three Point signed a direction to Tyson to pay to the Plaintiff the amount it (Three Point) owed the plaintiff , out of the monies owing by Tyson to Three Point. Tyson went into bankruptcy and in the proceedings issued by the plaintiff in reliance on the direction, the trustee in bankruptcy argued that the

direction given by Three Point to Tyson, if it was an assignment at all, is only an equitable assignment, because the amount owing by Tyson to the Three Point was greater than the amount owing by the Three Point to the plaintiff, and could not be enforced by the plaintiff against the Tyson. Having reviewed the authorities (in the course of which there was a passing reference to *Forster v Baker*) the Court (Bracken J.) concluded, at para.20: "*In this case, I conclude that the plaintiff does have the right to proceed against [Tyson] , given that Three Point is already before the court and presumably the pleadings alert both Tyson Creek and Three Point to the issue that Generous* Electric *has raised, and if this is not the case, then I grant liberty to the plaintiff to amend the pleadings if it considers necessary, so that the proper issues are raised, and I would allow 60 days from today's date to do so*."

90. The appellants submit that *Generous Electric* does not involve the assignment of part of a judgment debt. That is correct; *Generous Electric* involves the assignment of a debt and not a judgment debt. However, I do not think that there is any significant distinction, for present purposes, between the assignment of a debt, and the assignment of a debt in respect of which judgment has already been obtained. *Generous Electric* is clearly authority for the proposition that where part only of a debt has been assigned, and where all parties with any possible interest in the part of the debt assigned are before the Court, then the assignment may be enforceable.

91. The rule in *Forster v. Baker* that there cannot be assignment of part only of a debt (or, as in that case, a judgment debt) was grounded upon very practical concerns of the kind identified by Gibson J. in *Conlon* (see para.82 above). It is clear however that historically equity found a way around these difficulties and that the assignment was enforceable in equity if all of the parties concerned were before the court, as exemplified by *Conlon* itself.

92. The appellants argue for a rigorous and inflexible application of *Forster v Baker*, which appears to me to be out of step with the authorities to which the Court has been

referred, including *Conlon* and *Generous Electric.* Such an inflexible approach is very likely to work an injustice, in cases where there may be a ready solution to the problem. Concerns of the kind articulated by Gibson J. in *Conlon* may readily be addressed where all parties are before the Court, and might, in an appropriate case, also be addressed otherwise, such as where there is evidence, satisfactory to the Court, from any other parties with an interest in a judgment debt, that they are waiving their entitlements under the judgment debt

93. In conclusion on this question, I am of the view that *Forster v Baker* is good law in this jurisdiction, but subject to the important rider that if all parties with an interest in the judgment are before the Court, the assignee of part of the judgment debt may be given leave to execute.

General Principles arising out of the Court's questions.

94. Arising out of the questions the court asked the parties to address, the following principles may be identified:

1) In cases where an application is advanced under O.42, r.4 on notice (which will be the vast majority of cases) whatever order is made by the court is final and not interlocutory;
2) The test to be applied in the consideration of such applications is the balance of probabilities. This is the general rule; there may be exceptions, such as where the court hears and decides upon such an application *ex parte,* in which case the application is decided on the basis of a *prima facie* threshold;
3) A party moving an application pursuant to O.42, r.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 up to the date on which the

application is made. The explanation need not disclose exceptional circumstances, but some reasonable explanation is required.

4) A loan, for as long as it remains unpaid, continues to exist even though the cause of action in respect of the loan has become merged in a judgment, and the assignee of the loan receives the benefit of the judgment through the assignment of the loan.

5) Where judgment has already been obtained, there is no distinction to be drawn between the assignment of a loan, and the assignment of any judgment obtained in proceedings to recover the loan..

6) *Forster v. Baker* does represent the law in this jurisdiction. However, a judgment creditor may address the prohibition on assignment of part of a judgment debt by joining all parties to the judgment debt to the proceedings or by otherwise satisfying the court that any other party with an interest in the judgment has waived its entitlement to that interest.

Grounds of Appeal

95. While the notice of appeal set forth twenty seven grounds, at the hearing of this appeal, the appellant relied on the following grounds of appeal only:

1) That the conditions necessary for the joinder of Promontoria to the proceedings pursuant to O.17, r.4 are not satisfied in that there has been no transfer by Ulster Bank to Promontoria of either the Judgment or the underlying indebtedness. In other words, there was no change or transmission of interest for the purposes of O.17, r.4.

2) That the conditions necessary for leave to issue execution of the Judgment have not been satisfied because execution of part of a single unitary judgment debt is not permissible.

3) That no reason at all was provided for the failure by Ulster Bank to take any steps to enforce the Judgment in the first six years after judgment was granted, or in the period thereafter up to the date of execution of the global deed of transfer, 3 years and 9 months later. No evidence was provided by Promontoria as to the alleged engagement with the appellants which it relied upon in support of its claim that it refrained from execution on account of that alleged engagement.

96. I will now proceed to address these grounds of appeal, in light of the principles already identified above.

The conditions necessary for joinder of Promontoria to the proceedings pursuant to O.17, r.4 have not been satisfied.

97. This ground of appeal is premised on the description of the underlying loan agreement contained in the global deed of transfer, i.e. the appellants contend that the relevant underlying loan agreement, upon which the Judgment was grounded, has not been transferred to Promontoria, pursuant to the global deed of transfer. There is just one loan agreement referred to in that deed relating to the appellants, that being the "*facility letter dated 21st November 2003 between Timothy and Joan Quirke and Ulster Bank (Ireland) Limited*". It is the appellants' contention that since this is the only loan agreement transferred by Ulster Bank to Promontoria, it cannot place any reliance on the global deed of transfer for the purpose of this application, because the application for summary judgment

was grounded upon the facility letter of November 2004. That being the case, the argument goes, the summary judgment proceedings relate to the 2004 facility only, and that has not been transferred or assigned to Promontoria.

98. In response to this, Promontoria submits that the global deed of transfer was effective to transfer Ulster Bank's interest in the loan account to Promontoria, and this is clear from the schedule headed "Underlying Loan Facilities" which makes reference to a specific loan account in the name of the appellants, and it is not disputed that that is indeed the loan account of the appellants. Promontoria submits that, insofar as they have any relevance, the letters of 2003 and 2004 are concerned only with the terms and conditions of the loan facilities of the borrowers with Ulster Bank at the point in time when those letters were issued. While that might have a bearing on the quantum owed by the appellants to Ulster Bank, that issue was determined by the Judgment. For the purpose of this application, what Promontoria must establish is that the benefit of the loan account was transferred and assigned to it, and that, it is submitted, is demonstrably the case having regard to the reference to the account in the section headed "Underlying Loan Facilities" in the global deed of transfer.

99. Promontoria also relies upon the decision of Kelly J. (as he then was) in this Court in *Bank of Ireland v. Flanagan and Lillis* [2015] IECA 56. In that case, amongst other arguments advanced by the defendant was one that a facility letter relied on by the bank was an unenforceable contract because money had never been drawn down pursuant to that letter, and there was no consideration. At para. 17, Kelly J. said:

> "*In this ground of defence, the appellants are attempting to make something out of nothing. As already set forth, the facility dated 4th March 2009 is a loan for the purpose of restructuring all the previous borrowings. No new funds were being advanced. The appellants refer to the fact that, nonetheless, the facility letter more*

than once refers to a drawdown of funds, which it undoubtedly does. ..... For the appellants to try and argue that because the facility refers to drawdown and no actual drawdown in fact took place the Bank are in some way disentitled to the repayment of the monies the subject of this facility is a contrived and empty argument devoid of any merit whatsoever. It is quite obvious that being a loan in the nature of a restructuring of existing borrowings, no physical drawdown of any additional funds took place in the sense of funds being made available to the borrowers for use by them. The drawdown, quite obviously, was achieved by way of an internal accounting exercise whereby the previous borrowings were repaid by the restructuring loan."

100. Promontoria submits that in this case, the 2003 and 2004 facility letters relate to the continuation of the restructuring of an existing indebtedness, which was recorded in the loan account referred to in the global deed of transfer and that the appellants have admitted liability for that indebtedness. It is submitted that the loan account was transferred to Promontoria together with all related rights, title and interest, including the Judgment, and that the reference to different versions of the loan facility has no impact on the substance of the transaction to which the global deed of transfer gave effect.

101. Since this application is advanced post judgment, it is necessary to be satisfied, on the balance of probabilities, that the global deed of transfer has been effective to cause a change of interest in the proceedings such that an order under O.17, r 4 is necessary or desirable to reflect that change. I have no doubt whatsoever that the submissions of Promontoria as regards this issue must be correct. While I agree with submissions made on behalf of the appellants that a loan account does not exist in a vacuum, the terms and conditions attaching to the loan account cease to have any relevance once judgment has been obtained. Moreover, even if judgment had not been obtained at the time of the global deed of transfer, in my view

the deed would still have been effective to transfer the benefit of the loan account to Promontoria, subject to whatever terms and conditions applied to the account. The failure to identify those terms and conditions should not undermine the effectiveness of the transfer itself. I would therefore dismiss this ground of appeal, and affirm the order made by the trial judge pursuant to O.17, r.4.

(2) The conditions necessary for leave to issue execution of the Judgment had not been satisfied because execution of part of a single unitary judgment debt is not permissible.

102. This ground of appeal is addressed in the conclusions reached above at para.93 to the extent that I have held that a judgment creditor may be given leave to execute part of a judgment debt provided that all those with any interest in that judgment debt are before the court at the same time. The difficulty in this case is that while Ulster Bank remains a party to the proceedings, it is not a party to and has not had any involvement of any kind in this application, and while that might be normal practice in the vast majority of applications of this kind where the execution of part only of a judgment does not arise, in applications where that issue does arise it is necessary, for the reasons already discussed.

103. So therefore, as matters stand, it cannot be said with certainty that Ulster Bank would not attempt to pursue the appellants for the portion of the judgment debt that is related to the overdraft account, although in all of the circumstances that appears to be so unlikely a possibility as to be discounted. Nonetheless it is an issue that would have to be addressed appropriately if I were otherwise disposed to affirm the orders made by the High Court, but for the reasons that follow in the next paragraph, I am not so disposed. If I were so disposed, however, I believe that it would be possible to address this issue by making any order of the Court conditional upon the production of evidence, satisfactory to the Court, that Ulster

Bank waives any entitlement it has to pursue the appellants for that portion of the Judgment amount that relates to the overdraft. Since that portion is clearly identified in the Judgment, such an order would be workable. Another possible alternative is to refer the matter back to the High Court to determine the extent of the respective interests of Ulster Bank and Promontoria in the Judgment debt. In either case, it, it would be open to the Court to make such orders as to costs as are just to defray any extra expense incurred by the appellants by reason of actions of Ulster Bank and Promontoria.

No reason at all was provided for the failure by Ulster Bank to take any steps to enforce the Judgment in the first six years after judgment was granted, and in the period thereafter up to the date of execution of the global deed of transfer, such as to satisfy the test in *Smyth v Tunney*.

104. As already discussed above, it is settled since *Smyth v. Tunney* that reasons must be given to the court, on an application under O.42, r.24 as to why judgment was not executed. The reason or reasons do not have to be especially strong, but some reason is required. While *Smyth v Tunney* may not have made it absolutely clear, the reasons must, at least in a general way, explain the lapse in time in taking steps to execute judgment, commencing from the date of the judgment.

105. In this case no reasons at all were offered by Promontoria for the period prior to execution of the global deed of transfer, some seven years and nine months after the Judgment was obtained. While Promontoria had no interest in the Judgment during that period, this does not exonerate it from the requirement to explain the non execution of the Judgment during in those years. More than that, it is unclear from when exactly Promontoria claims that it decided to withhold execution because of negotiations with the appellants, but

it could not have been any time before October 2018, when it issued a special summons to enforce its lien over folio 21631F, Co. Limerick.

106. It follows from the above that in accepting an explanation for non-execution of the Judgment that at most explained a very short period at the end of a period of inactivity of between ten and eleven years, the trial judge fell into error, and the appeal against the order made under O.42, r.24 must be allowed.

Costs.

In the circumstances, it is appropriate that Court should be provided with submissions on the issue of costs, both in this Court and in the Court below. Submissions should not exceed 1500 words. Promontoria should deliver its submissions within two weeks from delivery of this judgment, and the appellants should deliver their replying submissions within two weeks thereafter, but excluding any period of vacation.