

APPROVED

[2022] IEHC 375



THE HIGH COURT

2009 No. 850 SP

BETWEEN

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

PLAINTIFF

AND

BRENDAN HICKEY
ANN HICKEY

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 June 2022

INTRODUCTION

1. This matter comes before the High Court by way of an application for an extension of time within which to issue execution of an order for possession. The application is made pursuant to Order 42, rule 24 of the Rules of the Superior Courts.

PRINCIPLES GOVERNING APPLICATION FOR LEAVE TO EXECUTE

2. 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.

3. That rule provides as follows:

“24. In the following cases, viz.:

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

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

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

4. The grant of leave to issue execution under Order 42, rule 24 is discretionary.

The criteria governing the exercise of this discretion have been set out in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512. There, the Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute following the lapse of six years from the date of the judgment or order, provided that there is some explanation at least for the lapse of time. Even if a good reason is given, the court must consider counterbalancing allegations of prejudice.

5. The discretionary nature of the relief has recently been reaffirmed by the Court of Appeal in *KBC Bank plc v. Beades* [2021] IECA 41 (at paragraph 67):

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

6. The concept of delay in the context of an application for leave to issue execution is very different from that of inordinate and inexcusable delay in the context of an application to dismiss proceedings by reference to the principles in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The position has been put as follows by the High Court (Allen J.) in *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 (at paragraph 36):

“It seems to me that even on first glance it is obvious that the rules governing the execution of a judgment or order are quite different to those which govern the prosecution of litigation. The holder of a judgment is free to issue execution at any time within six years of the judgment or order. By contrast, the times prescribed by the rules for the exchange of pleadings are measured in weeks. A delay of years in the prosecution of an action will always call for explanation but a judgment creditor need not explain or excuse any delay in the execution of a judgment or order within the first six years from the date of the judgment or order.”

7. The rationale underlying this approach has been explained as follows by Butler J. in *Ulster Bank Ltd v. Quirke* [2021] IEHC 199 (at paragraph 34):

“[...] In my view, an applicant under O. 42, r. 24 is not to be treated as being in an equivalent position to a party facing an allegation of inordinate and inexcusable delay in the

prosecution of proceedings. Delay in the prosecution of proceedings impacts on the ability of the court to conduct a fair trial. Evidence and witnesses may become unavailable and the recollection of those witnesses who remain available will doubtless be impacted by the lapse of time. Where judgment has been granted, a court has already adjudicated upon any disputed issues between the parties or, as here, a party has admitted liability for the claim made by the other. Absent an appeal, or at the conclusion of the appeals process, the rights and obligations of the parties inter se will have been finally determined. Because of the fundamental difference between a judgment and an unadjudicated dispute, there is no obligation on a judgment creditor to execute a judgment promptly equivalent to that on a litigant to prosecute proceedings promptly. Indeed, as noted by Gearty J in *Start Mortgages DAC v Piggott* (above), public policy would likely run counter to imposing such an obligation. After judgment has been obtained, the parties to litigation frequently resolve matters between themselves on a more satisfactory basis than mere execution of the judgment might permit. Requiring a judgment creditor to execute promptly could be counterproductive 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. Thus, while there must be a reason explaining the delay, that reasoning requirement is not predicated on the assumption that lengthy delay in execution is in itself inimical to the interests of justice.”

8. There is now an extensive body of case law which identifies the types of consideration which are relevant to an application for leave to issue execution. A summary of this case law has been set out in my recent judgment in *Mars Capital Ireland DAC v. Hunter* [2022] IEHC 353. It is not necessary to repeat that summary here. Having regard to the arguments advanced on behalf of the defendants in the present proceedings, it is sufficient to note that the case law recognises that there is a public interest in ensuring that judgment creditors are not deterred from engaging positively with debtors for fear that they may be precluded thereafter from enforcing their judgment in the event that the engagement does not bear fruit. In a number of decisions, leave to issue

execution, in the form of orders of possession, has been granted in mortgage proceedings where the explanation for the delay is that the judgment creditor had sought to negotiate a resolution with the debtor. See, for example, *Start Mortgages DAC v. Gawley* [2020] IECA 335; *Start Mortgages DAC v. Piggott* [2020] IEHC 293; and *Ulster Bank Ltd v. Quirke* [2021] IEHC 199.

PROCEDURAL HISTORY

9. An order for possession had been granted by the High Court (Dunne J.) on 19 December 2011, subject to a stay on execution for a period of six months. The order was perfected on 9 January 2012.
10. The order for possession is in respect of two properties: first, the defendants' family home, and secondly, a public house called "*The Cush*". As explained presently, the public house has since been sold and the proceeds of sale applied towards the first defendant's indebtedness to the plaintiff bank. The application for leave to issue execution is in respect of the family home only.
11. At the time of the application for the order for possession in 2011, the first defendant had been represented by Messrs. H. G. Donnelly & Son Solicitors. When the proceedings were re-agitated some ten years later, that firm of solicitors applied to come off record and an order to that effect was made on 28 February 2022. The first and second defendant are now represented by a new firm of solicitors, Gibson & Associates, which firm came on record on 17 June 2022.
12. The plaintiff bank secured an order for substituted service of certain pleadings on the second defendant on 16 December 2019.

13. The application for leave to issue execution was brought by way of notice of motion dated 2 March 2020. The hearing of the motion was delayed as a result of the public health measures introduced in response to the coronavirus pandemic. Whereas the business of the High Court continued in other lists, there was, in effect, a form of moratorium in place in respect of mortgage suits. It was not until October 2021 that the Chancery Special Summons List resumed at its normal level of activity.
14. The plaintiff bank filed a notice of re-entry on 25 January 2022. The motion for leave to issue execution ultimately came on for hearing before me on 20 June 2022. Judgment was reserved to today's date.

EVENTS SINCE THE MAKING OF ORDER FOR POSSESSION

15. There is some slight difference in emphasis in the case law as to whether a judgment creditor is under any obligation to explain delay in the execution of a judgment or order within the first six years. On one view, a judgment creditor is entitled to the full reach of the initial six years and need not explain any inactivity during this period. In practice, however, it may very well be the case that what did or did not happen within the first six years goes to why execution was not issued thereafter (*Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 at paragraph 51). The thrust of Order 42, rule 24 is that a judgment creditor is normally expected to execute within six years. Whereas the absence of any activity during this initial period will not necessarily be fatal, it may colour the court's view of the delay in the second six-year period.

16. I propose to analyse the delay in the present case by reference both to events which occurred during the initial six-year period from the date of the order for possession and to events thereafter.
17. The chronology of events is set out in a number of affidavits. It should be explained that some of these affidavits were filed in connection with an earlier application, namely an application for substituted service of certain pleadings on the second defendant. No objection has been taken by the defendants to the plaintiff bank placing reliance upon these affidavits in the present application. This seems very sensible.
18. In the present case, part of the rationale offered for not executing within the initial six-year period is that the plaintiff bank considered that taking possession of and selling a family home was the option of last resort, and that if there was other security held for a debt, it should be realised first. Here, there was a second security, namely the public house.
19. It seems that a receiver was appointed over the public house in January 2013. However, soon after the appointment of the receiver, the public house was damaged by fire. The bank ultimately recovered a total sum of €107,321.92 in respect of the public house. This represents the net balance remaining once the costs of the receivership had been deducted from the monies received pursuant to a policy of insurance and the sale of the property. Obviously, the fact that the public house has now been sold means that the plaintiff bank is not seeking leave to execute in respect of that part of the order for possession which related to the public house.
20. The plaintiff bank also sought to recover against a third property, namely an investment property owned by the defendants in Portugal. To this end, the

plaintiff bank pursued summary summons proceedings against the defendants and obtained judgment against both defendants in the sum of €2,164,285.89 on 12 June 2013. The first defendant has averred that this foreign property is valued at circa €150,000.

21. The plaintiff bank had invited proposals from the defendants in 2013 and 2014. The deponent on behalf of the plaintiff bank has averred that “*no meaningful proposals*” were forthcoming from the defendants. The plaintiff bank had written to the defendants on various dates in 2017 and indicated an intention to pursue the order for possession.
22. Thus, the position as of the expiration of the initial six-year period in December 2017 had been that the plaintiff bank had been corresponding with the defendants on a semi-regular basis, but no actual proposals for the resolution of the debt had been put forward by either side. The plaintiff bank had also arranged for the sale of the public house and had taken some preliminary steps towards enforcing against the property held in Portugal.
23. The first significant step taken in the second six-year period had been the filing of a notice of intention to proceed in the Central Office of the High Court in July 2018. There was further correspondence between the parties in 2018 and 2019. Some but not all of this correspondence has been exhibited. In contrast to the earlier correspondence, at this stage proposals were actually being put forward. The key letters in the exchange of correspondence are summarised below.
24. The first defendant had written to the plaintiff bank’s solicitors on 9 September 2018. This letter refers to an earlier offer of settlement in the sum of €100,000. It is not clear when this offer was made. At all events, in his letter of 9 September 2018, the first defendant indicates that he intends to make a “*new offer*” to the

plaintiff bank and asks the bank not to proceed with any order against him until he had put the new offer to it. This would appear to contradict the suggestion in the first defendant's affidavit of 16 June 2022 to the effect that he did not seek that enforcement be deferred.

25. By letter dated 23 September 2018, the first defendant made an offer to pay €100,000. The letter of offer explained that this money was to come from family help and from the sale of any possessions or assets that he had left. The proposal was that the payments would be made on a staggered basis, over a period of one year approximately. The plaintiff bank's solicitors replied by letter dated 5 October 2018 indicating that the proposed offer was rejected as it was not acceptable to the bank. It was further indicated that any proposed resolution of the outstanding debt would have to involve the sale of the family home.
26. There is a further, seemingly undated, letter from the first defendant. Relevantly, this letter refers to a health condition which the second defendant was suffering from. The letter states that there is no need to go back to court because as soon as the second defendant was well, the first defendant would go with her and collect some other unidentified letter. There is a reference to an offer of €220,000 having been made to the plaintiff bank.
27. On 13 September 2019, the plaintiff bank, seemingly for the first time, put forward a specific proposal to the defendants. The proposal was to the effect that the bank would accept either (i) a sum of €400,000, if paid within 60 days, in full or as final settlement of the debts, or alternatively (ii) a sum of €450,000 if paid within the next two years.
28. By letter dated 26 November 2019, the first defendant indicated that he had been attempting to get his wife to agree to the proposed settlement but that she would

not agree to do so. The second defendant is reported as having said that the bank's proposal was unreasonable and that it would not be possible for the defendants to get €450,000 in three years. The letter further indicated that the first defendant was going to see his solicitors for advice.

29. It is apparent from the foregoing correspondence that the delay in enforcing the order for possession in the second six years had been caused by ongoing discussions between the plaintiff and the first defendant. It is correct to say, as counsel for the defendants does, that no formal resolution was ever reached between the parties. This is not a case, for example, where a judgment debtor had been making some form of payments and it was only when such payment ceased that the creditor sought to enforce an order for possession. It is also correct to say that the bank had been inviting proposals from the defendants, and it appears that it was only on 13 September 2019 that the bank itself, for the first time, put forward its own proposal.
30. The first defendant, in his affidavit of 16 June 2022, has provided details of the health difficulties which he and his wife are suffering. The first defendant had been seriously injured in a road traffic accident, and his wife has had two full knee-replacements, is long term disabled with rheumatoid arthritis, and also has very poor eyesight due to degeneration in her eyes.
31. The first defendant avers that they would be left homeless if the order for possession is enforced and that there is currently a housing and social housing crisis. The first defendant describes the prospect of homelessness as terrifying.
32. The first defendant also refers to the profits which he alleges the plaintiff bank is making and submits that recovery and sale of the family home would only be a "*drop in the ocean*" in comparison.

DISCUSSION AND DECISION

33. In summary, the evidence establishes that during the period between December 2017 and December 2019, i.e. the first two years in the second six-year period, the plaintiff bank had been engaging with the first defendant and thereafter had taken steps towards execution by arranging to obtain an order for substituted service on 16 December 2019. The motion seeking leave to issue execution was issued on 2 March 2020. The lapse of time thereafter had been outside the control of the plaintiff bank, and is referable to the public health restrictions and the moratorium on eviction orders introduced in response to the coronavirus pandemic.
34. Counsel on behalf of the defendants has drawn attention to the fact that in certain correspondence in 2013 it is expressly stated that the bank intended to enforce against the family home. It is submitted that having formed that intention, there is no adequate explanation of the delay thereafter. Counsel has also emphasised the fact that no formal structure was ever put in place for resolving the debt. It is further submitted that although the bank refers consistently to “*forbearance*” on its part, in truth no such measures in the technical meaning of that term were put in place. There was no actual agreement between the parties, still less a formal arrangement such as, for example, a split mortgage or some other mechanism envisaged by the code of conduct on mortgage arrears.
35. The threshold to be met for leave to issue execution is a relatively low one. The judgment creditor is only required to provide a good reason for the delay in execution to the date of the issuing of the motion. In the exercise of their discretion under Order 42, rule 24, the courts have had regard to the public

interest in ensuring that judgment creditors are not discouraged from attempting to reach an amicable resolution with a debtor, short of enforcement of a court order, for fear that if discussions between the parties do not ultimately bear fruit, the judgment creditor may be prejudiced in that the time lost will be relied upon to resist an application for leave to issue execution.

36. Having regard to this public policy, it puts the matter too high to say that leave to execute will only be granted where discussions have resulted in a formal agreement. The true significance of the correspondence between the parties in the present case is that (i) the plaintiff bank was open to receive proposals from the defendants as to how the debt might be resolved; (ii) the bank had made a specific proposal in November 2019; and (iii) the first defendant had, at relevant points, asked the bank not to pursue matters before the court. Were leave to issue execution to be refused in such circumstances, it would be contrary to the public interest identified above. To refuse leave would create a chilling effect and would discourage other judgment creditors from engaging in discussions.
37. The next matter to be considered is whether the defendants have been caused any prejudice by the delay. Counsel on behalf of the defendants made a careful submission as to how, as a result of their advanced years and failing health, the defendants are now in a worse-off position than they would have been had they lost their home a number of years earlier. In particular, it is said that it would be more difficult, for financial and social reasons, for persons in their mid-sixties to secure alternative accommodation.
38. Whereas the court does, of course, have sympathy for anyone who is at risk of losing their home, the relevant question for the purpose of the test in *Smyth v. Tunney* is whether there has been prejudice caused by the delay on the part of a

judgment creditor. From a legal perspective, the prejudice asserted in the present case is not one which can be said to have been caused by the delay in executing the order for possession. Rather, it is the defendants' own decision not to comply with the court order from December 2011 that has resulted in ongoing litigation between the parties. On the facts of the present case, the plaintiff bank was clear at all times that it required some resolution of the debt and that it intended—certainly from the time that the public house had been sold and the proceeds failed to clear the outstanding debt—to pursue the order for possession in respect of the family home. This is not a case, therefore, where a judgment debtor had been lulled into thinking that a judgment had been abandoned and was not going to be enforced. The type of prejudice which might, in principle, militate against the grant of leave to issue execution would include cases where the debtor has, for example, expended monies on a property in the reasonable belief that an order for possession had been abandoned and would never be enforced. No such considerations arise on the facts of the present case.

39. It was always open to the defendants to comply with the court order by voluntarily surrendering possession. In the event, the defendants have chosen instead to hold out, and as a result, it is necessary that an application for leave to issue execution now be made. In truth, the delay has resulted in a benefit to the defendants in that they have been able to remain in the family home for an additional period of time without making any repayments since 2013.

CONCLUSION AND FORM OF ORDER

40. For the reasons explained herein, I am satisfied that the plaintiff bank has met the threshold of establishing a good reason which explains the failure to execute

the order for possession up to the date the motion was issued in March 2020. I am also satisfied that the delay in executing the order for possession has not caused any prejudice to the defendants. 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.

41. Accordingly, I propose to grant the plaintiff bank 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 19 December 2011.
42. As to costs, the default position under section 169 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings is entitled to recover its costs as against the losing party. Were the default position to apply, then the plaintiff bank would be entitled to its costs of the motion as against the defendants. If any party wishes to contend for a different costs order, then they will have an opportunity to address the court on 18 July 2022 at 10.45 am.

Appearances

Pauline McRandal for the plaintiff instructed by Mason Hayes & Curran
Keith Farry for the defendants instructed by Gibson & Associates

Approved
S. M. S. M. S.