

May 2022

A Review of Applications under Order 42 rule 24 of the Rules of the Superior Courts

This is a common application for loan sale purchasers and banks, as a means of enforcing or “executing” court orders/judgments, or recently purchased court orders for possession, well charging and summary judgment.

There is a recent trend in the courts which may make it more difficult for loan sale purchasers and banks to execute orders and judgments older than six years.

Order 42 r.24 RSC states *inter alia* that:

“... 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.”;

Practice Focus

- Applications for execution of court orders under Order 42 r24 RSC.

Background:

Where a judgment or order is granted by the courts, but

- (i) not executed by the party entitled to the benefit of the judgment or order within six years of the date of perfection of the order, or
- (ii) where change has taken place by death or otherwise in the parties entitled or liable to execution, under Ord.42 r.24 of the Rules of the Superior Courts (the “RSC”),

a plaintiff must bring an application in the High Court seeking leave to execute the judgment or order.

Historically, the courts granted Ord.42 r.24 RSC applications based on:-

- (i) the courts’ discretion,
- (ii) in the interest of public policy, and
- (iii) where there was no prejudice to the defendant.

Recently, where judgments or orders are sought to be executed where six years or more have lapsed, two notable trends have emerged:-

1. The applicant friendly scenario, where the courts focus on the execution of an order in the interests of public policy, in an effort to facilitate engagement between parties post-judgment;
2. The borrower friendly scenario, where the courts focus on the reason(s) for the lapse of time in a party seeking to execute an order outside the six-year period.

The Test

The seminal case on Ord.42 r.24 RSC applications is *Smyth v Tunney*. In that case, Geoghegan J. considered an application for the execution of two judgments of more than six years old. In confirming that Ord.42 r.24 RSC applications are discretionary, the Supreme Court established three broad principles:

1. Ord.42 r.24 RSC is a discretionary order;
2. plaintiffs must have sufficient reasons as to why they allowed a lapse of time; and
3. even if there are good reasons, the court must consider counterbalancing allegations of prejudice.

Per the Supreme Court, there *“must be some explanation or grounds for an application for leave to issue execution of an order or judgment more than six years after ... [and] the court must consider any allegations of prejudice made against such application.”*

The Case Law

In 2019, in *Start Mortgages DAC v Gawley*, Simons J. in the High Court considered an application by the plaintiff for leave of execution in respect of an order for possession dated 7 March 2011. The court examined the plaintiff’s reasons for delay which included bringing applications to amend the title of the subject property, engagement between the mortgagee and the mortgagor, and the previous steps taken to execute the possession order within six years.

The court also considered the potential result of rejecting the plaintiff’s application and thereby creating a *“disincentive for mortgagees to engage with mortgagors”* which *“would not be in the public interest and would ultimately be to the detriment of mortgagors”*, and granted the application.

In 2021, Butler J. in the High Court in *Ulster Bank Ltd v Quirke* considered an application for, inter alia, leave to execute a summary judgment order under Ord.42 r.24 RSC and an application to substitute Promontoria (Oyster) DAC as plaintiff for Ulster Bank Ltd under Ord.17 r.4. RSC.

The court noted that the granting of an order is discretionary, and in circumstances where *“the defendants borrowed a significant amount of money which they have not repaid and which they acknowledged in the summary proceedings were due and owing by them”*, Butler J. granted the application under Ord.42 r.24 RSC, also adding Promontoria (Oyster) DAC as co-plaintiff to the proceedings. This decision is under appeal at the time of writing.

Also in 2021, in *KBC v Beades*, Whelan J. in the Court of Appeal considered, *inter alia*, an Ord.42 r.24 RSC application by Pepper Finance Corporation Ireland DAC (“Pepper”) in respect of an order for possession dated 23 June 2008.

The defendant appealed the Ord.42 r.24 RSC order from the High Court on grounds, *inter alia*, that Pepper had failed to bring itself within the scope of the rule in failing to demonstrate that it came within the provision of Ord.42 r.24(c) RSC, and by

reason of Pepper's unreasonable and unexplained delay in bringing the application. Prior to the appeal, leave to issue execution was granted by the High Court on 18 May 2015.

However, recovery of the subject properties became impossible where they were occupied by third parties. Evidence was put before the High Court that the third parties were paying rent to the defendant which was not being remitted to the mortgagee. In circumstances where a good explanation for the delay was provided by Pepper, Whelan J. rejected the defendant's appeal.

In May 2021, in *Carlisle Mortgages v Sinnott*, Simons J. considered an application for extension of time to issue execution pursuant to Ord.42 r.24 RSC. Simons J. categorised Ord.42 r.24 RSC applications into four categories:-

1. where the delay has been caused by the conduct of the indebted party;
2. where there has been a change in the financial circumstances of the indebted party;
3. where execution has been deferred pending an attempt by the parties to reach an accommodation, namely in the public interest; and/or
4. where the delay is attributable to matters outside the control of the plaintiff.

An order for possession had been granted on 27 July 2009. The plaintiff made two previous successful applications for leave to execute on 21 March 2017 and 8 July 2019.

In circumstances where the delay was attributable to logistical difficulties caused by public health measures and where the lapse of time caused no prejudice to the defendant, Simons J. granted the application.

In *Start Mortgages DAC v Piggott*, Gearty J. in the High Court considered a second application for leave to issue execution of an order for possession from 2008. The defendant consented to the plaintiff's application.

The crux of the application centred on whether s.11(6)(a) of the Statute of Limitations applies to the renewal of an order for leave to execute. The said section provides that "*[a]n action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.*"

In considering the typical length of mortgages of 25 years and given the potential for delay of possession actions, the court stated: "*it seems absurd to suggest that the limitation period must apply not only to the first steps in the execution of a judgment but that the whole process of execution must be complete within 12 years.*"

The court held that s.11(6)(a) of the Statute of Limitations does not apply to Ord.42 r.24 RSC applications on orders of possession. The court granted the application where both parties were consenting to same.

The recent position

Two recent useful judgments have provided further guidance as to the courts' attitude to lapses of time and their interpretation of the reference to six years in Ord.42 r.24 RSC.

In *Irish Nationwide Building Society v Heagney*, Allen J. in the High Court considered an application by Mars Capital Ireland DAC ("Mars") under Ord.42 r.24 RSC.

Mars argued that *"the lapse of time since the making of the order for possession is irrelevant in circumstances in which there has been a change in the party entitled to execution."*

The order for possession was obtained on 23 November 2009 and sent for execution by the Galway County Registrar on 19 July 2011. Execution of the order for possession was postponed and there was no further evidence put before the court of further applications for execution after 2009. The subject mortgage and order for possession were transferred a number of times to Anglo Irish Bank plc, the Irish Bank Resolution Corporation Ltd and finally to Mars on 6 June 2014. Mars transferred to a designated activity company ("DAC") in September 2016.

The court differentiated the legal principles of plaintiff delay in prosecuting a claim and the associated test in *Primor v Stokes Kennedy Crowley* and delay in seeking leave to execute a court order under Ord.42 r.24 RSC, stating that plaintiff delay is *"quite different to the principles to be applied in the exercise of the jurisdiction conferred by the Rules of the Superior Courts in deciding an application for leave to issue execution."*

In examining the applicant's argument, Allen J. held that: *"all of the changes of name and transfers were made by 6th June 2014 which was within six years of the date of the order for possession and cannot go to explain why there was no application for leave to issue between then and 22 November 2015 or thereafter until 29th January 2020"* and rejected the application.

Significantly, Allen J. stated *"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 judgments or orders after six years unless the party entitled to execution (or an assignee) can offer some explanation why execution was not issued within six years."*

In *ACC Bank plc v Joyce*, McDonald J. in the Commercial Court considered an application under Ord.42 r.24 RSC from Cabot Finance Ireland Ltd ("Cabot") for leave to execute a summary judgment order dated 15 November 2010 for €271,637.31. Cabot had previously been substituted as plaintiff into the summary judgment order under Ord.17 r.4 RSC. McDonald J. examined the decision in *Smyth v Tunney* and noted the court's discretion to grant applications and the obligation of an applicant to provide some explanation for the lapse of time.

McDonald J. also examined the Court of Appeal's decision in *KBC Bank plc v Beades* and cited Whelan J.'s summary of the law in the area: *"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 courts can take into account counterbalancing arguments of prejudice”

Finally, McDonald J. examined the recent decision of *Irish Nationwide Building Society v Heagney*. The court noted that *“the onus is on the applicant ... to put forward a reason or explanation for the lapse of time”* and it rejected the application in circumstances where Cabot had *“failed to provide any reason to explain the lapse of time in this case.*

Arguably, the two judgments highlight the formation of a second trend within the judiciary concerning Ord.42 r.24 RSC applications.

Conclusion

The first trend focuses on the justification for relief based on the interests of public policy (*Start Mortgages DAC v Gawley* and *Start Mortgages DAC v Piggott*). However, the second trend focuses on a standard of acceptable plaintiff justification for a lapse of time in seeking to execute an order outside of six years.

Whilst the first approach is more facilitatory in terms of providing time for parties to discuss and potentially settle a dispute or debt, an order that is not subject to the Statute of Limitations hangs over a defendant’s head like Damocles’ sword. Conversely, the second approach may motivate plaintiffs to be less amenable to entering settlements/settlement discussions, and may motivate them to execute orders more promptly

Key takeaways

Ord.42 r.24 RSC applications are at the discretion of the courts.

1. The defences of the Statute of Limitations and/or plaintiff delay under Ord.36 r.12 RSC are arguably, not directly applicable to Ord.42 r.24 RSC applications, although such issues may have a bearing on the discretion exercised by the court.
2. In the case of a change of entitlement or liability within six years of the judgment or order, *“the applicant need prove no more than that there has been such a change”*. An applicant’s proofs should be in order to evidence the transmission of interest/assignment.
3. 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”*.

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