THE COURT OF APPEAL

Record No.: 2022 97

Donnelly J. **Neutral Citation Number [2023] IECA 281**

Faherty J.

Butler J.

CABOT FINANCIAL (IRELAND) LIMITED

(substituted for ACC Bank plc by Order dated 20/10/2021)

Appellant

-AND-

THOMAS JOYCE, PATRICIA JOYCE, NIALL O'MEACHAIR and VALWICH PROPERTIES LIMITED

Respondent

Judgment of Donnelly J delivered on the 15th day of November, 2023

Introduction

1. This appeal arises from a judgment of the High Court (McDonald J.) (reported under the name of the original plaintiff as *ACC Bank PLC v Joyce & Others* [2022] IEHC 92). Having already made an order substituting Cabot Financial (Ireland) Limited ("the appellant") as the plaintiff, McDonald J. refused leave to issue execution of the judgment against the third defendant, Mr. O'Meachair ("the respondent"). That application was made ten and a half years after judgment had been obtained.

2. Of crucial importance to this appeal, McDonald J. held that the reason given by the appellant for not executing the judgment – that the bankruptcy of the respondent impeded execution – manifestly did not explain the lapse of time in enforcing the judgment. Rejecting what was suggested on affidavit on behalf of the appellant, McDonald J. held that bankruptcy did not provide an impediment to enforcing the judgment mortgage against the properties owned by the respondent. The trial judge's interpretation of the legal position regarding the ability of a judgment mortgagee to proceed against a person who has been adjudicated bankrupt, was not challenged in any way by the appellant in this appeal.

3. According to the appellant, the fundamental issue in this appeal is whether it is necessary for the purpose of engaging a court's discretion under O.42, r.24 RSC to grant leave to issue execution, that any explanation offered to explain the lapse of time must be correct as a matter of law. As this judgment will reveal, this characterisation by the appellant of the issue arising in the appeal is not entirely accurate given the reasoning and findings of the High Court.

4. Arising from the appellant's submissions, this judgment will analyse the primary authority of *Smyth v Tunney* [2004] 1 I.R. 512 in order to understand the rationale behind the requirement that "some reason must be given" for the lapse of time in executing the judgment and therefore to understand what is meant by "some reason". It is undoubtedly the law that "it is not necessary to give some unusual, exceptional or very special reasons" to obtain leave to execute. As will become apparent in this judgment, the real issue in the case is whether an applicant for leave is required to meet a threshold of providing a "reasonable explanation" for the lapse of time and if so, what is meant by a "reasonable explanation".

5. The respondent, who represented himself, submitted at a general level that the Court should apply the law and dismiss the appeal. On the specific legal issues which the appellant's analysis of *Smyth v Tunney* suggested, the respondent's input was understandably limited. His main focus was his claim to have suffered prejudice especially by reason of the appellant's delay in making the application after the respondent had exited bankruptcy and the minimal proceeds realised by the earlier sale of one of his properties in reduction of the judgment debt.

Relevant Facts

6. On 15 November 2010, the High Court granted judgment in the sum of €271,637.31 for the original plaintiff as against the respondent. On 2 March 2012 and on 9 January 2013, that judgment was registered as a judgment mortgage against the respondent's interest in three properties. The third of those properties was sold on 3 March 2015 by the receiver appointed by the original plaintiff. After the expenses were deducted, the remaining (small) proceeds of sale were applied in reduction of the debt. The receivership ended on 5 June 2015. The other two folios together appear to comprise the respondent's principal private residence.

7. A six-year period under O.42, r. 23 RSC is permitted for execution of a judgment without the necessity to apply for leave of the court. On the 14 November 2016, the period of six years expired from the date of judgment.

8. On 9 October 2017, the respondent was adjudicated bankrupt on his own application. On the 1 October 2018, the Official Assignee was registered as full owner on the two remaining folios.

9. On 17 December 2018, the rights in the judgment against the respondent were transferred by the original plaintiff to another financial institution (not the appellant).

10. Before this Court, the appellant emphasised the dealings between the respondent and the transferee of the benefit of the judgment debt. On 26 March 2019, the respondent's then solicitors communicated with the original plaintiff over the sale of the third property referencing the judgment mortgages on the other properties. This correspondence asked for full accounting of monies received for the sale and questioned what residual debt, if any, was due in regard to this matter. A subsequent letter of 2 May 2019, from Link Asset Services to the respondent's then solicitors, advised the solicitors in relation to the proceeds of the sale and the realisation of the small amount set against the debt. Link Asset Services also inquired as to what had occurred as regards an application the respondent made in 2017 for an insolvency arrangement. Link Asset Services said that they had submitted a proof of debt to the insolvency service but had not received any further correspondence in relation to the respondent's application.

11. On 5 July 2019, the rights in the judgment against the respondent were transferred to the appellant. On 12 July 2019, a "hello" letter was sent by the appellant to the respondent.

12. In October 2020, following the respondent's discharge from bankruptcy, the properties in the two folios at issue were re-vested in the respondent.

13. On 12 May 2021, the appellant issued a motion seeking substitution as plaintiff (a matter not under appeal) and for leave to issue execution against the respondent on foot of the 2010 judgment.

The High Court Judgment

14. The High Court judge outlined the nature of the application and set out concisely the main evidence of the appellant and the respondent. Referring to the provisions of O.42, r.23 and r.24, he said that the principles to be applied on an application of

this kind were considered by the Supreme Court in *Smyth v Tunney*. He referred to the observation of Geoghegan J. that "…it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation at least for the lapse of time."

15. McDonald J. also referred to the confirmation of the discretionary nature of the power conferred by the rule as stated by the Court of Appeal in *Pepper Finance Corporation (Ireland) DAC v Beades* [2021] IECA 41. He cited with approval the following dicta of Whelan J. (Noonan & Haughton JJ. Conc.) at para 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 5 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."

16. The trial judge also noted (as had Whelan J., in para 68 of her judgment) that Dunne J. in *Bula Ltd. & Ors v Tara Mines Ltd*. & Ors [2008] IEHC 437, had extrapolated three principles from *Smyth v Tunney* as follows: -

> "(a) Order 42, r. 24 is a discretionary order.
>
> (b) Reasons must be given for the lapse of time since the judgment or order during which execution has not taken place.

(c) If there is good reason for the delay, the court must consider counterbalancing allegations of prejudice." (para 18)

17. McDonald J. then stated:

"It is clear from these authorities that, as Allen J. recently observed in *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12, at para 41, the onus is on the applicant for relief under O. 42, r. 24 to put forward a reason or explanation for the lapse of time. As Allen J. said in the same paragraph "Unless and until that is done, the jurisdiction is not engaged". In the same judgment, Allen J. referred to *Hayde v H. & T. Contractors Ltd* [2021] IEHC 103 where, at para. 21, Simons J. said:-

"21. The objective of… [the rule] … 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 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. 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. The threshold has not been met in the present case where the delay is attributable solely to inaction by the party seeking to execute.""

18. McDonald J. then set out the facts and history of the case. Thereafter he considered the reasons given by the appellant to explain the lapse of time (having earlier observed that the hearing was adjourned to allow, *inter alia*, the appellant place those reasons on affidavit). These reasons were, he held, addressed by Mr. Webb, a director of the appellant, in his second supplemental affidavit sworn on 1 December 2021 as follows:

"11. I am advised that thereafter ACC considered its alternative enforcement and recovery options however it appeared that the Respondent was insolvent and there was a legal charge in favour of First Active plc registered in priority to ACC on the Respondent's principal private residence.

12. I say that ACC's concerns proved accurate in circumstances where the Respondent petitioned to the High Court for his own bankruptcy in 2017 and he was subsequently adjudicated a bankrupt on 9 October 2017 circa 7 years post Judgment.

13. I am advised that thereafter ACC was, inter alia, stayed from executing its judgment for a period by reason of the Respondent's bankruptcy. I say that the subject properties did not vest in the Official Assignee until 1 October 2018 and the properties did not formally revest in the Respondent until October 2020 which, combined with the various transfers described in the Grounding Affidavit, clearly explains the delay in executing the Judgment in more recent years."

19. McDonald J. stated that these averments had to be considered in relation to what was said in the grounding affidavit to the motion which was that the appellant is "*desirous of issuing well charging proceedings*". That was the reason put forward for seeking leave under O.42, r.24 and McDonald J. noted that there was no suggestion that the respondent had any other available assets against which execution might be levied; the appellant's focus was plainly to enforce the judgment against the respondent's lands.

20. McDonald J. held:

"Against that backdrop, the reasons given by [the appellant] in para 11-13 of his affidavit of 1st December 2021, manifestly do not explain the lapse of time in enforcing the judgment against [the respondent's] properties. Contrary to what is

suggested by [the appellant], there was no impediment to [the appellant or the original plaintiff prior the transmission of interest in 2019) from enforcing the judgment mortgage against the properties owned by [the respondent]. Bankruptcy did not operate as an impediment to such action. On the contrary, it is well accepted that the holder of a judgment mortgage constitutes a secured creditor with the meaning of s.3 of the Bankruptcy Act, 1988 ("the 1988 Act"). A secured creditor is fully entitled, notwithstanding a bankruptcy, to pursue enforcement of security against the property of the bankrupt. There is a straightforward procedure by which a secured creditor can value the relevant security and thereafter enforce the security notwithstanding the bankruptcy. In the case of a judgment mortgagee, the application can be made either by notice of motion brought in the bankruptcy proceedings pursuant to O. 76, r. 61 or, alternatively, it can be made, in the usual way, by special summons under O. 3. In these circumstances, the attempt by [the appellant] to rely on [the respondent's] bankruptcy clearly does not provide any plausible reason for the lapse of time. In particular, it does not provide any basis to explain why no action was taken on foot of the judgment in the period after it became clear (at the latest in early 2015) that the proceeds of realisation of the lands comprised in Folio ****F were going to fall far short of satisfying the judgment debt. As noted above, it became clear by at least February, 2015 that the sale proceeds would not exceed €50,000. As further outlined in para. 11, the lion's share of that sum was eaten up in the costs of the receivership."

21. The trial judge rejected the reference to the first charge being in favour of another institution as an explanation. There was nothing to suggest any change in status and that the existence of that charge did not prevent the holder of a subsequent charge from seeking a well charging order and order for sale (although the first charge would have

to be paid in priority). He also rejected that the transmission of interest explained the lapse of time. No detail had been provided in that regard. He also held that in its capacity as assignee of the judgment debt, the appellant could not absolve itself of inactivity on the part of the relevant holder (referring to para 47 of the judgment of the High Court (Allen J.) in *Irish Nationwide Building Society v Heagney*).

22. McDonald J. found that the appellant had failed to provide any reason to explain the lapse of time. He was very conscious that it was not necessary to give some unusual, exceptional or very special reason for obtaining permission, but some reason had to be given. He said that the as the appellant had wholly failed to provide a reason that explains the long period of inactivity on its part, he was compelled to refuse the application for leave to execute. In those circumstances he held it was unnecessary to address the complaints made by the respondent or consider whether he had made out a case of prejudice, referring to Dunne J. in *Bula Ltd v Tara Mines Ltd* [2008] IEHC 437. McDonald J. made clear, however, that he believed the respondent was mistaken in his reliance on the *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 jurisprudence regarding delay as it was not relevant in the context of an application brought after judgment had been obtained. He deemed it inappropriate in the circumstances to express any views on the potential impact of Article 6 of the European Convention on Human Rights.

The Statute of Limitations Issue

23. Twelve years have now elapsed from the date of the judgment. In its notice of appeal, the appellant sought a priority hearing before the expiration of the twelve years for the reason that, in light of the respondent's bankruptcy, the only manner of execution in respect of the judgment lies against its security held by way of judgment mortgage and it did not want to be prejudiced in that matter.

24. At the hearing of the appeal, senior counsel for the appellant submitted that the question of the Statute of Limitations ought not to influence the court one way or the other in the exercise of the court's "undoubted discretion" with regards to this application for leave to execute. He submitted that the issue with the Statute would arise elsewhere; it was a matter to be pleaded by the respondent by way of defence and it was not appropriate to anticipate what the respondent might say. Counsel did not want to anticipate any matter that might arise but indicated that there were six circumstances in which the limitation period might conceivably be extended, including acknowledgement of debt. He submitted therefore that there may be avenues open to the appellant if it was granted leave to execute.

25. This question of whether leave to execute must be made within twelve years arose in the case of *Smyth v Tunney* and to the extent that it is relevant it will be addressed further below.

The Explanations for the Lapse of Time

26. In his affidavit grounding the motion for leave to execute, Mr. Webb stated he believed and was:

> "so advised by my solicitor that the [respondent] was adjudicated bankrupt and I am advised that no steps were taken to execute the Bankruptcy for this reason. I say that the [appellant] has recently been informed of the existence of a property which was kept outside of the Bankruptcy over which the [appellant] holds security by way of Judgment Mortgage and against which it is desirous of issuing well charging proceedings."

27. The High Court proceedings were adjourned by the trial judge "to allow [the appellant] an opportunity to place further evidence before the court in relation to the lapse of time since the judgment was obtained" and to allow the respondent to place evidence of any

prejudice suffered as a result of that lapse of time. It is in that context that the contents of Mr. Webb's affidavit referred to in the High Court judgment (set out above at para 18) must be viewed.

28. Moreover, the appellant's legal submissions before the High Court had submitted "that the necessity for an application under Order 42, rule 24 arises as a result of a change in the parties entitled to execute and on the basis that a period in excess of six years has lapsed since the making of the orders". These submissions are undated, but it appears that they may have been made prior to the order substituting the appellant as plaintiff and permitting the appellant to put on affidavit the reason for the adjournment. The notice of appeal referred, *inter alia*, to the failure of the High Court judge to have regard to the commercial reality that debts are regularly transferred between commercial entities and proper credit was not given by the trial judge for the "reasonable delays" that arose by reason of the transfers that occurred here. It is claimed that the trial judge applied an unduly strict standard to the question of whether the appellant had provided "some explanation at least for the lapse of time" (per Geoghegan J. in *Smyth v Tunney*) and erred in holding (in effect) that the appellant had to demonstrate that execution was not possible during the relevant periods. Furthermore, the trial judge paid inadequate regard to the fact that the respondent's liability had been finally determined by the High Court and that it was open to him to discharge that liability at any time. Moreover, the trial judge failed to have regard to the other avenues of enforcement pursued by the appellant's predecessor." A further appeal ground was that the conclusions reached by the trial judge at para 15 were incorrect. It is asserted and that the appellant should not be criticised for identifying the proposed method of execution, nor should the proposed method of execution have any bearing on the Court's assessment of the application for leave to issue execution.

29. In written submissions, the appellant premised the appeal on the basis that the judge had made a fundamental error which deflected his analysis from the correct path. Specifically, it was submitted, he erred in requiring not merely an *explanation* for the lapse of time, but a *justification*. It was said that it was incorrect for four reasons:

    a) The starting point should be that a court has determined that a debt is lawfully due, which the judgment debtor could of his own volition have paid at any time.

    b) The explanation need not go towards showing that execution was impossible or impracticable during a relevant period. Forbearance on the part of a creditor during negotiations was not a bar to enforcement.

    c) The judge was incorrect in determining that the respondent's bankruptcy provided no explanation for the lapse of time. It was specifically submitted that "[w]hile it is true to say that it was legally possible to seek well-charging orders and order for sale while the bankruptcy was ongoing, it was understandable for the creditor to allow the bankruptcy process to play out and for [the respondent] to be re-registered as owner of the relevant properties before seeking to execute against them. Even a misunderstanding of the true legal position can suffice in this regard". The submissions then referred to the reference by analogy with the creditor in *Smyth v Tunney* who believed it was necessary to seek leave because the twelve-year period for the date of the relevant judgment was about to run out.

    d) If the approach in the judgment under appeal were to be widely adopted, it could have significant implications for the marketability of debts where the six-year period has either expired or nearly expired.

30. The written submissions conclude by stating that the appellant explained the lapse of time by reference to various events, including: securing its position, enforcing part of

its security by the sale of an asset through receivership in reduction of the debt, assignments of the debt, and the respondent's bankruptcy. It was submitted that this was sufficient particularly in the absence of any real prejudice to the respondent and that the interests of justice required that the High Court judgment be reversed.

31. Counsel for the appellant opened the oral hearing by identifying the issue as the one set out at para 3 above; namely, whether, for the purpose of engaging the court's discretion pursuant to O. 42, r. 24, any explanation offered to explain lapse of time must be correct as a matter of law. He did however refer to other matters within the papers which he said were relevant to the issue of lapse of time and invited the Court in the exercise of its own discretion to grant leave to execute.

32. From the foregoing, I conclude that, although aspects of the notice of appeal claimed that the trial judge had not taken into account other factors leading to the lapse of time and reference was made to the other issues at the oral hearing, the primary submission, on which the others hinged, was in relation to how the trial judge characterised and dealt with the explanation that had been tendered. Thus, the main focus of this judgment will therefore be on the explanation given and whether it was sufficient reason (in the sense outlined by Geoghegan J. in *Smyth v Tunney*) to explain the lapse of time.

The Nature of the Appellate Jurisdiction

33. The appellant submitted that the judgment, involving as it did the exercise of judicial discretion, ought on appeal to be reviewable in accordance with the following approach as set out by the Court of Appeal in *Collins v Minister for Justice and Law Reform & Ors* [2015] IECA 27:

> "namely, that while the Court of Appeal…will pay great weight to the view of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to

interfere with the decision of the High Court only in those cases where an error in principle was disclosed".

34. A feature of the appeal is that the appellant strongly urged on the Court, as is apparent from the issue identified by the appellant in the appeal, that the trial judge erred in principle in how he approached the matter. It is not necessary on this appeal, which concerns the exercise of a discretion, to demonstrate such an error in principle, but having regard to the manner in which the appeal was brought, the absence of any error in principle, would appear to leave little, if any basis, for this Court to overturn the High Court decision. It is appropriate to state that the exercise of judicial discretion is not the exercise of the whim of every individual judge (or of appellate judges). It involves the exercise of judicial discretion within the principles applicable to the issue or mater to be decided. The Court of Appeal must consider and apply those relevant principles in the determination of the appeal.

Order 42, rules 23 and 24

35. Order 42, r.23 provides:

"As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order."

36. Order 42, r.24, in so far as relevant, 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;

(b) …;

(c) …;

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. …."

The appellant's focus on the policy behind the rules

37. Counsel for the appellant submitted that the trial judge and the judge in *Irish Nationwide v Heagney* had erred in deciding that there was nothing to engage their discretion pursuant to O. 42, r. 24 because in neither case had there been an acceptable reason for the lapse of time. According to counsel, what was required of the trial judge here was a greater focus on the overall facts rather than on the correctness or otherwise of the reason given for the lapse of time. Counsel submitted that the decision in *Smyth v Tunney* had involved a careful examination of the history of O.42, r.24 and, in particular, the difference between procedure in Ireland (application on notice) and in England and Wales (application *ex parte*). Counsel emphasised that in *Smyth v Tunney*, Geoghegan J. regarded it of some significance that the application in England had traditionally been made, at least in the first instance, *ex parte* which suggested that no strong or exceptional reasons were required for the discretion of the court to be engaged. Some reason for the delay had to be shown but no more. In Ireland, an application was only permitted to be made *ex parte* if there were special circumstances shown. Furthermore, as Geoghegan J. observed, "the old Irish cases did not seem to indicate that strong reasons had to be given in the case of applications on notice." Counsel's

submission to this Court was that any reference to "good reason" or "sufficient reason" had to be seen in that context.

38. Counsel referred to later case law which will be discussed further below. A particular emphasis was placed on the dicta of Whelan J. in the Court of Appeal decision in *Pepper Finance Corporation (Ireland) DAC v Beades* when she said at para 69 with reference to *Smyth v Tunney*:

> "The judgment has been subject to extensive academic analysis and consideration including Collins, Enforcement of Judgments (2Ed., Round Hall, 2019) where the author observes at Chapter 3, Section 6:-
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> > "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." (para 3-47)".

39. Counsel also placed significant emphasis on *Ulster Bank Limited v Quirke & Anor* [2021] IEHC 199, a decision of the High Court (Butler J). The judgment in *Ulster Bank v Quirke* was given prior to the decision of the High Court in the present case, but it is unclear if it was opened to the trial judge. The decision of the High Court in *Ulster Bank v Quirke* granting leave to execute was overturned on appeal shortly after the hearing of the within appeal.

40. The appellant emphasised the distinction identified by Butler J. in the High Court between the policy considerations in an application for leave under O.42, r.24 and those involving an application of the Statute of Limitations. Butler J. stated that, because there was a fundamental difference between a judgment and an unadjudicated dispute, there was no obligation on a judgment creditor to execute a judgment with the

promptitude expected of a litigant when prosecuting proceedings (approving Gearty J. in *Start Mortgages DAC v Piggott* [2020] IEHC 293, that public policy would run counter to imposing such an obligation).

41. Butler J., having stated that parties often seek to resolve litigation after judgment is granted, held that it could be counterproductive in many instances to require a creditor to execute promptly. Thus, she held, "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."

42. In *Ulster Bank v Quirke*, the original judgment creditor had not given an explanation of the non-execution in the seven years leading to the transfer to the applicant. The applicant explained that since that transfer there had been ongoing engagement with the judgement debtor. Butler J. said the debtor's observations on the earlier lack of explanation had to be seen against the background where there was no obligation on a judgment creditor to move immediately or even promptly to execute a judgment and where there are sound public policy reasons – which may benefit both judgment debtors and judgment creditors – not to impose such a requirement. Butler J. was satisfied that the explanation proffered by the applicant met the threshold of a good reason, understood in the light of the judgment of the Supreme Court in *Smyth v Tunney*.

43. It was the finding by Butler J. that no explanation was required to explain the delay in executing the judgment in the first six years (also made at para 51 in *Irish Nationwide Building Society v Heagney* that was specifically overturned by the Court of Appeal.

44. In rejecting the suggestion that no explanation for the delay prior to expiration of six years was required, Binchy J. (Murray and Edwards JJ. concurring), explained that what was required after the six years had elapsed was an explanation for the lapse of time. This, it was said, was in accordance with the purpose of O.42, r.24, the wording of the

rule and its interpretation in the authorities. Thus, if the application for leave to execute was made six years and a day after the judgment was given, then in order to succeed, an explanation had to be given to explain all of that time. Binchy J. said that this view was consistent with *Smyth v Tunney*, *Beades* and with *Hayde v H & T Construction Ltd*. He held therefore that the trial judge had fallen into error in not seeking an explanation for the lapse of time before the transfer of the benefit of the judgment in that case.

45. Binchy J. stated that in reaching this conclusion he had due regard to various dicta to the effect that rules of court were intended to be facilitative and importantly, to the dicta of Butler J. in the High Court when she stated: "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." This latter passage from Butler J. in *Ulster Bank v Quirke* was strongly relied upon by the appellant in this appeal together with the observation of Butler J. that "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."

46. Significantly, Binchy J. stated: "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."

47. Binchy J. recounts in his judgment how the Court of Appeal had sought submissions on, *inter alia*, (a) what was the nature of an Order under O.42, r.24: final or interlocutory

and (b) what must an applicant establish to obtain an order under O.42, r. 24. Having addressed the relevant case-law particularly jurisprudence post *Smyth v Tunney*, Binchy J. identified at para 94, the following general principles arising out of the Court's questions:

> "1) In cases where an application is advanced under O. 42 r. 4 (sic) on notice (which will be the vast majority of cases) whatever order is made by the court is final and not interlocutory;
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> 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."

48. While the appellant relied in a general way on the absence of requirement to explain the first six years of the lapse of time, I do not consider that the reversal of that dicta by the Court of Appeal in *Ulster Bank v Quirke* has any great bearing on the within appeal. This is in circumstances where there was evidence of some activity in relation to execution of the judgment within the first six years (against one of the respondent's three properties). The most important argument made by the appellant to this Court however is the contention that the trial judge erred in rejecting the explanation that had been given even though it was a mistaken view of the law. More particularly, the appellant's ultimate argument is centred on how the giving of a reason, even if based

on a mistake of law, constituted "some good reason" (in the sense contemplated by Geoghegan J. in *Smyth v Tunney*) such that the court's discretion was engaged, thus triggering the requisite global assessment of the prejudice (if any) to the judgment debtor, in relation to which the appellant says no such prejudice occurred here. To address the arguments of the appellant, it is necessary to take a deeper look at *Smyth v Tunney* while bearing in mind what the subsequent decisions, including *Ulster Bank Ireland Limited v Quirke*, have found.

49. Before leaving *Ulster Bank v Quirke*, it is appropriate to make some observations. The requirement to provide an explanation for lapse of time will only be a requirement to provide "a reasonable explanation". The meaning of "reasonable explanation" is addressed below. What is reasonable however will, inevitably, be dependent on its context. Part of that context will be that a person in the first six years was entitled as of right to execution on the judgment. It is not for this Court, on this appeal, to set out the circumstances which a future court may or may not deem as a reasonable explanation. It is not beyond the bounds of possibility however that, a reasonable explanation might include a general description of why the matter was let lie and an explanation for why the motion for leave to execute was issued, for example, a month after the six-year time limit rather than execution as of right having taken place the day before the six-year time limit. They are matters for future decision in an appropriate case. In the present appeal, it must be recalled that the judgment was issued on the 15 November 2010 and the motion was not issued until 12 May 2021. That was ten and a half years after the judgment issued and thus four and a half years into the period when leave of the court was required for execution. By any token, the lapse of time here was significant; it was at the outer end of the total permitted time limit in which a judgment may be executed.

Smyth v Tunney

50. It may be helpful to comment that, more usually, it is a plaintiff who has obtained judgment who then becomes the applicant for leave to execute against a defendant. In *Smyth v Tunney*, the applicants for leave to execute were the defendants who had obtained a costs judgment against the plaintiff.

51. A central part of the appellant's submission in the present appeal is that the references to reason, or good reason, or sufficient reason, must be read in light of the purpose behind requiring an application for leave to execute to be made on notice to the other side. Counsel refers to the dicta of Geoghegan J. that "…the purpose of the application to the court was to give both a benefit to the plaintiff and a protection to the defendant if he was prejudiced." Geoghegan J. went on to say that the "emphasis is then essentially on prejudice to the defendant though obviously some reason must be given by the applicant."

52. At various stages in *Smyth v Tunney* there are references to the giving of reasons and a description of the nature of those reasons. References contained at pages 517-518 were opened by counsel:

> "The matters raised by the first plaintiff only come into play if the defendants can be regarded as having *prima facie* given **acceptable reasons** for granting the order. The order is a discretionary one and this court would be slow to interfere with the High Court Judge's exercise of that discretion. Clearly, McCracken J. was of the view that **sufficient reasons** had been shown because he expressly accepted that that was a requirement. He then effectively went on to outline the reasons. Not only was it entirely open to the High Court Judge to take the view which he did in relation to this aspect of the matter but I do not think that he could have taken any other view. For reasons which I will explain in greater detail when treating of the

law, I am satisfied that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of the time provided that there is **some explanation** at least for the lapse of time. It is, of course, accepted by all sides that even if a **good reason** is given the court must consider counterbalancing allegation of prejudice. It is in that context that the first plaintiff's affidavit comes into play. I cannot see that the first plaintiff was prejudiced in any legal sense." (**Emphasis added**).

53. Counsel placed emphasis on the phrase "some explanation" in submitting that this was the extent of the explanation that was required from the judgment creditor. In relation to the use of the phrase "good reason", a phrase taken up in later cases, counsel submitted that the term "good" takes its colour from its context. A reason is "good" if it is enough. It is a bad reason if it is not enough.

54. The factual situation in *Smyth v Tunney* was that part of the reason given by the defendant/judgment creditor for seeking leave *at the particular time* they did so, was that they were afraid that once the statutory period elapsed for bringing an *action* on foot of the judgment had elapsed leave to execute would not be granted. The plaintiff/judgment debtor is recorded in the judgment as suggesting that the application was not brought for *bona fide* purposes of recovering money but for ulterior purposes. Geoghegan J. said it was absurd to suggest in circumstances where there was genuinely a fear, at least on the part of the defendants' legal advisers, that once the statutory period for bringing an action on foot of the judgment had elapsed leave to execute could not be granted, that they would allow the judgments to go by default and not make sure to apply for leave to execute before the period ran out. Geoghegan J. said that it was not necessary to consider whether that alone was a good reason because there were clearly

circumstances which had rendered it reasonable to delay execution, as the trial judge had accepted.

55. I raise this aspect of *Smyth v Tunney* because counsel for the appellant argues his case that a judgment creditor ought to be granted leave to execute~~,~~ by analogy with the manner in which the Supreme Court in that case treated the argument of the *judgment debtor* to the effect that if there was some kind of sufficient reason *not to execute* then the judgment creditor ought not to have been granted leave. Citing *Smyth v Tunney*, counsel argued that the appellant's misunderstanding of the true legal position as to the effect of bankruptcy was not a bar to the discretion of the court being engaged, particularly when viewed against the fact that the debt sought to be executed had already been ruled upon." It is noteworthy that counsel was unable to identify any other area of law (substantive or procedural) where a mistaken view of the law could be relied upon by an applicant in order to seek relief. While a factor akin to a mistake is one of the three questions that will guide the exercise of the court's discretion in an application for leave to extend the time within which to appeal, it is well established that a mistake as to law or procedure will generally not be sufficient for an extension of time to appeal to be granted (as per the principles set out in *Éire Continental Trading Company Limited v Clonmel Foods Limited* [1955] 1 I.R. 170, although the cases of *Brewer v Commissioners of Public Works in Ireland* [2003] IR 539/IESC 51 and *Goode Concrete v CRH Plc & ors* [2013] IESC 39 on the discretion of the court and the role of the balance of justice considerations must also be noted). That, in my view, is not to say that a mistake of law can never amount to "some reason" or "good reason" for the lapse of time. That will depend on context and in particular the nature of the mistake.

56. Counsel referred to the dicta contained in para 19 of the judgment of Geoghegan J. that: "If the perception that the benefit of the judgment debts might be lost after the twelve

year period elapsed was a reasonable one, it is entirely irrelevant whether it is correct in law." Geoghegan J. went on to say that he would not comment on the correctness of the view formed by the judgement creditors, preferring to await a case where it was necessary for the decision, but he said that he had to refer to the case law with a view to demonstrating that "the perception of danger on the part of the legal advisers of the respondents was at least a reasonable one, which I believe it was".

57. In *Smyth v Tunney*, the first and second defendants (judgment creditors) had given as one of their reasons for the delay in executing the judgment, that they were awaiting the outcome of other proceedings between the parties, and that the judgment debtors had demanded that they defer execution until all proceedings were disposed of. The factual position was that in an application made by the fourth defendant to wind up the second plaintiff, the High Court judge decided to adjourn the application with liberty to re-enter until all proceedings between the second plaintiff and the second defendant were disposed of. The judgment creditors became concerned because lengthy delays that had occurred in finalising the proceedings, that their execution of the orders for costs they had obtained against the plaintiffs may be hindered by the Statute of Limitations. The fact that the judgment creditors had concerns about the Statute of Limitations in *proceeding at that time for leave to execute* must be distinguished from the reason being put forward in this case, namely the existence of the judgment debtor's bankruptcy, as an excuse *for the lapse of time in applying for leave to execute*. Moreover, the counterbalancing argument in *Smyth v Tunney* was that the first judgment debtor had disposed of his share in the second judgment debtor company in the meantime and pleaded prejudice. All the dicta of Geoghegan J. concerning the Statute of Limitations and the reasonableness of the belief of the legal advisers must be seen in

light of the specific facts of that appeal; in effect that dicta went to the *bona fides* of making the application when it was made rather than an excuse for not making it earlier.

58. In *Smyth v Tunney*, the dicta of Geoghegan J. at para 19 regarding the reasonableness of the belief concerning the fear of the statute running, had come immediately after the judge had considered the case of *Fitzgerald v Gowrie Park Utility Society Ltd* [1966] IR 662*;* a case which Geoghegan J. observed confirmed the discretionary nature of the order. It is appropriate to look more closely at *Fitzgerald v Gowrie Park Utility Society Ltd*. In that case, the solicitor for the plaintiff had taken an assignment of the judgment in the Circuit Court in favour of the plaintiff in consideration of a release by the solicitor of all his costs. On the same day however, the defendants had obtained an order for possession against the plaintiff and payment of costs. A third set of proceedings in the High Court existed in relation to a claim for mesne profits for the plaintiff's use of the premises. The High Court on appeal affirmed the order in the ejectment proceedings and the order for judgment in favour of the plaintiff. The solicitor, as assignee, then made an application for leave to issue execution which the High Court granted. The defendants appealed and at the date of hearing of the appeal, the defendants' costs of the ejectment proceedings had been taxed. They had also recovered judgment against the plaintiff in the High Court which was, however, subject to appeal.

59. The Supreme Court decision, by a three to two majority, was that the High Court had exercised its discretion on a wrong basis. The High Court had taken the view that when the solicitor took the assignment, the judgment was in full force and effect and that, if it was not then available as an asset, he might have obtained some other security. Lavery J. took the view that the potential availability of other security was wholly unrealistic in light of all the counterclaims of the defendant against the plaintiff. The Supreme Court decided that the High Court had exercised its discretion on a wrong

principle but gave liberty to the solicitor to renew his application to the High Court upon the determination of the plaintiff's appeal against the defendants' judgment for mesne profits.

60. In the course of his judgment in *Smyth v Tunney*, Geoghegan J. referred to the *obiter* comment of Lavery J. that "[i]t was not contended in this court that a judge was bound to set off one judgment against another and I hope that nothing I have said suggests that I think this is so."

61. Geoghegan J. distinguished the appeal before him given there was at least a perceived danger that if the application was not made for leave to execute then the benefit of the judgment debt would be lost. He said that it was entirely reasonable that the High Court judge should exercise his discretion in favour of the defendants no matter what other claims may have been extant.

62. It was at that point that Geoghegan J. stated that if the perception that the benefit of the judgment debts might be lost after the twelve-year period elapsed was a *reasonable* one "it is entirely irrelevant whether it was correct in law". He then discussed the old Irish cases on the question of the Statute of Limitations and how English law had become muddied on the topic over the years referring to a [then] more recent decision the House of Lords. He said that given the uncertainties emerging from the Irish and English cases, it was entirely reasonable for the judgment creditors to be concerned about whether they would be able to obtain leave to execute. He went on to say that, even if it was the case that leave under the rules could be granted to execute a statute-barred debt on the basis that the application for leave was not *an action* for recover a judgment, and also on the basis that a statute-barred debt could not be said to be extinguished altogether, the judgment creditors would have considerable difficulties in persuading a court to exercise discretion in their favour. This latter factor is one that this Court might

have to consider if this case reaches the stage where it must consider whether the interests of justice would require the discretion to be exercised in favour of the grant of leave.

63. Geoghegan J. then returned to the case of *National Bank v Cullen* (1894) 2 IR 683 in which the Irish Court of Appeal had affirmed the High Court order refusing an *ex parte* application for leave to execute. He viewed passages in the judgment of Palles CB as relevant. Palles CB had stated that the relevant rules at that time (O.42, rr.24 and 25 of the Rules of Judicature Act) were substantially similar to provisions of the Common Law Procedure Amendment Act, 1853. Sections 148 and 149 of that Act had modified the common law as to time and had substituted a modified summary application instead of the old writ of *scire facias*. The Chief Baron said that the reason in each case was the same as that explained by Lord Denman in *Hiscocks v Kemp* (1835) 111 ER 571 who described the reason behind the earlier statute which had replaced the *scire facias* as follows:

> "The *scire facias* in personal actions was given by that statute rather in aid of plaintiffs than in restraint of them. At the 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 be allowed to have its effect in execution. After such a delay, therefore, he was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law, for the purpose of executing judgments in real actions after a year and a day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as *equally affording protection* to the defendant, if he had any reason to show why the execution should not issue." (*emphasis in original*)

64. Geoghegan J. noted that none of the above suggested that an applicant for leave to execute had to have strong reasons for the extension of time. Rather the purpose of the application to the court was to give both a benefit to the plaintiff and a protection to the defendant if he was prejudiced. Geoghegan J. quoted from Baron CB as follows:

> "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."

65. Geoghegan J. concluded that the general thrust of the four judgments he had considered was, *inter alia*, that the emphasis was essentially on prejudice to the defendant though obviously some reason must be given by the applicant. He said that the judgment creditors had shown sufficient reasons why they allowed a lapse of time and why they should be allowed to execute even though it had not been proven that they could not have executed the judgment debt by some means within the six-year period. He said that, essentially, the conduct of the plaintiffs heavily contributed to the delay in execution.

66. It was against that background that counsel for the appellant urged on this Court the proposition that a mistake of law on the part of a judgment creditor was a reason which ought to have been accepted by the High Court as an explanation for the lapse of time and thereafter engaged the discretion of the court in considering the alleged prejudice sustained by the respondent.

Case law since *Smyth v Tunney*

67. Counsel for the appellant opened to the Court further case law in which *Smyth v Tunney* was discussed and applied. Some of these were cited in the judgment of the High Court and have been discussed above. The principles that the High Court (Dunne J.) identified in *Bula Limited (In Receivership) v Tara Mines Ltd* are referred to above. Those principles were cited with approval by the Court of Appeal in *Pepper Finance Corporation (Ireland) DAC v Beades*. I have referred to and analysed above the appellant's reliance on the High Court decision in *Ulster Bank v Quirke*.

68. Another decision, *Carlisle Mortgages v Sinnott* [2021] IEHC 288, upon which the appellant relied in this Court, does not appear to have been opened to the trial judge. In that case, the High Court (Simons J.) identified three broad categories from the cases where leave to execute had been granted:

    a) Where delay has been caused by the conduct of the indebted party.

    b) Where there has been a change in the financial circumstances of the indebted party e.g. *Mannion v Legal Aid Board* [2018] IEHC 606 where the party seeking execution had at all material times believed there was no capacity to pay the judgment debt but now had reasonable grounds to believe that the financial circumstances had improved.

    c) Where execution has been deferred pending an attempt by the parties to reach an accommodation whereby alternative arrangements of the payment of the underlying debt may be entered into.

69. Simons J. held that the categories of cases were not, of course, closed. He was satisfied that cases where the delay in execution is attributable to circumstances outside the control of the person seeking to enforce the judgment represent a fourth category. He said that in the absence of any prejudice to the indebted party, leave to execute should not normally be refused unless there had been some culpable delay by the party seeking

to execute. It is unnecessary to outline the specific facts in that case save to note that Simons J. held that all the factors of delay – a difficulty serving the order, logistical difficulties attributable to the Covid19 pandemic and the necessity to obtain a further letter of authorisation from the Central Office having returned the initial set of papers – represented "good reason for allowing a further extension of time."

70. In *Irish Nationwide Building Society v Heagney*, Allen J. noted that the foundation of the modern jurisprudence in this area was *Smyth v Tunney*. His view was that the law reporter had correctly distilled the principles on which the jurisdiction should be exercised as follows:

> "2. That it was not necessary to show the existence of an unusual, exceptional or very special reason for a successful application for leave to issue execution more than six years after the fate or an order or judgment.
>
> 3. That 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 the date of such order of judgment and that the court must consider any allegations of prejudice made against such application."

71. Allen J. re-iterated that the policy considerations behind the Statute of Limitations were different to those at issue in an application for leave to execute a judgment. As Allen J. stated, *prima facie*, under the rules, judgments and orders are to be executed within six years. If they are not executed within that time, some reason must be advanced to engage the discretion of the court to extend the time. If the construction urged on behalf of the applicant were correct, the requirement to explain a delay – more properly termed lapse of time – of upwards of six years could be avoided altogether by the simple expedient of assigning the judgment or order. He said that O.42, r.24 properly construed means that an application by an assignee of a judgment or order is to be

approached on the same basis as an application by or against the party originally entitled or liable to execution. In an application made upwards of six years the applicant must demonstrate the reason for the lapse of time. As referred to above however in so far as Allen J. said that no explanation was needed for the first six years lapse of time, that no longer represents the law.

72. In *Irish Nationwide v Heagney*, other proceedings had been commenced by Irish Nationwide against the defendant and another person, and this was used as a factor to explain delay. Allen J. said that those proceedings were "a red herring" and that "[i]f that action was not – as it demonstrably was not – an impediment to the making of the order for possession I cannot see how it might have been an impediment to execution."

73. Counsel for the appellant asked the Court to distinguish between *Heagney* and the present case, primarily stressing that even a reason based on misconstruing the law can be a good reason for lapse of time. Counsel also submitted that the case could be distinguished as the respondent in the present case had engaged. He also pointed to the fact that this case had involved the insolvency of the respondent whereas in *Irish Nationwide v Heagney* the other proceedings had primarily involved another person.

The requirement to give a reason

74. The, admittedly, rather lengthy dissection of the judgment in *Smyth v Tunney* in which I have engaged, together with the dicta set out in the subsequent judgments, demonstrate that before a judgment creditor can seek leave to execute after the expiry of six years since the date of the judgment, *some reason* must be shown for the delay. Cases such as *Bula* and *Beades* identified this as a first step in the process of execution; the second being the assessment of prejudice accruing to the judgment debtor. Nothing in the analysis of *Smyth v Tunney* demonstrates that it is incorrect to view the requirement to give *some reason* as a first step in the adjudication process. The express language of

the decision in fact supports it: "The matters raised by the [judgment debtor] *only come into play* if the [judgment creditor] can be regarded as having prima facie given acceptable reasons for granting the order" (see para 12). (*Emphasis added*).

75. The decision of the Court of Appeal in *Ulster Bank v Quirke* has put beyond doubt that the requirement to give a reason is a *threshold* that a judgment creditor must cross prior to the court being required to enter into a consideration of the prejudice to the judgment debtor. The requirement of a threshold demonstrates that McDonald J. was quite correct when he accepted what Allen J. had said in *Irish Nationwide v Heagney* that the jurisdiction to grant leave is not engaged *unless and until* an explanation is given.

76. McDonald J. also quoted from Simons J in *Hayde v H & T Contractors* [2021] IEHC 103 where he identified the objective of the corresponding rule in the Circuit Court as "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". In my view, taking into account the reasoning of the Court of Appeal in *Ulster Bank v Quirke*, it is now beyond doubt that this correctly identifies the objective of the rule.

77. On the other hand, the fact that judgment creditors have the opportunity to seek leave after the expiration of six years to enforce a judgment also meets another objective, as outlined by Simons J. in *Hayde*, of "…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."

78. Such a policy objection is similar to that outlined by Butler J. in the High Court in *Ulster Bank v Quirke* with which the Court of Appeal agreed and which is referred to at para 41 above.

79. Bearing in mind those twin objectives, what is the nature of the reason that must be offered? It is undoubtedly not an unusual, exceptional, strong or very special reason. I cannot accept the appellant's submission to the effect that the reference by Geoghegan J. to "some reason" means that as long as "some reason" is proffered there is little required by way of judicial analysis of the reason. In other words, the appellant's argument borders on saying that once any explanation is provided, then that is sufficient to overcome the threshold. Of course, the appellant does not quite say that because, in arguing that a reason is either good or bad, the appellant accepts that the reason is good if it is "enough". Working out what is "enough" requires, however, a court to engage in some sort of assessment of the explanation or reason given for the lapse of time.

80. The nature of that assessment of the explanation has been variously referred to by all levels of the Superior Courts as "acceptable" "sufficient" "good" (*Smyth v Tunney*), "good" (*Bula*, *Beades,* and *Hayde*) and "reasonable" (*Ulster Bank v Quirke*). I do not consider that this usage is accidental. It is there to convey that the nature of the reason given for the lapse of time must be of substance (but not substantial in the sense of strong) and it must reach a level that is at the least consistent with the policy in the rules which requires at least some expedition in the execution of judgments. Would an explanation by a large financial institution that it had simply overlooked the judgment for 11 years and 11 months be sufficient? Taking the appellant's case to its logical conclusion, it would be sufficient.

81. The specific argument of the appellant is that the reason put forward in explaining the lapse of time, although based upon a mistaken view of the law, was nonetheless a reason sufficient to engage the court in an assessment of the prejudice claimed by the respondent. As I have described above, the finding by Geoghegan J. in *Smyth v Tunney* with regard to the mistaken belief in the effect of the Statute on an application for leave

to execute was not directed to the explanation for the lapse of time. On that basis it is *obiter,* but does it apply by analogy to this situation?

82. That dicta is certainly not directly relevant: in that case the argument was being used as a shield against the judgment debtor's claims of prejudice and it was thus relevant to the overall consideration of whether the High Court was correct to exercise its discretion to grant leave. When seeking leave to execute, the burden is on the judgment creditor to present an explanation that will overcome the (low) threshold which exists; this is because the rules seek to encourage *some expedition* in the execution of judgments. When viewed in that light, the requirement of the court to make an assessment of the nature and quality of the reason is apparent.

83. Even if one accepts the appellant's argument that the dicta of Geoghegan J. applies by analogy, it must be recalled that Geoghegan J. was careful in his characterisation of the legal advisers' belief as to the consequences of a failure to act. He referred to the perception of danger as "a reasonable one" and also the perception of benefit as being "a reasonable one". Clearly, therefore, reasonableness was at the heart of the analysis by Geoghegan J. of the legal representatives' belief.

84. All of the foregoing leads to the conclusion that the explanation given by a judgment creditor must be a reasonable one and it is through the lens of reasonableness that this explanation can also be described as "good" or "sufficient" or "acceptable" (as indeed underscored by the approach of this Court in *Ulster Bank v Quirke*). Therefore, if the explanation provided on behalf of the judgment creditor was, although based upon a mistake of law, a *reasonable* one, it would be sufficient to overcome the low threshold and would require the court to then engage in a consideration of the prejudice to the judgment debtor by the granting of leave. To that extent, the legal issue identified by the appellant ought to be resolved in its favour; it is not necessary that the explanation

must be correct as a matter of law. Yet, that in itself is not a complete statement of the legal position. In order, however, for the explanation to meet the low threshold, in so far as the explanation is one of a mistaken belief as to law, the mistaken belief must have been a reasonable one in all the circumstances of the case. This, in my view, is not to require a *justification* for the lapse of time, as the appellant's written submissions suggested, but to require an *explanation that is reasonable.*

85. In his decision, McDonald J. explained with crystal clarity precisely why the explanation given on behalf of the appellant "manifestly [did] not explain the lapse of time". There simply was no impediment to the appellant enforcing the judgment. As McDonald J. stated, reliance on the respondent's bankruptcy "does not provide any plausible reason for the lapse of time". In my view, in his assessment that the reason proffered was not "plausible", McDonald J. was saying that it was not reasonable. That view must be assessed in the context in which the explanation was offered. It will be recalled that the reason given by the appellant for seeking leave to execute was because it was desirous of issuing well charging proceedings. The explanation as to lapse of time was placed before the court by the director of the appellant company. The appellant had purchased from Cooperative Rabobank U.A. (the successor in title to ACC Bank Plc) the legal and beneficial ownership of respondent's debts and rights against, and obligations to, Cooperative Rabobank U.A. (as successor in title to ACC Bank Plc) in relation to the underlying facilities and security. No evidence was placed before the High Court as to who gave the advice about the inability to execute because of the respondent's bankruptcy, or when, or in what circumstances, that advice had been proffered. Moreover, it was never contended, before the High Court that this was an area of law that was uncertain or left any room for doubt. As McDonald J. held "it is

well accepted that the holder of a judgment mortgage constitutes a secured creditor within the meaning of s.3 of the Bankruptcy Act, 1988".

86. Nothing in the appellant's submission to this court has sought to explain how it might have been reasonable for the appellant to have relied upon the mistaken belief that the respondent's bankruptcy meant that execution, by way of an application for a well charging order, could not occur. Unlike the complexities of the legal position with regard to the effect of the Statute of Limitations upon applications for leave to execute a judgment (such as arose in *Smyth v Tunney*), the law relating to a secured creditor proceeding to execute against the property of a bankrupt, is as the trial judge described it, a straightforward procedure. In so far as the written submissions of the appellant appear to suggest otherwise, McDonald J. did not require an explanation that the execution was impossible or impracticable during the relevant period; he required an explanation that was reasonable.

87. In the present case, the explanation as to lapse of time relied upon a statement of law about which there was no genuine dispute or doubt as to the law or as to procedure. No explanation was given as to how the appellant had made the mistake. All that was placed before the Court were bald assertions that this provided a reason for the lapse of time. Furthermore, those reasons had to be viewed against both the original lack of explanation for the lapse of time and the surrounding matters referred to by the appellant. The existence of a first charge by a separate financial institution (but no suggestion was given of any change in those circumstances) did not affect the appellant as holder of a subsequent charge in seeking a well charging order and an order for sale. Similarly, any suggestion of the transmission of interest explaining the delay was rejected as no detail was provided. In short, the various explanations of the appellant did not stand up.

88. This case can be contrasted with the decisions such as *Smyth v Tunney* and *KBC v Beades,* where valid, reasonable explanations for the lapse of time were given. Forbearance, for which a reasonable explanation set out on affidavit has been provided, may be acceptable and can accommodate the policy interest, identified by Butler J. in *Ulster Bank v Quirke,* of seeking a beneficial outcome to both judgment debtors and judgement creditors. Previous attempts to evade execution can also provide a reasonable explanation for lapse of time. Nothing of this sort was provided as an explanation by the appellant in this case.

89. I conclude therefore that trial judge was correct to find that the explanation was not plausible in the sense that it was not a reason that had any merit within its content. Thus, the appellant had failed to provide a reasonable explanation for "the long period of inactivity on its part or on the part of its predecessor in title" and therefore failed to overcome the low threshold required to be given when making an application for leave to execute a judgment.

90. Finally, I wish to comment on the appellant's written submission to the effect that if the approach of the High Court were to be widely adopted, it could have significant implications for the marketability of debts where the six-year period has either expired or nearly expired. I do not accept that a desire to protect the "marketability of debts" is part of the objective or rational of O.42, r.24 which permits a judgment creditor to apply for leave to issue execution after six years have elapsed. The rule provides a protection for the judgment debtor but the fact that a judgment creditor is permitted to seek leave also protects the public interest in encouraging engagement between judgment creditors and debtors once forbearance to execute is adequately explained on affidavit. The rule requires a reasonable explanation for the lapse of time when an application is made at any time after the expiration of six years. If the requirement to

provide a reasonable explanation for the lapse of time has an effect on the "marketability of debts" then that effect is as a consequence of the rule itself and not as a consequence of the High Court decision.

Interests of Justice

91. Even if I am wrong in holding that the trial judge was correct to find that the reason given was sufficient to overcome the low threshold and therefore the court is required to consider the counterbalancing allegations of prejudice, I am not convinced that the balance of justice requires the trial judge's decision to be set aside. While I have no doubt that the respondent's arguments concerning the application of the principles set out in the *Primor* jurisprudence must be rejected as this is not a trial of an action (as explained by Butler J. at para 34 in *Ulster Bank v Quirke*), this is not to say that the issue of delay is entirely irrelevant to the question of the assessment of the balance between the judgment creditors interests and those of the judgment debtors. As I have indicated above, while there is no requirement to execute *promptly*, the objective of the rules is to impose *some expedition.* The requirement to provide an explanation for the entire period of delay – even for the first six-year period - would seem to balance the scale slightly more in favour of the judgment debtor after substantial time has elapsed. These factors indicate that some regard must be had to the interest of a judgment debtor in having their debts put behind them with some expedition (noting of course that there is no right to so demand and that the obligation remains to pay the sum due thereby extinguishing the debt). The appellant has relied on the following dicta of Geoghegan J. in *Smyth v Tunney: The trial judge puts it more strongly than I have done and it is worth quoting him:-*

"… The plaintiffs can hardly be heard to say that they are prejudiced because they failed to pay their own debts due by them on foot of judgment. ….". That dicta must

however be viewed in the context of the facts of that case. I do not accept that it was intended to deny permission to a judgment debtor to raise any issue whatsoever that touches or concerns the failure to pay and the lack of expedition in execution. Each case must depend on its own facts; a judgment debtor's position may have materially changed in the intervening time and that may be relevant.

92. A number of relevant arguments arise in the present appeal. First, the nearer a judgment creditor and particularly a judgment mortgagee waits to the end of the twelve-year period to seek to execute, the greater the possibility that the Statute of Limitations will be a factor in the consideration as to whether to grant leave. As Geoghegan J. opined:

> "Even if it was the case that leave under the rules could be granted to execute a statute-barred judgment debt on the basis that the application for leave was not an action to recover a judgment within the meaning of the Statute of Limitations and also on the basis that the statute-barred debt could not be said to be extinguished altogether, the defendants would still have encountered very considerable problems in persuading a court to exercise discretion in their favour. Even on the best possible view of the law from the point of view of the defendants, the fact that the statutory period has run must surely be a major factor to be considered by a court in considering whether to grant or refuse leave as a matter of discretion."

93. In this case, the statutory period has now run. This Court was invited to ignore this as irrelevant to this appeal. I do not see how that can be quite correct given that *Smyth v Tunney* expressly says it must surely be *a major factor* to be considered in the exercise of a court's discretion. The appellant here says there may be many reasons why any action may not be statute barred; presumably the appellant would, if the Statute were pleaded in a defence, reply to that defence claiming, *inter alia*, acknowledgement of

debt. That does not deal with the point at issue, however. The policy behind the Statute is that twelve years is intended to be an outer end of litigation unless the plaintiff can point to some factor that will extend that twelve-year period. On the other hand, leave to issue execution is discretionary and is aimed towards, *inter alia*, a policy that some expedition be brought to the execution of judgments. Where subsequent proceedings will be the result of an exercise of discretion to grant leave to execute, the fact that those proceedings will begin *after* the expiry of twelve years is clearly relevant because it will be against the well-recognised policy that proceedings ought, in the usual course, to be brought within the twelve-year period.

94. Secondly, even if the judgment creditor can point to factors which they say *may* give rise to an extension of the twelve-year period, there is almost an inevitability to new proceedings being required to decide that statutory issue. A delay necessitating further proceedings is not conducive to the efficient use of court resources because it means that a litigant (the judgment creditor) will take up court resources for a second time in order to obtain the benefit of a court judgment for which that litigant had already had years in which to execute. These are factors to be weighed in the balance.

95. I am also of the view that a court, in the exercise of its discretion to grant leave, ought to at least consider if any prejudice arises by virtue of the judgment debtor having entered into bankruptcy. In the present case, the judgment debtor entered into, and came out of, bankruptcy more than six years after judgment was granted. While the main consequence of bankruptcy is to have unsecured debts written off, there are some policy features in the new bankruptcy regime that are relevant to the court's consideration of the balance between the secured judgment creditor and the judgment debtor.

96. It is not necessary to trace in any detail the legislative history of the reduction of the period of bankruptcy from 12 years in the Bankruptcy Act 1988 to the period of 5 years for which an application for discharge can be made pursuant to the Civil Law (Miscellaneous Provisions) Act, 2011, to the period of one-year automatic discharge but extendable to 15 years as set out in the Bankruptcy (Amendment) Act, 2015. It is noteworthy however that the 2010 Law Reform Commission Report on Personal Debt Management and Debt Enforcement identified various policy considerations going towards reform in this area. For example, in identifying the fostering of entrepreneurship, the Commission said: "This idea of using bankruptcy law as a means of fostering entrepreneurship has been a policy of the European Commission for several years."

97. In reporting on the period of time before which a debtor may be discharged, the Law Reform Commission stated:

> "3.33 – As economic and social conditions evolved, however, the purpose of bankruptcy developed in other countries to include the promotion of universal economic participation and entrepreneurship; the economically efficient allocation of risks throughout society; the support of social welfare structures; the rehabilitation of over-indebted members of society; and the protection of consumers. The discharge of a debtor's remaining obligations is fundamental to all of these purposes of modern bankruptcy law, and to the 'fresh start' or 'earned start' philosophies on which they are founded. The recognition of these principles and the creation of modern bankruptcy laws have had the effect of transforming bankruptcy in many other countries from being a creditor-initiated debt collection exercise to a debtor-initiated debt relief mechanism...."

98. Given the significant reduction in the term of bankruptcy brought about in the Act of 2015 as well as other reforms in the Act, it can hardly be contested that the provenance of the policy in the Act is traceable to the Law Reform Commission report. The 'fresh start' policy apparent from those significant changes is not, I consider, a matter that can be ignored when it comes to applications for leave to execute a judgment which is made well outside the six-year time in which leave may issue without leave of the court and after the judgment debtor has been discharged from bankruptcy under those new provisions.

99. Weighing the explanation of the appellant – that there was a mistaken view as to the effect of bankruptcy on the bringing of well charging proceedings – as against the significant lapse of time in this case which by the time of the appeal resulted inthe statutory period for taking proceedings having run and this judgment creditor having entered into and been discharged from bankruptcy, I am satisfied that the interests of justice would not require this court to overturn the decision of the High Court to refuse leave to execute.

Conclusion

100. The appellant's appeal against the refusal by the trial judge to grant leave to execute a judgment is dismissed. For the reasons set out above, there was no error of principle by the trial judge in holding that the explanation for the lapse of time given by the appellant was not sufficient to amount to a reason as required before leave to execute will be granted. As no reasonable explanation had been given by the appellant for the lapse of time, it had failed to reach the low threshold required under O.42, r. 24 of a judgment creditor and leave was therefore properly refused. Even if the reason given had been sufficient to require the court to enter into consideration of its discretion to grant leave, the interests of justice would not require the court to do so in this case.

101. The appeal is therefore dismissed.

102. As the respondent has been entirely successful in resisting this appeal, he is presumptively entitled to his outlay and expenses. If either side take issue with an order being made in those terms, they have 14 days from the date of this judgment in which to seek a short, early hearing date on the issue of costs.

As this judgment is being delivered electronically Ms. Justice Faherty has authorised me to indicate her agreement with the judgment and the Orders proposed.