THE HIGH COURT

[2021] IEHC 199

[2006 No. 106 S.]

BETWEEN

ULSTER BANK LIMITED

PLAINTIFF

AND

TIMOTHY QUIRKE AND JOAN QUIRKE

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 19th day of March, 2021

Introduction

1. This is an application by Promontoria (Oyster) DAC for what it describes as process orders in aid of execution of an existing judgment against the defendants under O. 17, r. 4 and O. 42, r. 24 of the Rules of the Superior Courts. The orders sought are to add the applicant as a plaintiff to the proceedings and for leave to execute the judgment. The application is resisted by the defendants on a range of grounds which are more fully discussed below.

2. The judgment, in the sum of €73,685.32, resulted from summary proceedings issued by Ulster Bank Ltd against the defendants in January, 2006 in respect of monies lent by Ulster Bank to the defendants on foot of a loan account number XXXXX138 and the overdraft on a current account number XXXXX054. Of the principal sum of €58,713.95 initially claimed, by far the larger portion was due on foot of the loan account, namely €55,072.37, compared to €3,641.58 due on the current account. The balance of the sum comprised interest which continued to accrue during the course of the proceedings in similar, although not identical, proportions.

3. Although an appearance was entered by the solicitor on behalf of the defendants when the summary proceedings were initially instituted, no affidavit was filed and no defence to the claim was advanced. In March, 2008, Ulster Bank brought a second motion seeking liberty to enter final judgment and, on 29th May, 2008, the Master of the High Court granted liberty to enter final judgment in the sum of €73,635.32 together with continuing interest from 19th January, 2008 (differentiating between the rate of interest applicable to the loan account and to the overdraft) and costs against the defendants. The matter was adjourned back to the Master's Court on the 30th June, 2008 and the order was stayed pending further order. Counsel for the defendants is recorded as having been present in the Master's Court on the making of the order and it may well be that both the stay and the adjournment were made on that counsel's request because, subsequent to the Master's order, an affidavit was sworn by the second defendant in which the defendants' liability to Ulster Bank was acknowledged in the following terms: "*I acknowledge the sum claimed in the summons herein is due and owing to the plaintiff in the sum sought of €62,857.11*". (The sum of €62,857.11 is the figure claimed in the summary summons as issued on 26th January, 2006. The second defendant's affidavit is silent on the question of any interest due on that sum subsequent to the issuing of the proceedings). The purpose of the affidavit seems to have been to seek further time and the balance of the affidavit sets out efforts then being made by the defendants to sell the

lands which were (and are) security for the loan and/or to refinance their debt through a different lender.

4. A further order was made by the Master of the High Court on 3rd July, 2008 in which the stay originally ordered on 29th May, 2008 was vacated and a three month stay on execution imposed instead (i.e. to expire on 2nd October, 2008). There was also a change made to the figure in respect of which liberty was granted to the Ulster Bank to enter final judgment from €73,635.32 to €73,685.32. Whilst it was suggested in argument that this figure could reflect an updated calculation of interest, given that only one digit is changed and the change is from a 3 to an 8, it seems far more likely that a typographical error had crept in at some point. In any event, nothing now turns on this.

5. Some six months after the expiry of the stay imposed by the Master, Ulster Bank proceeded to enter judgment in the Central Office on 27th March, 2009. In the context of this application, that judgment is evidenced by an Execution Order of the same date addressed to the County Registrar. The applications currently before the court are made in light of the fact that a twelve-year limitation period from the date of entry of judgment is due to expire on 26th March, 2021. Whilst the applicant does not concede the applicability of s. 11(6)(a) of the Statute of Limitations to the potential execution of the judgment, the defendants contend that the original High Court judgment is statute barred and has been since "*at least"* October, 2020. Consequently, the applicant is making this application on a protective basis, lest s. 11(6)(a) applies. I will deal with the defendants' argument pursuant to the Statute of Limitations further below.

6. On 19th December, 2016, Ulster Bank executed a global deed of transfer which assigned to the applicant all rights, title and interest that the Ulster Bank held in a large number of security documents, underlying loans and finance documents together with Ulster Bank's ancillary rights and claims therein. Clause 1 of the deed of transfer, which is exhibited for the purposes of this application, is drafted in very broad terms. For the avoidance of doubt, the security documents the subject of the transfer include those listed at Schedule 1 to the deed. There are four listings in that Schedule to the defendants' loans and/or securities. These are found at Section 1A Tier 2 Security Documents (Real Estate) where the lien registered on 18th September, 2009 is listed with the defendants named as borrowers; at Section (2B Part-01) Tier 2 Underlying Loan Agreements (Dataroom Facility Letters) where the facility letter dated 21st November, 2003 between Ulster Bank and the defendants is listed; at Section (2B-Part-02) Tier 2 Underlying Loan Facility (Loan Database) where loan account XXXXX138 is listed; and, finally, at Section (1B) Tier 2 Properties, the defendants were again listed as is their property comprising 57 acres of land at Folio 21631F, County Limerick. It is clear that the intent and effect of the 2016 transfer was the sale of Ulster Bank loans (including the defendants' loans) to the applicant. The court was advised that the defendants' indebtedness on foot of the said loans currently stands at some €90,000.

7. However, the applicant accepts that the defendants' current account number XXXXX054 was not transferred to it by Ulster Bank as part of this global transfer. Consequently,

there is a dispute between the parties as to the extent to which the applicant can seek orders in respect of the judgment in circumstances where it does not have an interest in the entire of the defendants' indebtedness underlying the judgment.

8. Finally, before looking at the specific issues raised on this application, the court notes the existence of related proceedings between the same parties (Record No. 2018/500SP) in which Promontoria seeks a well charging order for the repayment of monies owed by the defendants under loan account number XXXXX138 on foot of a lien registered by Ulster Bank on 18th September, 2009. Those proceedings were adjourned by consent with liberty to re-enter on the same date that these applications were heard. Although the court has not considered the content of the well charging/lien proceedings in any detail, they are relevant insofar as the defendants assert, firstly, that a settlement was reached between the parties in the well charging/lien proceedings creating both an issue estoppel and obviating the need – or entitlement – of the applicant to pursue these applications in respect of a judgment relating to the same indebtedness. The existence of any concluded settlement is disputed by the applicant. Secondly, the defendants rely on differences in the presentation of the applicant's case as between the two sets of proceedings.

Admissibility of Without Prejudice Correspondence:

9. Given that the defendants' solicitor has exhibited the entire exchange of without prejudice correspondence between the parties' respective solicitors to assert the existence of a concluded settlement agreement, the court regarded it as both necessary and appropriate to rule on the admissibility of this evidence as a preliminary matter during the course of the hearing. Having heard from counsel on both sides, I ruled that I would not consider this material for the following reasons. The overriding concern of the court was the importance of the principle that parties to litigation should be able to conduct without prejudice negotiations freely and without fear that any concessions made in the context of negotiations will be used against them in the proceedings in the event that a settlement is not reached. I acknowledge that there are circumstances where, notwithstanding that exchanges or negotiations are conducted on a without prejudice basis, their contents may become admissible in evidence, most particularly where proceedings are brought to enforce a settlement alleged to result from such negotiations (*per Moorview Developments v First Active plc* [2009] 2 IR 788). However, these are not proceedings brought to enforce the agreement alleged to have resulted from the negotiations, nor are they the proceedings in which the negotiations took place. Thus, the defendants are attempting to rely on the assertion that a concluded settlement reached in negotiations in separate (albeit related) proceedings has given rise to an issue estoppel which precludes the applicant proceeding with this application. No authority was advanced for that proposition.

10. The applicant urged the court not to embark on any consideration of whether a concluded settlement had been reached on the basis that, even if that dispute were to be resolved in the defendants' favour, it would still be irrelevant to this application in light of the nature of the relief sought. The applicant asserted that any comments made by the court in this application regarding the grounds for believing that a settlement had, or alternatively had

not, been reached would prejudice the determination of that issue if and when it arose in the well charging/lien proceedings or in proceedings brought for that purpose. I accept the latter argument. The parties would likely attach unwarranted weight to any views which this Court might express as regards the existence of a concluded settlement in circumstances where that issue is not squarely or properly before it.

11. I also accept the former proposition but subject to the proviso that the alleged existence of a settlement may be a factor to consider if the court comes to exercise its discretion under O. 42, r. 24. The defendants argued that this was not a mere assertion on their part and that they wanted to establish that there was credible evidence of a settlement, the former standard being equated to one which would not pass the threshold of a defence to summary proceedings which would justify sending the matter for plenary trial. The latter standard was not defined. In my view it is not necessary to determine conclusively whether a settlement was actually reached in order for the court to consider the alleged existence of a settlement. To categorise the allegation that a settlement was reached by reference to the strength of the evidence underlying the allegation introduces an unnecessary complication into this application for which no particular authority was advanced. If it were necessary to examine the without prejudice communications in order to establish as credible the argument that a settlement had been reached, then the privilege normally attaching to such material would of necessity be undermined. I felt this would not be appropriate in circumstances where the court would not be proceeding to determine whether, as a matter of fact, such a settlement was reached.

12. Finally, the defendants took issue with paragraphs 26 and 27 of the applicant's grounding affidavit in which the deponent, Mr Lynham, in contending for the urgency of this application, expresses concern at the possibility that if on-going negotiations were to continue past the point at which the limitation period might become applicable without the applicant having secured leave to execute the judgment, there would then be little incentive for the defendants to continue with the negotiations. The defendants wish to be allowed to introduce evidence of the negotiations which they claim have resulted in a settlement in order to refute the adverse inference they perceive in these paragraphs. I did not read the paragraphs as suggesting any lack of bona fides on the part of the defendants. There is clearly a dispute between the parties as to whether a settlement has been reached and from the applicant's perspective, no settlement has been concluded between the parties. In those circumstances Mr Lynham's affidavit reflects no more than the advice which any prudent solicitor would give a client in the applicant's position – i.e. that notwithstanding any negotiations which might be on-going the applicant should not allow a limitation period to expire without taking the steps necessary to protect its interests as the other party to the negotiations would be entitled to rely on a statutory limitation period.

Application under Order 17, rule 4

13. The first of the two applications made by the applicant is for the substitution or addition of Promontoria (Oyster) DAC as a plaintiff in these proceedings. Order 17, rule 4 provides: -

"Where by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."

The applicant contends that the application under O. 17, r. 4 is a straightforward one which would normally be made on an *ex parte* basis. The global assignment by Ulster Bank of its loans to the applicant in 2006 is relied on as the event, occurring after the institution of the 2006 proceedings, which has caused a change or transmission of interest or liability as a result of which Promontoria should now be made a party to the proceedings. Although the notice of motion is expressed in terms of the substitution of the applicant as plaintiff (i.e. in lieu of Ulster Bank), counsel for the applicant submitted that in light of its acceptance that the overdraft loan was not transferred to it, the more appropriate order would be for the applicant to be added to the proceedings as a co-plaintiff alongside Ulster Bank. It was submitted that there was no legal requirement that all plaintiffs in proceedings have a common or identical interest in all relief sought against the defendants, nor indeed that all defendants have a common liability to the plaintiffs.

14. Further, counsel pointed to the judgment of Meenan J. in *Friends First Finance v. Moloney* [2019] IEHC 844 as reflecting the relatively low threshold to be met on an application under O. 17, r. 4, albeit in that case, unlike this, a global or omnibus order had been sought in respect of multiple sets of proceedings involving multiple unrelated borrowers. Meenan J. identified the conditions to be met as: -

"10. In each application to the court for a "global" or "omnibus" order there should be an affidavit, from a solicitor instructed in the matter, deposing that in respect of each action listed in the Schedule he/she has personally satisfied himself/herself that:-

(i) There has been a valid transfer of the loan and/or security involved to the party being substituted as plaintiff; and

(ii) Valid notice has been given by way of "goodbye" and "hello" letters to the persons involved.

The documentation evidencing the above should be exhibited in the grounding affidavit. In making an order the court may rely on the aforesaid."

Counsel submits that all of these conditions have been met in this case.

15. The defendants raise a series of objections to this application. The first of these, although fully engaged with by the applicant, is one I had some difficulty understanding in light of Schedule 1 to the Deed of Transfer. The defendants argue that the facility letter on foot of which the 2006 summary proceedings were instituted was not the one dated November, 2003 but a later one dated 10th September, 2004. The significance of this is that although the 2003 facility letter is recorded as having been transferred by Ulster Bank to the applicant, the 2004 facility letter is not. Counsel for the defendants argued that the renewal of the loan offer in September, 2004 meant it was incontrovertible that the 2003 letter had not been implemented and, that if it had been, there would only be one loan account. In fact, the initial affidavit grounding the summary proceedings in 2006 did not mention either facility letter but referred to the defendants' indebtedness to the Ulster Bank on each of two accounts both of which were described by reference to their account numbers. The affidavit grounding the second motion for liberty to enter final judgment refers to the 2004 facility letter. However, it describes it as renewing an existing loan facility on revised terms which required monthly repayment of interest on the defendants' loan account.

16. The defendants' argument cannot be directed to the legal merits of the 2006 proceedings nor the validity of the judgment since the defendants did not object to the entry of judgment in those proceedings and went further in expressly acknowledging, on affidavit, their indebtedness in the sums claimed in the summary summons. Thus, the argument is only relevant as regards the applicant's entitlement in respect of their indebtedness pursuant to the Deed of Transfer. I do not regard it as necessarily incontrovertible that the 2003 facility letter was not acted on just because a further facility letter issued in 2004. As counsel for the defendants observes, the facility letters both relate to the consolidation or continuation of the defendants' existing indebtedness to the Ulster Bank. It seems that loan account XXXXX138 predates both facility letters as the date recorded for that account under "Origination" in Section (2B Part-02) of Schedule 1 of the Deed of Transfer is 21st September 1999. I note that the 2003 facility letter contains a review date of 28th February, 2004 and thus envisaged a review of the terms offered within a relatively short time. It is also evident from the second defendant's affidavit that at that time the defendants had extensive borrowings with a number of different financial institutions and that they were, perhaps not through choice, engaged in an ongoing process of re-negotiation and re-finance. Most significantly, as counsel for the applicant points out, the 2003 facility letter was signed as having been accepted by the defendants on 22nd November, 2003. The 2004 facility letter is not signed and there is no evidence before the court that it was accepted by the defendants.

17. In an affidavit sworn for the purposes of this application on 1st March, 2021, the first defendant contends that the defendants' loan account was not transferred to the applicant, apparently by reference to a failure to mention the transfer of the loan account in the affidavit sworn by the applicant in the well charging/lien proceedings. The first defendant also points to the differences between the extracts of the Deed of Transfer exhibited in each set of proceedings. Counsel for the applicant argued strongly that a facility letter does not exist in a vacuum but must be referable to a loan account reflecting

the implementation of the transaction authorised by the facility letter. Although in another context I would likely be persuaded by this argument, I do not think that it is necessary to decide the issue in circumstances where there is a dispute as regards whether the "*correct*" facility letter had been transferred to the applicant under the Deed of Transfer. The reason this is unnecessary is because, regardless of the transfer of the facility letter, it is clear that the defendants' loan account number XXXXX138 is listed as a Security Document under Section (2B Part-02) of Schedule 1 of the Deed of Transfer. Thus, that loan account and all of Ulster Bank's rights and interests in it was transferred to the applicant in 2016.

18. Secondly, the defendants argue that as a matter of law the benefit of part only of a judgment cannot be assigned, relying on the decision in *Chung Kwok Hotel Company Ltd v. Field* [1960] 3 All ER 143 as authority for this proposition. In that judgment, Harman L.J. stated: -

> *"Whether part of an order can be assigned without the rest seems to me at least very doubtful. I should on the whole think that it could not. So that I should be inclined to the view, without deciding it, that this order, or part of the order which deals with possession, is probably not at law assignable."*

It is notable that the case was decided on a narrower factual basis as the transfer of the property in issue did not purport to also transfer the benefit of the court order. In a number of recent cases, Irish Courts have declined to follow *Chung Kwok Hotel* pointing out that the comments in question were *obiter*, that they were made in the context of a specific UK statutory scheme, that the facts of the case are quite distinctive and distinguishable and generally were not relevant to the various issues of Irish law under consideration (see Whelan J. in *Everyday Finance DAC v. Beades* [2021] IECA 48 and *Pepper Finance v. Beades* [2021] IECA 41).

19. I do not regard this Court as bound by *obiter* comments made in another jurisdiction which do not appear to have been endorsed by any Irish Court in the past 60 years. Whilst the views expressed by Harman L.J. are clear, the underlying rationale is not explained in the judgment, no doubt because the comments were obiter. The factual circumstances of the two cases are different because , as previously noted, clause 1 of the Deed of Transfer is drafted very broadly so as to include all of the rights, title and interest and ancillary rights and claims in the security documents, underlying loans and finance documents transferred pursuant to it. I do not think that I have to decide definitively whether part of a judgment of this nature (i.e. a money judgment as opposed to an order for possession) is assignable as a matter of law in circumstances where the applicant now seeks to be joined to the proceedings as a co-plaintiff with the Ulster Bank. The test to be met under O. 17, r.4 is that there has been a change or transmission of interest or liability such that a person who is not already a party should be made a party to proceedings. I think that the applicant has demonstrated that such a change did occur.

20. The third objection raised by the defendants to the application under O. 17, r. 4 is that the Ulster Bank is not on notice of the application and has not consented to it. Whilst it is questionable whether the defendants can rely on the interests of Ulster Bank in the judgment against them, clearly it would not be appropriate for the court to make any order depriving Ulster Bank of the benefit of any judgment in its favour on foot of an application of which it does not have notice and without hearing any objection it might have. However, the evidence before the court amply establishes the interests of the applicant in the defendants' loan account which was transferred to the applicant pursuant to a commercial agreement with Ulster Bank. The loan account gave rise to the greater part of the defendants' indebtedness underlying the judgment. Joining the applicant to the proceedings as a co-plaintiff protects the interests of the applicant in the judgment in respect of that loan account and does not deprive the Ulster Bank of the status of plaintiff to protect any interest it may wish to assert in the balance of the indebtedness reflected in the judgment.

21. The final objection to this relief raised by the defendants relates to the "*goodbye*" notice described by Meenan J. in *Friends First Finance v Moloney* as one of the conditions to be satisfied for an order adding or substituting a new plaintiff to be made. In the affidavit grounding this application, Mr. Lynam, solicitor, has exhibited a letter dated 6th January, 2017 sent by Ulster Bank to the defendants confirming the transfer of their loan facilities to the applicant as of 19th December, 2016. The letter expressly states that all the rights of Ulster Bank have been transferred to the applicant and advises the defendants of the identity of the applicant's servicing agent from whom the defendants should expect to hear at the end of the transitional period. The letter does not expressly mention the judgment which had been obtained in 2009. The first defendant responded to this at para. 13 of his affidavit in quite a deliberate manner. Firstly, he says, *"I do not admit that the defendants received* [the letter]" and he takes issue with Mr. Lynam's status as deponent of the facts averred to in the applicant's grounding affidavit. He then states "*categorically*" that the defendants did not receive *"notification from Ulster Bank that it had assigned its interest in any order or judgment*" to the applicant and that he only became aware that the applicant had "*stepped into the shoes*" of Ulster Bank recently and in the context of this application.

22. It should not be necessary to observe that an affidavit is a sworn statement of evidence and is not a pleading. The phrase "*I do not admit*" has no place in an affidavit. In a pleading, a plea that something is not admitted has the legal effect of placing the opposing party on proof of that fact or issue. Affidavits constitute evidence and where evidence of a fact (in this case, the sending of a goodbye letter) is adduced in an affidavit, a response to the effect that that fact is "*not admitted*" is meaningless. The opposing party has advanced evidence to prove an issue. The court must decide each issue on the basis of the evidence before it and, unless that evidence is expressly denied and contrary evidence adduced, the uncontroverted evidence in an affidavit must in normal course be accepted by the court. In this instance, the deliberateness with which the first defendant says he does not admit receipt of the goodbye letter (i.e. he has not stated that it was not received) can be contrasted with the express statement that he did

not receive notice of assignment of the order or judgment. The exhibited letter (no doubt in a standard form sent to many borrowers with outstanding Ulster Bank loans) does not expressly mention the judgment. However, as it makes it clear that all of the rights of Ulster Bank "*including all claims, suits and causes of action and any other right*" were transferred together with the relevant loan facilities, it necessarily followed that Ulster Bank's interest in the judgment on the loan facility was transferred. If the defendants wished to dispute the sending and receipt of the "*goodbye letter*" then that should have been done in express terms and without the equivocation which is manifest in para. 13 of the affidavit. I find the defendants' approach on this issue to be without merit.

23. In conclusion in respect of the application under O. 17, r. 4, I am satisfied that the applicant has established to the requisite civil standard of proof that it falls within the terms of that order, in that, an event has taken place involving the change or transmission of an interest to it, as a result of which it should be made a party to the proceedings. The applicant has also established that the conditions identified by Meenan J.in *Friends First Finance v Moloney* (albeit in respect of a global application of this nature) have been met. Therefore, I will make an order joining the applicant as a co-plaintiff to these proceedings. I do not propose to make any order segregating the two loans which are comprised within the judgment in the absence of Ulster Bank. The applicant may make a further application in that regard if it is deemed necessary to do so.

Application under Order 42, rule 24

24. In circumstances where the judgment was issued more than six years ago, the second application before the court is one under O. 42, r. 24 which provides as follows: -

> *"In the following cases, viz.:*
>
> *(a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;*
>
> *…*
>
> *…the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just."*

25. An order under this rule would permit the applicant to enforce the judgment in respect of which it is now a co-plaintiff. While such an order is necessary before execution can take place, the granting of the order does not, of itself, effect any positive step in the execution process nor indeed does it presume that the applicant will proceed to take any such step. Further, the application has been made on an urgent basis lest s. 11(6)(a) of

the Statute of Limitations be held to preclude execution more than twelve years after the date of the judgment. Section 11(6)(a) provides: -

> *"An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable."*

The applicant contends that execution per se is not "*an action*" to which the section applies, although it accepts that there are steps which might be taken in aid of execution (such as seeking a well charging order) which would constitute an action and to which the statute might apply. The court was addressed extensively on the Statute of Limitations and whether execution of a judgment constitutes "*an action*" within the meaning of Section 11(6)(a). To a large extent the argument was inchoate as, unless the court were to accept the defendants' argument that the statute had already expired (considered below), the leave sought in the application before the court is manifestly not itself "*an action*", and if such leave is granted then it remains open to the defendants to raise the statute in the context of any subsequent step the applicant might take. For the record, it is noted that the most recent Irish decisions suggest that whatever about subsequent steps, an order under O.42, r.24 does not come within s.11(6)(a) (see *Ulster Investment Bank Ltd v Rockrohan* [2015] 4 IR 37and *Start Mortgages DAC v Piggott* [2020] IEHC 293).

26. The principles applicable to the granting of an order under O. 42, r. 24 have been considered in a number of cases. The applicant contends that the threshold to be met is a relatively low one. In *Smyth v. Tunney* [2004] 1 IR 512, the Supreme Court dismissed an appeal from an order granting leave to execute orders for costs made against the plaintiff between twelve and six years earlier. Although the point was argued, the court did not find it necessary to decide whether the right to execute a judgment came within the Statute of Limitations. However, having found the court's jurisdiction under O. 42, r. 24 to be a discretionary one, Geoghegan J. observed that the fact a judgment debt might be statute-barred was something which should be taken into account in the exercise of the court's discretion. Indeed, he felt that, in such circumstances, the party seeking leave to execute would have likely "*encountered very considerable problems in persuading a court to exercise discretion in their favour*". As regards the onus on the party seeking leave to execute to explain their delay in doing so, Geoghegan J. was of the view that "*no very strong or exceptional reasons*" were required (unless the application was being made *ex parte*); rather "*some reason for delay had to be shown but no more*".

27. More recently, Whelan J. for the Court of Appeal in *Pepper Finance v. Beades* [2021] IECA 41 has emphasised the discretionary nature of the order: -

> *"It is clear from the jurisprudence, particularly the decision of the Supreme Court in Smyth v. Tunney…, that O. 42, r. 24 is a discretionary order and reasons must be given for the lapse of time since the judgment or order during which execution did not occur. Even where a good reason is identified for the delay, the court can take into account counterbalancing arguments of prejudice. It is noteworthy that in Smyth v. Tunney, as in the instant case, orders sought to be executed had been*

made in the course of long running litigation, and leave to issue execution pursuant to O. 42, r. 24 had been made some twelve years or so later. It is also noteworthy that the reasons identified for lapse in time in Smyth v. Tunney included that the applicants had made a number of unsuccessful attempts to execute."

Whelan J. noted the decision of Dunne J. in the High Court in *Bula Ltd v. Tara Mines Ltd* [2008] IEHC 437 in which reference is made to the court considering counterbalancing allegations of prejudice "*if there is good reason for the delay*". Finally, she quoted, without demur, from the academic text Collins, *Enforcement of Judgments* (2nd Ed., Round Hall, 2019):-

"The combination of a light onus on a judgment creditor to provide reasons for the delay, coupled with a general difficulty in establishing prejudice on the part of the judgment debtor, suggests that for such applications brought 6-12 years after the date of the order or of recovery of the judgment the court will generally extend time."

28. Needless to say, the defendants contend that the onus on the applicant is somewhat heavier and focus on the need for a "*good reason*" to be established before the court proceeds to consider discretionary factors. The defendants also point to the fact that no explanation has been offered by Ulster Bank for the delay which occurred prior to the transfer of their indebtedness to the applicant in 2016. I will return to the issue of whether the applicant has met the necessary threshold after addressing a further raised issue by the defendants under the Statute of Limitations.

29. The defendants argue that not only does s. 11(6)(a) apply to this application but that the twelve-year period has already expired "*at least*" as of October, 2020. The basis for this argument is a reliance on the Order of the Master of the High Court as effectively constituting the judgment in the case rather than the subsequent administrative step of entering judgment in the Central Office. The Master made the order granting liberty to enter final judgment on 29th May, 2008. The order was initially subject to an indefinite stay which was vacated and replaced with a three-month stay on 3rd July, 2008. The three-month stay expired on 2nd October, 2008. The defendants point out that this latter stay was a stay on execution only and did not prevent entry of the judgment. The defendants argue that the twelve-year limitation period runs from the date of the Master's order or, alternatively, the date of expiration of the stay and, consequently, that it expired either in May or October, 2020. When pressed, Counsel for the defendants accepted that the Ulster Bank could not have executed the judgment on foot of the Master's order before it had been entered in the Central Office but argued that it was open to Ulster Bank to enter the judgment at any time after 3rd July, 2008 and to execute it at any time after October, 2008. Thus, the key date is not the Master's order itself but the subsequent vacation of the unlimited stay. On this argument the fact that Ulster Bank delayed in entering judgment until 27th March, 2009 should not mean that the judgment is not treated as being effective from the point in time when it could have been effective.

30. The defendants also rely on O. 41, r. 6(4) of the Rules of the Superior Courts to draw an analogy between the process under which liberty to enter final judgment is granted by the Master of the High Court with the subsequent entry of judgment in the office and the making of an order in open court and its subsequent filing. Oder 41, rule 6(4) provides as follows: -

> *"Every judgment or order pronounced or made by the High Court, by the Court of Appeal or by the Supreme Court when so filed shall be deemed for all purposes to be duly entered, and the entry thereof shall be dated as of the day on which the judgment or order was pronounced or made, unless the Court otherwise directs."*

If the analogy sought to be drawn by the defendants is correct, then notwithstanding the actual entry of judgment in March, 2009, it should be deemed to have been entered and the entry should be dated with the date of the Master's order, namely 29th May, 2008. This obviously does not sit well with the acceptance that judgment could not have been entered on that date because of the unlimited stay which was not vacated until 3rd July 2008. It seems unlikely to say the least that the rules require judgment to be deemed to have been entered on a date when the judgment creditor was in fact precluded from entering judgment.

31. There are a number of other difficulties with this argument, not least of which is the fact that the Master of the High Court is not a judge and an order made by him is not a judgment. As I understand it, the purpose of O. 41, r. 6(4) is to link the date of the formal documentation reflecting a court order or judgment to the date on which the judgment or order was made in the sense of being pronounced in open court by a judge. However, the granting by the Master of liberty to enter final judgment was not itself a judgment. It was, at most, a determination that no defence had been raised to a summary claim. Had a *bona fide* defence been shown, then the Master would have been required to adjourn it for plenary hearing before a judge of the High Court. As no defence had been shown then Ulster Bank was granted liberty to enter final judgment but, crucially, had to proceed to do so before it could be said to be in possession of a judgment against the defendants.

32. In the circumstances, I think the analogy sought to be drawn by the defendants is a false one. The Master of the High Court did not grant judgment in this case and the date of the order granting liberty to enter final judgment should not be treated as if it were a judgment or order of the High Court subject to O. 41, r. 6(4).

33. My attention was drawn to a number of judgments in which the policy considerations underlying the Statute of Limitations were considered, most specifically the need to *"remove the potential injustice that may be generated by the increased difficulty of proving a claim or defence after an extended period of time"* (Irvine J. in *Ulster Investment Bank Ltd v. Rockrohan* [2015] 4 IR 37). However, there is also an acknowledgement that these considerations do not apply where a party seeks to enforce a judgment or order previously made at some time removed from the date on which it was made. As "*there is no surprise or evidential unfairness inherent in such a process*".

34. This is relevant not only to the application of the Statute itself but also the more general issue of delay. In my view, an applicant under O. 42, r. 24 is not to be treated as being in an equivalent position to a party facing an allegation of inordinate and inexcusable delay in the prosecution of proceedings. Delay in the prosecution of proceedings impacts on the ability of the court to conduct a fair trial. Evidence and witnesses may become unavailable and the recollection of those witnesses who remain available will doubtless be impacted by the lapse of time. Where judgment has been granted, a court has already adjudicated upon any disputed issues between the parties or, as here, a party has admitted liability for the claim made by the other. Absent an appeal, or at the conclusion of the appeals process, the rights and obligations of the parties *inter se* will have been been finally determined. Because of the fundamental difference between a judgment and an unadjudicated dispute, there is no obligation on a judgment creditor to execute a judgment promptly equivalent to that on a litigant to prosecute proceedings promptly. Indeed, as noted by Gearty J in *Start Mortgages DAC v Piggott* (above), public policy would likely run counter to imposing such an obligation. After judgment has been obtained, the parties to litigation frequently resolve matters between themselves on a more satisfactory basis than mere execution of the judgment might permit. Requiring a judgment creditor to execute promptly could be counterproductive in many instances, not least in this case where that would have entailed execution during a severe economic recession which would hardly to have led to a particularly beneficial outcome for either side. Thus, while there must be a reason explaining the delay, that reasoning requirement is not predicated on the assumption that lengthy delay in execution is in itself inimical to the interests of justice.

35. In this case the applicant has explained that since the transfer of the defendants' indebtedness on foot of the loan to it, there has been on-going engagement between the applicant and the defendants. The defendants' observation that there is no explanation from Ulster Bank to explain non-execution in the 7 year period leading up to the transfer is correct. However, that has to be looked at in light of the observations made in the preceding paragraph to the effect that there is no obligation on a judgment creditor to move immediately or even promptly to execute a judgment and that there are sound public policy reasons – which may benefit both judgment debtors and judgment creditors - not to impose such a requirement. I am satisfied that the explanation proffered by the applicant meets the threshold of a good reason, understood in the light of the judgment of the Supreme Court in *Smyth v Tunney*, and has established its *prima facie* entitlement to issue execution.

36. The making of an order under O.42, r.24 is discretionary, and the court must consider all of the circumstances to see whether, notwithstanding the applicant's prima facie entitlement, the order should be made. The defendants advance four grounds upon which it is said that the order should not be made. Some of these matters have already been considered as part of the issues addressed above and need only be mentioned briefly. These include the fact that no explanation has been offered by Ulster Bank for its delay. In this regard the threshold is not a particularly onerous one and for the reasons explained in the preceding paragraph I am satisfied that the applicant has met it. The

defendants also submit that unlike some of the judgment debtors who have come before the courts in these cases they are not unsympathetic litigants. This may be the case, but the defendants borrowed significant amounts of money which they have not repaid and which they acknowledged in the summary proceedings were due and owing by them. Certainly, they have not engaged in the devices and delaying tactics that other courts have criticised in other cases. However, that does not really have a bearing on the central issue of whether the applicant should be granted leave to execute the existing judgment against them.

37. The defendants also criticise the applicant for "charging into court" at the end of a limitation period. It would undoubtedly be preferable for applications of this nature to be made on a timely basis to prevent the type of urgency which has arisen in this case. However, where limitation periods apply a litigant can hardly be criticised for taking steps within those periods which they might be precluded from taking thereafter and human nature is such that unfortunately that often means taking steps at the last minute. Further, the court is live to the fact that there is a dispute between the parties as to whether the contended for limitation period applies and it would be unfair to the applicant to penalise it for moving at a late stage to protect itself from the potential operation of a limitation period relied on by the defendants but which may not apply at all. If the applicant is correct and the limitation period does not apply it would be incongruous to have refused to exercise the court's discretion in the applicant's favour because of proximity to the end of a non-applicable period. In any event, limitation periods do not operate to bar the right of action but may, if raised by the opposing side, operate to prevent recovery. Whilst the applicant's stance may be prudent, unless and until a limitation period is actually raised against it, it is not precluded from making this application.

38. This leaves the defendants final submission which is based on the alleged existence of a concluded settlement agreement. Obviously if related proceedings concerning the same indebtedness have been compromised, then it would be at a minimum unfair and most likely unlawful to allow the applicant recover on foot of this judgment for the same debt. However, the existence of a concluded settlement agreement is disputed. If the applicant is correct and no such agreement exists then it would be manifestly unfair to have denied it the opportunity to execute this judgment because of the existence of a settlement. On the other hand, granting leave to the applicant to execute is not of itself execution. The defendants will have the opportunity to raise the issue of the alleged settlement before the judgment can be executed against them. If they establish the existence of a settlement, that will have consequences which will likely preclude the execution of the judgment. Even in a worst case scenario as the judgment is a money judgment, if it were to be wrongly executed against them the sums can be repaid. In other words, the potential damage to be caused to the applicant if execution is precluded is irreversible whereas the potential damage to the defendants if leave to issue execution is allowed is both currently inchoate as it depends on additional steps being taken by the applicant and, in the unlikely event that the damage were to materialise it would be reversible.

39. The only other matter raised by the defendants is the fact that the applicant has another remedy by virtue of the fact that a lien has been registered on their property in respect of which the applicant is currently seeking a well charging order. I accept that both the judgment and the well charging order relate to the same indebtedness and that the lands in the folio subject to the lien were provided as security for that debt. That argument might carry more weight if the well charging order had been made but as things stand those proceedings are being strenuously contested by the defendants. It would, I think, be unfair to the applicant to deny it the benefit of the judgment in circumstances where the well charging order has not been and may never be made. In this context I am also taking account of the fact that the judgment relates to indebtedness which was never disputed by the defendants.

40. For the reasons set out above I am satisfied that the court should exercise its discretion in favour of making an order pursuant to O.42, r.24 granting the applicant leave to issue execution of the judgment.