

**THE HIGH COURT**

[2022] IEHC 12  
[2006 No. 628Sp.]

**BETWEEN**

**IRISH NATIONWIDE BUILDING SOCIETY**

**PLAINTIFF**

**AND**

**CON HEAGNEY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Allen delivered on the 14th day of January, 2022**

**Introduction**

1. This is an application by Mars Capital Ireland DAC for an order pursuant to O. 42, r. 24 of the Rules of the Superior Courts granting leave to the applicant to issue execution on foot of an order for possession which was made on 23rd November, 2009, and, if necessary, an order pursuant to the inherent jurisdiction of the court for the amendment of the order for possession by replacing the words "*Irish Nationwide Building Society*" with the words "*Mars Capital Ireland DAC*".
2. The application raises a novel issue as to the correct interpretation of O. 42, rule 24. In a nutshell, the applicant argues that the lapse of time since the making of the order for possession is irrelevant in circumstances in which there has been a change in the party entitled to execution.
3. The motion was issued on 29th January, 2020, originally returnable for 24th February, 2020 but was adjourned generally when the Chancery Summonses list was suspended by reason of COVID-19 restrictions. The motion was revived and transferred to the Chancery list on 13th July, 2021 and eventually came on for hearing on 7th October, 2021.

**Background**

4. These proceedings were commenced by special summons issued on 1st December, 2006. The plaintiff, Irish Nationwide Building Society ("*Irish Nationwide*"), claimed an order for possession of a property at Tully House, Eyre Court, Ballinasloe, County Galway, which had been mortgaged by the defendant by deed made 5th October, 2005.
5. In order that the background and arguments can be fully understood it is necessary at this point to say that the mortgaged property was described in the mortgage and shown on a map annexed as a plot of 7.1886 ha or thereabouts outlined in red, excluding an area of 0.0352 ha outlined in blue and marked with the latter "*D*". As explained by Mr. Heagney in his affidavit of 30th August, 2021 filed in response to this application and shown on the copy map exhibited, the excluded area is a building or part of a building owned and occupied by his mother.
6. Precisely when and in what circumstances this came about is unclear, but the effect of the mortgage was that Irish Nationwide has a mortgage over a 17.763 acre plot, excluding a 0.087 acre island, more or less in the middle. All the appearances are that when Mrs. Heagney's house was carved out of the original much larger holding there was not

reserved for the benefit of her house any express right of way leading from the public road to Tully House or any easement to drain into the septic tank serving her house.

7. By plenary summons issued on 14th October, 2008 Irish Nationwide commenced proceedings against Mr. Heagney and Mr. Daniel Coleman, the solicitor who had acted for Mr. Heagney in connection with his borrowings from the Building Society. By the general indorsement of claim, the plaintiff claimed an order for specific performance of a loan agreement made on 16th October, 2002 between the plaintiff and Mr. Heagney; specific performance of an undertaking in writing given by Mr. Coleman on 30th October, 2002; and damages. I do not have the statement of claim in that action, but the affidavit filed on behalf of the applicant confirmed what I think could in any event have been confidently inferred, that the loan was drawn down on the undertaking of the solicitor to provide good and marketable title to the property offered as security and a first legal charge or mortgage, and that the security given was not what Irish Nationwide thought that it was entitled to have expected. It is easy to see why Irish Nationwide hoped to fix Mr. Coleman with responsibility for the shortcoming in the security but not at all what it could have hoped to recover against Mr. Heagney over and above the debt and interest which was already covered by his covenant to repay the loan.
8. What is significant in terms of understanding the arguments now made is that the plenary summons was issued upwards of thirteen months before the special summons was heard, so that whatever difficulty there was with the security (if any) was well known by the time the order for possession was made. The indorsement of service on the plenary summons shows that it was served on Mr. Coleman on 5th March, 2009 and on Mr. Heagney on 10th October, 2009. Mr. Heagney did not enter an appearance and by order of 22nd March, 2010 judgment was given against him for such amount as might be assessed by a judge sitting alone in respect of the loan, interest thereon, and damages, as well as an order for costs.
9. The order of 22nd March, 2010 shows that Mr. Coleman, also, had failed to enter an appearance but he appeared at the hearing of the motion for judgment and the plaintiff was given leave to list the matter before the bankruptcy judge. Eventually the claim against Mr. Coleman was the subject of a settlement between him and Irish Bank Resolution Corporation Limited by which Mr. Coleman submitted to judgment for €786,920.75 which, by order of 14th November, 2011, was admitted as a debt in a scheme of arrangement which had been proposed by Mr. Coleman on 14th December, 2009. There is no evidence as to whether the scheme of arrangement proposed by Mr. Coleman was ever approved or what, if any, dividend was ever paid to the plaintiff.
10. The assessment against Mr. Heagney was never set down.

**The application for leave to issue execution**

11. In the meantime, as I have said, an order for possession of the mortgaged property was made by the High Court (Dunne J.) on 23rd November, 2009. That order was not executed and the applicant, as the transferee of the mortgage and loan, now seeks liberty to issue execution.

12. The affidavit of Mr. Anthony Noonan, a director of the applicant, shows that an order of possession was sent to the County Registrar for County Galway for execution. A date for execution was arranged for 19th July, 2011 but this was postponed to 15th September, 2011. There is no evidence as to why the earlier date was postponed or what, if anything, happened on the later date.
13. According to Mr. Noonan, it appears from unidentified records provided by the plaintiff to the applicant that further unquantified delays ensued at an unspecified time or times as a result of an unidentified dispute raised by the solicitors then acting for Mr. Heagney in which they questioned the validity of the order for possession made by the High Court and the plaintiff's right to enforce that order. As Mr. Noonan spells out, there was no appeal against the order for possession, so I cannot see what sensible issue might have been raised as to its validity.
14. Mr. Noonan suggests that the position between the parties at the time was also complicated by the plenary proceedings which the plaintiff "*had to take*" against Messrs. Coleman and Heagney: to which I will return.
15. Mr. Noonan suggests that:- "*It appears that due to all of these issues the execution of the order for possession was not pressed and that thereafter execution was not sought as the assets of Irish Nationwide Building Society were being transferred as part of credit stabilising measures taken in the Irish banking system which ultimately resulted in the sale of the loan facilities and security relating to the defendant to the applicant herein.*"
16. Mr. Noonan carefully sets out the chronology leading to the purchase by the applicant of Mr. Heagney's loan and mortgage.
17. The first step was a transfer order made by the High Court on 1st July, 2011 pursuant to s. 34 of the Credit Institutions (Stabilisation) Act, 2010, by which all of the assets of Irish Nationwide were transferred to Anglo, which, on 14th October, 2011 changed its name to Irish Bank Resolution Corporation Limited ("*IBRC*"). Then, following the enactment of the Irish Bank Resolution Corporation Act, 2013, IBRC was put into special liquidation.
18. By Loan Sale Deed dated 31st March, 2014, IBRC, acting by its special liquidators, agreed to sell a number of assets, including Mr. Heagney's loan account the subject of this application, to the applicant, which was then called Sandalphon Mortgages Limited. The applicant changed its name to Mars Capital Ireland Limited on 10th April, 2014, and by Deed of Conveyance and Assignment made the 6th June, 2014, IBRC conveyed, assigned, transferred and assured a large number of properties, including Tully House, to the applicant, subject to the proviso for redemption.
19. Mr. Heagney was notified by the special liquidators by letter dated 9th June, 2014, and by the applicant by letter dated 10th June, 2014, that the transfer of his mortgage had been successfully completed on 6th June, 2014.

20. To complete the narrative, Mars Capital Ireland Limited was converted to a designated activity company on 17th September, 2016.
21. Paragraph 24 of Mr. Noonan's affidavit is of some significance and I will set it out in full. He said:-

*"I say and believe that efforts were made to obtain a statement of affairs from the defendant and to arrange a meeting through an Authorised Third Party ("ATP"), however as no progress could be made the ATP ultimately resigned his authority in or about 2018. I say and believe that the plaintiff has continued to write to the defendant periodically in accordance with the Code of Conduct on Mortgage Arrears, however the defendant has not responded to the correspondence or engaged with the plaintiff in any way."*

22. The applicant's case is that by virtue of the assignment and transfer there has been a change of interest in the party entitled to execute the order for possession, that it is the party entitled to execute the order, and that it is necessary to apply to the court for leave to issue execution in the name of Mars Capital Ireland DAC.
23. Mr. Noonan has deposed that as at the date of swearing of his affidavit grounding the application – which was 23rd January, 2020 – the sum of €1,215,592.80 was due and owing in respect of the loan facility; that no payments were made since the transfer to the applicant; and that the last payment made on the account was a sum of €5,707.00 which was made on 16th October, 2009 – which was shortly before the order for possession was made. A statement of account between the applicant and Mr. Heagney shows an opening balance on 27th September, 2014 of €945,006.75 and a closing balance on 22nd January, 2020 of €1,214,592.80.
24. The applicant's motion, as I have said, was originally returnable for 24th February, 2020 but was adjourned generally when the Chancery Summonses list was suspended by reason of COVID-19 restrictions. It was revived and transferred to the Chancery list on 13th July, 2021 and on 30th August, 2021 Mr. Heagney swore a replying affidavit. He suggested that the application should be refused for a number of reasons.
25. First, it was said, a period of eleven years and nine months had elapsed since the making of the order for possession and the application should be refused based on this exceptional delay alone. The delay, it was said, had not been caused or contributed to by Mr. Heagney. Mr. Heagney disclaims any knowledge of the litigation between Irish Nationwide and Mr. Coleman and says that his non-engagement with the plenary proceedings did not cause any delay in respect of these proceedings. Moreover, he says, the plenary proceedings could not possibly have delayed these proceedings since nothing was done in the plenary action as far as he was concerned since judgment was given against him in default on 22nd March, 2020; and that action appears to have concluded against Mr. Coleman on the making of the order of the High Court made on 14th November, 2011.

26. I pause here to say that on the hearing of the motion it was accepted by counsel for Mr. Heagney that the relevant time was not the eleven years and nine months which elapsed between the making of the order for possession and the swearing of the replying affidavit but the ten years and two months between the making of the order and the issuing of the motion for liberty to issue execution on 29th January, 2020.
27. Secondly, it was said, the exceptional delay had been caused directly and indirectly by the plaintiff's irresponsible conduct of business. Mr. Heagney in his affidavit repeated – and so can be taken to accept – the evidence as to the transfer from Irish Nationwide to Anglo, and by IBRC to the applicant, and the evidence as to the change of name and conversion of Mars Capital Ireland DAC.
28. Thirdly, Mr. Heagney's affidavit suggested that between 6th June, 2014 and 23rd November, 2015 (the sixth anniversary of the order for possession) the applicant could have executed the order for possession without leave, and since then caused further exceptional delay.
29. I pause again to say that on the hearing of the motion it was accepted that this was incorrect. As a transferee of the security, the applicant would have required leave. I will come in due course to the basis on which any application which might have been brought by the applicant within six years of the making of the order for possession would have been dealt with.
30. Fourthly, Mr. Heagney suggests that no reason or explanation, good or bad, has been offered for the lapse of time between the transfer to the applicant and the making of the application.
31. Fifthly, Mr. Heagney suggests that he has been greatly prejudiced by what he characterises as the applicant's extraordinary and inexcusable delay. He says that in the time which has elapsed he has continued to live and work on the property, on which he carries on the business of dry stock farming. He says that he has invested approximately €150,000 over the past eight years or so in providing livestock accommodation, sheds and yards.
32. Further, Mr. Heagney has deposed that the property owned and lawfully occupied by his elderly mother is in the middle of the secured property. He suggests, on the one hand, that because his mother lives in the middle of the mortgaged property there would be no reality for possession to take place if the order for possession were to be renewed, and, on the other, that if the applicant were to take possession his mother would be cut off from the public road and septic tank. Various, Mr. Heagney suggests that the security was completely flawed because no provision was made for the easements necessary for the ordinary use and enjoyment of his mother's house, and that her right to access and drainage would be severed.
33. Finally, Mr. Heagney suggests that his partner has been residing in a property on the secured property since "*in or around 2010*" with their daughter, aged ten years. He says

that his partner, since 2013, has contributed by way of work and services on the farm in the sum of €50,000 to €70,000 and has thereby acquired legal and equitable rights which would be greatly impeded upon by the making of the order sought.

### **Legal principles**

34. I hope that I will be forgiven for saying that there was some confusion in the arguments advanced and language used by counsel for both parties in the written submissions and on the hearing on the motion. The applicant identified the issues as being whether delay was a basis on which leave to issue execution might be refused and whether the prejudice asserted by the defendant, if established, would justify the refusal of the relief sought. The broad thrust of the respondent's argument was based on extraordinary and inexcusable delay and prejudice. Counsel on both sides, I hasten to add, did refer to the relevant authorities, to which I will come, but reference was made also to the *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 line of authorities, dealing with the jurisdiction of the court to dismiss proceedings for delay. As I hope to make clear, the principles applicable to the exercise by the court of its inherent jurisdiction to dismiss proceedings by reason of inordinate and inexcusable delay are quite different to the principles to be applied in the exercise of the jurisdiction conferred by the Rules of the Superior Courts in deciding an application for leave to issue execution.

35. The jurisdiction invoked by the applicant on this motion is that conferred by O. 42, r. 24 but as counsel for the applicant correctly submits, r. 24 must be read in the context of rule 23. Order 42, rr. 23 and 24 provide, insofar as is material:-

" 23. *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.*

24. *In the following cases, viz.:-*

(a) *where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; ...*

*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: ..."*

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

excuse any delay in the execution of a judgment or order within the first six years from the date of the judgment or order.

37. The foundation of the modern jurisprudence in relation to applications for leave to issue execution after the expiry of six years is the decision of the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512. Geoghegan J. (with whom Denham and Murray JJ., as they then were, agreed) undertook an exhaustive analysis of the Irish and English cases, starting with the Common Law Procedure Amendment Act (Ireland), 1853. Following the decision of the Supreme Court in *Fitzgerald v. Gowrie Park Utilities Society Ltd.* [1966] I.R. 662, Geoghegan J. found that the jurisdiction to decide whether to grant leave to issue execution more than six years after the judgment or order was a discretionary jurisdiction. In the headnote, the law reporter correctly distilled the principles on which that jurisdiction should be exercised as being:-

"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 date of 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 or judgment and that the court must consider any allegations of prejudice made against such application."*

38. I mentioned earlier that after this motion had been adjourned generally by reason of COVID-19 restrictions a motion was brought to restore it to the list. That restoration application was based on an apprehension that the motion would have to be heard and determined within twelve years of the making of the order on 23rd November, 2009. Whatever justification there might previously have been for an apprehension that a motion pursuant to O. 42, r. 24 might have been governed by s. 11(6)(a) of the Statute of Limitations, 1957 as "*an action upon a judgment after the expiration of twelve years from the date upon which the judgment became enforceable*" ought to have been dispelled by the judgment of the Supreme Court in *Ulster Investment Bank Ltd. v. Rockrohan Estates Ltd.* [2015] 4 I.R. 37: which held that an application for possession of lands the subject of a previous well charging order and order for sale was not an action upon a judgment. Certainly any such apprehension ought to have been dispelled by the judgment of Gearty J. in *Start Mortgages DAC v. Piggott* [2020] IEHC 293, but I suppose that it is fair to say that the judgment in *Piggott* which was delivered on 15th June, 2020 and uploaded on 18th June, 2020 was still hot off the press when the motion to restore this motion to the list was issued on 6th July, 2020.
39. The judgments in *Rockrohan*, in the High Court [2009] IEHC 4 and the Supreme Court *op. cit.*, are instructive in dispelling the confusion which crept into the arguments made on this application. At p. 29 of the judgment of the High Court, in a passage reproduced at para. 20 of the judgment of Charleton J., and endorsed by the Supreme Court as clearly correct, Irvine J. (as she then was) said:-

*"Given that so much of the submission of Rockrohan is based upon various provisions of the [Statute of Limitations] 1957, it is worthwhile briefly reflecting upon the purpose of legislation of this nature. Limitation statutes are intended to prevent stale claims and to relieve certain classes of defendants of the uncertainty of late claims being made against them. They are designed to further remove the potential injustice that may be generated by the increased difficulty of proving a claim or defence after an extended period of time. Brady and Kerr in their 2nd edition of The Limitation of Actions (Law Society of Ireland, 1994) at p. 3 described such concerns as follows:-*

*'One can therefore conclude that the underlying rationales of the Statutes of Limitations 1957 and 1991 are threefold, and that they may be described as the certainty, evidentiary and diligence rationales.'*

*These considerations do not apply where one party seeks to enforce a judgment or order previously made against the other party thereto at some time removed from the date upon which it was made. There is no surprise or evidential unfairness inherent in such a process. This being so there are good policy reasons for the courts to distinguish between 'actions' within the meaning of s. 2 of the Act of 1957 and procedures whereby an order or judgment may be executed. Similarly, there are good reasons, beyond the consideration of time limits, why a further distinction should be made between applications for leave to issue execution in respect of a prior order or judgment and an order required for the purposes of giving effect to an existing court order and these reasons emerge in the case law referred to later in this judgment."*

40. If, strictly speaking, *Rockrohan Estates Ltd.* was not an application for leave to issue execution on a judgment, I can discern no difference in principle between the policy considerations applicable to an application for an order for possession required to give effect to a previous order for sale and an application for leave to issue execution on foot of an order for possession. The principles by reference to which disputes as to alleged delay in progressing a court ordered sale are slightly different to those which apply to an application for leave to issue execution, but the broad policy approach is the same.

**The construction of O. 42, rule 24**

41. In the case of an application as between the original parties to a judgment or order, the discretionary jurisdiction of the court under O. 42, r. 24 to consider an application for leave to issue execution after six years is engaged by the applicant giving a reason – not necessarily an unusual, exceptional or very special reason – why execution was not issued within six years. The onus is on the applicant to put forward a reason or explanation. Unless and until that is done, the jurisdiction is not engaged.
42. The application of this principle was illustrated by the judgment of Simons J. in *Hayde v. H. & T. Contractors Ltd.* [2021] IEHC 103, which was an unopposed appeal against a refusal by the Circuit Court, of what appears to have been an unopposed application in



that court, of leave to issue execution under the equivalent provision of the Circuit Court Rules. Under O. 36, r. 9 of the Circuit Court Rules there is an outer limit of twelve years on the time within which an application for leave to issue execution may be made but that was not material in circumstances in which the application had been made within twelve years of the judgment. Simons J. identified the threshold established by *Smyth v. Tunney* as not being particularly high but as nevertheless a threshold which has to be satisfied. On the facts, he found that the threshold had not been met, so that it was not necessary for the court to move to the second part of the test laid down by *Smyth v. Tunney*, namely the consideration of any prejudice to, in that case, the indebted party, but generally to the party liable to execution.

43. The argument advanced on behalf of the applicant in this case – for the good and sufficient reason to which I shall come – is that the requirement that an original party to a judgment or order should explain why execution was not issued within six years does not apply where there has been a change in the party entitled to execution.
44. Order 42, r. 23, it is said, clarifies the period within which execution may issue. As between the original parties, execution may issue at any time within six years from the date of the judgment or order. So far, so good. Order 42, r. 24, it is said, governs the position in which either six years have elapsed or there has been a change in the parties entitled or liable to execution. Rule 24, so the argument goes, distinguishes between two categories of cases: first, those where the application is based on six years having elapsed, and secondly, those where there has been a change in the parties entitled or liable to execution. This case, it is said, is one in which there has been a change in the party entitled to execution and the applicant is entitled to apply for leave on that basis. That being so, it is said, the question of delay is not relevant since the question of delay is “*primarily applicable*” to those cases within the other category, that is, those in which a court application is necessary because the judgment or order is more than six years old.
45. Although the argument as articulated on behalf of the applicant is that “*delay is not determinative*” and that the question of delay is “*primarily applicable*” to those cases in which six years have elapsed, in truth the argument is that in any case there has been a change in the parties entitled or liable to execution delay is irrelevant. As I understand the argument the court is invited to look no further than the assignment of the security. But if that were so, as counsel for the defendant argues, the O. 42, r. 23 clock would not run against an assignee who would be entitled to issue execution more or less as of right.
46. The scheme of the rules is that *prima facie* 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 of upwards of six years could be altogether avoided by the simple expedient of assigning the judgment or order. By the same token, the obligation of a judgment creditor who had allowed, say, eleven years, to elapse to offer some explanation for his failure to execute would evaporate in the event of a change in the party liable to execution, such as the

death of the judgment debtor. That, it seems to me, would be to subordinate the clear policy of the rules to artifice or chance.

47. I am satisfied that O. 42, r. 24, properly construed – as the applicant correctly submits it should be – having regard to O. 42, r. 23 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 the case of a change of entitlement or liability within six years of the judgment or order, the applicant need prove no more than that there has been such a change. In the case of an application made upwards of six years from the date of the judgment or order, however, the applicant, in the same way as the party originally entitled, must demonstrate the reason for the delay. If the discretion of the court is so engaged, the court will move on to consider whether it should be exercised in favour of, or against, granting leave.
48. Again, if I may say so, there was some confusion in the arguments as to whether and if so to what extent the applicant might have been guilty of, or the defendant might have contributed to, the "*delay*" in execution. It is better, I think, to approach an application for leave to issue execution after six years on the basis that there has been a lapse of time, rather than a delay. The onus is squarely on the applicant to explain the lapse of time. If, for example, an applicant could show that a judgment debtor had gone abroad, or had gone to ground, for years and had recently reappeared, or that a straw judgment debtor had recently come into money, I think that the lapse of time would be more accurately characterised as just that, rather than delay on the part of the judgment creditor. Similarly, if the fact that execution was not issued can be shown to be attributable to circumstances outside the control of the judgment creditor, I think that the lapse of time would be better described as such, rather than as delay. When the lapse of time is examined, it may become apparent that one or other of the parties entitled or liable to execution has delayed execution, but the starting point is to examine the explanation offered for the lapse of time beyond six years.

**Application of the principles to the facts**

49. Mr. Heagney, having repeated the evidence of Mr. Noonan as to the devolution of the mortgage, accepted, at least implicitly, that there had been a change in the party entitled to execution and the applicant's case that it was the party now "*entitled*" to execution was not contested.
50. The first question is whether the applicant has explained the lapse of time.
51. In the same way that the applicant is obliged to explain the lapse of time after six years from the date of the order, I do not believe that there is any obligation to explain the fact that the order was not executed within six years, although it may very well be the case that what happened or not within the first six years goes to why execution was not issued thereafter.
52. At some time in 2010 or 2011 Irish Nationwide sued out an order of possession which was sent to the County Registrar for County Galway for execution. The evidence is that

execution was scheduled for 19th July, 2011 and postponed to 15th September, 2011. There is no evidence as to why execution was postponed on 19th July, 2011. It was submitted that execution was again postponed on 15th September, 2011 but it was acknowledged that this was not supported by the evidence.

53. It seems to me that the plenary action by Irish Nationwide against Mr. Heagney and Mr. Coleman is a red herring. If 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. In any event, as Mr. Heagney correctly argues, the plenary action was over as far as he was concerned on 22nd March, 2010 and as far as Mr. Coleman was concerned on 14th November, 2011. I cannot see how, as the applicant suggests, this action complicated the position between the parties.
54. On 1st July, 2011 the assets of Irish Nationwide were transferred to Anglo. I cannot see how that goes to the execution of the order against Mr. Heagney. The transfer was at the macro level. The order of the High Court made on 1st July, 2011 was in respect of all of the assets and liabilities of Irish Nationwide, which were defined in the order in great detail. The schedules to the order listed dozens of branch offices, development properties and subsidiaries and subsidiary undertakings. I cannot see what effect this might have had in the conduct of the day to day business.
55. On the day before the transfer execution might have been issued by Irish Nationwide and on the day after, albeit subject to leave, by Anglo. Such leave, it seems to me, might have been obtained simply on production of the transfer order. To my mind, the fact that the transfer to Anglo was part of credit stabilising measures taken in the Irish banking system is as irrelevant as the suggestion that the business of Irish Nationwide was conducted irresponsibly.
56. Nor do I understand how the change of name of Anglo to Irish Bank Resolution Corporation Limited, or the placing of that company into special liquidation explains why execution was not issued.
57. Nor do I understand how the transfer to the applicant explains why execution was not issued. This transfer was not at quite the same level as the transfer to Anglo, but it was nevertheless a high level transaction involving the sale and purchase of a large portfolio of loans. The Loan Sale Deed of 31st March, 2014 – in respect of what was described as Project Sand, Tranche 4 – runs to 122 pages, with a schedule of 33 pages, fully redacted, save for a single line showing which is presumably an account number, Mr. Heagney's name, and the number 865,330. The Deed of Conveyance and Assignment of 6th June, 2014 runs to only 13 pages, which include a five page schedule of properties assured, entirely redacted save as to a line in tiny print identifying Mr. Heagney, the mortgaged property, and the mortgage. If the applicant bit off more than it could chew, Mr. Noonan did not say so.
58. The chronology offered by the applicant is simply a chronology of changes of name and transfers. It is not suggested that between the time Mr. Heagney's mortgage was

acquired by Anglo until the time it was sold to the applicant nothing was done with the order for possession on the basis that it would have made no difference to the price of the portfolio in which it was included, and I express no view as to whether that would have been a sufficient explanation. Nor is it suggested that there was any practical difficulty, or in the modern language, challenge – by reason of staff numbers or whatever – in the execution of the order by Anglo, or later by the applicant.

59. In any event, all of the changes of name and transfers were made by 6th June, 2014, which was within six years of the date of the order for possession and cannot go to explain why there was no application for leave to issue execution between then and 22nd November, 2015 (the eve of the sixth anniversary of the order), or thereafter until 29th January, 2020.
60. As to what, if anything, was done after the transfer of the loan and security to the applicant, the evidence is vague and confused. At para. 21 above I set out para. 24 of the grounding affidavit of Mr. Noonan. That came after the chronology of changes of name and transfers and the re-registration of the applicant as a designated activity company on 17th September, 2016. It makes no sense to me to contemplate that years after the transfers, first to Anglo and later to the applicant, that the plaintiff – Irish Nationwide – should be writing to Mr. Heagney: but that is what Mr. Noonan says.
61. If I take it that Mr. Noonan's references to "*the plaintiff*" are intended to refer to the applicant, the height of the evidence is that at some unspecified time or times after 6th June, 2014 some unspecified efforts were made by unspecified means to obtain a statement of affairs and to arrange a meeting. While reference is made to an authorised third party there is no indication of who that was or when or how or in what circumstances he or she is said to have been appointed. If I am to take it from the averment immediately following the averment that the ATP resigned his authority "*in or about 2018*" that "*the plaintiff has continued to write to the defendant periodically*", that it was the applicant who before and after then (whenever that was, perhaps sometime between 2017 and 2019) wrote to the defendant, the height of the evidence is that an unspecified number of letters were sent to the defendant in the five and a half years between the transfer to the applicant and the date of swearing of Mr. Noonan's affidavit grounding this motion: which the defendant steadfastly ignored.
62. If I were to assume – although the applicant does not say so – that lenders generally, and perhaps residential mortgage lenders in particular, would much prefer that the borrower would repay the loan than force a realisation of the security, this does not account for the failure of the applicant to seek leave to issue execution years ago.
63. As Simons J. observed in *Carlisle Mortgages v. Sinnott* [2021] IEHC 288, it is socially desirable that a homeowner who encounters financial difficulties should retain his home if the lender can be repaid. In a case in which there is engagement between the lender and the borrower with a view to reducing the debt – particularly in the case of a family home or principal private dwelling – forbearance on the part of the lender in enforcing an order for possession is to be encouraged rather than punished. But this is not such a case.

Despite whatever efforts were made by the applicant, there was no engagement by Mr. Heagney but the applicant did nothing until it was apprehended – albeit mistakenly – that the order for possession was about to expire.

64. The last payment made was a payment of €5,707.00 on 16th October, 2009. The only evidence of Mr. Heagney's financial circumstances is his own averment that he has continued to live and work on the farm and that in the eight years or so prior to 30th August, 2021 he invested €150,000 in improvements. I do not believe that it is socially desirable that defaulting borrowers who ignore their legal and financial responsibilities should be allowed to keep their homes while those who struggle to meet their obligations and fail lose theirs. Along the way, it is inevitable that the lenders' cost of carrying defaulting borrowers are passed on to those borrowers who can and do meet their commitments.
65. In this case, it seems to me that all of the evidence – such as it is – points in one direction. Mr. Heagney's continuing default and refusal to engage was a continuing and ever increasing reason why the order for possession should have been executed, not that execution should have been deferred. There is simply no explanation offered for why that was not done.
66. On any application that might have been made by the applicant before 22nd November, 2015 on the basis that there had been a change in the party entitled to execution, I cannot see why leave might not have been granted to issue execution more or less as of right. On this application, however, there is a wholly unexplained period of four years and two months which was allowed to run after the sixth anniversary of the order for possession. Absent some explanation or grounds, I find that the discretionary jurisdiction to grant leave has not been engaged.
67. It is this absence of explanation that I earlier characterised as the good and sufficient reason for the novel argument advanced as to the correct construction of O. 42, rule 24. I stress that my examination of the evidence tendered in support of the application has not been coloured by the legal argument, or my analysis of the legal argument by the evidence, but I cannot help thinking that if the lapse of time in applying for leave to issue execution could have been accounted for, counsel might not have deemed it necessary to advance the technical legal argument.
68. The applicant having failed to engage the jurisdiction of the court to consider granting leave to issue execution, the motion must be refused.
69. In case the matter goes further I think that I should say something about the other grounds on which the motion was resisted, specifically the defendant's various suggestions that the granting of the application would give rise to prejudice.
70. The first suggestion of prejudice is that, since the order for possession was made, Mr. Heagney has continued to live and work on the secured property, from which he has earned a living farming dry stock. I cannot see how Mr. Heagney could possibly have

been prejudiced by his occupation of the land in respect of which he has not paid so much as a cent. Secondly – or perhaps it is allied to his first argument – Mr. Heagney has deposed that in the eight years or so prior to the swearing of his replying affidavit on 30th August, 2021 he invested approximately €150,000 in additional livestock accommodation, sheds and yards. There is no breakdown of this alleged investment. Some or all of it may have fallen into the two years or so prior to 22nd November, 2015 when IBRC and later the applicant could have secured leave to issue execution more or less as of right. In any event, the height of this allegation is an allegation of investment in the property without any indication of the value of the property or extent to which the investment might have enhanced the value of the property. If the property is worth more than the secured indebtedness, Mr. Heagney would be entitled to any surplus after a sale and might thereby recoup any enhanced value. If notwithstanding the investment the property is worth less than the secured indebtedness, there is no suggestion that the source of the money said to have been invested was other than the profits of working the land. There is no suggestion that at the time he made the alleged investment Mr. Heagney believed that the order for possession would not be executed. It seems to me that the bald assertion of expenditure on the land goes nowhere.

71. Secondly, Mr. Heagney suggests, variously, that because his mother owns and occupies her property more or less in the middle of the secured property, execution would not be possible, and that his elderly mother would be marooned if execution were to issue. This, it seems to me, is an argument that Mr. Heagney is not permitted to make. Leaving aside the fact that any problem his mother may face is of Mr. Heagney's own making in executing the mortgage which he did, Mr. Heagney, as a matter of law, is not entitled to rely on the rights of a third party – *a jus tertii* – to advance his own case.
72. In any event, by reference to the map annexed to the deed of mortgage, Mrs. Heagney's property is a building or part of a building more or less in the middle of the much larger holding, at the end of an avenue or driveway and immediately adjacent to an area marked "Tanks". If execution of the order for possession were to issue, any issue, if any, as to what, if any, rights of access and drainage were appertaining or reputed to appertain to Mrs. Heagney's house, or what such rights are necessary for the ordinary use and enjoyment of that house, would be a matter between any purchaser and Mrs. Heagney. Logically, Mrs. Heagney's legal rights *vis-à-vis* any purchaser would be no different than they are *vis-à-vis* Mr. Heagney. Any argument that heretofore Mrs. Heagney has been coming and going by the grace and favour of her son is not immediately attractive.
73. The third element of the alleged prejudice is also *a jus tertii* and as far as I can see it has nothing to do with the land. The suggestion is that Mr. Heagney's partner has been residing in a property on the secured property since "in or around 2010" with their daughter, aged ten years. Mr. Heagney's partner, it is said, has contributed by way of work and services on the farm in the sum of €50,000 to €70,000 and has thereby acquired legal and equitable rights which would be greatly impeded upon by the making of the order sought. If Mr. Heagney does not say so in terms, I understand his evidence

to be that his partner has done work for which she is entitled to be paid but has not been paid. It is not suggested that this unpaid work has enhanced the value of the property. If it had, any equity which might have arisen would have been puisne to the first legal mortgage. As far as I can see the only legal and equitable right which arises from the doing of work is a right to be paid. Mr. Heagney does not attempt to explain why he has not paid for the valuable work which he says has been done and there is no indication that his partner's prospects of being paid will be any greater if leave to issue execution is refused.

### **Summary**

74. On an application under O. 42, r. 24 for leave to issue execution on foot of a judgment or order where six years have elapsed since the judgment or order and in which there has been a change in the parties entitled or liable to execution, the applicant – in the same way as the original party to the judgment or order – must advance some explanation or grounds so as to engage the discretion of the court to grant or refuse leave.
75. In this case I can discern no such explanation or grounds. Accordingly, I must find that the discretion of the court has not been engaged and refuse the application.
76. If, to a layman, it might appear surprising that a mortgagor who has made no effort to deal with his arrears and ignored all correspondence gets to keep his house while many who engaged with their lenders – and their assignees – and have done their best have lost theirs, the explanation is that it is all about the legal obligation on the part of the party entitled to issue execution to do so, or, if it has not done so, to explain why it has not done so. In the same way that the Statute of Limitations bars good and bad claims at the expiration of specified periods of time, the Rules of the Superior Courts bar the enforcement of judgments or orders after six years unless the party entitled to execution (or an assignee) can offer some explanation why execution was not issued within six years. In this case there was no explanation.
77. In the ordinary way the defendant, as the successful party, would be entitled to an order for costs but in this case there is a complicating factor in that a previous hearing date had to be abandoned and the hearing rescheduled because there was no appearance on behalf of the defendant.
78. I will list the matter for 28th January, 2022 at 11:00 a.m. for submissions as to the appropriate costs order.