

APPROVED

[2022] IEHC 353



THE HIGH COURT
CIRCUIT APPEAL

2021 No. 168 CA

BETWEEN

MARS CAPITAL IRELAND DAC

(SUBSTITUTED BY ORDER DATED 12 JUNE 2017)

PLAINTIFF

AND

JAMES HUNTER

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 June 2022

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The appeal is against an order granting Mars Capital Ireland leave to issue execution in respect of an order for possession granted on 11 January 2010. Mars Capital Ireland had not been the original plaintiff in the proceedings, but asserts that it has since taken an assignment of the plaintiff's interest in the order for possession.

NO REDACTION NEEDED

RULES GOVERNING APPLICATION FOR LEAVE TO EXECUTE

2. Order 36, rule 9 and rule 10 of the Circuit Court Rules provide as follows:

“9. Every decree of the Court, and every judgment in default of appearance or defence, shall be in full force and effect for a period of twelve years from the date thereof, and an execution order based on any such decree or judgment may be issued in the Office within the said period, but not after the expiration of six years from the date of such decree or judgment without leave of the Court. An application for such leave shall be made by motion on notice to the party sought to be made liable.

10. If, at any time during the period of twelve years, any change has taken place, by death, assignment or otherwise, in the parties entitled or liable to execution, the party claiming to be so entitled may apply to the Court on notice for leave to issue execution, and the original decree or judgment may be amended so as to give effect to any order made by the Court on the application.”

3. As can be seen, a judgment or decree shall be in full force and effect for a period of twelve years. However, if a party has not sought an execution order within the first six years of that period, it is necessary to apply to a judge of the Circuit Court for leave to issue an execution order. Such an order cannot, after the lapse of six years, simply be issued in the Circuit Court office without leave. Similarly, if there has been a change in the identity of the party entitled to execute, it is again necessary to apply for leave to issue an execution order.

4. These rules differ from the equivalent provision under the Rules of the Superior Courts in that there is, in effect, an outer time-limit of twelve years. There is no outer time-limit prescribed under Order 42, rule 24 of the Rules of the Superior Courts. Presumably, the inclusion of a twelve-year period in the Circuit Court Rules is intended to coincide with the period prescribed under section 11(6)(a) of the Statute of Limitations 1957, which provides that an action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable. (This is how the rule

appears to be understood by the learned authors of Dowling and Martin, *Civil Procedure in the Circuit Court* (3rd ed, 2018, Round Hall)).

5. It is open to question whether the issuance of an execution order represents an action brought upon a judgment. Certainly, there is authority to the effect that the renewal of an *order of possession* is not subject to a twelve-year time-limit. The High Court (Gearty J.) held in *Start Mortgages DAC v. Piggott* [2020] IEHC 293 that the process by which an order of possession, already obtained, is renewed, is not an action upon a judgment in the sense intended by the Statute of Limitations. (As to the distinction between an order *for* possession and an order *of* possession, see *Start Mortgages DAC v. Rogers* [2021] IEHC 691 (at paragraphs 24 to 29)).
6. It would appear therefore that, on one reading at least, the Circuit Court Rules seek, unilaterally, to align the time-limits governing (i) the procedural right to execute a judgment which has already been obtained, and (ii) the substantive right to sue for and obtain a judgment as prescribed under the Statute of Limitations.
7. On the facts of the present case, the order for possession was made by the Circuit Court on 11 January 2010, i.e. more than twelve years ago. However, it is not necessary for the purpose of determining the present appeal to say anything further in respect of the twelve year period under Order 36 of the Circuit Court Rules. In particular, it is not necessary to consider whether the phrase “*shall be in full force and effect for a period of twelve years*” implies that a judgment or decree is spent upon the expiration of that period and cannot thereafter be the subject of a grant of leave to issue execution. This is because both parties are agreed that the twelve year period under Order 36 has been complied with in the present case in circumstances where both the motion seeking leave to issue execution and the subsequent order of the Circuit Court granting leave were made within twelve years of the date of the order for possession. The defendant does not seek to rely

on the fact that any order made by the High Court on this appeal will have been made at a remove of more than twelve years from the date of the order for possession. A more detailed consideration of this aspect of Order 36, rules 9 and 10 will have to await a case where it is fully argued.

8. The grant of leave to issue execution is discretionary. Order 36 of the Circuit Court Rules is silent as to the criteria to be considered in the exercise of this discretion. However, there is a well-established body of case law which identifies the criteria governing the equivalent rule under the Rules of the Superior Courts, namely, Order 42, rule 24; and this case law can be applied by analogy to the Circuit Court Rules. The leading judgment remains that of the Supreme Court in *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512. There, the Supreme Court held that it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute following the lapse of six years from the date of the judgment or order, provided that there is some explanation at least for the lapse of time. Even if a good reason is given, the court must consider counterbalancing allegations of prejudice.
9. It should be explained that the fact that there has been an assignment of a judgment does not obviate the necessity to provide an explanation where that judgment has not been executed within the initial six year period. The High Court in *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 rejected an argument that the lapse of time since the making of an order for possession is irrelevant in circumstances where there has been a change in the party entitled to execution. Allen J. held as follows (at paragraphs 47 and 48 of the judgment):

“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.

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.”

10. Applying these principles to the facts of the present case, it will be necessary for the moving party, Mars Capital Ireland, to provide some explanation for the lapse of time, notwithstanding that it is an assignee of the judgment.
11. Finally, it is important to emphasise that the concept of delay in the context of an application for leave to issue execution is very different from that of inordinate and inexcusable delay in the context of an application to dismiss proceedings by reference to the principles in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The position has been put as follows by the High Court (Allen J.) in *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 (at paragraph 36):

“It seems to me that even on first glance it is obvious that the rules governing the execution of a judgment or order are quite different to those which govern the prosecution of litigation. The holder of a judgment is free to issue execution at any time within six years of the

judgment or order. By contrast, the times prescribed by the rules for the exchange of pleadings are measured in weeks. A delay of years in the prosecution of an action will always call for explanation but a judgment creditor need not explain or excuse any delay in the execution of a judgment or order within the first six years from the date of the judgment or order.”

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

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

PROCEDURAL HISTORY

13. The original plaintiff, Irish Nationwide Building Society, instituted the within Circuit Court proceedings by issuing an Ejectment Civil Bill on 13 July 2007. The proceedings culminated in the making of an order, on consent, on 11 January 2010. In brief, an order

for possession was made in favour of the then plaintiff over lands in respect of which the defendant, Mr. James Hunter, was the registered owner. The order for possession was subject to a stay of three months, with a proviso that the order be vacated if the arrears were discharged within the period of the stay or such other time as the parties might agree.

14. Mars Capital Ireland claims to have succeeded to the interest in the order for possession originally held by Irish Nationwide Building Society. It has been explained on affidavit that the entire assets and liabilities of Irish Nationwide Building Society were transferred to Anglo Irish Bank Corporation Ltd pursuant to the Credit Institutions (Stabilisation) Act 2010. Thereafter, Anglo Irish Bank Corporation Ltd changed its name to Irish Bank Resolution Corporation Ltd.
15. Mars Capital Ireland claims to have been assigned the benefit of, *inter alia*, the order for possession by way of a loan sale deed dated 31 March 2014. The registered charges previously held by Irish Nationwide Building Society in respect of the lands owned by the defendant have since been transferred to Mars Capital Ireland. The relevant folios have been exhibited, namely, Folio 23834F and Folio 9940 County Mayo; and in each instance, there is an entry indicating that the respective charges were transferred on 26 June 2014.
16. Mars Capital Ireland now seeks leave to issue execution in respect of the order for possession. It has to be said that its efforts to do so have been marked by a series of procedural mishaps. The motion the subject of the appeal now before the High Court is, in fact, the fourth motion which has been issued by Mars Capital Ireland. As explained below, the first three motions were unsuccessful.

17. The first motion issued on 26 September 2016. This motion was struck out in the absence of the defendant in circumstances where, seemingly, Mars Capital Ireland had been unable to prove service.
18. The second motion issued on 5 May 2017 and was returnable before the Circuit Court, Western Circuit, on 12 June 2017. The Circuit Court made an order on that date substituting Mars Capital Ireland as plaintiff in lieu of Irish Nationwide Building Society. The order for substitution was made pursuant to Order 22, rule 4 of the Circuit Court Rules. The order for substitution appears to have been made in the absence of the defendant. The balance of the relief sought in the motion, i.e. the application for leave to issue execution, was adjourned. It seems that, following a number of further adjournments, the second motion was struck out for non-attendance on 14 February 2018.
19. The third motion was issued on 28 March 2018 and was returnable before the Circuit Court, Western Circuit on 9 April 2018. This motion was ultimately struck out for non-attendance on 26 June 2018. Mars Capital Ireland then brought an appeal against the order striking out the third motion. This appeal was ultimately dismissed on jurisdictional grounds by the High Court (Power J.) on 27 January 2020, *Mars Capital Ireland v. Hunter* [2020] IEHC 192. In brief, it was held that in circumstances where the Circuit Court has neither heard nor determined an application because the application itself was struck out due to the non-attendance of the moving party, then the appropriate course of action is for that party to issue a fresh motion before the Circuit Court rather than to ask the High Court to hear the motion for the first time.
20. Mars Capital Ireland then issued a fourth motion on 11 February 2020. This motion was heard and determined by the Circuit Court (His Honour Judge Groarke) on 21 October 2021. An order was made pursuant to Order 36, rule 10 of the Circuit Court Rules

granting Mars Capital Ireland leave to issue execution of the order for possession obtained on 11 January 2010. The order was stayed for a period of six months. The defendant filed a notice of appeal against this order on 1 November 2021. The appeal ultimately came on for hearing before me on 30 May 2022.

21. The matter proceeded by way of a rehearing of the motion for leave to issue execution. The defendant, Mr. Hunter, has sworn two affidavits in opposition to the motion. The principal grounds of opposition are as follows. First, it is said that there has been inordinate and inexcusable delay on the part of Mars Capital Ireland in prosecuting its claim. It is said that this delay is likely to jeopardise the defendant's constitutional right to a fair and expeditious trial. The delay is sought to be measured from the date the Circuit Court proceedings were commenced on 13 July 2007. Secondly, the defendant says that he never consented to the transfer or assignment of the benefit of the charge or the order for possession to Mars Capital Ireland. Thirdly, it is said that the order for possession was not served upon him by Irish Nationwide Building Society. Finally, it is said that the delay has caused specific prejudice to the defendant in that it has caused him significant stress and anxiety and has adversely affected his health. It is also said that the delay has resulted in the imposition of legal costs on his mortgage account in a sum in excess of €9,000. It is alleged that there has been no proper engagement between Mars Ireland Capital and the defendant since he received a so-called "*hello letter*" dated 10 June 2014.
22. Counsel on behalf of the defendant, very sensibly, did not pursue the first three of these grounds of objection at the hearing before me. The first ground is misconceived in that it mistakenly seeks to import concepts which are properly confined to the court's inherent jurisdiction to dismiss *ongoing* proceedings for inordinate and inexcusable delay. As

explained at paragraphs 11 and 12 above, these principles are not relevant to an application, post-judgment, for leave to issue execution.

23. The second and third grounds of objection cannot be relied upon in circumstances where the validity of the assignment of the interest in the order for possession is the subject of an unappealed decision of the Circuit Court. As explained earlier, the Circuit Court made an order on 12 June 2017 substituting Mars Capital Ireland as plaintiff in lieu of Irish Nationwide Building Society. It is implicit from this that the Circuit Court had been satisfied that Mars Capital Ireland had succeeded to the interest in the order for possession. The defendant did not seek to appeal the substitution order and is now bound by same by virtue of the doctrine of *res judicata*.
24. Counsel for the defendant directed her submissions to the question of whether the legal test as per *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512 has been met. Attention was drawn, in particular, to the limited actions taken by Irish Nationwide Building Society and Mars Capital Ireland during the initial six year period, and thereafter to the various procedural errors which resulted in four motions having to be issued. Emphasis was also placed on the prejudice said to have been caused to the defendant by the delay.

DISCUSSION

25. The objective of Order 36, rule 9 and rule 10 of the Circuit Court Rules is that there should be some expedition in the execution of judgments. A generous period (six years) is allowed during which the party seeking to enforce a judgment may obtain an execution order from the Circuit Court Office, i.e. without any necessity to apply to court. If, however, a party allows that period to expire, then leave of the court is required and a good reason must be provided for the delay to the date of the leave application. The threshold is not particularly high: it is not necessary to give some unusual, exceptional

or very special reasons for the delay (*Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512). It is nevertheless a threshold which has to be satisfied: the threshold albeit minimal is not meaningless.

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

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

27. The cases in which leave to execute has been granted can conveniently be considered as falling into four broad categories. It should be emphasised that the categories of cases are, of course, not closed. The illustrative list that follows is not intended to be exhaustive.
28. The first category is where the delay has been caused by the conduct of the indebted party. For example, on the facts of *Smyth v. Tunney*, the indebted party had, by their conduct, contributed to the delay in the execution of the relevant costs orders. In particular, they had previously demanded that execution be deferred until *all* proceedings between the parties were disposed of. Other examples would include cases where the indebted party has evaded earlier attempts at execution.
29. The second category is where there has been a change in the financial circumstances of the indebted party. In *Mannion v. Legal Aid Board* [2018] IEHC 606, for example, the High Court (Noonan J.) granted leave in a case where the party seeking execution had,

at all material times during the initial six year period, believed that the indebted party did not have the capacity to pay the judgment debt and that, accordingly, there was no point in attempting execution. The application for leave to execute outside the six year period was allowed in circumstances where the court was satisfied that the judgment creditor had reasonable grounds to conclude that the indebted party's financial circumstances had significantly improved as a result of her having settled other legal proceedings.

30. The third category is where execution has been deferred pending an attempt by the parties to reach an accommodation whereby alternative arrangements for the payment of the underlying debt might be entered into. There is a public interest in ensuring that creditors are not deterred from engaging positively with judgment debtors for fear that they may be precluded thereafter from enforcing their judgment in the event that the engagement does not bear fruit. There is now an established line of case law where leave to issue execution, in the form of orders of possession, has been granted in mortgage proceedings where the explanation for the delay is that the judgment creditor had sought to negotiate a resolution with the debtor. See, for example, *Start Mortgages DAC v. Gawley* [2020] IECA 335; *Start Mortgages DAC v. Piggott* [2020] IEHC 293; and *Ulster Bank Ltd v. Quirke* [2021] IEHC 199.
31. The fourth category is where the delay in execution is attributable to circumstances outside the control of the person seeking to enforce the judgment. An example is provided by *Carlisle Mortgages v. Sinnott* [2021] IEHC 288. There, leave to issue execution had been granted where the delay had been caused, initially, by a difficulty in serving the order and, thereafter, by logistical problems presented by the public health measures introduced in response to the coronavirus pandemic. In the absence of any prejudice to the indebted party, leave to execute should not normally be refused unless there has been some culpable delay by the party seeking to execute.

32. There are a number of recent judgments which provide useful illustrations of what constitutes culpable delay. In *Hayde v. H & T Contractors Ltd* [2021] IEHC 103, the judgment creditor had made a deliberate decision not to take up a certificate of taxation, which would have been a necessary proof for any application to enforce the relevant judgment, for a period of some six years. Leave to issue execution was refused on the grounds of delay. In *ACC Bank plc v. Joyce* [2022] IEHC 92, the High Court (McDonald J.) rejected a submission that it had been necessary for the judgment creditor to await the finalisation of the debtor's bankruptcy process before seeking a well charging order in respect of a judgment mortgage. A submission that it had been necessary to await the transmission of interest to the assignee was also rejected. McDonald J. observed that the assignee of a judgment debt cannot absolve itself of any inactivity on the part of the original judgment creditor. In *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12, the High Court (Allen J.) held that the existence of parallel plenary proceedings did not constitute an excuse for non-execution in circumstances where the self-same plenary proceedings had not been a bar to obtaining the order for possession in the first instance.
33. Turning next to apply the foregoing principles to the circumstances of the present case, I am satisfied that Mars Capital Ireland has met the threshold of establishing a good reason which explains the failure to execute the judgment to date. I propose to analyse the delay by reference both to events which occurred during the initial six year period from the date of the order for possession and to events thereafter. There is some slight difference in emphasis in the case law as to whether a judgment creditor is under any obligation to explain delay in the execution of a judgment or order within the first six years. On one view, a judgment creditor is entitled to the full reach of the initial six years and need not explain any inactivity during this period. In practice, however, it may very well be the

case that what did or did not happen within the first six years goes to why execution was not issued thereafter (*Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 at paragraph 51). The thrust of Order 36, rule 9 is that a judgment creditor is normally expected to execute within six years. Whereas the absence of any activity during this initial period will not necessarily be fatal, it may colour the court's view of the delay in the second six year period.

34. On the facts of the present case, there had been constructive engagement between the original judgment creditor, Irish Nationwide Building Society, and the defendant during the initial six year period. Indeed, the terms of the order for possession of 11 January 2010 expressly envisaged the possibility that the order might be vacated if the arrears were discharged within the period of the three-month stay or such other time as the parties might have agreed. The affidavit evidence indicates that the defendant made some payments up and until 28 February 2013. There is a dispute between the parties as to whether there were further negotiations between the period 2014 to 2015. It seems that the defendant had submitted a "*standard financial statement*" in October 2014.
35. Shortly after the expiration of the initial six year period in January 2016, Mars Capital Ireland issued the first of its four motions seeking leave to execute on 26 September 2016. Counsel for the defendant has been critical of the various procedural errors on the part of Mars Capital Ireland which resulted in its issuing four motions. Counsel points out that the first three motions were struck out because of shortcomings on the part of Mars Capital Ireland or its agents. Counsel also observes that a period of some eighteen months was lost between June 2018 and January 2020 while Mars Capital Ireland pursued its ill-fated appeal against the order striking out its third motion for non-attendance.

36. There is some force in these submissions. Had more attention been paid to basic procedural requirements, then an application for leave to issue execution could have been heard and determined much earlier. For the purpose of an analysis of the delay, however, the true significance of this procedural history is that it is apparent that, from September 2016 onwards, Mars Capital Ireland has been taking steps towards enforcing the order for possession. This would have been known to the defendant from, at the very latest, the time of the second motion in June or July 2017. This is not a case, therefore, where a judgment debtor had been lulled into thinking that a judgment had been abandoned and was not going to be enforced.
37. The worst that can be said of Mars Capital Ireland is that it might have pursued its attempts to secure leave to execute more efficiently. Had its agents attended before the Circuit Court in February 2018 and June 2018—as the company says they were instructed to do—then the second and third motions would not have been struck out. Similarly, the wisdom of the decision to pursue an appeal to the High Court in July 2018, rather than simply issue a fresh motion, might, with the benefit of hindsight, be questioned. Importantly, these procedural missteps have already been addressed by the making of costs orders in favour of the defendant where he had been put to the time and trouble of responding to the motions and the appeal. It would be disproportionate to go further and to refuse leave to execute solely on the basis of these procedural missteps.
38. Taken in the round, Mars Capital Ireland has done enough to meet the threshold set by *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512. The evidence establishes that, during the initial six year period, there had been constructive engagement between the original judgment creditor and the debtor for part of the time. Thereafter, Mars Capital Ireland has been taking steps towards enforcing the order for possession since September 2016.

39. It is next necessary to consider the question of whether the delay has caused prejudice to the defendant. The principal prejudice asserted is that the defendant has suffered significant stress and anxiety as a result of the proceedings, and that this has adversely affected his health. Naturally, the court has sympathy for anyone who suffers ill-health. However, from a legal perspective, the prejudice asserted is not one which can be said to have been caused by the delay in executing the order for possession. Rather, it is the defendant's own decision not to comply with the court order that has resulted in ongoing litigation between the parties. The defendant has been on notice of the order for possession since it was made, on consent, on 11 January 2010, and has known from, at the very latest, June or July 2017, that Mars Capital Ireland intends to exercise its right to enforce the order for possession. The defendant has chosen not to comply with the court order, i.e. by surrendering possession voluntarily, and it is this choice that has necessitated the pursuit of an application for leave to issue execution. In truth, the delay has conferred a benefit upon the defendant in that, notwithstanding the existence of the order for possession, he continues to reside in a dwelling house in respect of which he has made no payments since 28 February 2013.
40. The only other prejudice asserted is in respect of the charging of legal fees to the mortgage account. If and insofar as the defendant wishes to challenge these fees, he is not prejudiced from so doing by the grant of leave to issue execution. Rather, this challenge may be raised at the time of the division of the proceeds of the sale of the mortgaged property. In any event, Mars Capital Ireland has indicated, on affidavit, that it has removed all legal costs from the sums said to be due and owing by the defendant to it.

CONCLUSION AND FORM OF ORDER

41. For the reasons explained herein, I am satisfied that Mars Capital Ireland has met the threshold of establishing a good reason which explains the failure to execute the order for possession to date. I am also satisfied that the delay in executing the order for possession has not caused any prejudice to the defendant. The legal test as per *Smyth v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512 for granting leave to issue execution has therefore been met.
42. Accordingly, the appeal against the Circuit Court order of 21 October 2021 is dismissed and the order affirmed. As to costs, the default position under section 169 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings is entitled to recover its costs as against the losing party. Were the default position to apply, then Mars Capital Ireland would be entitled to the costs, both above and below, as against the defendant. If the defendant wishes to contend for a different costs order, then short written legal submissions should be filed in the Central Office by 1 July 2022. A soft copy should also be sent to the registrar assigned to this case.
43. The proceedings will be listed, remotely, for final orders on 11 July 2022 at 10.45 am.

Appearances

Rudi Neuman Shanahan for the plaintiff instructed by AB Wolfe & Co.
Elaine Finneran for the defendant instructed by Mahon Sweeney

Approved
S. M. S. M. S.