

# THE HIGH COURT

COMMERCIAL

[2022] IEHC 92

[2010 No. 9146 P]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

THOMAS JOYCE, PATRICIA JOYCE, NIALL O'MEACHAIR AND  
VALWICK PROPERTIES

DEFENDANTS

**JUDGMENT of Mr. Justice Denis McDonald delivered on 22<sup>th</sup> February 2022**

1. This judgment addresses the relief claimed in para. 2 of the applicant's notice of motion dated 12<sup>th</sup> May 2021 by which the applicant, Cabot Financial (Ireland) Ltd. ("*Cabot*") seeks an order pursuant to O. 42, r. 24 granting Cabot leave to issue execution as against the third named defendant, Mr. O'Meachair, on foot of a judgment obtained by ACC Bank plc against him on 15<sup>th</sup> November 2010 in the sum of €271,637.31 together with the costs of the proceedings (limited to six-day costs). In circumstances where that judgment is now more than six years old, the leave of the court is required before any steps are taken to execute the judgment.

2. It should be noted that Cabot had previously sought an order pursuant to O. 17, r. 4 substituting it as plaintiff in these proceedings in place of ACC Bank plc. At a hearing on 22<sup>nd</sup> October 2021, I made such an order, after hearing submissions from counsel for the plaintiff and from Mr. O'Meachair who appeared in person. Although Mr. O'Meachair opposed the order under O. 17, r. 4, I was satisfied, on the basis of

the evidence placed before the court, that such an order should be made. On that occasion, I adjourned the application made by Cabot for an order pursuant to O. 42, r. 24 in order to allow Cabot an opportunity to place further evidence before the court in relation to the lapse of time since the judgment was obtained on 15<sup>th</sup> November 2010 and to give Mr. O'Meachair the opportunity to place further evidence before the court in relation to any prejudice claimed to have been sustained by him as a consequence of the lapse of time in executing the judgment against him.

3. Both Cabot and Mr. O'Meachair availed of the opportunity to place further evidence before the court and a further hearing took place of the application under O. 42, r. 24 on 16<sup>th</sup> December 2021. The evidence placed before the court by Cabot is examined further below. Insofar as the evidence of Mr. O'Meachair is concerned, he made the point that, in light of the long period which has elapsed since judgment was given, he had been led to believe that it would not be enforced. He also raised an issue in relation to the manner in which one of his assets had previously been realised by ACC Bank plc in part discharge of the judgment debt. In particular, he complained strongly that ACC Bank plc had failed to realise value for the asset. He further raised issues in relation to the net amount due on foot of the judgment. In addition, he sought to rely on Article 6.1 of the European Convention on Human Rights ("*ECHR*") and on the decision of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and related authorities. As explained further below, it seems to me that the *Primor* line of authority is inapplicable in the context of O. 42, r. 24.

4. A number of the provisions of O. 42 are relevant to an application of this kind. In particular, O. 42, r. 23 and r. 24 are relevant. O. 42, r. 23 provides for a six-year period for execution on foot of a judgment. However, O. 42, r. 24 permits the court to extend the six-year period. These rules provide as follows:-

“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;*

(b) *where a party is entitled to execution upon a judgment of assets in futuro;*

(c) *where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company; 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. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgment or order made in a matrimonial cause or matter, an order of fieri facias may be*

*issued as of course upon an affidavit of service of the judgment or order and non-payment.”*

5. The principles to be applied on an application of this kind were considered by the Supreme Court in *Smyth v. Tunney* [2004] 1 I.R. 512. In that case, Geoghegan J. noted at p. 519 that: -

*“Order 42, r. 24 does not set out any express criteria on foot of which the leave to execute after the six years may be granted or refused.”*

6. Notwithstanding the lack of any express criteria, Geoghegan J, identified that the court has a discretion on an application of this kind and that, to engage this discretion, the applicant has an obligation to provide some explanation for the lapse of time. In this context, he observed at p. 518: -

*“...it is not necessary to give some unusual, exceptional or very special reasons for obtaining permission to execute out of time provided that there is some explanation at least for the lapse of time.”*

7. These are the principles to be applied in the exercise of the court’s discretion under O. 42, r. 24. The discretionary nature of the power conferred by the rule was reiterated by the Court of Appeal in *KBC Bank plc v. Beades* [2021] IECA 41 where Whelan J. said at para. 67: -

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

*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.”*

8. As noted by Whelan J., in para. 68 of her judgment in that case, Dunne J. in *Bula Ltd. v. Tara Mines Ltd.* [2008] IEHC 437, extrapolated three principles from *Smyth v. Tunney* as follows: -

- (a) Order 42, r. 24 is a discretionary order.
- (b) Reasons must be given for the lapse of time since the judgment or order during which execution has not taken place.
- (c) If there is good reason for the delay, the court must consider counterbalancing allegations of prejudice.

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

“21. *The objective of... [the rule] ... is that there should be some expedition in the execution of judgments. A generous period (six years) is allowed during which the party seeking to enforce a judgment may obtain an execution order from the Office, i.e. without any necessity to apply to court. If, however, a party allows that period to expire, then a good reason must be provided for the delay to date. The threshold is not*

*particularly high: it is not necessary to give some unusual, exceptional or very special reasons for the delay. It is nevertheless a threshold which has to be satisfied: the threshold albeit minimal is not meaningless. The threshold has not been met in the present case where the delay is attributable solely to inaction by the party seeking to execute.”*

**10.** Bearing those principles in mind, it is next necessary to consider the facts of this case. As noted above, judgment was given against Mr. O’Meachair on 15<sup>th</sup> November 2010. That judgment was subsequently registered as a mortgage against Mr. O’Meachair’s interest in three properties. On 2<sup>nd</sup> March 2012, it was registered as a mortgage against Mr. O’Meachair’s interest in Folio 5067F County Mayo in which he held a half share interest as tenant in common with Mr. Thomas Joyce, the first named defendant in these proceedings, against whom judgment was given on 18<sup>th</sup> November 2010 in the sum of €2,468,308.80 together with costs. Subsequently, on 9<sup>th</sup> January 2013, the judgment against Mr. O’Meachair was registered as a mortgage against his property comprised in Folio 37958F County Mayo. There is a prior charge in favour of First Active plc over this folio which was registered on 1<sup>st</sup> June 1999 and is stamped to cover IR£53,000 together with interest. As I understand it, Mr. O’Meachair’s family home is situated on this folio. The judgment against Mr. O’Meachair was also registered on 9<sup>th</sup> January 2013 as a mortgage against his property comprised in Folio 52936F County Mayo which, according to the folio is otherwise unencumbered.

**11.** On 4<sup>th</sup> April 2011, Mr. Kieran Wallace was appointed receiver over the property comprised in Folio 5067F. According to a brief report of the receiver exhibited to the affidavit of Mr. Sean Webb of Cabot, sworn on 1<sup>st</sup> December 2021,

the property comprises four terraced bungalows on a 2.62-acre site located at Sheeaune, Westport, County Mayo. It was sold to Peter Finch and Martha Finch on 3<sup>rd</sup> February 2015 and the sales proceeds of €50,000 were received on 10<sup>th</sup> March 2015. However, when the costs and expenses of the receivership and the sale were deducted by the receiver, the net return to ACC Bank plc as at 5<sup>th</sup> June 2015 is stated to have been no more than €7,653. As noted in para. 3 above, Mr. O’Meachair has strongly criticised the sales process.

**12.** In the course of the period between 2014 and 2016, ACC Bank plc underwent a series of name changes which culminated in a certificate of incorporation on conversion to a designated activity company dated 23<sup>rd</sup> August 2016 which confirmed that it had been converted under the Companies Act 2014 to a designated activity company known as ACC Loan Management DAC. On 31<sup>st</sup> October 2018, ACC Loan Management DAC agreed to assign to Cooperatieve Rabobank U.A. the legal and beneficial ownership of certain debts and related rights including the facilities held by Mr. O’Meachair with ACC Bank Plc. That assignment was subsequently completed under a deed of transfer dated 17<sup>th</sup> December 2018 under which ACC Loan Management DAC assigned to Cooperatieve Rabobank U.A. the legal and beneficial ownership of debts and rights including the facilities held by Mr. O’Meachair with ACC Bank plc. Subsequently, by Global Deed of Transfer dated 5<sup>th</sup> July 2019, Cooperatieve Rabobank U.A. assigned to Cabot the legal and beneficial ownership of debts and related rights including Mr. O’Meachair’s facilities. By letter dated 12<sup>th</sup> July 2019, Cabot wrote to Mr. O’Meachair confirming that the transfer had been completed.

**13.** At some point in 2017, Mr. O’Meachair petitioned for his own bankruptcy. He was adjudicated a bankrupt on 9<sup>th</sup> October 2017. According to the supplemental

affidavit of Mr. Webb sworn on 1<sup>st</sup> December 2021, the properties owned by O’Meachair vested in the Official Assignee on 1<sup>st</sup> October 2018 and did not re-vest in Mr. O’Meachair until October 2020. The present application was brought by notice of motion dated 12<sup>th</sup> May 2021.

**14.** Having set out, in brief terms, the relevant facts, it is next necessary to consider the reasons given by Cabot to explain the lapse of time in this case. This is addressed by Mr. Webb in his affidavit sworn on 1<sup>st</sup> December 2021. In that affidavit, Mr. Webb said that ACC Bank plc had sought to enforce its security and recover its judgment debt as against the lands over which the receiver was appointed. This culminated in the sale of the property in 2015 (as set out above). According to Mr. Webb, he has been advised by the ACC “*Legacy Team*” that the property had been advertised for a considerable time before its actual sale. It was initially marketed at €200,000 but that this was reduced to €95,000 in 2013. An offer of €80,000 was received but was subsequently withdrawn and the property ultimately sold for €50,000. As noted above, this occurred in February 2015 which was more than six years prior to the filing of the application under O.42, r. 24. Mr. Webb has sought to explain the ensuing period in the following terms in paras. 11-13 of his affidavit: -

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

*12. I say that ACC’s concerns proved accurate in circumstances where the Respondent petitioned to the High Court for his own bankruptcy in*



*2017 and he was subsequently adjudicated a bankrupt on 9 October 2017 circa 7 years post Judgment.*

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

15. In my view, it is important to consider the reasons given by Mr. Webb (as quoted in para. 14 above) in conjunction with what he said in para. 18 of his initial grounding affidavit sworn on 30<sup>th</sup> April 2021 in which he said that Cabot is "*desirous of issuing well charging proceedings*". That was the reason put forward for seeking leave under O. 42, r. 24. There is no suggestion in any of the affidavits that Cabot has any other purpose in seeking leave to execute at this stage. Thus, for example, there is no suggestion that Mr. O'Meachair has any other available assets against which execution might be levied. Cabot's focus is plainly to enforce the judgment against Mr. O'Meachair's lands. Against that backdrop, the reasons given by Mr. Webb in paras. 11-13 of his affidavit of 1<sup>st</sup> December 2021 manifestly do not explain the lapse of time in enforcing the judgment against Mr. O'Meachair's properties. Contrary to what is suggested by Mr. Webb, there was no impediment to Cabot (or ACC Bank plc prior to the transmission of interest in 2019) from enforcing the judgment mortgage against the properties owned by Mr. O'Meachair. Bankruptcy did not operate as an impediment to such action. On the contrary, it is well accepted that the holder of a

judgment mortgage constitutes a secured creditor within the meaning of s. 3 of the Bankruptcy Act 1988 (*“the 1988 Act”*). A secured creditor is fully entitled, notwithstanding a bankruptcy, to pursue enforcement of security against the property of the bankrupt. There is a straightforward procedure by which a secured creditor can value the relevant security and thereafter enforce the security notwithstanding the bankruptcy. In the case of a judgment mortgagee, the application can be made either by notice of motion brought in the bankruptcy proceedings pursuant to O. 76, r. 61 or, alternatively, it can be made, in the usual way, by special summons under O. 3. In these circumstances, the attempt by Mr. Webb to rely on Mr. O’Meachair’s bankruptcy clearly does not provide any plausible reason for the lapse of time. In particular, it does not provide any basis to explain why no action was taken on foot of the judgment in the period after it became clear (at the latest in early 2015) that the proceeds of realisation of the lands comprised in Folio 5067F were going to fall far short of satisfying the judgment debt. As noted above, it became clear by at least February 2015 that the sales proceeds would not exceed €50,000. As further outlined in para. 11, the lion’s share of that sum was eaten up in the costs of the receivership.

**16.** Equally, the reference to the first charge in favour of First Active plc over the lands comprised in Folio 37958 does not explain the lapse of time. There is nothing to suggest that there has been any change in the status of that charge in the intervening period. The copy folio exhibited shows that the charge remains in place. Moreover, the existence of that charge did not prevent the holder of any subsequent charge from seeking a well charging order and order for sale (albeit that, on any sale, the amount due to the first charge holder would have to be paid in priority).

**17.** In so far as it is suggested that the transmission of interest explains the lapse of time, I cannot accept that this is so. No detail whatsoever has been provided in

relation to why the transmission of interest could be said to explain matters. Furthermore, there would have been nothing, during the currency of that process, to prevent an application being made, in the meantime, for leave to execute after the relevant six-year period. The relevant holder of the judgment debt could have done so. In its capacity as assignee of the judgment debt, Cabot cannot absolve itself of the inactivity on the part of the relevant holder. In this context, as the judgment of Allen J. in the *Irish Nationwide* case makes clear, an assignee of a judgment debt is in no better position than the original judgment creditor. In para. 47 of his judgment, Allen J. held that an application by an assignee of a judgment debt is to be approached on the same basis as an application by the party originally entitled to execute the judgment.

### **Conclusion**

**18.** In the circumstances described above, Cabot, notwithstanding the opportunity given to it at the hearing in October 2021, has failed to provide any reason to explain the lapse of time in this case. In this context, I am very conscious that, as Geoghegan J. made clear in *Smyth v. Tunney*, it is not necessary to give some unusual, exceptional or very special reason for obtaining permission. However, it is clear that some reason must be given. In this case, Cabot has wholly failed to provide a reason that explains the long period of inactivity on its part or on the part of its predecessor in title, ACC Bank plc. In these circumstances, I am compelled to refuse the application of Cabot under O. 42 for leave to execute as against Mr. O’Meachair the judgment obtained by ACC Bank Plc on 15<sup>th</sup> November 2010.

**19.** In the circumstances, it is unnecessary to address the complaints made by Mr. O’Meachair or to consider whether he has made out a case of prejudice. As Dunne J.

observed in *Bula Ltd v. Tara Mines Ltd*, counterbalancing allegations of prejudice only fall to be considered where a good reason has been given for the lapse of time.

**20.** For completeness, I should make clear that I believe that Mr. O’Meachair is mistaken in his attempted reliance on *Primor* and related authority. It is clear from the judgment of Allen J. in *Irish Nationwide Building Society v. Heagney*, that the *Primor* line of authority is not relevant in the context of an application brought after judgment has been obtained. As Allen J. said in para. 34 of his judgment: -

*“...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... in deciding an application for leave to issue execution.”*

**21.** It would, however, be wrong to offer a view on the potential impact of Article 6 of the ECHR. In so far as I can see, that is not an issue that has previously been debated in the context of O. 42, r. 24 and, in light of my view that Cabot’s application must be refused, it would be inappropriate to express any view on it.

### **Next steps**

**22.** In light of my decision that the application by Cabot for an order under O. 42, r. 24 must be refused, my provisional view is that Mr. O’Meachair should be entitled to his costs as against Cabot. As a lay litigant, these will be limited to his out-of-pocket expenses such as expenses in relation to travel, printing, copying, stamp duty and any other out of pocket expenses incurred by him. As the decision of the Supreme Court in *Dawson v. Irish Brokers Association* [2002] 2 ILRM 210 demonstrates, there is no facility to award a sum to a lay litigant in respect of the time spent in preparing a case or in arguing a case.

**23.** Ordinarily, the court would direct that Mr. O'Meachair's costs should be adjudicated by the Legal Costs Adjudicator. However, in circumstances where there is no professional fee to be assessed, it strikes me that this would be an unduly cumbersome procedure to be adopted and I would be prepared, in the circumstances, to measure the costs in accordance with the court's power under O. 99, r. 7(2)(a). In order to do so, it will be necessary for Mr. O'Meachair to submit to the Registrar (and copy this to the solicitors acting on behalf of Cabot) a list of all of his expenses together with any vouching documentation following which I could make an adjudication as to the amount to be recovered from Cabot.

**24.** However, I stress that the views expressed in paras. 22 and 23 above are provisional. It may be the case that the parties may wish to make submissions to me in relation to costs and to propose a different form of order. For that purpose, I will list the matter before me at a physical sitting of the court on Thursday 24 March 2022 at 10.30 a.m. In the meantime, I would encourage the parties to engage with each other in relation to costs. If they can reach agreement in relation to costs, they should inform the registrar to that effect by email following which an order can be made by me without the necessity of any further hearing.