

HIGH COURT

[2007 No. 938SP]

BETWEEN

CARLISLE MORTGAGES LIMITED

PLAINTIFF

AND

PATRICK CANTY

DEFENDANT

Judgment of Ms. Justice Dunne delivered on 3rd day of December, 2013.

This is an application for, *inter alia*, an order pursuant to Order 42, rule 20 of the Rules of the Superior Courts renewing an order of possession dated the 9th October, 2009, subsequently renewed for a period of one year pursuant to an order made on the 4th July, 2011, perfected on the 7th July, 2011. The application is made on foot of a notice of motion issued on the 25th February, 2013 returnable for the 8th April, 2013. Ultimately, following an exchange of affidavits, the application came on for hearing on the 7th October, 2013. At the hearing on that date, it was contended on behalf of the defendant that it was not open to the Court to renew the order for possession, the argument being that once the first renewal order was made it was necessary thereafter that any subsequent order renewing the order of possession should be made during the currency of the existing order for possession.

Background

An order for the delivery of possession of lands in the townland of Tooreen and Barony of Coshma in the county of Limerick being all of the lands described and comprised in Folio 16861 F of the Register of Freehold Land was made on the 9th June, 2008 pursuant to s. 62(7) of the Registration of Title Act 1964. The defendant was represented by counsel when that order was made and a stay of five months on execution of the order was granted.

Subsequent to the expiration of the stay, the plaintiff sought an order of possession for the purpose of enforcing the order of the 9th June, 2008. The order of possession having been obtained was sent to the County Registrar for Limerick requesting that the order be executed and it was arranged that execution of the order would take place on the 26th January, 2010. The proposed execution was postponed when the defendant contacted the plaintiff indicating that he would discharge the underlying loan. He failed to do so and it was sought again to have the order of possession executed. Execution was arranged for the 21st September, 2010 but prior to that date a sum of €15,000 was paid to the plaintiff by the defendant. On that basis, the order of possession was returned to the plaintiffs solicitors.

No further payments were made by the defendant despite his assurances that he would be in a position to clear the loan facility and, accordingly, he was advised by letter that the plaintiff would proceed with the execution of the order of possession. The order of possession was then renewed on the 4th July, 2011 for a period of one year.

The order of possession was returned to the County Registrar's office in Limerick for the purpose of execution in September 2011. Ultimately, it was intended to execute the order of possession on the 28th February, 2012. The defendant was informed of this on the 22nd February, 2012 by the plaintiff's solicitors and advised that it was necessary to remove livestock from the land. The defendant was further advised that failure to do so would constitute a contempt of court. The defendant did not remove the livestock from the land and the order was not executed on that date for that reason.

Subsequently it was arranged that a further attempt to execute the order for possession would be made. This was to take place on the 19th June, 2012. Prior to that date, John Madden, the Court messenger for Limerick, met with the defendant and requested him to remove livestock from the lands.

On the 19th June, 2012, Mr. Madden attended at the lands at 7.30am in the company of three members of the Gardaí and two security men. Gates were locked and there was livestock on the lands. The defendant's actions on that occasion, which involved him taking to the air for a period of time in a microlight aircraft and subsequently driving a tractor around in circles on the lands, is described in full in a statement made to the Gardaí by Mr. Madden which was exhibited by Caroline Kerr in her affidavit grounding the application herein on behalf of the plaintiff. His behaviour on that occasion was somewhat bizarre, obstructive and uncooperative.

The Court messenger, Mr. Madden, was unable to execute the order of possession on the 19th June, 2012 or as set out previously on the 28th February, 2012 due to the conduct of the defendant. The order of possession as renewed on the 4th July, 2011 expired in July 2012.

As I have said, a number of affidavits were exchanged between the parties but suffice it to say that, apart from a small technical point in relation to the appropriate provision to invoke an order to seek renewal, the main point made on behalf of the defendant is the contention that in order to renew an order of possession, the order should be in force at the time the application for renewal is made.

The Rules

In order to understand the arguments made herein it is necessary to set out the provisions of certain Rules of the Superior Courts. The first of those is Order 8 which provides for the renewal of summonses as follows:

"1. No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may

order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons. The summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal;

... and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons.

2. In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

It is also necessary to refer to Order 42 which contains the provisions relating to execution. Order 42, rule 5 provides as follows:

"A judgement for the recovery or for the delivery of the possession of land may be enforced by order of possession."

Order 42, rule 20 is also of relevance. It provides:

"20. An execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such order may, at any time before its expiration, by leave of the Court, be renewed by the party issuing it for one year from the date of such renewal and so on from time to time during the continuance of the renewed order, either by being marked with the seal of the High Court, bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal; and an execution order so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof."

Submissions and discussion

Counsel for the defendant in the course of his submissions placed reliance on the decision in the case of *Bingham and Anor. v. Crowley & Ors.* [2008] IEHC 453 (Feeney J.) In that case, two of the defendants brought applications seeking orders setting aside order of the High Court renewing the plenary summons. The applications were made pursuant to Order 8, rule 2 of the Rules of the Superior Courts. In considering the issue of the second renewal of a summons and whether it had to be done within the currency of the renewed summons, Feeney J. noted (at p. 13 of the judgment):

"That was a second renewal as against the second named defendant, the first renewal having been against all defendants. Such renewal is therefore subject to the words contained in Order 8, Rule 1, being a second or subsequent renewal, namely 'and so from time to time during the Currency of the renewed summons'. It is contended by counsel for the second named defendant that those words mean that a second or subsequent renewal can only be applied for and granted during the currency of the renewed summons, which on the facts of this case was on a date within six months from the 21st November, 2005. In other words, the second named defendant contends that on the 19th February, 2007, the application was made not within the currency of the renewed summons. The solicitor for the plaintiffs argue that a correct interpretation of Order 8, Rule 1 is that the Court retains a discretion to renew the summons and that since the word currency is not defined, that the currency of the renewed summons can be taken to apply to any date after the first renewal of the summons.

This Court is satisfied that the interpretation contended for by the second named defendant's counsel is correct. If such interpretation was not correct it would mean that the words 'during the currency of the renewed summons' had no additional meaning or effect and that the sentence in the rule could have concluded at 'from time to time'. The Court is obliged to give effect and meaning to the wording of Order 8, Rule 1 and that includes the words 'during the currency of the renewed summons'. The only interpretation which can be given to the words 'the currency of the renewed summons' is the period identified as being the six month period of renewal provided for in an order to renew the summons. The rule provides a more stringent requirement in relation to a second or subsequent renewal in that after the first renewal, a summons will be incapable of further renewal unless an application to renew is made within the currency of the renewed summons.

Currency does not and cannot be interpreted as equating to the existence of the summons. Order 8, Rule 1 provides that no original summons shall be in force for more than twelve months and insofar as the words 'shall be in force' are used, that does not mean that the summons becomes a nullity, merely because it cannot be validly served after the date of its expiry without leave. The Courts have recognised this by the use of terms such as 'lapse' (see *Cavern Systems Dublin Limited v. Clontarf Residents Association and Dublin Corporation* [1984] I.L.R.M. 24). In effect a summons which has not been renewed is not a nullity but it cannot be validly served after the date of its expiry without leave of the Court. This Court is satisfied that the currency of the renewed summons refers to the period when the summons can be validly served. If the word currency did not have such meaning it would have the effect of rendering the word 'currency' as used in Order 8, Rule 1 as meaningless.

It follows from the above interpretation of Order 8, Rule 1 that on the 19th February, 2007, the summons could not be renewed under Order 8, Rule 1 as that date was not during the currency of the renewed summons. Therefore the *ex parte* order granting such renewal as against the second named defendant must be set aside."

It was pointed out by counsel on behalf of the defendant herein that there was a difference between the words used in Order 8, rule 1 and Order 42, rule 20. Order 8, rule 1 uses the phrase "and so from time to time during the currency of the renewed summons" while Order 42, rule 20 uses the phrase "and so on from time to time during the continuance of the renewed order". However, it was argued that notwithstanding the difference in wording that the principle identified by Feeney J. in the case of *Bingham* referred to above was applicable to Order 42, rule 20 and that the word "continuance" used in Order 42, rule 20 should be interpreted in the same way as the word "currency" in Order 8, rule 1.

Counsel on behalf of the plaintiff argued that there was no requirement to apply for the renewal of an order of possession during the continuance of the renewed order. Reliance was placed on the decision in the case of *Wymes v. Teahan* [1988] 1 I.R. 717. That case concerned orders of *fiery facias*. The defendant was the county registrar for the county of Meath and acted as the sheriff for the county and in that capacity she seized goods on foot of orders of *fiery facias*. She notified the plaintiff that unless payment of the full amount due on foot of the orders was made within forty eight hours, she proposed to sell the seized goods. The plaintiff sought interlocutory relief by way of injunction to restrain the sale of the goods and further contended that the orders of *fiery facias* were

invalid on the basis that they could only be renewed by order of the Court and on notice to the plaintiff. There was a further argument raised in relation to the validity of the orders but that is not of relevance here.

The key point argued in that case was that the orders of *feri facias* "if renewed after the expiration of one year - or if renewed during the year when the original orders were current - this should have been the subject of an order of the court or a judge, and should have been the subject of an application for renewal on notice to the judgment debtor". (See page 720 of the judgment). O'Hanlon J. in the course of his judgment at page 721 commented:

"I have examined the orders of *feri facias* which were sent to the defendant for execution in this case, and I can find nothing on the face of those orders to suggest any invalidity or that they were irregularly obtained. There is nothing to suggest, either on the face of the said documents or in any affidavit filed on behalf of the plaintiff to suggest that an application was made to the court or a judge to renew previous orders of *feri facias* which had ceased to be enforceable after the expiration of one year, and without notice to the plaintiff. On my reading of the Rules of the Superior Courts it appears to me that it is permissible to apply *ex parte* before the expiration of one year from the issue of the order for renewal and so on from time to time during the continuance of the renewed order. (See O. 42, r. 17, and O. 63 reapplications which should be made on notice). The form of the orders, however, does not suggest that they are to be regarded as renewals of the original orders, but rather as new orders ranking in priority according to the dates which they bear. Mr. Geoghegan, for the plaintiff, referred to a statement in a footnote to O. 46 of the English rules, to be found in the Annual Practice, 1892 Edition, Para. 46/811, which reads as follows:-

'After the year has expired the ordinary course is to issue a new writ on the certificate of a solicitor that nothing has been levied under the first writ.'

No authority is given for this statement, or to support the further proposition made by counsel for the plaintiff that it is not permissible to issue a new writ after the expiration of the year, if something has been levied under the first writ, nor is there anything to show that the course of practice is the same here as in England in this respect. It is difficult to see why it should not be permissible to issue a new writ even if partial execution has already taken place on foot of the original writ."

The judgment creditor applying for a new writ instead of seeking renewal of the original writ will thereby lose the priority he gained in the dating of the original writ. As far as the defendant was concerned, she was put in possession of orders of *feri facias* issuing from the court which appeared and still appear perfectly regular on their face and it seems to me that she was in duty bound to proceed to execute on foot of the said orders. No proceedings have been instituted to challenge the validity of the said orders and the evidence on affidavit which has been adduced in the present application does not suggest to me that there is a substantial case for challenging the validity of the said orders, or a serious question to be tried in relation to same."

O'Hanlon J. in the course of his judgment noted that the orders in that case were not to be regarded as renewals of the originals orders but rather as new orders ranking in priority according to the dates which they bore. One of the points that I think is of relevance to note is that the effect of a renewal of the order as set out in Order 42, rule 20 is that an execution order so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

As can be seen from the passages referred to above, there is no authority for the proposition that it is not permissible to issue a new writ of execution even if partial execution has already taken place on foot of the original writ. That, of course, is particularly so in the case of a writ of *feri facias* in the sense that partial execution of such an order can be made.

There is one part of the judgment in that case with which I find I must disagree. The headnote to the judgment notes as follows:

"That the Rules of the Superior Courts, 1986, permit an application *ex parte* for the renewal of orders of *feri facias* before the expiration of one year from their issue."

The section of the judgment dealing with that issue appears on page 5 of the judgment where O'Hanlon J. noted:

"On my reading of the Rules of the Superior Courts it appears to me that it is permissible to apply *ex parte* before the expiration of one year from the issue of the order for renewal and so on from time to time during the continuance of the renewed order. (See O. 42, r. 17, and O. 63 reapplications which should be made on notice)."

If one examines Order 63 of the Rules of the Superior Courts, one can see that the provisions of Order 63, rule 1, set out the jurisdiction of the Master of the High Court to make certain orders under the Rules; one of those is Order 63, rule 1 (32) which provides as follows:

"An order giving liberty to renew an order of *feri facias* after the lapse of one year, or to issue a new order of *feri facias* on loss of the original."

Order 63, rule 4 then goes on to specify the orders which can be made on an application *ex parte*. The list of orders does not include Order 63, rule 1(32) and, accordingly, to that extent, I think that the interpretation of the Rules of the Superior Courts by O'Hanlon J. as to how an application for the renewal of an order of *feri facias* can be made is one with which I cannot agree. The other rule cited by O'Hanlon J. in that context is Order 42, rule 17 and this does not have any bearing on the method of renewal of the order of *feri facias*. The basis upon which such an order can be renewed is to be found in Order 42, rule 20. (See also *Practice and Procedure in the Master's Court* (2nd Ed., Barron), at p. 62 which sets out the requirements for making such an application, namely, that it should be an application made on notice.) Insofar as the plaintiff places reliance on the decision in that case, I cannot see any basis for the suggestion on behalf of the plaintiff that it is open to a plaintiff seeking the renewal of an execution order to apply *ex parte* during the continuance of the order and on notice if the execution order has lapsed, as was suggested in the course of the submissions.

Perhaps some confusion arises from the procedure which is set out in Order 8, rule 1 which enables a plaintiff to apply before the expiration of twelve months to the Master for leave to renew the summons but, after the expiration of twelve months, the application to extend time for leave to renew the summons is required to be made to the Court. Obviously, an application to renew a summons is made *ex parte* (given that the reason for renewal of the summons is to effect service) whereas an application in relation to the renewal of an order of execution is made in the course of proceedings which have been served on a defendant. In the case of other applications, it is clear from the provisions of Order 52, rule 2 that:

"Save as otherwise provided by these Rules, all such applications other than such as under the existing practice are made *ex parte* or are authorised by these Rules to be so made, shall be made by motion on notice to the parties concerned"

Accordingly, it seems to me to be clear that any application for the renewal of an order of execution must be made on notice to the parties concerned.

Having made those observations in relation to the judgment in *Wymes v. Tehan*, it is now necessary to consider the arguments of the parties as to whether or not it is possible to make a second or subsequent order renewing a summons outside the currency or continuance of the order previously renewed. Although the word "currency" is used in Order 8, rule 1, and "continuance" is used in Order 42, rule 20, I see no basis for considering that there is any real difference between the words "currency" and "continuance" as used in the respective rules. For that reason, I am of the view that the interpretation of the word "currency" in the context of Order 8, rule 1, as set out in the judgment of Feeney J. in the case of *Bingham* referred to above, is carefully considered and thought out and is an interpretation with which I find myself in agreement. While Feeney J. was dealing with an application to renew a summons and this is an application to renew an order of possession, the words used in Order 8, Rule 1 and Order 42, Rule 20 are, in my view, incapable of warranting a different interpretation despite the use of the words "currency" and "continuance" in the respective rules. In practical terms, I find it impossible to distinguish the phrases "so from time to time during the currency" and "so on from time to time during the continuance" as used in the respective rules. As I have pointed out, there are some procedural differences between applications pursuant to Order 8, Rule 1 and those pursuant to Order 42, Rule 20 but I do not think that the procedural differences have any bearing on the interpretation of the words "currency" and "continuance" as used in the respective rules.

The plaintiff in these proceedings was entitled to obtain an order of possession. Subsequently, that order not having been executed, it was open to the plaintiff to seek to have that order renewed. Once the order was so renewed, it was necessary thereafter, in order to retain the priority of the original order of possession obtained pursuant to Order 42, Rule 5 to seek the renewal of the order during the continuance of the renewed order. In other words, a second and subsequent renewal of the order of possession must be obtained during the continuance of the order so renewed. That was not done in this case as the application to renew was not issued for some months after the expiration of the order as renewed. However, there is absolutely nothing to prevent the plaintiff from seeking to have another execution order in the form of an order of possession issued in the usual way in the Central Office. It should be remembered that the only reason why the order of possession in this case was not executed during its continuance was because of the conduct of the defendant. The only penalty, if that is the appropriate word to use, for the plaintiff is that it does not have priority in respect of its execution order over any other execution order that might be in existence in respect of the same property.

In the circumstances, I am compelled to refuse the application to renew the order of possession herein.