

APPROVED

[2021] IEHC 103

THE HIGH COURT
CIRCUIT APPEAL

2020 No. 176 CA

BETWEEN

JASON HAYDE

PLAINTIFF

AND

H & T CONTRACTORS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 February 2021

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court (Her Honour Judge Linnane). The Circuit Court had refused the plaintiff's application for leave to seek an execution order pursuant to Order 36, rule 9 of the Circuit Court Rules. Such leave had been necessary in circumstances where the judgment which is sought to be enforced had been entered more than six years previously.

PROCEDURAL HISTORY

2. These proceedings arise out of the construction of a dwelling pursuant to a contract entered into between the plaintiff and the defendant company. The plaintiff alleges that the construction works were defective. The proceedings issued before the Circuit Court

NO REDACTION REQUIRED

on 26 January 2011. The plaintiff subsequently obtained judgment in default of appearance on 28 June 2011, and damages were assessed on 24 October 2011. The relevant order of the Circuit Court reads as follows:

“THE COURT DOTH ORDER that the Plaintiff do recover from the Defendant the sum of €22,408.00 together with the costs of the Proceedings to be taxed in default of agreement, such costs to include any reserved costs.”

3. The costs were subsequently “taxed”, i.e. measured, by the County Registrar on 17 October 2014. The certificate of taxation was not, however, taken up until 1 July 2020. No step had been taken to enforce the judgment prior to that date.
4. In circumstances where more than six years had elapsed since the entering of the judgment, it had been necessary for the plaintiff to apply for leave to seek an execution order pursuant to Order 36, rule 9 of the Circuit Court Rules.
5. The application is grounded on the affidavit of Mr. John Hennessy, Solicitor. The explanation for the delay is set out as follows at paragraphs 5 and 6 of the affidavit.

“5. The Plaintiff’s costs were taxed and ascertained in the sum of €15,258.08 on October 17th, 2014. However, the Certificate of Taxation did not issue until July 1st, 2020. I beg to refer to a copy of the said certificate upon which marked with the letter ‘JH3’ I have signed my name prior to the swearing hereof.

6. I say that the Plaintiff did not issue execution of the said order before now, because of the expensive cost of obtaining the certificate of taxation: €1,190.00, eventually paid by this firm of solicitors. I say the payment of same was low in priority due to the nature of such cases and the difficulty to recover such moneys, however, it was eventually decided by the partners to pursue, on behalf of the Plaintiff the damages and costs.”

6. An application for leave to seek an execution order was made before the Circuit Court on behalf of the plaintiff on 13 October 2020. The Circuit Court refused leave. A notice of appeal was filed on behalf of the plaintiff. The appeal came on for hearing before me on 15 February 2021. There was no appearance on behalf of the defendant company on

that occasion. Two affidavits of service have been filed which confirm that the notice of appeal was properly served on the defendant company, and that it was subsequently notified of the hearing date.

DISCUSSION

7. Order 36, rule 9 of the Circuit Court Rules provides 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.
8. As can be seen, a judgment in default of appearance 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 an execution order. Such an order cannot, after the lapse of six years, simply be issued in the Office without leave.
9. The rule differs 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 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)).

10. 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 for 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 a possession order, already obtained, is renewed, is not an action upon a judgment in the sense intended by the Statute of Limitations.
11. This distinction between the wording of the Circuit Court Rules and the Rules of the Superior Courts is not, however, critical in the present case in circumstances where the application for leave had been made within twelve years in any event.
12. Order 36, rule 9 is silent as to the criteria which govern the court's discretion to grant leave to seek an execution order. Counsel for the plaintiff submitted that the applicable test is that set out in the judgment of the Supreme Court in *Smith v. Tunney* [2004] IESC 24; [2004] 1 I.R. 512. Specifically, it is submitted that whereas there must be a good reason for the delay in executing a judgment, 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. In the event that a good reason is demonstrated, the court must then consider any counterbalancing allegations of prejudice to the indebted party.
13. Counsel submits that the reason offered for the lapse of time in the present case, namely a reluctance to incur the costs of taking up the certificate of taxation, represents a good reason. As to the question of prejudice, counsel observes that the defendant company has not appeared in response to the application, and, in any event, can hardly be said to have been prejudiced by the fact that the company has not yet had to satisfy the judgment against it.

DECISION

14. For the reasons which follow, I am satisfied that this is not an appropriate case in which to grant leave to seek an execution order. The delay in the present case has been caused by a unilateral act on behalf of the party seeking to execute, namely a deliberate decision not to take up the certificate of taxation for a period of some six years. The facts of the present case stand in marked contrast to the type of circumstances arising in those cases in which leave to execute out of time has been granted. Three broad categories of good reasons for delay emerge from the case law as follows. The first category is where the delay has been caused by the conduct of the indebted party. For example, on the facts of *Smith 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 enforcement.
15. The second category is where there has been a change in the financial circumstances of the indebted party. In *Mannion v. The 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 six year period believed that the indebted party did not have the capacity to pay the judgment debt and that 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.
16. 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

judgment 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. See, for example, *Start Mortgages DAC v. Gawley* [2020] IECA 335 and *Start Mortgages DAC v. Piggott* (cited earlier).

17. Finally in this regard, it would appear from the judgment in *Bula Ltd (In Receivership) v. Tara Mines Ltd* [2008] IEHC 437 that delay in the process of having an award of legal costs taxed, i.e. measured, may, in principle, represent a good reason. The facts of the present case are, however, distinguishable from those at issue in *Bula Ltd* in that here the taxation process had been completed in 2014. The delay thereafter was in consequence of a decision not to take up the certificate of taxation.
18. The categories of cases in which an extension of time to seek an execution order is justified are by no means closed. The case law cited above is merely illustrative. Moreover, as with the exercise of any judicial discretion, the outcome will be fact-specific and necessitates careful consideration of the particular circumstances of the individual case. Earlier case law will, therefore, only ever be of limited assistance. Nevertheless, it is telling that there does not appear to be any written judgment in which an extension of time had been granted where the delay is attributable solely to inaction by the party seeking to execute. Yet, this is precisely what is relied upon in the present case. The only matter put forward in explanation of the delay is an alleged reluctance on the part of the plaintiff to pay the sum of €1,190 necessary to take up the certificate of taxation. In the event, this sum was ultimately paid by the firm of solicitors acting on behalf of the plaintiff. It is implicit from the grounding affidavit that some sort of arrangement has been entered into with the plaintiff by which the firm of solicitors will recover the judgment (including costs) on his behalf. It is also implicit that this

arrangement had been in place for some period of time prior to the firm taking up the certificate of taxation in 2014: the affidavit refers to the payment of same being “low in priority”. This was explained by counsel as referring to the priorities of the firm of solicitors, rather than of the plaintiff personally.

19. No detail is provided in the affidavit in respect of the financial standing of the defendant company. There is no suggestion, for example, that there has been a change in its circumstances which now makes the realisation of the judgment debt more likely than at any point previously.
20. Counsel suggested at one stage that his side might file a further affidavit. However, the special leave of the court would be required to adduce further evidence in the context of an appeal from the Circuit Court heard on affidavit evidence only. (See section 37 of the Courts of Justice Act 1936). Very sensibly, no such application has been made in this case.
21. The objective of Order 36, rule 9 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.
22. Given that the threshold has not been met, it is not necessary for this court to move to the second part of the test prescribed in *Smith v. Tunney*, namely the consideration of prejudice to the indebted party.

CONCLUSION AND FORM OF ORDER

23. The appeal against the Circuit Court order of 13 October 2020 is dismissed. The application for leave to seek an execution order pursuant to Order 36, rule 9 of the Circuit Court Rules stands refused.
24. No order for costs will be made in favour of the successful party, i.e. the defendant company, in circumstances where the company had not been represented at the hearing before me and thus has not incurred any recoverable costs.

Appearances

Laurence Masterson for the plaintiff instructed by Hennessy & Perrozzi Solicitors
No appearance on behalf of the defendant company

Approved
Gareth S. Mans