

THE HIGH COURT

CIRCUIT APPEAL

[2017 No. 170 C.A.]

BETWEEN

IRISH LIFE AND PERMANENT PLC

PLAINTIFF

AND

JOHN DUFFY AND KATHLEEN DUFFY

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 8th day of December, 2017

1. This is an appeal brought by the first defendant from the order of the Circuit Court (His Honour Judge McCabe) made on the 26th April, 2017, at Castlebar Circuit Court.

2. The background to the matter is briefly as follows. These proceedings commenced as an ejectment action on foot of a mortgage the defendants had with the plaintiff which was alleged to be in default. The proceedings culminated in the Circuit Court making an order for possession on the 10th May, 2004. Arising from that order for possession, an execution order was made by the Circuit Court office, signed by the County Registrar, on the 31st May, 2005. It would appear that no steps were taken by the plaintiff to actually execute on foot of that order. Instead, the plaintiff applied to the Circuit Court office from time to time to have the execution order renewed. It appears to have been renewed on some six subsequent occasions with the last renewal being granted on the 20th November, 2013. Each renewal was signed by the County Registrar. The interval between the renewal of the order in each case appears to be in excess of twelve months.

3. In each case the renewal was for a period of one year from the date of renewal. Arising from the last renewal on the 20th November, 2013, the plaintiff executed the order by taking possession of the premises on the 18th November, 2014. Thereafter it would appear that the first defendant re-entered the premises. Arising from those circumstances, the plaintiff brought an application for an injunction restraining the first defendant from trespassing on the property. The Circuit Court granted that order as I have said on the 26th April, 2017.

4. There are two matters now before the Court. The first is an appeal from that order of the Circuit Court. The second is a motion to consolidate with the Circuit Court proceedings, further proceedings brought in the High Court by the defendants and another member of their family against not only the bank but also the County Registrar, the company that executed the possession order and an auctioneer instructed by the bank to dispose of the property. The basis for the High Court proceedings is that it is alleged that the execution was wrongful and constituted a trespass on the plaintiffs' property for which they seek damages and an injunction restraining trespass. Although the High Court proceedings issued on the 30th July, 2015, the motion to consolidate was not issued until the 21st June, 2017, almost two months after the Circuit Court had made its order and the first defendant served notice of appeal.

5. The issue in the Circuit Court proceedings is very net. The first defendant says that the renewal of the execution order was made invalidly because it was without notice to him and that being so, the plaintiff is not entitled to seek an injunction. That is the essential point in the High Court proceedings also.

6. Order 36 of the Rules of the Circuit Court deals with execution. Rule 9 provides that an order of the court shall be in force for twelve years and an execution order may be issued within the same period but not after the expiration of six years without leave of the court obtained on notice to the affected party. In the present case, the execution order was made just over one year from the order for possession. Rule 12 provides that the execution order shall remain in force for one year. Rule 13 provides as follows:

"13. An execution order may, on the application of the party entitled thereto, be renewed in the Office at any time during the currency of the decree or judgment in respect of which it was originally issued for the period of not more than one year from the date of such renewal, provided that the said decree or judgment be in full force and effect for the period for which the said execution order is so renewed. The fact of the renewal of any such order shall be indorsed thereon and the order shall be re-sealed. An order for execution so renewed shall have effect and be entitled to priority according to the time marked thereon as the date of its original issue."

7. Before renewal of an order for execution can be made, the person seeking it must, pursuant to r. 14, file an affidavit setting out all credits to which the defendant is entitled and the amount due on foot of the judgment.

8. The "Office" referred to in the order is the Circuit Court Office. It is clear therefore from the rule that an execution order can be issued in the office provided that is done within six years of the original judgment. Rule 13 expressly provides that the execution order may be renewed in the office "at any time" during the currency of the judgment, that is to say within twelve years. The order makes clear however that the execution order cannot be renewed for a period longer than that during which the original judgment is in force. Thus if an application for renewal were made eleven years and six months from the date of the judgment, the execution order could only be renewed for a period of six months.

9. It will be seen therefore that the rules do not require an application to court on notice to the defendant where a renewal is sought provided that the original execution order was made within six years, as it was in this case. Equally, the rules do not require that the execution order can only be renewed while it is still in force i.e. during the period of a previous renewal. This is evident from the plain words of the rules themselves. The defendant argues that the rule ought to be interpreted in the same way as the equivalent rule of the superior courts dealing with execution. Order 42 r. 20 of the Rules of the Superior Courts is the equivalent of O. 36 r. 13 of the Rules of the Circuit Court. The High Court order provides as follows:

"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, ..." (My emphasis)

10. In *Carlisle Mortgages Ltd v. Canty* [2013] IEHC 552, the High Court (Dunne J.) held that in order to retain priority of the original order for possession, the renewal had to be made during the continuance of the renewed order. She said (at para. 26):

"In other words, a second and subsequent renewal of the order of possession must be obtained during the continuance of the order so renewed."

11. Of course that is perfectly consistent with the explicit wording of the High Court rule. The words "during the continuance of the renewed order" are clear in their meaning and effect. A renewal cannot be made except while the order is in force. If accordingly it is allowed to lapse, renewal is not possible.

12. The wording of the Circuit Court rule is of course entirely different. In contrast, it provides that the execution order may be renewed "at any time" and it is notable that words equivalent to "during the continuance of the renewed order" are manifestly absent from the Circuit Court rule. There is no warrant in my view for reading into the Circuit Court rule words that are plainly not there and would have the effect of entirely altering its clear meaning.

13. I am therefore satisfied that there is no merit in the defendant's argument that any invalidity attaches to the renewal order in this case made on the 20th November, 2013. Moreover, it seems to me that if the defendant wished to impugn the validity of that order on the basis that it was made without jurisdiction, the appropriate means of doing so is by making an application for judicial review to quash the order. It is not permissible in my view for the defendant to seek to indirectly attack an order that is valid on its face and made in accordance with the Circuit Court Rules.

14. Suffice is to say that I am quite satisfied that the learned Circuit Court judge was correct in making the order he did and I will accordingly dismiss this appeal. Insofar as the motion to consolidate is concerned, this obviously disposes of that motion also which necessarily fails.