UNAPPROVED

THE COURT OF APPEAL
CIVIL

Appeal Number: 2022/97

High Court Record Number: 2010/9146P
Neutral Citation Number [2023] IECA 281

Donnelly J

Faherty J

Butler J.

BETWEEN/

CABOT FINANCIAL (IRELAND) LIMITED

SUBSTITUTED FOR ACC BANK PLC BY ORDER DATED 20/10/2021

APPELLANT

- AND -

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

RESPONDENTS

JUDGMENT of Ms. Justice Butler delivered on the 15th day of November 2023

Introduction:

1. In circumstances where I find myself unable to agree with the conclusions reached by my colleagues, it is appropriate that I set out my reasons for such disagreement in this judgment. I will attempt to do so concisely in circumstances where the factual background

to the case, the rationale of the High Court judgment and the relevant authorities are set out in some detail in the judgment of Donnelly J.

2. In brief, the application before the High Court was one brought on 12 May 2021 by Cabot Financial Ireland Limited ("the appellant") under O.42, r.24 of the Rules of the Superior Courts seeking leave to issue execution of a judgment obtained by ACC Bank plc ("ACC") on 15 November 2010 against the third defendant ("the respondent"). Cabot was the ultimate assignee of the judgment debt on foot of a transfer dated 5 July 2019 and obtained an order in October 2021 substituting itself for ACC in the title to the proceedings. The application for leave to execute the judgment was made some ten years and six months after the judgment had been granted.

3. The background facts to the initial proceedings are now of only peripheral relevance. In 2005 the sum of €300,000 was lent by ACC to the first and third defendants to fund the purchase of residential investment property in County Mayo. This loan was secured by a first legal mortgage and charge on the investment property and that charge was registered by ACC on the folio in March 2006. Additional and indeed larger sums were subsequently lent by ACC in 2007 and 2008 to the first and second defendant (a married couple) secured on different property owned by them and to the fourth defendant (a company controlled by the first and second defendants). The latter loans were secured on commercial property owned by the fourth defendant together with a personal guarantee provided by the first and second defendants.

4. The timing of the loans was inauspicious given the severe economic recession and subsequent depression which commenced in 2008. By mid-2009 the parties were experiencing difficulties in making the scheduled repayments on the loans. Proceedings were instituted by ACC on 5 October 2010 against all four defendants in respect of all four loans of which the respondent was party to only one. On 10 November 2010 ACC issued a

motion seeking to transfer the proceedings to the Commercial List and to enter judgments against the various defendants. The application made against the respondent was for liberty to enter final judgment in the sum of €271,637.31 being the outstanding amount due on foot of the 2005 loan. Judgment was sought against the first defendant for a larger sum which included the amount outstanding on the 2005 loan for which the first and third defendants (i.e. the respondent) were jointly and severally liable. On 15 November 2010 the High Court (Kelly J.) made an order granting judgment to ACC against the respondent, there being no attendance in court by him or on his behalf. Orders were made against the first, second and fourth defendants some days later on 18 November 2010. The respondent did not appeal the order made against him.

5. After obtaining judgment in April 2011, ACC appointed a receiver over the investment property which it was entitled to do pursuant to the terms of the mortgage. It is worth bearing in mind that at the time judgment was granted Ireland was in the throes of a deep recession which had particularly severe effects on the property market. Unsurprisingly, in light of this economic situation and the collapse of the property market, the receivership progressed slowly and, after a number of failed attempts, the investment property was ultimately sold by the receiver in February 2015. Unfortunately, the amount paid by the purchasers for the investment property was very low, €50,000. In effect, the sale of the property recovered only about one-sixth of the amount borrowed to fund its purchase a decade earlier. By the time the costs of the receivership were deducted, the residual amount of less than €8,000, did not have a meaningful impact in reducing the total due on foot of the 2005 loan.

6. Whilst the receivership was progressing ACC also took steps to protect its interest on foot of the judgment and in March 2012 registered the judgment as a judgment mortgage on the folio of the investment property which was the security for the loan. In January 2013

it registered the judgment on the folios of two additional properties owned by the respondent. The respondent's family home is located on one of these folios and there was some dispute, which could not be resolved on the papers before the court, as to whether the second property was part of the overall holding on which the family home is situated. Nothing turns on this for present purposes. What is potentially relevant is that the respondent's family home was subject to a first charge registered in favour of First Active plc which was, presumably, the mortgage lender which had advanced monies to the respondent for the purchase of that property. That charge ranked in priority to ACC's judgment mortgage.

7. This sequence of events is, to my mind, significant. ACC did not sit on its hands having obtained judgment. It took steps to realise the security provided for the underlying loan and also registered its judgment as a judgment mortgage over the secured property and over the respondent's other property. ACC can hardly be faulted for allowing the receivership to proceed and seeking to realise the sums due from the secured property prior to seeking to execute the judgment. If the secured property had been sufficient to discharge the loan, no recourse would have been required to the judgment mortgage registered over what appears (and at least in large part) to be the respondent's family home. The difficulties it faced, and indeed which also faced the respondent, are evident from both the lengthy period of time taken to sell the secured property and the low price recovered. Notwithstanding the gradual improvement in the economic situation, it is evident that a forced sale of the respondent's remaining property in 2015 would have been unlikely to have benefited either party.

8. At this point, according to an affidavit sworn by Mr. Webb, director of the appellant, following discussions with *"the ACC legacy team"*, *"ACC considered its alternative enforcement and recovery options"* but that *"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". The belief that the respondent was insolvent transpired to be correct as in 2017 he petitioned the High Court for his own bankruptcy and was ultimately adjudicated a bankrupt in October 2017. In October 2018 the properties contained in the two remaining folios over which ACC had registered judgment mortgages vested in the official assignee in bankruptcy. It appears from correspondence that Link Asset Services, who acted as service provider for ACC, submitted a proof of debt to the Insolvency Service of Ireland (ISI) but did not receive any further correspondence in the matter. The respondent was discharged from bankruptcy in 2020 and the two properties were re-vested in him in October 2020.

9. Whilst the respondent was in bankruptcy ACC sold its interest in a portfolio of debt, including the respondent's debt, to Rabobank on 17 December 2018. The following year on 5 July 2019 Rabobank in turn assigned the debt to the appellant. On 12 July 2019 a *"hello letter"* was sent by the appellant to the respondent advising him of the transfer of ACC's loan to it, of the obligation to make loan repayments to it and asking him to contact it in respect of proposals for the discharge of the loan.

10. In one of three affidavits sworn by Mr. Webb to ground the application under O.42, r.24 he avers to his belief (based on advice) that *"ACC was, inter alia, stayed from executing its judgment for a period by reason of the Respondent's bankruptcy"*. The time during which the properties were vested in the official assignee coupled with the various transfers of the judgment debt referred to in the preceding paragraph are offered as an explanation for the delay in executing the judgment in more recent years. As it happens the belief that the respondent's bankruptcy precluded steps been taken on foot of the judgment mortgages to execute the judgment is legally incorrect and this legal error was at the centre of much of the argument on this appeal.

11. Needless to say, the respondent opposed the granting of leave to execute the judgment against him. Some of his complaints relate to the conduct of the receivership, the lack of information provided to him by ACC and a perceived unfairness that action was not taken against his co-defendants. Of more direct relevance to the issues on the appeal, the respondent disputes the appellant's original averment that it believed a property over which it had the benefit of a judgment mortgage had been kept out of the bankruptcy (i.e. the respondent's principal private residence). Whilst it seems the respondent is correct in that no property was kept out of the bankruptcy, Mr Webb's apparent belief that property would have to be kept outside the bankruptcy for the appellant to proceed to execute a judgment mortgage registered over it, is consistent with the mistaken belief that the bankruptcy otherwise precluded execution of property that was included within it.

12. The respondent specifically avers that *"no action was taken [sic] ACC Bank in nearly ten years and I had unsurprisingly assumed that the matter was at an end"*. In light of the chronology of events set out in this judgment that averment is not really accurate. During that period ACC had both appointed a receiver to sell the secured property and registered judgment mortgages on three folios owned by the respondent. He had also received correspondence from the appellant in 2019 advising of the transfer of his loan to it. As the loan stood at over €250,000 it would be surprising, to say the least, if following receipt of this correspondence the respondent still believed the matter to be at an end.

13. In a subsequent affidavit the respondent disputes the belief that ACC were prevented from *"commencing proceedings"* prior to or on the day his property was transferred to the Insolvency Service of Ireland for the duration of his bankruptcy. He states:

> *"On the day of being declared a Bankrupt it was made clear to me both by the Court and the Insolvency Service of Ireland (ISI) that all my properties would immediately transfer to ISI and this position was confirmed by the required signing of a "Day1*

> *Form" by me. There were no legal barriers preventing the Plaintiff from commencing proceedings on that day or indeed beforehand. I reject the assertion that they were prevented from doing so "inter alia". I believe this is an attempt by the Plaintiff to excuse their way out of their failure to act in a timely fashion."* (emphasis added)

Interestingly, by pointing out that there was no legal impediment to commencing proceedings "*beforehand*" this averment suggests that the respondent shared the appellant's mistaken belief that proceedings could not have been taken in respect of his property once and for as long as it was vested in the official assignee in bankruptcy.

The High Court Judgment:

14. The High Court, McDonald J. [2022] IEHC 92 refused the appellant leave to execute against the respondent the judgment obtained by its predecessor-in-title, ACC, on 15 November 2010. Three reasons were given for this conclusion which, in the trial judge's view, had to be seen against the stated desire of the appellant to execute the judgment against the respondent's lands in circumstances where no additional assets had become available to satisfy it in the intervening period. Firstly, he held that as the bankruptcy did not in fact preclude ACC as a secured creditor from enforcing its judgment mortgage, reliance on the bankruptcy "*does not provide any plausible reason for the lapse of time*". Secondly, he held that the reference to the first charge in favour of First Active did not explain the lapse of time in circumstances where there had been no change in the status of that charge in the intervening period. Thirdly, he held that the transmission of interest from ACC to Rabobank and from Rabobank to the appellant did not explain the lapse of time as "*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 6 year period*."

Order 42, Rule 24:

15. The basic legal principles applicable to this factual situation are not in dispute but I have some difficulty with the way they have been interpreted and applied by my colleagues. The time limits for the execution of judgments are found in O.42, rr. 23 and 24 which, excluding the provisions of r.24(b) and (c) which deal with other circumstances, provide as follows;

> *"O.42, r. 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.*
>
> *O.42, r. 24: In the following cases, vis:*
>
> *(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;*
>
> *…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 parties 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. …"*

16. In the instant case, judgment having been granted on 15 November 2010, the six-year period under O.42, r.23 during which it could have been executed by ACC without the leave of the court expired on 14 November 2016. The application for leave to execute under

O.42, r.24 was made on 12 May 2021 – i.e. four years and six months after the expiration of the initial six-year period or ten years and six months after the date of the judgment. The principal point of difference between myself and my colleagues is the extent to which an explanation is required to be given for the failure to execute during the entire of the initial six-year period from the date of the judgment when an application is subsequently brought under O.42, r.24. I should clarify that I accept that an explanation must be given, firstly, for the failure to execute *simpliciter* during the initial six-year period and thereafter for the delay in seeking leave to execute after that period – i.e. here during the subsequent period of four years and six months. However, I do not think it is legally correct nor supported by the authorities on which reliance is placed to say that an explanation must be provided for the lapse of time during the entire of the period from the date of the judgment in November 2010. In addition, in my view, the trial judge was incorrect in the height of the onus he placed on the plaintiff regarding the explanation actually furnished. I will return to this in due course.

17. The issue thrown up by this case is of some significance in light of uncertainty as to whether a judgment creditor who is not granted leave to execute a judgment would be shut out from suing on foot of the judgment or acting on foot of any judgment mortgage registered pursuant to it after the expiration of twelve years from the date of the judgment. Under s.11(6) of the Statute of Limitations 1957 no action can be brought on foot of a judgment after twelve years of the date on which the judgment became enforceable. (As there was no stay in this case the judgment was enforceable from the date of the order.) The Supreme Court has provided clarity regarding the application of both s.11(6) and s.13(2)(a) of the Statute of Limitations in circumstances where a judgment creditor (or other mortgagee) has obtained but not executed a well charging order and an order for sale more than twelve years previously (see *Ulster Investment Bank Limited v. Rockrohan Estate Limited* [2015] 4 IR 37,

Charleton J., affirming Irvine J. in the High Court [2009] IEHC 4). However, the extent to which a similar analysis applies to the registration of a judgment mortgage without proceeding to obtain a well charging order has yet to be determined.

Smyth v Tunney:

18. The main authority in this jurisdiction on O.42, r.24 is the decision of Geoghegan J. in *Smyth v. Tunney* [2004] 1 IR 512. The interpretation of that judgment - although not necessarily its application – has become progressively stricter in recent years in a manner which, in my view, is neither consistent with the judgment itself nor required by the terms of the rule. *Smyth v. Tunney* concerned the execution of costs orders made in favour of the defendants which, at the time of the application under O.42, r.24, were eleven years and eleven months, nine years and six years old respectively. Various reasons were advanced by the defendants as to why they had not proceeded to execution earlier. These included the fact that they were awaiting the outcome of other litigation between the same parties and that the plaintiff had requested the defendants to defer execution of the costs orders until all the litigation had been disposed of. It appears that the defendants did not formally agree to this request but did not proceed to take any action until they became concerned that the operation of s.11(6) of the Statute of Limitations might preclude recovery on foot of the order that was nearly twelve years old.

19. The plaintiff relied on a change in financial circumstances since the date the judgment had been obtained and, in particular, on the disposal by the first plaintiff (a natural person) of his shares in the second plaintiff (a company) thereby exposing the first plaintiff to personal liability on foot of the orders which he had expected the second plaintiff to be in a position to meet.

20. The starting point for Geoghegan J.'s analysis was that there was an onus on the applicant to show the reason for the delay. However, he saw the real issue as being (at p.515) *"whether there have to be some quite exceptional or special reasons or whether it is sufficient that in a general way the applicant was reasonable in making the application at the stage he did"*. The High Court had accepted that *"sufficient reasons"* had been shown and the Supreme Court upheld this conclusion. Geoghegan J. stated (at p.158):

> *"I am satisfied that 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. It is, of course, accepted by all sides that even if a good reason is given the court must consider counterbalancing allegations of prejudice."*

21. I do not read this passage as requiring that a *"good"* in the sense of a strong or persuasive reason must be shown. Rather, some explanation must be provided but, even if a good reason is shown, the court may nonetheless decline to make the order in the exercise of its discretion if the prejudice to the judgment debtor outweighs the judgment creditor's interest in executing the judgment. That this is so is evident from other parts of the judgment where Geoghegan J. refers (at p.519) to *"no very strong or exceptional reasons that would have to be adjudicated upon"* being required in the context of the procedure in the United Kingdom which historically allowed such applications to be made *ex parte* and the older Irish cases not seeming *"to indicate that strong reasons had to be given in the case of applications on notice"*. He differentiates the type of reasons that are required where an application of this nature is brought on notice and contrasts this with the *"special circumstances"* that would have to be proved on affidavit if an order were to be made on the basis of an *ex parte* application. In concluding, Geoghegan J. stated (at p. 524-525):

"The emphasis is then essentially on prejudice to the defendant though obviously some reason must be given by the applicant. Although in this case it has not been fully proved that the relevant respondents could not have executed the judgment debt by some means within the six year period, they have nevertheless shown sufficient reasons why they allowed a lapse of time and should still be allowed to execute if they can. Essentially, the conduct of the plaintiffs heavily contributed to the delay in execution."

22. Notably, Geoghegan J. granted the defendants leave to execute even though they had not established that they could not have executed the judgment debt within the initial six-year period – nor presumably in the subsequent five years and eleven months. Thus, the test does not require the judgment creditor to show that they could not execute the judgment but rather to establish sufficient reason as to why they did not actually do so. I regard this as an important distinction because of the emphasis placed by the trial judge on the fact that the matters relied on by the appellant (including the transfer of the loan and the bankruptcy) did not operate to preclude enforcement of the judgment during the relevant period. In my view, the correct question is not to ask whether these matters prevented enforcement but whether it was reasonable for the judgment creditor not to have proceeded to enforcement in light of these factors.

23. A considerable portion of Geoghegan J.'s judgment examines the concerns expressed by the defendant as to the potential operation of the Statute of Limitations so to preclude execution of the costs orders more than twelve years after the dates on which they were granted. Interestingly, without deciding the point, Geoghegan J. placed some reliance on the concerns expressed by the defendants' legal advisors regarding this risk. Although this issue went to the exercise of the court's discretion when weighing the *"counter balancing allegations of prejudice"* rather than to the defendants' reasons for not having acted more promptly, Geoghegan J. observed (at p.520):

"If the perception that the benefit of the judgment debts might be lost after the twelve year period elapsed was a reasonable one it is entirely irrelevant whether it was correct in law."

24. This statement obviously has resonance in light of the trial judge's conclusion that because the bankruptcy did not actually operate as an impediment to the enforcement of the judgment mortgage against the respondent's properties, reliance on his bankruptcy *"clearly does not provide any plausible reason for the lapse of time"*. The inference seems to be that because the reason provided was legally incorrect it could not, *per se*, be sufficient to explain the inaction. In essence this equates the reasonableness of a belief with its correctness rather than expressly considering whether an erroneous view might nonetheless be reasonably held. I am not convinced that the approach taken by the trial judge is correct and the comments of Geoghegan J., albeit in a slightly different context, would suggest that it is not.

25. Further, in my view, the reasonableness of the erroneous belief has to be examined in light of three factors. Firstly, Mr. Webb, director of the appellant, has averred to the fact that he was advised that ACC were stayed from executing the judgment because of the respondent's bankruptcy. Indeed, the application itself appears to have been prompted by the ostensible discovery (also erroneous) that property which was subject to a judgment mortgage had been kept outside the bankruptcy. He has not been cross-examined on his affidavits and there is no reason to doubt that the averment he has made regarding the advice he was given, and, by extension, the belief of ACC and the appellant based on that advice is not *bona fide*. The trial judge's finding that the explanation was not plausible carries with it an inference that it is not credible or believable. I do not see any basis in the papers before me for reaching the conclusion that the averment is not credible as distinct from the impediment being averred to being legally incorrect.

26. Secondly, it appears from the respondent's averments that he was also under the same legal misapprehension. As noted, he has expressly averred to his view that there was no legal barrier preventing ACC from taking action prior to his bankruptcy thereby implicitly suggesting that the absence of a legal impediment "*beforehand*" ceased at the point where his property was transferred to the official assignee in bankruptcy.

27. Thirdly whilst the analysis at para. 15 of the trial judge's judgment as to the enforceability of a secured debt notwithstanding the bankruptcy of the debtor is undoubtedly legal correct, it should be noted that there had been significant changes in the law in Ireland relating to personal insolvency and bankruptcy in the years immediately preceding the respondent's bankruptcy. Therefore, in my view, it does not follow from this that the contrary view was not capable of being reasonably, albeit erroneously, held and thus being capable of providing a reasonable explanation for the lapse of time over the period of the bankruptcy. Note that I do not think that there is or necessarily should be a requirement that the law be in a state of uncertainty for an erroneous legal view to be reasonably held. However, in circumstances where the law in an area has undergone extensive revision a misunderstanding of the correct legal position is more readily explained.

Historical Analysis

28. Geoghegan J. reviewed a range of older cases many of which addressed the discrete issue of whether a motion for liberty to execute a judgment is an action upon that judgment such as to render the execution of a judgment debt statute barred after twelve years under s.11(6) of the Statute of Limitations. However, two of the older Irish cases and one of the English cases cited in those judgments may be of relevance to the issue on this appeal. The first of these is *Fitzgerald v. Gowrie Park Utilities Society Limited* [1966] IR 662 which confirmed that an order to grant leave to execute under O.42, r.24 is a discretionary one. The

significance attached by Geoghegan J. to this was that (at p.515) *"once the order is discretionary there must be something to which the judge can attach himself in exercising the discretion"* and hence the need for the judgment creditor to provide *"some explanation at least for the lapse of time."*

29. I might observe that I am not entirely convinced that a judgment creditor who establishes a *prima facie* legal entitlement to execute an unexecuted judgment need establish more in terms of an explanation for the lapse of time in order for a court to have something to which it can attach itself for the purpose of exercising its discretion. As I read the rule, the more natural meaning is that the court may exercise a discretion not to permit execution of a judgment which the applicant has otherwise established an entitlement to execute. This is also more consistent with the fact that the other circumstances in which O.42, r.24 comes into play feature changes in the party entitled or liable to execution or execution against the shareholders of a company rather than the company itself. The discretion lies not so much in accepting or rejecting an explanation for the lapse of time but in deciding whether the applicant should be refused leave to execute notwithstanding a *prima facie* entitlement to do so. However, *Smyth v Tunney* is a long-standing authority and I accept that the requirement that some explanation be provided for the lapse of time is a well-settled element of our law.

30. In *Fitzgerald v. Gowrie Park* the focus on the discretionary nature of the order did not arise in considering the respective onus on the parties at each stage of the analysis but because of the then-accepted position that, on appeal, the Supreme Court could not interfere with the decision of the High Court unless there was an error of principle or the decision was legally erroneous. The jurisprudence on that issue has developed since 1965 and it is now accepted that although an appellate court will pay great weight to the views of a trial judge, the scope of an appeal from a discretionary order is not limited to circumstances where an error of principle is disclosed (per Irvine J. in *Collins v. Minister for Justice* [2015] IECA

27 affirmed by Collins J. in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327). As it happens, although Lavery J. treated the Supreme Court as being bound to find an error of principle in order to allow the appeal, he notes the prescient suggestion by Walsh J. that this position might not be correct but refrains from deciding the point as it was not argued in the case.

31. The issue in *Fitzgerald v. Gowrie Park* arose in the context of a multiplicity of actions between the parties which resulted in the plaintiff obtaining a money judgment against the defendant and the defendant obtaining an order ejecting the plaintiff from certain property together with the costs of that action and a separate money judgment against the plaintiff for a sum of three times the amount of the judgment the plaintiff held against the defendant. The plaintiff assigned to the benefit of his judgment to his solicitor in lieu of fees owed by him and the solicitor then sought to execute it. The application under O.42, r.24 was required because of the change in the party entitled to execute the judgment and not because of any delay in attempting to do so. The discretionary issue of concern to the court was whether the solicitor should be allowed to execute the plaintiff's judgment against the defendant in circumstances where it was apparent the plaintiff did not have sufficient assets to allow the defendant recover on foot of its judgments or whether the plaintiff's judgment should be kept available for set-off against the defendant's judgment.

32. Lavery J. in delivering the majority judgment stated that *"the words of the Rule make it clear that the Court has a discretion to refuse leave or, if granting leave, to impose terms so as to achieve justice"*. He regarded the case law as demonstrating the width of the discretion and as giving some indication as to how it should be exercised. Perhaps unsurprisingly, the cases examined by him all deal with the assignment of judgments and their subsequent execution by the assignee. He did however find that the trial judge had made an error of principle and, thus, the appeal was allowed.

33. In reviewing the history of the rule, Lavery J. noted that the earliest provisions he could trace were ss.147 to 150 of the Common Law Procedure Amendment Act (Ireland) 1853. Under the common law, a judgment debtor had a period of a year and a day within which to execute a judgment. Section 148 of the 1853 Act extended this period to six years and under s.149 an application to court was required if the judgment creditor wished to execute outside the initial six-year period. That application, which is now reflected in O.42, r.24(a), replaced the common law writ of *scire facias* under which a judgment creditor could execute a judgment more than a year and a day after its delivery.

34. It is perhaps informative to briefly consider the writ of *scire facias* (literally "make known"). Under the common law, the passage of a year and a day after delivery of the judgment gave rise to a presumption that the judgment had been satisfied or, exceptionally, that for some intervening cause the judgment creditor should not be allowed to execute. The issuing of a writ of *scire facias* operated to make the record of the judgment known to the defaulting party and required the judgment debtor to show cause as to why the judgment should not be executed against him. This could frequently entail establishing that the judgment debt had been wholly or partly discharged but the law also allowed other reasons to be shown by the judgment debtor. The judgment creditor's entitlement to execute arose from the record of the judgment and, thus, the issuing of the writ had the effect of placing the onus of proof on the judgment debtor as to why the judgment reflected in that record could not be executed. Thus, Lord Denman in *Hiscocks v. Kemp* (1835) (3 Ad & Ell. 676) described the writ of *scire facias* as having been given *"rather in aid of plaintiffs than in restraint of them"* and *"as equalling affording protection to the defendant, if he had any reason to show why the execution should not issue."*

35. Geoghegan J. notes that (at p.524) *"none of this suggests that historically, a plaintiff had to have strong reasons for extension of time."* If anything, it shows that at least prior to

1853, a judgment creditor did not have to have any reason for seeking to execute a judgment out of time but that the judgment debtor would be afforded the opportunity of showing why this should not be permitted. Following the extension of the one-year period for automatic execution to six years, a requirement to have some explanation for not executing within the initial six-year period seems to have been judicially imposed.

36. The second of the two Irish cases (although first in time) is *National Bank v. Cullen* [1894] 2 IR 683. The plaintiff had obtained a judgment against the defendant which it had not executed because of a belief that the defendant did not possess goods or chattels which might be seized. Eight years later an *ex parte* application was made for leave to execute which was refused. A second application made some months later, also *ex parte*, grounded on an affidavit which indicated that the bank manager had recently ascertained that the defendant was in possession of certain chattels and that he apprehended that if the defendant had notice of the application he would take steps to put his goods out of reach of the sheriff. The issue in the case was whether the application should have been made and could be granted on an *ex parte* basis. The conclusion of the Court of Appeal was that an application under the then-equivalent O.42, r.24 should be brought on notice to the judgment debtor unless the judgment creditor established special circumstances under which the order ought to be made without notice. The provisions of the rule which allow a court to direct that an issue should be tried between the parties would have little practical effect if the judgment debtor were not present in court to raise such an issue.

37. As the central issue in the case was whether an application of this nature could generally be brought *ex parte* and, if not, whether special circumstances had been shown which would justify an *ex parte* application on the facts, the judgments do not focus on the question of the judgment creditor's delay save peripherally. In fact, there seems to have been a measure of disagreement as to whether reasons for the delay had been shown at all,

but a consensus that such reasons as there were did not amount to special circumstances. Walker C. observed that the judgment creditor's affidavit had shown *"no special reason for the delay of eight years"* without indicating whether such reason would have been required if the application had been brought on notice. By inference Fitzgibbon L.J. regarded the extent of the delay as significant, commenting that allowing the appeal would authorise a practice whereby seizure of goods by the sheriff could be put in motion *"without any notice to the opposite party, after any lapse of time…without any explanation of delay, or any effort whatever to obtain payment without execution"*. In his view, the consequence of a party allowing six years to expire was that the other side had to be put on notice of an application to execute the judgment.

38. Palles C.B. considered the rationale for the requirement for leave of the court to issue execution after six years and expressly posed the question as to what was the principle upon which such requirement was based. He answered it by reference to the common law rule as modified by ss.148 and 149 of the 1853 Act which substituted a summary application for the writ of *scire facias*. He regarded the reason for requiring an application as evident from the judgment of Lord Denman in *Hiscocks v. Kemp* (above) and characterised the restriction upon the period for issuing execution as being for the protection of the defendant with the same presumption against execution arising after six years as previously arose after a year and a day. He did not determine whether the affidavit which had been filed was sufficient to rebut the presumption as he was not prepared to dispense with the requirement that the defendant be put on notice of the application and consequently was not prepared to embark on such a determination in the absence of the other party.

39. Geoghegan J. (at p. 524) took the import of *National Bank v. Cullen* to be that as a "*matter of natural justice*" an application under O.42, r.24 must be made on notice to the

judgment debtor and, thereafter, *"the emphasis is then essentially on prejudice to the defendant though obviously some reason must be given by the applicant."*

Case law subsequent to *Smyth v. Tunney*

40. The written judgments on O.42, r.24 delivered since *Smyth v. Tunney* expressly affirm that judgment and seek to apply its principles. However, the language used in these judgments has at times varied from that used by Geoghegan J. with the consequent effect, deliberate or otherwise, that the test to be met by a judgment creditor which Geoghegan J. undoubtedly perceived as a low threshold has gradually been made stricter and thus harder to meet. This has occurred in two different ways. Firstly, Geoghegan J.'s requirement that there be some reason provided for the lapse of time prior to the bringing of the application has become a requirement to provide reasons for the delay for the entire of the period from the date of the judgment. Whilst I can accept the logic of requiring the judgment creditor to explain why the judgment was not executed within the initial six-year period, requiring an explanation for inaction that covers the entire of a relatively lengthy period during which the judgment creditor was under no immediate obligation to act seems counter intuitive. It also has the practical effect of placing an obligation on a judgment creditor to execute a judgment promptly as, if there is a requirement to explain non-execution during the entire of the initial six-year period, there is by implication an obligation to execute immediately it is possible or practical to do so. Otherwise, the judgment creditor risks refusal of leave to execute at a later stage based on this earlier delay.

41. Secondly, Geoghegan J.'s requirement that there be a reason which explains the delay in execution has morphed into a requirement that there be reasons which justify the failure to execute the judgment at an earlier stage. As I have mentioned previously in this judgment, this in effect elides the distinction between an explanation as to why something

was not done and a justification as to why something could not be done, the latter being an appreciably different and higher test.

42. Taking the case law chronologically, the first decision post *Smyth v. Tunney* is that of Dunne J. in *Bula Limited (in Receivership) v. Tara Mines Ltd.* [2008] IEHC 437. This case also concerned costs orders made in favour of the defendants in long running litigation between the parties. The costs orders were dated 1997 and 1999. A significant proportion of the time between the making of the orders and the application pursuant to O.42, r.24 was taken up with two separate taxation processes which finished in March and July 2003 respectively. Dunne J. cited extensively from Geoghegan J.'s judgment in *Smyth v. Tunney* and then concluded that the following principles could be derived from that decision:

> "*1. Order 42, r. 24, is a discretionary order.*
>
> *2. Reasons must be given for the lapse of time since the judgment or order during which execution has not taken place.*
>
> *3. Even if there is good reason, the court must consider counter-balancing allegations of prejudice.*"

43. Dunne J. then said that her task in the context of the particular case was *"to consider if there is some explanation for the lapse of time involved"* and then *"to consider whether there are counter-balancing allegations of prejudice…such as to affect the exercise of the court's discretion"*. On the facts she found that the orders for costs could not have been executed until all appeals had been disposed of and the taxation process was concluded. She rejected the respondents' motion seeking to dismiss the application on the grounds of inordinate and inexcusable delay holding that the considerations applicable to the effect of delay on the trial of an action had no application to the execution of costs orders following the conclusion of the litigation.

44. The second of Dunne J.'s principles, namely that reasons must be given for the lapse of time since the judgment order during which execution has not taken place, is now interpreted as an obligation to provide reasons for delay or non-execution to cover the entire of the period from the date of the judgment. It is not clear that this is what Dunne J. intended as the issue did not arise on the facts of the case before her. Virtually the entire of the initial six-year period was taken up with the taxation process and with the resolution of an appeal to the Supreme Court against the High Court order for costs.

45. In any event, Dunne J.'s statement of principle was approved by Whelan J. in *Pepper Finance Corporation (Ireland) DAC v. Beades* [2021] IECA 41. In *Beades* the High Court made an order in June 2008 for possession of premises which were mortgaged as security for a loan to the defendant. There was considerable delay in progressing an appeal to the Supreme Court which did not affirm the High Court order until November 2014. In May 2015 leave to issue execution was granted by the High Court and an execution order was issued to the sheriff in July 2015 for recovery of possession of the property. That order was not acted upon in circumstances where it appeared that the property was occupied by third parties to whom it had been leased by the defendant. There was apparently a general hope that the rental income would be applied to discharge the mortgage debt, but this did not occur, and no particular effort appears to have been made to secure such payment. In October 2017 a further application was made to issue execution of the possession order which also sought leave to amend the title of the proceedings to substitute the name of an assignee of the original mortgagee as the plaintiff. Whelan J.'s judgment was delivered on an appeal from the decision of the High Court to grant such leave.

46. In summarising the law Whelan J. looked primarily at *Smyth v. Tunney* and at the principles extrapolated by Dunne J. from that judgment in *Bula Ltd. v. Tara Mines Ltd.*. She

also cited, with apparent approval, a passage from Collins on *Enforcements of Judgments* (2nd ed., Round Hall, 2019) to the following effect:

> *"…The combination of a light onus on a judgment creditor to provide reasons for the delay, coupled with a general difficulty in establishing prejudice on the part of the judgment debtor, suggests that for such applications brought 6–12 years after the date of the order or of recovery of the judgment the court will generally extend time." (para. 3–47)"*

47. In her conclusions on this issue Whelan J. accepted that a good explanation had been advanced for *"the delay in executing the order for possession"* and that there was no countervailing prejudice demonstrated by the appellant. It is interesting to note that although the existence of an appeal to the Supreme Court for the entire of the first six years after the date of the High Court order for possession would reasonably explain non-execution during this period, the reasons offered for failure to execute between July 2015 and the making of the second application in October 2017 (the fact that there were third party tenants in the property) were not such as would have precluded execution during that period. Indeed, circumstances had not materially changed in terms of the property being tenanted at the time the second application was made in October 2017.

48. In *Carlisle Mortgages v. Sinnott* [2021] IEHC 288 Simons J. identified three broad categories into which the cases in which leave to execute had been granted could be conveniently grouped. The first was where the delay was caused by the conduct of the indebted party; the second was where there had been a change in the financial circumstances of the indebted party; and the third was where execution had been deferred pending negotiations between the parties regarding the underlying debt. Simons J. was careful to note that the categories of cases are not closed and immediately identified a further category in which leave to execute should not normally be refused, namely where the delay in

execution is attributable to circumstances outside the control of the person seeking to enforce the judgment. Obviously, care must be taken with the categorisation of cases involving the exercise of a discretion not only because such categories are not closed (a point fairly acknowledged by Simons J.) but also because, depending on their individual circumstances, cases ostensibly falling within an established category might nonetheless warrant a refusal of leave for other reasons. Simons J. cited his own earlier decision in *Hayde v. H&T Contractors Limited* [2021] IEHC 103 to the effect that whilst the threshold identified by *Smyth v. Tunney* is not particularly high *"it is nevertheless a threshold which has to be satisfied: the threshold albeit minimal is not meaningless"*.

49. The case itself involved an order for possession which had been made in July 2009, nearly twelve years earlier, and which had been the subject of three separate applications for leave to execute in 2017, 2019 and 2021. There had been an initial unsuccessful attempt to execute the judgment in 2010 followed by unsuccessful negotiations between the parties between 2012 and 2017. However, Simons J. did not attempt to analyse the reasons provided for the delay over the entire of the period since judgment had been granted focussing instead on the period between the preceding order granting leave to issue execution in 2019 and the date of the application. He was satisfied that difficulties in effecting service of the order coupled with the public health restrictions that were imposed in 2020 meant that the delay was largely attributable to matters outside the control of the applicant and constituted a good reason for allowing a further extension of time.

50. In *Irish Nationwide Building Society v. Heagney* [2022] IEHC 12 Allen J. refused an extension of time to the assignee of a judgment on the grounds that no explanation at all had been provided for a lapse of time in excess of four years which *"was allowed to run after the sixth anniversary of the order for possession"*. Consequently, Allen J. found that the discretionary jurisdiction to grant leave had not been engaged. Significantly however, Allen

J. drew a distinction between the first six years after judgment and the subsequent period. He put the matter thus (at para. 36 of his judgment):

> *"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."*

51. He reiterated this distinction at para. 51 of the judgment as follows:

> *"In the same way that the applicant is obliged to explain the lapse of time after six years from the date of the order, I do not believe that there is any obligation to explain the fact that the order was not executed within six years, although it may very well be the case that what happened or not within the first six years goes to why execution was not issued thereafter."*

Allen J.'s deliberate use of the phrase *"lapse of time"* rather than *"delay"* is in part derived from the language of O.42, r.24(a) itself and maintains the distinction between the jurisprudence relating to this rule and the stricter tests applicable to delay in the prosecution of proceedings.

52. The most recent judgment in this series is the decision of the Court of Appeal (Binchy J.) in *Ulster Bank v. Quirke* [2022] IECA 283 which expressly disagreed with the conclusions of Allen J. as set out in the preceding paragraphs of this judgment. In that case the Court of Appeal allowed an appeal against an order of the High Court (in which I was the trial judge) to grant leave to execute pursuant to O.42, r.24 on the basis that the

explanation offered for non-execution at most covered a very short period at the end of a period of inactivity of between ten and eleven years. In coming to this conclusion Binchy J. appears to have accepted the appellant's submission that it was necessary for the judgment creditor *"to explain the entire delay that has elapsed since the date of the judgment and not merely any delay after the expiry of the six year period referred to in the rule."*

53. At para. 60 of the judgment Binchy J. accepts this argument stating that:

> *"Once the period of six years from the date of the judgment or order has expired, an application is required for leave to issue execution, and the applicant, in order to succeed with an application, must explain the "lapse of time" up to that point."*

The rationale proffered for this conclusion is that if the application were to be made six years and one day after the judgment or order the lapse of time must necessarily refer to the period beginning on the date of the judgment or order *"because there has been no other lapse of time at that point, and yet an application is required"*.

54. With respect, I have considerable difficulty in understanding why the requirement for an explanation for not having executed the judgment within the first six years requires an explanation for a lapse of time dating back to the date of the judgment or order. In Binchy J.'s example an explanation would still be required as to why the deadline, whether it be a day or a week earlier, had not been met. The difference is potentially material. Take for example the position of a judgment creditor who does not move to execute a judgment in his favour for a period of five and a half years, perhaps because economic circumstances are not conducive to doing so or perhaps because he entertains an optimistic but unrealistic hope that the judgment creditor will pay up, whilst never intending to allow the full six years to elapse. If that judgment creditor were to be afflicted by a serious illness six months before the end of that initial period which rendered him unable to attend to his business affairs, he would have a *bona fide* explanation as to why he did not execute the judgment within six

years but he would not have an explanation for the lapse of time dating back to the date of the judgment or order. I doubt any court would refuse an extension of time in those circumstances even though the lapse of time for the entire of the period has manifestly not been explained. Similarly, a requirement can be imposed on the judgment creditor who arrives in court seeking leave to execute six years and one day after the date of the judgment as to why the judgment was not executed within the six years without requiring an explanation covering the entire of the six-year period.

55. This distinction would not have had a material bearing on the outcome of the appeal in *Ulster Bank v. Quirke* since, as Binchy J. notes at para. 106 of the judgment the explanation offered at most covered a very short period at the end of a ten or eleven year period of inactivity.

Application of this analysis to the facts of this case

56. As will be apparent from the preceding analysis I have a particular concern at the imposition of a requirement on a judgment creditor seeking to execute a judgment after a lapse of six years to give an explanation for non-execution during the entire of the initial six-year period. This does not seem to me to be warranted by the terms of O.42, r.24 itself nor the historical basis for the order under which a judgment debtor was afforded an opportunity to explain why execution should not issue but the judgment creditor did not have to justify non-execution at an earlier stage once it was established that they were legally entitled to enforce the order. Further, a stringent requirement of this nature is not warranted by the language used by Geoghegan J. in his judgment in *Smyth v. Tunney* nor indeed by the application of the relevant legal principles in *Smyth v. Tunney* itself. I fully acknowledge the point made by Simons J. that, although the threshold is minimal it is not meaningless. Nonetheless, the imposition on a judgment creditor of an obligation to explain non-execution

dating right back to the judgment or order changes the requirement from being a minimal one to being quite a substantial one which will in many instances be difficult to satisfy. Imposing an obligation on a party seeking to execute a judgment after the expiration of the initial six-year period to provide an explanation for non-execution during the entire period effectively creates an obligation not just to execute within six years but to execute promptly within that period unless there is a positive reason which justifies non-execution. Failure to execute at any stage within the six-year period may become an impediment to execution thereafter.

57. Sight should not be lost of the fact that the judgment itself reflects the adjudication by a court of the rights and liabilities of the parties to it. Where a judgment is granted for a money sum, the primary onus is on the judgment debtor to pay that sum to the judgment creditor. The law provides mechanisms through which a judgment creditor can enforce their judgment against the judgment debtor, but the need to enforce a judgment will only arise where the judgment debtor has been and continues to be in default in the obligations the court has determined he owes to the judgment creditor. A judgment creditor who does not move to enforce a judgment immediately should not be regarded as the person in default. Delay in execution after judgment has been delivered is not inimical to the interests of justice – the interests of justice have been served by the final adjudication of the dispute between the parties and any delay thereafter arises primarily because the judgment debtor has not complied with the court order.

58. Therefore, in my view a judgment creditor must provide an explanation for why he did not execute within the initial six-year period *simpliciter* – but is not required to account for the entire of that period. Thereafter the judgment creditor should account for any further delay in bringing the application after the initial six years has elapsed. This accords with Allen J.'s view in *Heagney* which, I appreciate, was not approved by Binchy J. in *Ulster*

Bank v. Quirke. It also differentiates appropriately between the initial period during which execution is as of right and the subsequent period where there is not an automatic right to execute.

59. The approach more recently taken by this Court in *Ulster Bank v. Quirke* means that while there is no obligation on a judgment creditor to execute promptly within the six-year period, once the six-year period has passed a retrospective obligation arises to have acted right from the beginning of that period or to be able to explain why you have not done so. Notably, in very few of the cases analysed above was an explanation offered which covered the entire of the initial six-year period although this is probably not surprising since an express requirement that the entire of this period be explained does not seem to have crystalised until the judgment of the Court of Appeal in *Ulster Bank v. Quirke*.

60. The other concern I have with the trial judge's approach to the issue in this case arises from his rejection of the main excuse proffered for the more recent delay, namely the respondent's bankruptcy. In circumstances where advice to the effect that this stayed ACC from enforcing its judgment mortgage during the period of the bankruptcy was legally incorrect, the explanation was dismissed by the trial judge as not providing *"any plausible reason for the lapse of time"*. In effect, the excuse is rejected because it was not legally correct. Whilst ignorance of the law does not excuse a person in breach of it, the inaction of a judgment creditor who does not move promptly to execute a judgment is not a breach of the law. It might reasonably be asked whether a court would dismiss so readily something which the judgment creditor *bona fide* believed prevented or impeded execution which transpired to be factually incorrect.

61. In my view, the trial judge's treatment of this reason elevates the threshold from the *Smyth v. Tunney* requirement to provide an explanation for the lapse of time in two interconnected ways. Firstly, instead of requiring the judgment creditor to explain the delay

it effectively requires him to justify the delay. Further, as noted above, the requirement is the provision of an explanation as to why the judgment was not executed, not to establish that it could not have been executed. Whilst it will not be sufficient to merely state that you chose not to execute, if that choice is rationally explained then the fact that it was a choice rather than a legal impediment should not prevent it being regarded as an acceptable explanation. I have discussed above why I regard the explanation in this case as reasonable even though it was premised on legal advice which was not correct.

62. This is also relevant to the trial judge's rejection of the appellant's reliance on the fact that ACC had chosen not to take further action in 2015 in light of the existence of a charge ranking in priority to the judgment mortgage and that this circumstance had not changed in the intervening period. The lack of any change in circumstances over a period during which the person entitled to the benefit of a judgment did not execute it was not regarded as an impediment to the granting of leave to execute in *Beades* (above). A change in circumstances may well provide a reason for seeking to execute a judgment at some remove from the date of its grant but it does not follow that there must be a change in circumstances for leave to execute at such a remove to be granted. Something which might discourage (although not impede) execution at the outset might well carry less weight with a judgment creditor as time runs out. Further, this explanation has to be viewed in the context of the unproductive receiver sale of the investment property at that time and the general improvement in the property market since, which would of course also impact on the extent to which sale proceeds would remain after the first charge was discharged. The sale of the respondent's other property at a time when property prices were weak and in circumstances where there was another charge registered in priority to ACC's interest would not have been commercially attractive. The commercial considerations are clearly different at a point where the Statute of Limitations might imminently preclude execution altogether.

63. Similarly, the subsequent sale of the respondent's loan to the appellant did not legally preclude the enforcement of the judgment mortgage but it does provide a reasonable enough explanation as to why the judgment mortgage was not executed whilst the sale was underway. It is neither necessary nor appropriate for the courts to adopt a policy approach which deliberately facilitates the marketability of loans and the transfer of debt. However, regard can be had to the time taken to effect a transfer which actually took place and indeed to take the formal steps necessary to amend the judgment to reflect the change when considering the lapse of time before leave is sought to execute a judgment by the transferee. In my view the approach taken by the trial judge to this issue is impractical. It is unrealistic to expect a party who is in the process of selling a judgment debt to simultaneously take steps to execute the judgment prior to the conclusion of the sale. It may be legally possible to do something but nonetheless reasonable not to have done it in the circumstances.

64. Finally, both sides appear to have believed that the respondent's bankruptcy precluded execution of the judgment mortgage during the period whilst the property was vested in the official assignee. The fact that this was not legally so does not, in my view, prevent such belief constituting a reasonable explanation as to why an application for leave to execute the judgment was not brought during that period. I appreciate that in his application the applicant has focussed solely on the mistaken belief as to the legal effect of the bankruptcy. However, I think that explanation should be looked at in the broader context which I have just described.

65. Returning to the facts at hand, this is not a case in which no action was taken by the judgment creditor during the initial six years. ACC registered a judgment mortgage firstly on the secured property and subsequently on the respondent's other properties. The judgment creditor also appointed a receiver pursuant to the security for the underlying debt and the receiver sold the secured property. The fact that the receivership lasted for four years

and the price ultimately achieved was only a fraction of the secured sum illustrates the poor economic climate which prevailed at the time. The decision, even a decision through inaction, not to proceed with the sale of a second property is neither unsurprising nor unreasonable.

66. Thereafter most of the following four-year six-month period can be accounted for by the time taken to effect two transfers of the judgment debt, the respondent's bankruptcy and the need for the appellant to substitute itself in the title to the judgment. The first two matters did not of themselves preclude execution of the judgment at an earlier stage (subject to an application being made under O.42, r.24) but provide an explanation – whether characterised as some explanation or as a good explanation - as to why leave to execute the judgment was not applied for earlier. In all of the circumstances, I am of the view that the judgment creditor has advanced a sufficient explanation for the lapse of time to engage the court's discretion under O.42, r.24.

67. The next step should be for the court to proceed to consider the case made by the respondent and to analyse whether the prejudice alleged – or any other ground advanced – is sufficient to justify refusing leave to execute. I do not propose to engage in this exercise in circumstances where my colleagues have reached the opposite conclusion to me on the prior question of whether a sufficient explanation has been provided by the appellant to engage the court's discretion.

68. However, I would note three things. The first is the view expressed by McCracken J. in the High Court in *Smyth v. Tunney*, approved of by Geoghegan J. in the Supreme Court, to the effect that a debtor cannot claim prejudice because he has failed to pay the debt due by him on foot of the judgment which may now be enforced against him. I agree that the failure of a judgment debtor to pay a debt owed by him over a long period cannot be claimed by him to constitute a prejudice which should prevent execution of that judgment. A

judgment debtor cannot simply assume that a debt which remains unpaid has been excused. Secondly, I would be cautious in accepting the respondent's averment to the effect that he believed the matter was at an end. It is manifestly not correct to say that no steps were taken by ACC over a ten-year period as clearly steps were taken by ACC during the initial six-year period. Further, in 2019 the respondent was advised of the transfer of his debt to the appellant and he was contacted by the appellant who requested him to make arrangements to repay the debt. Finally, I note Geoghegan J.'s view that the expiration of a statutory limitation period may be something to be weighed in the balance in the exercise of the court's discretion. However, where the application was made comfortably within the twelve-year period but was not determined before the twelve years expired (due to a combination of COVID-19 related public health restrictions and time taken within the courts system), I would not weigh the expiration of the limitation period heavily against the appellant.

69. Perhaps fortunately, I do not have to consider where that would leave matters as regards the exercise of the court's discretion. I might add one final comment. I do not see the analysis required at this point as being the ascertainment of where the balance of justice lies as between the parties – at least not in the sense in which that phrase is generally used, for example in the context of interlocutory injunctions. The courts have already administered justice in granting judgment to the judgment creditor. Therefore, the starting point must be that the balance of justice favours the execution of that judgment. The court is vested with a discretion to refuse to permit execution after six years even where the judgment is otherwise legally in order and the party seeking to execute has established an entitlement to do so. In my view, the exercise of that discretion in favour of a judgment debtor would require something fairly significant in terms of prejudice or changed circumstances which would render it fundamentally unfair to allow the judgment creditor to execute the judgment.

70. Although I have not agreed with my colleagues as to the outcome of this appeal, in light of their decision I am in agreement with the views expressed by Donnelly J at para.102 of her judgment as how the costs of this appeal might be disposed of.