THE HIGH COURT

[2020] IEHC 293

[2008 No.161 SP]

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

BARRY PIGGOTT

DEFENDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 15th day of June, 2020

1. Introduction

1.1 On the 30th of June, 2008, Ms. Justice Dunne gave an order to the bank whose interest was acquired by this Applicant, the Plaintiff, for possession of a property in Limerick, which property was owned by the Defendant. The Defendant had been unable to make mortgage payments on the property but, over the following years, various attempts were made by all parties to ensure that the Defendant kept his home. A number of payment plans were put in place and there was a small measure of success but, one by one, all such arrangements failed and, by 2016, the Defendant had stopped making payments. The Plaintiff sought and obtained leave to issue execution of the Order in November 2018, and that Order was renewed in July of 2019. The 2018 Order, as renewed, permits, on its face, the execution of the Possession Order up to the 24th July 2020, some weeks after the period of 12 years will have passed since the making of the 2008 order. A second renewal of this Order is now sought.

1.2 The issue for the purposes of this application is whether or not section 11(6)(a) of the Statute of Limitations of 1957 applies to the renewal of an order for leave to execute a possession order. In other words, is the order sought, to renew the Order of Possession, an "action on a judgment", to use the phrase in section 11. The Applicant has argued that the order may be renewed for a further year under the relevant rules of court and Irish authorities. The Defendant consents to the renewal. If the Statute requires that the order be executed within 12 years of the date on which the possession order became enforceable, there is a concern that further proceedings will be statute barred in the next fortnight.

1.3 The Applicant is reluctant to execute the order, despite the passage of 12 years, due to the ongoing global pandemic, the medium to long-term effects of which are not clear. The applicant Plaintiff is reluctant to take any action which would render the respondent Defendant homeless during the current crisis, particularly given his efforts to reduce the debt in the relatively recent past.

1.4 The relevant rule of court requires an application for leave to renew an order if it has not been executed within 6 years but there is Supreme Court authority to confirm that once the application is made within 12 years of the date of the judgment, one need only show the court sufficient reason for the delay in order to obtain such leave; part payment of the debt in the meantime easily satisfies that test.

1.5 There are conflicting authorities from other jurisdictions as to whether the court can make such an order after 12 years have passed. If there is no jurisdiction to further renew the Order for Possession, the Plaintiff seeks an order granting it leave to issue execution in the proceedings on foot of the Order for Possession granted in 2008.

1.6 Section 11(6)(a) of the 1957 Statute provides that "actions on a judgment must be taken within 12 years of the judgment". The Supreme Court declined to consider a similar issue in *Smyth v. Tunney* [2004] IESC 24, [2004]1 IR 512 at page 520; [2004] 2 ILRM

537, at page 548, as it was not necessary in that case given that the application for leave to execute was made in time (one day before the expiry of 12 years since the possession order was made).

2. Irish Authorities

2.1 The Statute of Limitations provides, in section 11(6)(a) 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".

2.2 The Supreme Court decision in *Smyth v Tunney*, confirms that the Court has a discretion to renew an order for execution and that the party seeking leave to renew must show sufficient reason as to why she has not yet executed the judgment in which case the court will give her leave to execute within the following year. This leave application may be renewed time after time. The Rules of the Superior Courts [RSC] are silent as to whether or not an order can be renewed beyond the period of 12 years from the date of judgment, although the Circuit Court Rules provide that such applications must take place within 12 years of the judgment (see Order 36 rule 9).

2.3 English case law on the matter is of very limited assistance. Several cases outline the history of the limitation provisions, but the position is much clearer in this jurisdiction. In *Lowsley v Forbes (t/a L.E. Design Services)* [1999] 1 AC 329, the leading decision in England and Wales, the House of Lords noted the position in *W. T. Lamb & Sons v Rider* [1948] 2 KB 331, which was that no limitation period applied to execution on a judgment and also noted that the relevant statute was enacted in 1980 in that jurisdiction *after* the WT Lamb case. This sequence of events persuaded Lord Lloyd of Berwick in *Lowsley*, to follow *Lamb* despite disagreeing with its logic. The case is decided, in part, due to an analysis of statutory interpretation that simply does not apply here: it is of limited interest to judges or lawyers

here what Parliament intended in enacting the Limitation Act of 1980 after an English Law Reform Commission report was published or in deference to a decision in the English Court of Appeal. This Court is concerned to ascertain the meaning of the Statute of Limitations of 1957 and to apply it, using available Irish authority and common sense.

2.4 In a very recent judgment, *Greene King Brewing and Retailing Ltd v Baker [2020] IEHC 221*, [2020] IEHC 221, Ms. Justice Pilkington relied on the decision of *Ulster Investment Bank Ltd v Rockrohan Estate Ltd* [2015] IESC 17 [2015], 4 I.R. 37, and [2009] IEHC 4. This is not only the most pertinent authority for the purposes of this case but the reasoning of Ms. Justice Irvine in *Rockrohan* has the endorsement of a Supreme Court judgment upholding the result and the rationale by which it was attained.

3. Ulster Investment Bank Ltd v Rockrohan: High Court and Supreme Court

3.1 In *Rockrohan*, Irvine J. began her consideration of the application of section 11(6), at page 15, with these observations:

> *"Limitation Statutes are intended to prevent stale claims and to relieve certain classes of defendants of the uncertainty of late claims being made against them. They are designed to further remove the potential injustice that may be generated by the increased difficulty of proving a claim or defence after an extended period of time. Brady and Kerr in their 2nd Ed. of The Limitation of Actions at p. 3 described such concerns as follows:-*
>
> *'One can therefore conclude that the underlying rationales of the Statutes of Limitations 1957 and 1991, are threefold, and that they may be described as the certainty, evidentiary and diligence rationales.'*
>
> *These considerations do not apply where one party seeks to enforce a judgment or order previously made against the other party thereto at sometime removed from the date upon*

which it was made. There is no surprise or evidential unfairness inherent in such a process. This being so there are good policy reasons for the courts to distinguish between "actions" within the meaning of s. 2 of the Act of 1957 and procedures whereby an order or judgment may be executed. Similarly, there are good reasons, beyond the consideration of time limits, why a further distinction should be made between applications for leave to issue execution in respect of a prior order or judgment and an order required for the purposes of giving effect to an existing court order…"

3.2 This quotation was repeated in full in the Supreme Court judgment of Mr. Justice Charleton upholding the High Court decision. The first issue addressed in the Supreme Court judgment was the claim that Rockrohan was in adverse possession of the property, despite having effectively conceded that the respondent bank was entitled to its order in the initial litigation. Dispensing with this argument and in this context, Charleton J. commented at paragraph 18:

"*In terms of fundamental rational, this claim by Rockrohan was correctly characterised by Irvine J, at page 29 of her judgment, as outside the purpose for which limitations on actions to recover land were imposed by legislation*".

And he went further in paragraph 19:

"It might also be noted that there are many aspects of the Statute of Limitations which do not apply to bar litigation or settle entitlements through the passage of time; equity actions are the most obvious example in this regard but, there, equitable principles such as delay and estoppel substitute as a straightforward manner of enabling a fair appraisal of the justice of the situation. Had there been a lack of action by the bank, circumstances might have arisen whereby the bank could possibly be estopped from asserting title as against Rockrohan."

3.3 In Rockrohan, the plaintiff was an unsympathetic litigant and there were repeated attempts by the sole director of the company to re-litigate the original judgment in the case. Irvine J. accepted the argument that the enforcement action was not a fresh action and, for that reason, was not barred by section 11(6)(a). The case of *Ezekiel v. Orakpo*, [1997] 1 WLR 340, was relied upon for the substance of the High Court decision. There, the House of Lords decision in *Lowsley* was distinguished and the distinction between fresh actions on a judgment and proceedings to enforce a pre-existing judgment was endorsed. *Ezekiel* confirmed that a claim to enforce a charging order is not a claim to enforce a judgment but a claim to recover a sum due to the claimant as a secured creditor and, as such, the claimant is not therefore restricted by any limitation period.

3.4 The relevant portion of the judgment of Millet J. in *Ezekiel* is relevant to the issues arising here and it is worth reviewing the summary provided by Irvine J, at page 19 of Rockrohan:

> "*One of the issues considered by the Court of Appeal [in Ezekiel] was whether or not the application for possession and sale was one governed by O. 46, r. 2 of the RSC, a provision remarkably similar to our Order 42 rule 24, which provided as follows:-*
>
> *'(1) A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:-*
>
> *(a) where six years or more have elapsed since the date of the judgment or order; …'*
>
> *Millet L.J. concluded that there was a difference to be drawn between an application for leave to issue execution and an application in aid of enforcing an existing order. He held that O. 46, r. 2 did not apply to the application for possession and sale. He stipulated that O.46, r.2 was meant to cover situations which called for some further consideration or investigation by the court before it might justify directing execution. He stated that the application in 1993*

for an order for possession and sale was not an application for execution but an application to enforce a charging order previously made."

3.5 Similarly, an order renewing the execution of a possession order calls for no further consideration by the Court. It can properly be seen as an application to enforce an order previously made.

Just as pertinently, the judgment of the High Court in Rockrohan goes on to deal with the specific RSC orders at issue and again, it is worth repeating what was set out at pages 19 and 20:

"Millet L.J. was further required to consider whether s. 20(5) or s. 24(2) of the Limitation Act 1980, the equivalent in this jurisdiction being s.37(1) and s.11(6)(b), were such as to limit the plaintiff's right to interest to the six year period prior to the application to enforce the charge. In this regard, Millet L.J. dealt with the matter in the following way, at p. 346:-

'It is important to recognise at the outset what was the true nature of the plaintiff's application in 1993. He was not bringing an action upon the judgment debt which he had obtained in 1979. He was not even seeking to enforce execution of that judgment. He did that when he applied for and obtained the charging order in 1982. In 1993, he was a secured creditor with the statutory equivalent of an equitable charge. He was taking action to recover what was due to him, not as a judgment creditor, but as a secured creditor. He was in the same position as any other creditor with an equitable charge which had been created in 1982 and which he wished to enforce in 1996. Of course he had to apply to the court for orders for possession and sale, not because he was executing a judgment – as I say, so far as this property was concerned, that process had come to an end when he obtained the charging order – but because he needed an order for possession in order to effect a sale. Because he had no power of sale unless until the court ordered it, the question was not: 'What does the charge secure?' but, 'How much interest must the defendant pay to redeem the charge so as to prevent the sale

from taking place in order to bring himself within RSC., Order. 50, rule 7?' Or, to put it another way 'How should the account be taken after the sale if the plaintiff realises his security; should the plaintiff account to the defendant for the surplus after deducting principal and six years interest or after deducting the principal and the whole of the interest due to him since the judgment debt?'

It is a settled rule that a mortgagor is not entitled to redeem a mortgage unless he tenders the full amount of the interest due, whether or not any part of the interest is statute barred: See Dingle v. Coppen [1899] 1 Ch 726. Likewise, when a mortgagee sells the mortgaged property, he is entitled to retain all arrears of interest, whether or not statute barred, before accounting to the mortgagor for the surplus."

It is clear that the facts in Ezekiel are such that the decision of Millet L.J must be considered good authority for the submissions made by UIB that its application for possession is not one to which Section 11(6)(a) of the Act of 1957 applies as it cannot be considered to be an "action" within the meaning of that section. It is also supportive of UIB's submission that the application for possession is not one governed by Order 42 rules 23 and 24 of the RSC as it is not an application for "execution" within the meaning of that rule but rather an application for an order to assist it in enforcing the order previously made which itself permitted UIB to execute the well charging order by a sale of the Rockrohan lands."

3.6 Irvine J. also set out, in persuasive terms, why her decision was attractive on a policy level, in addition to quoting from the line of authority which supported her conclusions. The rationale for the decision is worth exploring in full. Having dismissed an argument in respect of interest payments, holding that they were not barred by section 11(6)(b) of the 1957 Statute after a period of 6 years, Irvine J., continued:

"Neither is the decision of significance to the provisions of S 11(6)(a) insofar as the decision in Ezekiel clearly demonstrates that the nature of UIB's present application for possession is

neither a fresh "action" within the meaning of that section nor a process of "execution" within the meaning of the Rules of Court, the distinction between these processes being at the centre of the Court's considerations.

There are also practical reasons why the Court believes that the provisions of s.11(6)(b) nor indeed any other provision of the Act of 1957, were intended to apply in the manner contended for by Rockrohan. The relief granted by the court in proceedings brought of foot of an equitable mortgage or charge provides the plaintiff with the right to recover monies outstanding by seeking a sale of the defendant's lands. That sale is under the control of the court and is for the benefit of all who may have a charge or encumbrance burdening the land. The plaintiff's ability to realise a defendant's assets is not entirely within its control. The uncertainty of a plaintiff's ability to realise the assets the subject matter of the court order within any defined period is all too readily apparent from the facts in the present case. Firstly, there was the delay generated by the earlier proceedings wherein a challenge was made to the security on foot of which the plaintiff obtained its order for sale. Secondly, there was the claim of Mr. Hegarty to adverse possession of certain portions of the lands the subject matter of the well charging order. Whilst this claim did not ultimately trouble the Court on the present application, in another case such a claim could have delayed an application for possession or the possibility of affecting a sale for many years. Finally, the judicial review proceedings instituted by Rockrohan also delayed UIB's present application for a further period of approximately eighteen months.

Any number of complications may arise, unrelated to any default on the part of a plaintiff, which could result in the lands charged not being sold within six years of obtaining a well charging order. On the basis of Rockrohan's arguments, a plaintiff might find itself unable, because of matters outside its control, including obstruction tactics on the part of a defendant, to recover the sums due for principal and interest which a defendant had contracted to pay at

the time the charge was created. All of these factors would suggest that it is unlikely that the legislature intended to impose any time limit on firstly, the right of a plaintiff to enforce a well charging order, secondly, its rights to take such steps as might prove necessary to enforce that order or thirdly, its right to recover interest on the monies outstanding on foot of such order."

3.7 These considerations are not only persuasive, the latter two paragraphs were also quoted, with approval, in the Supreme Court. Given this endorsement of the passages quoted, they are binding on this Court. The common sense behind this conclusion makes more commercial sense and reflects the modern reality of lengthy mortgages (and, as appears above, occasionally even more lengthy litigation).

4. Conclusions in Rockrohan

4.1 In Rockrohan, the relevant order was also made in 1987 but the litigation went on until 2005. The case involved a judgment in a specific amount, which sum had been declared well charged on a piece of land and where the judgment recorded that in default of repayment the land was to be sold. The original judge, Blayney J., held that there was no need for an Order of Possession as there was no suggestion there being any impediment to the sale of the land. Having recited the history of the proceedings, Charleton J. concluded that the Appellant, Rockrohan was estopped from claiming adverse possession or relying on the Statute of Limitations.

4.2 The exact wording of Charleton J. is instructive, and this Court adopts and follows his conclusion, as it applies equally to the cooperative approach adopted in the instant case:

"20. Every fact in this protracted history points to the bank not proceeding because of the posture adopted by Rockrohan in this, and in related litigation. Their position was that there

was an expectation of success in the proceedings, … whereby a sufficient sum in damages would ultimately be recovered from the State defendants or other defendants to cover and to discharge the debt charged on the land.

21. One of the arguments advanced in the High Court, but effectively abandoned on this appeal, was that the Rules of the Superior Courts would not permit what was contended to be the extension of time necessary under Order 42, rules 23 and 24, whereby leave might be given by the court to issue execution. Irvine J did not find that to be a good argument; and correctly so. She found support for the averments of the bank that it was the existence of these proceedings and the challenges to the underlying securities which resulted in the bank taking no further steps to enforce the order for sale of Blayney J, once it had been made. That must be correct. Everything in this case suggests that the bank did not sleep on its rights or represent that it had no rights, but instead, was primarily concerned to see an end to litigation, which had extended over decades, and which had resulted in an argument being made before Blayney J in 1987 by Rockrohan that time should be allowed to pass in order to facilitate success in that litigation."

5. Policy Considerations

5.1 This consideration of the policy behind the Statute of Limitations and the relevant rules of court by the Supreme Court confirms that section 11(6)(a) does not apply to proceedings such as those before this Court. The practical effect of any other result could be to require a successful litigant, even where the debt had been acknowledged by payments, as here, to sue again on the same principal sum and the same contract after 12 years had passed in wholly avoidable litigation. Just as startling would be the result that even a creditor dealing with a diligent debtor, who repeatedly acknowledges a judgment debt by repayments, would be *required to* execute a possession order within 12 years of obtaining

judgment no matter what the advantage to the parties of facilitating the continuing payments. This cannot be correct as it would frustrate the wishes of all parties in such cases, as it would in this case.

5.2 Primary objectives of the limitation of actions, identified above as certainty and diligence, would be defeated if the result of this application were otherwise. Not to interpret the Statute and the RSC in this light would result in an absurd situation. Even if the history of the limitation periods suggests otherwise to the Law Lords in *Lowsley*, a more purposive interpretation of the section can only lead to one result and it is that set out in the High Court and in the Supreme Court in *Rockrohan*. This is not to ignore a limitation period but to refuse to let historical comparisons lead to unintended results. This logic suggests that the RSC are not affected by the apparent inconsistency created by the Circuit Court Rules, which appear to require that an execution order must be issued within 12 years. Insofar as there is an anomaly, the wording of the Statute, requiring only that the action be brought within that time, and the *Rockrohan* decision on the meaning of the phrase "action on a judgment", as set out above, prevail in considering the weight attaching to the relevant rule of the Circuit Court.

6. Conclusions

6.1 The judgment in the instant case was an order that the Plaintiff was entitled to possession of a property in Limerick. The Plaintiff has chosen not to enforce this order, mainly because payments have been made for some years and because it suited both parties to reduce the debt rather than arrange to sell the property: it is also pertinent to recall that the Defendant was living in the property as a family home and this forbearance should be encouraged in such cases rather than punished. The same estoppel as arose in *Rockrohan* would arise here, on these facts. The Defendant could not expect, in other words, to

challenge or obstruct these proceedings for possession of the property without being defeated by a claim that he was estopped from so doing. The issues which arise in limitations of actions generally (discovery of damage, difficulties with the identification of defendants or the accrual date of the action, capacity issues) simply do not arise in most cases involving the execution of a judgment.

6.2 The Supreme Court in *Rockrohan* upheld Irvine J. having expressly endorsed her finding that Order 42 rules 23 or 24 of the Superior Courts could not be used to reject an application for leave to renew an order for execution after 12 years in the circumstances of that case. The High Court judgment concluded that an order for leave to execute a well charging order is not an action upon a judgment. This being the case, and given that it has the persuasive force of Irvine J. carrying the imprimatur of the Supreme Court, this Court has no hesitation in holding 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. The conclusions of Charleton J. on the phrase "*action on a judgment*" are definitive on this issue. His final comments at paragraphs 28 and 29 read:

> *"Any order in respect of possession for the purpose of sale is entirely supplementary to the conclusion of that action.*
>
> *The supplementary nature of the order sought is immediately apparent from the nature of is the order sought and the circumstances in which the order for sale was made; and on the basis by which this supplementary step became possible. An action is, of its nature, a dispute between parties, where there is an assertion of fact or an argument of law, whereby one party seeks the benefit of some legal entitlement as against the other. The action in this case took place when the bank, as mortgagee, asserted that they had a charge over the lands held by Rockrohan as mortgagor and whereby Rockrohan had an entitlement to plead to the contrary or to offer any evidence to challenge that assertion, or to demonstrate through cross examination or legal*

argument that the action should fail. No such step was taken by Rockrohan and in no sense is any aspect of the definition in section 2(1) of the Act of 1957 be taken as embracing supplementary steps once an action, so properly described, as either succeeded or failed."

This Court adopts and follows the rationale in both courts in Rockrohan.

6.3 Returning to the Supreme Court decision of Geoghegan J. in *Smyth v Tunney*, he concluded in respect of such applications for leave:

"Even if it was the case that leave under the rules could be granted to execute a statute-barred judgment debt on the basis that the application for leave was not an action to recover a judgment within the meaning of the Statute of Limitations and also on the basis that the statute-barred debt could not be said to be extinguished altogether, the defendants would still have encountered very considerable problems in persuading a court to exercise discretion in their favour. Even on the best possible view of the law from the point of view of the defendants, the fact that the statutory period has run must surely be a major factor to be considered by a court in considering whether to grant or refuse leave as a matter of discretion. As I indicated, I do not intend to give a definitive view of what I believe to be the correct legal position as I do not find it necessary to do so."

6.4 It appears that the Court should indicate its reasons for exercising its discretion to give leave to renew this Possession Order, if they are not already plain from the comments above.

6.5 If leave to renew the Order was not granted in this case the result would be contrary to the wishes of all parties who have worked together over the years to achieve two socially desirable results: that homeowner retains his home and that lenders are repaid. It could work a serious injustice in other comparable cases and this ruling follows and adopts the rationale expressed by Irvine J. and Charleton J. in *Rockrohan.* The provision limiting

actions on judgments cannot apply to enforcement provisions in these circumstances. Even turning to modern commercial requirements, given the potential for delay in such actions it seems absurd to suggest that the limitation period must apply not only to the first steps in the execution of a judgment but that the whole process of execution must be complete within 12 years. In this case, as in *Rockrohan* and doubtless in others, such a result cannot have been the intention of the legislature.

6.6 For commercial purposes it is far better for mortgagor and mortgagee if payments are made and if time is granted in circumstances where the debt is being addressed. It is in nobody's interest if houses are repossessed and sold to pay off debt if the debt can be addressed by repayment and it is, and should be, a last resort to repossess a home. We now live nearly twice as long as those who created the early rules dictating limitation periods. Mortgages, which used to be of ten, or fifteen, years duration, are now typically of 25 years or more. Modern longevity and commercial reality also support the view that this is the only sensible interpretation of section 11(6)(a).

6.7 This Court will grant the Plaintiff leave to renew the execution order for a further year, pursuant to Order 42 rule 20 of the Rules of the Superior Courts.