THE HIGH COURT

[2023] IEHC 578

[Record No. 2023/1416P]

BETWEEN

MARS CAPITAL FINANCE IRELAND

DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

MICHAEL QUINN AND BRIGID QUINN AND ANY PERSON IN OCCUPATION OF THE PROPERTY COMPRISED IN FOLIO 17101 COUNTY MONAGHAN AND KNOWN AS CASTLEBLANEY ROAD, CARRICKMACROSS, COUNTY MONAGHAN

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 28th day of July 2023.

1. Introduction

1.1. By Notice of Motion dated 29 March 2023, the Plaintiff seeks various reliefs including injunctions restraining the Defendants from trespassing over a property at Castleblayney Road, Carrickmacross, Co Monaghan and comprised in folio MN17101, hereinafter referred to as the Property.

1.2. The Plaintiff claims to have become a Mortgagee in Possession following the execution of an Order for Possession in the Plaintiff's favour over the Property. However, the Second Named Defendant subsequently re-entered the property. The Plaintiff argues

that the Second Named Defendant is therefore a trespasser and seeks Orders restraining the Second Named Defendant and others from unlawfully trespassing over the property.

1.3. The Defendants deny that they are trespassers, principally on the basis of objections to the Order for Possession and the manner of its execution.

2. The Facts

2.1. Seamus Corbett's grounding affidavit sets out the background to the proceedings from the Plaintiff's perspective. Key events in the proceedings include the following:

- On **5 October 2016** Mars Capital Ireland No. 2 Designated Activity Company issued Circuit Court Possession proceedings arising from the Defendants' default under a mortgage. That entity was the Plaintiff's Predecessor in Title and this judgment shall refer to it as such in the interests of brevity.
- On **23 October 2018**, the Circuit Court made an Order for Possession over the Property.
- On **25 March 2022 the** High Court (Mr. Justice McDonald on the Commercial list) made an order pursuant to Section 480 of the Companies Act 2014 approving the merger of the Predecessor in Title and other entities into the Plaintiff.
- On **7 June 2022** the Registrar of the Circuit Court directed the amendment of the title to the proceedings to reflect the Order of the High Court on 25 March 2022) and permitting substituted service of the Order for Possession.
- On **17 June 2022** the Order for Possession was duly served.
- On **29 July 2022** the Circuit Court Office issued an Execution Order of Possession directing the Sheriff to take Possession of the Property.
- The Monaghan County Sheriff executed the Order for Possession on **24 March 2023** and handed over vacant possession to the Plaintiff's agent, rendering the Plaintiff a mortgagee in Possession. The Plaintiff's agents secured the Property.

- On **27 March 2023** the Plaintiff became aware that the Second Named Defendant had re-entered and reoccupied the property. The Plaintiff argues that this was unlawful and that she thereby became a trespasser.
- In subsequent correspondence, the Second Named Defendant has refused to accede to demands that she vacate the property and cease interfering with it and with the Plaintiff as Mortgagee in Possession.

2.2. The Second Named Defendant swore two affidavits. She accepts that she reoccupied the property but denied that the Plaintiff had demonstrated their entitlement to the Order for Possession or that she was a trespasser.

2.3. Some points raised in her affidavits are no longer being pursued for the purposes of the application (although her position was reserved on those issues in the context of the proceedings generally). Mrs. Quinn's testimony in respect of the key issues which remained "live" for the purposes of the current application was as follows:

2.3.1. The underlying mortgage debt had been extinguished. Accordingly, there was no mortgage debt to enforce pursuant to the Order for Possession dated 23 October 2018. (The Second Named Defendant does not appear to be contending that the mortgage had been repaid, but rather to that it was statute barred by virtue of the last payment having been made in April 2011.)

2.3.2. Mrs. Quinn stated at paragraph 7 of her first affidavit that:–

"The Plaintiff has no basis to enforce the Order for Possession and/or sell this deponent's family home, as there are no monies lawfully due and owing under the mortgage… For the Plaintiff to be able to do so it would have required to issue debt proceedings against this deponent for the alleged debt, which it has not done".

2.3.3. Mrs. Quinn objected to the procedures in the original proceedings which led to and were ultimately the basis of the Order for Possession. She also took issue with the rate of interest applied in the course of the underlying proceedings.

3. Plaintiff's response to Second Named Defendant's replying affidavit

3.1. In response to the Second Named Defendant's first affidavit, Barbara Tanzler's affidavit on behalf of the Plaintiff:

3.1.1. Rejected the contention that the Order for Possession was invalid because of limitation issues. Paragraph 5 of her affidavit stated:–

> *"These proceedings concern Mrs. Quinn's trespass to the property… following the lawful execution of the Order for Possession…These proceedings do not concern a claim for the recovery of any debt and I am instructed by my client that the first and Second Named Defendants remain indebted to the Plaintiff in the sums described at paragraph 17 of the Grounding Affidavit."*;

3.1.2. Characterised the objections raised by the Second Named Defendant as:– *"an entirely improper collateral attack against the Order for Possession which is final and not the subject of any outstanding appeal…the first/or Second Named Defendants made three applications to the High Court by way of appeal or an extension of time to appeal and all of those applications were rejected by the High Court". Other allegations are likewise dismissed as irrelevant or as an improper collateral attack against final Orders of the Circuit and High Courts".*

4. The Merger

4.1. One of the grounds of opposition to the application was the Second Named Defendant's contention that the Plaintiff was not the entity entitled to possession in any event. The Second Named Defendant objects that the Plaintiff was not the registered owner at the time of the substitution Order on 7 June 2022 or the execution Order on 2 December 2022. Exhibit BT1 showed that the Plaintiff's interest in the property was registered on 22 February 2023 (previously the interest had been registered in the name of the Plaintiff's Predecessor in Title). The 23 October 2018 Order for Possession was originally granted in favour of the Predecessor in Title. The Second Named Defendant denied that its benefit was transferred to the Plaintiff either following the merger or as a result of the *ex parte* 7 June 2022 Order.

4.2. In particular, the Second Named Defendant emphasises the fact that paragraph 7 (c) of that Order required the Plaintiff to inform the Defendants of their entitlement to contest the transfer to the Plaintiff. The Plaintiff's evidence confirms that the Plaintiff did in fact notify the Defendants of their entitlements. There were attempts on behalf of at least some of the Defendants to contest the transfer and the Order for Possession but those efforts were ultimately unsuccessful.

4.3. Paragraph 9 of Mr. Corbett's second affidavit confirms that the Predecessor in Title was the legal and registered owner of the charge on the Folio on 23 October 2018, the date the Order for Possession was made and that:–

> *"following the merger as Ordered by Mr. Justice McDonald the Plaintiff took steps to have the merger reflected on the Folio which was completed on 22 February 2023 but which did not stay execution of the Order".*

4.4. Mr. Corbett denies that these are the appropriate proceedings or forum for Mrs. Quinn to challenge the Plaintiff's ownership of the debt and/or charge, noting that:–

> *"By Order of the County Registrar made on 7 June 2022 the Plaintiff was substituted into the Possession proceedings following the merger and no appeal against or application to set aside that Order has been filed".*

4.5. In the context of this argument, it should be noted that the merger was directed by the High Court (Mr. Justice McDonald) in accordance with a statutory procedure prescribed by the Companies Act 2014. Section 480 provides for such an order in the event that the Court is satisfied that the statutory conditions and procedures have been complied with.

4.6. Crucially s.480(3) provides that such an order shall have various effects from the date specified in the order. These include:

> *(a) "All the assets and liabilities of the transferor company or companies are transferred to the successor company.*
>
> *[…]*
>
> *(d) all legal proceedings pending by or against any transferor company shall be continued with the substitution, for the transferor company, of the successor company as a party."*

5. Manner in Which the Order of Possession was Executed

5.1. There is a dispute as to what transpired at the property on 24 March 2023 when the Order of Possession was executed. The Plaintiff's evidence is that the Second Named Defendant initially refused to leave the Property, threatening to smash a glass bottle on a bailiff but that ultimately, she was escorted from the Property and the Property was secured by the Plaintiff's agents, as reflected in a lockdown report exhibited by Mr. Corbett.

5.2. Mrs Quinn has a different perspective, as summarised in paragraphs 58 to 66 of her first affidavit. She confirms that she was told that she had to leave but refused to do so. She alleges that she was surrounded by the individuals carrying out the eviction and that when she tried to get past them, she was pushed, causing her to fall. She disagrees with the Plaintiff's reference to a bottle, claiming to have grabbed a bottle "with the intention of slashing (herself)". She stated that she was grabbed and dragged out of the house, that she suffered distress and injuries including to her back and extensive bruising to her arm which required medical treatment.

5.3. No independent evidence of the medical treatment was exhibited but the Plaintiff exhibited a plenary summons which she had issued arising out of the events, alleging, *inter alia*, slander of title and assault. Those proceedings do not appear to have progressed.

6. Balance of Convenience and Adequacy of Damages

6.1. The Plaintiff argues that damages would not be an adequate remedy in the absence of an injunction because the trespass continues to have a serious detrimental effect on the Plaintiff's rights in respect to the property. The Plaintiff's ability to take and maintain possession would be irretrievably impaired, preventing the Plaintiff from marketing the property for sale.

6.2. Mr. Corbett notes that that the Defendants may not be able to account to the Plaintiff for any damages given their existing substantial indebtedness to the Plaintiff and this was not denied by the Second Named Defendant, an undischarged bankrupt.

6.3. The Plaintiff argued that if the Second Named Defendant was to succeed at trial, then damages would be an adequate remedy for her, and the Plaintiff has proffered the usual undertaking in that regard.

6.4. Against this, the Second Named Defendant argued that the property had been her family home for more than 20 years and therefore damages could never be an adequate remedy for her whereas it was a purely monetary issue for the Plaintiff.

7. The Law

7.1. *Carlisle Mortgages Limited* v *Eugene Costello* [2018] IECA 334 ("*Carlisle*") concerned facts very similar to those before the Court on this application. Mr. Justice Peart concluded at paragraph 31 that once the plaintiff had taken possession, the Order for Possession had been executed and any subsequent adverse action by the appellant constituted an act of trespass rather than a retaking of possession. The court confirmed that the Mortgagee in Possession was entitled to seek to restrain any subsequent trespass.

7.2. Also pertinent are the Court's observations at paragraph 32 to the effect that if the appellant wished to challenge the lawfulness of the underlying enforcement action either because of the rate of interest or because of any breach of his rights under consumer law, the time for doing so was when the Order for Possession was sought.

7.3. In *Start Mortgages DAC* v *Noel Rogers and Una Rogers* [2021] IEHC 691 ("*Start Mortgages DAC*"), the High Court gave short shrift to a statute of limitations defence which, Counsel for the Plaintiff observed, closely resembles the defence raised by the Second Named Respondent in these proceedings. Ms. Justice Butler cited the conclusion of Mr. Justice Allen in *KBC Bank Ireland PLC* v *Mc Gann* [2019] IEHC 667 that in such situations the cause of action was the act of trespass (which occurred in March 2023 in this case) rather than the cause of action giving rise to the original enforcement proceedings.

7.4. Ms. Justice Butler also noted that because the relief sought was a prohibitory injunction

to restrain unlawful activity the applicable test for the injunction in these circumstances was that of a serious question to be tried. In any event, she noted that the plaintiff had advanced a strong case that was likely to succeed at trial. The position in respect of the current application on both points appears directly analogous.

7.5. Counsel for the Second Named Defendant sought to pursue all the points potentially open to his client, and his zeal was entirely appropriate, given the importance of the issue to his client and her family. Among the points raised was the argument that the execution was invalid by virtue of the operation of Order 36, Rules 2 and 10 of the Circuit Court Rules.

7.6. Rule 10 provides that:–

> *"10. If, at any time during the period of twelve years, any change has taken place, by death, assignment or otherwise, in the parties entitled or liable to execution, the party claiming to be so entitled may apply to the Court on notice for leave to issue execution, and the original decree or judgment may be amended so as to give effect to any order made by the Court on the application."*

7.7. Mr. Donelon argued in effect that this was a mandatory requirement which had not been met, thus rendering the execution process invalid.

7.8. There is no suggestion in the evidence in this case that the Second Named Defendant was in any way prejudiced by the merger or by the subsequent change to the title of the proceedings or that she would have had any substantive factual or legal basis to object to the change to the title of the proceedings. Nevertheless, the Second Named Defendant argued that a mandatory requirement had not been met, giving rise to an issue as to the validity of the subsequent execution process.

7.9. In support of this proposition Mr. Donelon cited *Crowley v. Ireland & Ors.* [2022] IEHC 596 ("*Crowley*"), a decision of Ms. Justice Stack. That case concerned the validity of an execution order which had previously lapsed in the light of irregularities in the process

leading to the renewal of that order prior to its execution. One of the irregularities was the fact that the lender named in the execution order had assigned its rights to another party prior to the making of that order. The Court held that an application was required on notice pursuant to Order 36 Rule 10 of the Circuit Court Rules by virtue of that assignment, but no such application had been made.

7.10. Mr. Donelon also relied heavily on the Supreme Court decision in *Christopher Moore and Ann Moore* v *Dun Laoghaire-Rathdown County Council* [2017] 3 IR 42 ("*Christopher Moore*") as demonstrating that an ejectment of a tenant which would otherwise have been lawful was rendered unlawful by virtue of the failure to follow a required step in the process, in that case to seek a renewal of the warrant for possession and to do so on notice to the applicant. The plaintiff noted that the failure to follow a mandatory procedure required by the Rules of Court rendered the ejectment unlawful and also noted the Supreme Court's emphasis on the importance of the rights pertaining to a dwellinghouse under Irish law and under the ECHR. The Court noted that the plaintiff had been deprived of an opportunity, which was required under the relevant Rules of Court, to argue that the order for ejectment should not be renewed and that there was at least the possibility that the Court would have concluded that an order for ejectment was no longer necessary or appropriate in the circumstances. The Plaintiff placed particular emphasis on paragraphs 24 and 25 of that decision which noted that Rules of Court are a form of delegated or secondary legislation imposing binding legal requirements and noted that the same applied in respect of Order 36 Rule 10.

7.11. The Court summarised its conclusion at paragraph 28:–

> *"... at a minimum, the hearing on notice which is required as a matter of law by O. 47, r. 15 contains within it the possibility that there may require to be a fresh*

assessment of the proportionality of possession being sought by a local authority in the light both of those general considerations attaching to the local authorities obligations and of the rights of the tenant…. it must be the case that there is a possibility that the District Court judge might properly refuse to allow for the issuing of a late warrant and thus trigger a mechanism which would require the local authority to carry out a fresh assessment. Either way, the court has given a role in protecting the rights of tenants which may not be bypassed by the expedient of obtaining a warrant for possession without a court application on notice".

7.12. Mr. Donelon also drew the Court's attention to the observation at paragraph 37 of the Supreme Court judgment that:–

"The ultimate deprivation of the occupation of the family home in this case came about when a warrant for possession, which was obtained in a fundamentally defective manner, was executed. It does not seem to be the case that it is possible to describe, therefore, the deprivation of possession of the family home in this case as having been conducted in a manner consistent with Article 8.2 of the ECHR which prohibits interference by a public authority with the family home "except such as is in accordance with the law". The fundamental value at stake in these proceedings is the rule of law…"

7.13. The Court added at paragraph 40 that:–

"On the facts of this case we consider it to be of the highest importance to acknowledge that an order, which significantly affected the Moores' rights, was made without putting them on notice of the intention to seek that order as the law required. This is not a case where there were attempts to notify which perhaps fell short of proper notice but were deemed good and sufficient by a court. This is a case where,

for reasons which remain unexplained, no attempt to notify at all was made. This is not a case where the reasons put forward for suggesting that the warrant was invalid are technical but rather where the reasons put forward are of significant substance being that the party most likely to be affected by the making of the order was denied an opportunity to be heard because they were not served with notice as the law required. In the view of the Court the circumstances display a significant illegality in the manner in which possession was actually obtained. It follows from that fact that it would require a very significant countervailing factor before it could be appropriate to decline to grant some relief to the Moores. This is not a case where it is simply a question of balancing factors on one side or the other. This is a case where the rule of law requires that a party should not be able to retain the benefit of a warrant for possession, obtained in a fundamentally unlawful way, in the absence of significant countervailing factors going beyond the general considerations pertaining to the statutory role of a housing authority."

7.14. In response to the Second Named Defendant's submission, the Plaintiff invoked the Supreme Court decision in *First Active PLC v Cunningham*, [2018] IESC 11 ("*Cunningham*"). One of the issues in those proceedings related to the transfer of the business of First Active PLC to Ulster Bank Ireland limited Pursuant to the Central Bank Act 1971. That Act sets out a statutory mechanism for the transfer of businesses and assets of a licensed bank or other financial institution in the procedure subject to the approval of the minister for finance.

7.15. As appears from paragraph 13 of the judgment, the appellant claimed that as a result of the transfer and the failure to disclose the same, the judgment should be set aside as irregularly obtained:–

"The appellant claims that the result of this transfer of rights, and the failure to disclose same, is that the judgment obtained in this case should be set aside as irregularly obtained, as the party that obtained it had no interest in the matter and the proceedings were never regularised to reflect the correct parties. The respondent, on the other hand, maintains that a mandatory and automatic substitution has been effected by section 41 of the 1971 Act and that the judgment obtained against the appellant is, as a matter of law, a judgment in favour of Ulster Bank."

7.16. The Supreme Court's conclusions appear at paragraphs 25 and 26:–

"25. It is apparent, therefore, that much will turn on the proper interpretation of the statutory provision question. Section 41 of the 1971 Act, said in the marginal note to concern the continuance of pending legal proceedings, provides as follows: *"41.- Where, immediately before the transfer date any legal proceedings are pending to which the transferor is a party and the proceedings have reference to the business agreed to be transferred, the name of the transferee shall on the transfer date be substituted for the transferor and the proceedings shall not abate the reason of such substitution". (emphasis added)*

26. The different constructions, it seems to me, center on the proper interpretation of the emphasised portion of the text. Undoubtedly there are different meanings that may be attributed to the word "shall". For the respondent, the use of the word means that the process is mandatory and automatic. It leaves no uncertainty as to what is to occur or when it is to occur: no application under the rules is necessary because the substitution has already occurred automatically as a result of the operation of the section. However, the applicant disputes this is so, maintaining that an application for substitution under the rules is required. Under this reading, "shall" is to be construed as a command to the parties to take action to effect the substitution rather than

indicating an unavoidable and inevitable substitution that operates independent of the taking of any procedural step by the parties".

7.17. It seems to the Court that paragraphs 38 to 40 of the *Christopher Moore* decision show that that case was clearly distinguishable. The Supreme Court observed at paragraph 38 that:–

"... the problem with the warrant in this case is not a technicality such as a minor misdescription for an absence of authority on the face of a warrant arising in circumstances where it can be demonstrated that the judge issuing the warrant had all of the necessary evidence to enable the warrant to be issued. Rather this is a case where there was a complete failure to invoke the proper jurisdiction of the District Court resulting in a fundamental denial of fair process in the issuing of the warrant. The law required that, in the circumstances of this case, the Moores be put in notice before a warrant could be issued. They were not put on notice. The fact that they were thus deprived of the opportunity of seeking to to persuade the District Court not to allow for the late issuing of the warrant is not, in the courts view, simply a factor to be taken into account in the balance. It is an issue which renders a warrant unlawful in the most fundamental way."

7.18. This Court considers that the circumstances of the *Crowley* and *Christopher Moore* decisions are very different to the present case and that the *Cunnningham* decision is more applicable. *Christopher Moore* concerned the High Court's decision to decline to quash a warrant for ejectment notwithstanding its finding that the warrant had been unlawfully obtained by virtue of the failure to notify the tenant of the renewal application. A key element of the Supreme Court's decision (and a clear distinction to the present case) is its conclusion at paragraph 25 of the judgment that the Moores had

been deprived of a substantive right to be heard and it could not be assumed that no useful purpose could be served by the legally mandated procedure. The Court noted that the provision had:– *"…introduced a new entitlement on the part of a tenant - to be heard in opposition to the ground of a warrant outside the six month period. It follows that it must be the case that there could be circumstances where it would be appropriate for a District Court judge to decline to meet the order sought. If it were otherwise what would be the point in the procedure in the first place?"*

7.19. The Court added at paragraphs 26 and 27 that:–

"26. As a matter of first impression, it seems arguable that the point of the rule is the possibility that lapse of time may result in a relevant change of circumstances such that the District Court judge might come to the conclusion that it because it had become inappropriate to issue a warrant.

27. But even if the proper role of the District Court judge is confined in the manner contended for on behalf of Dun Laoghaire-Rathdown, it clearly follows that there must be circumstances in which a tenant might successfully persuade the District Court judge not to allow for the issuance of a late warrant. … It is clear that, in such circumstances, having regard to the jurisprudence following the enactment of the European Convention on Human Rights Act 2003 in cases such as Dublin City Council v Fennell [2005] IESC 33; [2005] 1 IR 604 and Donnegan v Dublin City Council [2012] IESC 18, [2012] 3 IR 600, a local authority would be required to consider afresh the Article 8 rights of the tenant and it would be required to do so in the light of the circumstances then prevailing. Thus …it must be acknowledged that it is possible that a District Court judge might properly fail to be persuaded to allow for late issuance and that this would inevitably lead to an obligation on the relevant local

authority to reassess whether it was then appropriate to seek possession in all the circumstances of the case."

7.20. By contrast to *Crowley,* in the *Cunningham* decision, the Court dealt with a situation more analogous to the present case, a statutory assignment, concluding that the statutory proceedings obviated the need for the application which might otherwise have been required under the Rules of Court and that while it might still have been appropriate in individual proceedings to obtain a direction changing the title to the proceedings this was a formality and there would be no basis for other parties to object to any such application. The Court observed that:–

> *"27. This section must be viewed as being ancillary to the substantive provisions of section 33 of the 1971 Act, and in this case S.I. 481/2009, by which the business transfer was effected. Section 41 does not disturb or affect the underlying rights and/or obligations of the parties to the relevant proceedings. Its single aim is to regularize the title of extant legal proceedings for administrative purposes. In my view, effect is given to the intended purpose of the section by permitting such change to be brought about in as procedurally straightforward and simple and manner as the provision itself permits. Accordingly, despite the appellant's arguments to the contrary, I am of the view that the proper construction of the section is that the substitution of the title of the proceedings occurs automatically. That's without more, i.e. by automatic process, at least for the purposes of the business transaction, the substitution in respect of legal proceedings is concluded. Indeed it is not clear that the appellant disputes this interpretation, but rather maintains an application to the court is nonetheless required to regularise the position. I cannot agree. As a substitution occurs pursuant to statute, it obviates the need*

for a formal application under the rules of the Superior Court, for of course the 1971 Act cannot be subordinated to the rules (see for example, Luby v McMahon [2003] 4 IR 133). Thus as a matter of substantive law the name of Ulster Bank was substituted for that of First Active as of the date of the transfer and according to the subsequent judgments and orders stand to be read in favour of Ulster Bank. This is the plain meaning of this section and the natural consequence of the statutory process therein described.

28. However, even if as a matter of substantive law the transfer was affected automatically by operation of section 41, it is undoubtedly the case that a situation such as occurred in this case could give rise to potential difficulties such as those outlined in paragraph 16 and 18, supra, if the same was not brought to the attention of the trial judge and the record altered to reflect the new circumstances. The step which I have in mind would not require a formal application under the rule of; I'm entirely satisfied that had the respondents simply notified the trial judge of the transfer, the requisite name change to the title of the proceedings could, and would have had to have been made there and then. This ought to have been done and of itself would have been sufficient to bring the identity of the party seeking to recover on foot of the guarantee to the attention of the judge, the court registry, the appellant and those members of the public with an interest. However this course was not followed with the respondent attributing its failure is inadvertent. While acknowledging that this fact is "unfortunate", it maintains that such failure has no consequences for the judgments obtained."

7.21. This Court considers that, although expressed in slightly different language, the effect of the provisions of s. 480(3)(d) of the Companies Act 2014 are directly analogous to the

provision, s. 41 of the Central Bank Act 1971, under consideration in *Cunningham* and that the reasoning in that decision is equally analogous in the current situation.

7.22. It should also be noted that the *Crowley* judgment made clear at paragraph 52 that, notwithstanding the acknowledged irregularities leading to the execution order, the order remained valid. The Court observed that:–

> *"52. The position in relation to the validity of the order remains: it has not been appealed or challenged. The time for appeal or challenge, in view of the timeline and these proceedings, is now long gone..."*

7.23. The Court's observations at paragraph 53 and 54 of that decision as to why any challenge would be out of time whether bought by way of plenary proceedings or pursuant to Order 84 are equally applicable in the current context. While Mrs. Quinn's affidavits do offer various explanations for her delay and inaction in the original proceedings, her evidence falls well short of providing an arguable basis upon which the Second Named Defendant could seek an extension pursuant to Order 84 Rule 21(3). That is not to say that she would not be entitled to seek to do so in future, but for the purposes of the present application, the Court must regard any such application to extend time to challenge the execution order as out of time.

7.24. Significantly, as appears from paragraph 56, the court in *Crowley* concluded that the execution order remain valid notwithstanding the proven irregularities and the proceedings in that case were an abuse of process insofar as they constituted a collateral attack on the order of the county register.

8. Findings

8.1. As Ms. Justice Butler observed in *Start Mortgages DAC*:–

"1. For historical reasons, it can be difficult to approach issues concerning eviction dispassionately in Ireland. Nonetheless, the courts cannot ignore the legal consequences which flow when the law has taken its course and the lender becomes a mortgagee-in-possession. In this case, the plaintiff is seeking as a mortgagee in possession, interlocutory relief requiring the defendants to vacate property which was previously their family home and in which the plaintiff alleges that there are now trespassers."

8.2. The Court is satisfied that many factual issues raised by the Second Named Defendant have either been resolved by the Plaintiff's affidavits or constitute an improper collateral attack on the validity of the Order for Possession and the Execution Order subsequently issued by the Circuit Court. This application is not an appropriate forum to contest the underlying Order for Possession or the Possession proceedings. On the basis of the evidence before it, the Court is not at all satisfied that there is an arguable basis for the contention that the Statute of Limitations or the alleged issue with the interest rate invalidates those Orders but in any event this application is not the appropriate forum for the Plaintiff to seek to resolve such issues. The Court considers that that contention does not in law provide a basis to justify the Second Named Defendant's reoccupation of the property on the basis of the allegations contained in her affidavits. The position in this case is analogous to the situation considered by the High Court in *Carlisle* and at paragraph 30 of that decision, the Court referenced an earlier *ex tempore* judgment of Mr. Justice Twomey in the same proceedings.

8.3. The Court would also respectfully adopt the conclusion of Ms. Justice Butler at paragraph 39 of the *Start Mortgages DAC* case to the effect that:–

"…The proceedings now brought by the plaintiff are not proceedings to enforce the original judgment which was executed on 10th March 2020. Having executed the judgment, the proceedings now taken by the plaintiff are taken against the defendants as trespassers on the plaintiff's property, trespass which commenced on 10th March 2020 and which is still continuing. No question of a breach of the statute of limitation arises".

8.4. The Court is satisfied that the Plaintiff has a strong case that the Order for Possession was validly executed, notwithstanding the Second Named Defendant's submissions in respect of Order 36 Rule 10 of the Circuit Court Rules. While *Crowley* is authority for the proposition that, despite the use of the term "may" rather than "shall", an application pursuant to the Rule would be necessary where the parties change due to assignment, the decision did not arise in the context of a merger pursuant to a statutory procedure. Furthermore, Order 36 Rule 10 pre-dates the statutory provision pursuant to which the merger was approved by the High Court. Given the express terms of Section 480, the detailed statutory procedure under the supervision of the High Court which led to the order of Mr. Justice McDonald and the subsequent substitution order of the Registrar of the Circuit Court it is difficult to see any legitimate interest to be served in requiring an application under Order 36 Rule 10.

8.5. The analysis in paragraphs 27 and 28 of the Supreme Court decision in *Cunningham* is equally relevant to the provision in issue in these proceedings. In summary, then, in the Court's view, there is a strong argument that Rule 10 must be deemed to have been superseded in the context of a merger by the subsequent enactment of primary legislation governing such merger processes, particularly in circumstances in which such procedures are undertaken under the supervision of the High Court.

8.6. On that basis, the Court is satisfied with the Plaintiff's standing, notwithstanding the merger, to enforce the judgment mortgage on the basis of the 7 June 2022 Order, the Order for Possession and the subsequent Execution Order. The Court is not assisted by the Second Named Defendant's explanations for failing to take appropriate steps within time with a view to setting aside the 7 June 2022 Order and would reject any suggestion that paragraph 7 (c) gave rise to an ongoing entitlement to take issue with the Order more than a year after it was made and after subsequent enforcement steps in the proceedings.

8.7. It is not necessary for the purpose of the current application for the Court to reach a determination as to the conflicting allegations in respect of the events of 24 February 2023. For the purpose of the application, it is sufficient to note that the Court is satisfied that the Plaintiff has established a strong case that the conduct of the eviction was appropriate and lawful. Furthermore, even if there was a basis for the First Named Defendant's criticism (and the Court is making no finding either way), any such complaint would presumably fall to be directed at the Sheriff rather than against the Plaintiff. Nor would any such issues alter the fact that the Order had ultimately been executed, rendering the Plaintiff a Mortgagee in Possession and the Second Named Defendant a trespasser. Accordingly, those allegations like other issues raised by the Second Named Defendant (such as the interest element of the monies claimed by the Plaintiff) are not relevant to the issue before the Court.

8.8. In the circumstances, although, as outlined by Ms. Justice Butler in *Start Mortgages DAC,* the lower test is applicable, on the basis of *Carlisle, Cunningham, Start Mortgages DAC* and the other authorities listed above, and having regard to the provisions of Section 480 of the Companies Act 2014, the Court is satisfied that the Plaintiff has met the higher standard in any event and established a strong case that:

- The Order for Possession was validly executed by the Monaghan County Sheriff on 24 March 2023 and the Plaintiff became a mortgage in Possession on that date when the Property was handed over to it.
- The Second Named Defendant's return to and reoccupation of the property was unlawful. She was, and remains, a trespasser.

8.9. The Court does not consider that damages would be an adequate remedy in the absence of an injunction because the Second Named Defendant is an undischarged bankrupt and there would be no reality to enforcing any such order. Furthermore, the Plaintiff has been seeking to enforce its charge since 2016, with an order for possession granted to its predecessor in title nearly five years ago. Further delay would be contrary to the interests of justice.

8.10. The Court would have regard to the observations of Ms. Justice Butler at paragraph 61 of the *Start Mortgages DAC* decision to the effect that:–

> *"…It cannot be the case that, if trespassers go into occupation of property, that occupation must be regarded as a status quo which the law should protect until it has been determined otherwise. In this case the plaintiff as mortgagee-in-possession is prima facie the person entitled to possession of the property. Allowing the defendants to remain in the property while the plaintiff prosecutes the proceedings it has been obliged to take by virtue of the defendants' unlawful actions would not be to the maintenance of the status quo rather an inversion of the status quo".*

8.11. The following paragraph of the judgment, in which the Court acknowledged that in human terms the events had created a disastrous situation for the defendants' family is equally applicable in this case. While the Court fully appreciates how extraordinarily distressing the events of and leading up to 24 February 2022 must have been at an

emotional level for the Second Named Defendant and her family, the Court must consider the matter on the basis of the parties' legal entitlements, as established through longrunning and exhaustive legal proceedings in which the Second Named Defendant had ample opportunity to participate. In terms of the balance of convenience, the Second Named Defendant is not entitled to consideration on the basis of continued occupancy of the family home. As a result of the lawful execution that was undertaken by the sheriff of Monaghan County, the Plaintiff became the party lawfully entitled to possession of the property. The remarks of Mr. Justice Allen at paragraph 38 of his judgment in *KBC Bank Ireland PLC v McGann* [2019] IEHC 667 are equally apposite here. In legal terms, the Second Named Defendant is a trespasser, disregarding the orders of the court and the Plaintiff's rights. The balance of convenience clearly favours the granting of the orders sought and the Court will make the appropriate orders accordingly.