THE COURT OF APPEAL

Unapproved

Neutral Citation No. [2021] IECA 166

Record No.: 2020/182

Whelan J.
Donnelly J.
Ní Raífeartaigh J.

BETWEEN/

ALLIED IRISH BANK PLC

PLAINTIFF/RESPONDENT

-and-

BALFORD CONSTRUCTION LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered on the 9th day of June, 2021

1. In an *ex tempore* judgment delivered on 10 March 2020, the High Court (Meenan J.) on the motion of the plaintiff/respondent (hereinafter "the Bank") for summary judgment against the defendant/appellant (hereinafter "the Company"), adjourned the matter for plenary hearing. Somewhat unusually, the Company appealed that order. In the notice of appeal the orders claimed were an order setting aside the High Court Order and an order for costs. By the time of the written submissions, the Company clarified that it was seeking an order striking out the summary summons.

2. The summary summons was issued on 21 July 2016. The special indorsement of claim made two separate claims. The first claim was pleaded as follows:

"2. The defendant by Loan Agreement made in writing on or about the 27th April 2010 agreed for value received to pay to the Plaintiff the sum of €214,435.66 repayable by way of 1 Instalment of €214,435.66 to be paid on the 30th July 2010. The value received by the Defendant was an advance of €211,619.00. The said advance was made on or about the 27th April 2010 and the Annual Percentage Rate of Interest charged thereon was 5.321%

3. The defendant made default in the payments due under the Agreement and by letter dated the 20th May 2016 the Plaintiff demanded payment of the amount due.

4. There is now due and owing to the Plaintiff on foot of the said Agreement the sum of €286,101.25."

The second claim as pleaded was as follows:

> "5. The Defendant by Bank Guarantee in favour of Roscommon County Council made in writing on or about the 12th August 2010 agreed to pay to the Plaintiff the sum of €167,600.00 if and when the said sum was advanced by the Plaintiff to the said Council. The said advance was made on or about the 13th May 2011 and the Defendant thereby became liable to repay same to the Plaintiff.
>
> 6. The Defendant made default in the payment due under the agreement and by letter dated the 22nd June 2016 the Plaintiff demanded payment of the amount due.
>
> 7. There is now due and owing to the Plaintiff on foot of the said Agreement the sum of €167,600.00"

The Guarantee in favour of Roscommon County Council

3. Mr. Brian McGuinness of the Bank swore an affidavit grounding the reliefs claimed in the motion for summary judgment. He averred that the Company, "by bank guarantee in favour of Roscommon County Council" ("the Council") made in writing on 12 August 2010, agreed to pay to the Bank the sum claimed if and when the said sum was advanced by the Bank to the

Council (hereinafter "the bank guarantee"). He said that the advance was made on 12 December 2011 (a date different to that set out in the special indorsement of claim) and the Company became liable to repay the Bank on that day. The only document he exhibited was a document entitled "Letter of Sanction" referring to the facility of the bank guarantee in favour of the Council. That Letter of Sanction also stated that the terms of that bank guarantee must have the prior approval of the Bank.

4. Mr. Peter McNicholas, a director of the Company, swore an affidavit in which he referred to a letter from the Council dated 9 May 2012, stating that the Council had requested the Bank to pay over the bond in full by 28 June 2012. He said that the Bank confirmed to him by letter of 30 March 2015, that they had not paid out the bond and that the matter remained ongoing. He avers that this was confirmed in a letter from the Bank in May 2017.

5. Mr. McGuinness swore a "corrective affidavit" in response. He averred that the bank guarantee had been entered into in September 2005 and the agreement of 12 August 2010 was a renewal of the facility and not a new facility. He exhibited that guarantee. He then averred that the Bank had received a demand from the Council on 9 May 2012, and he claimed that the said sum was due and owing by the Company to the Bank "as a contingent liability".

6. While this appeal was pending, by motion before the High Court dated 24 February 2021, the Bank sought to amend the special indorsement of claim by *inter alia*, deleting the claim in respect of the bank guarantee. The grounding affidavit stated that the Bank "no longer pursues this element of the claim and that the amendment was of no prejudice to the Company, was in the interests of justice and expedience of the hearing of the action by ensuring that only the real issues in controversy between the parties are addressed." The Bank submit that this claim is moot, but they recognise that because it was their unilateral action that caused the claim to become moot there will be an implication for costs.

7. The solicitor for the Company submits that the Bank's deponent acknowledged that the claim with regard to the guarantee made in the special indorsement of claim and the affidavit was untrue. She submits that this was not a harmless error and because of this and the "untruths" in relation to the claim in respect of the loan agreement of April 2010, the Bank's claims in the summary summons should be dismissed in their entirety.

The Loan Agreement of 27 April 2010

8. Mr. McGuinness averred in his grounding affidavit to the precise claim set out in para 2, 3 and 4 of the special indorsement of claim (see above para 2). He exhibits a letter of sanction signed by Mr. McNicholas and his wife and a company resolution also signed by both, accepting the offer of the facilities amounting to €211,619.

9. Mr. McNicholas, in his replying affidavit, set out that he received a loan from the bank in 2007 which was to be repaid by 2008 but that the Company was not able to repay it as agreed. He said that Mr. Charles Kane was appointed the manager of the Swinford branch of the Bank and that he was invited to have a discussion with him primarily about another matter. At a later meeting Mr. Kane brought up the issue of the loan to the Company and told him if he did not get some "new paperwork signed up" the Bank would have to move against it.

10. Mr McNicholas averred that he met Mr. Kane again at the end of April where he had a new loan facility ready for him to sign. Mr. Kane asked about his wife's signature, but he told Mr. Kane that if she had to come to the office she would probably refuse to sign the facility. Mr. McNicholas said he signed four copies of the letter, brought three copies with him but he did not recall bringing the form home for his wife to sign. Following further affidavits from the Bank, Mrs. McNicholas swore that she did not sign either the loan agreement or the Company resolution.

11. Mr. McGuinness in his corrective affidavit said that;

> "while the [Bank] did enter into a loan agreement with the [Company] on or about 27th April 2010 to repay the sum of €214,435.66 by one instalment on 30th July 2010 at a rate of interest at 5.321%, the purpose of the Agreement and the value received by the [Company] was the renewal of an existing facility in the sum of €211,619.00 and not a new advance of €211,619.00. I say that the [Company] did default in the said payment and that, including accrued interest, the amount due and owing by the [Company] to the [Bank] is €286,101.25."

12. Mr. Kane also swore an affidavit pointing to the relevant borrowings of the Company. He said that the loan of 2007 was renewed by the Bank on various dates, most recently by letter of sanction signed by him and dated 27 April 2010. Mr. Kane said it was quite clear from a perusal of the Letter of Sanction and the Company resolution that Mrs McNicholas did sign the documents.

The High Court's finding

13. It is against that background that Meenan J., having referred to the evidence of Mr. Kane confirming that the facility of April 2010 was in substitution for existing facilities, stated in his judgment;

> "…but, to my mind, of some significance, there was an affidavit of Ms. Nancy McNicholas and, in the course of her affidavit, she criticises the terms of the special endorsement of claim and in light of the contents of the affidavit from Mr. Kane, it seems to me there is actually a basis for this criticism. She says in the course of her affidavit that there was no meeting of the defendant company in relation to the loan facility of April 2010."

Meenan J. went on to hold;

> "I have to say I have misgivings as to the way in which these loans were entered into and the manner in which the plaintiff bank appeared to have been conducting the

> business concerning the loans. There is no doubt in my mind but that the terms of the special endorsement of claim don't fully or adequately set out the claim which is being made. Thus, it seem[s] to me that in my view the defendant is entitled to rely on the recent Supreme Court judgment of Bank of Ireland Mortgage Bank against O'Malley, a judgment which was delivered on the 29th November 2019, which is just only a matter of days before this matter came before this Court."

He then quoted from para 8.1 of the judgment of the Chief Justice in *Bank of Ireland v. O'Malley* [2019] IESC 84, in which the Chief Justice had made his findings in the specific case before him as to the insufficiency of the particulars. Meenan J. then concluded that this was an issue which needed to be determined and directed that the matter be sent to plenary hearing. He also directed the Bank to deliver a fully particularised statement of claim.

The Company's Appeal

14. The solicitor for the Company makes two primary contentions:

a) The motion judge erred in not striking out the entire claim.
b) If she is wrong in that contention, the motion judge should have adjourned the matter so that the special indorsement of claim could be amended.

The motion judge erred in not striking out the entire claim

15. The solicitor for the Company relies upon a number of grounds in submitting that the motion judge should have struck out or dismissed the claim. The solicitor appears to use these terms interchangeably. From the Company's point of view a strike out or a dismissal would in this case amount to the same thing; the Bank would be statute barred from bringing fresh proceedings. The main issue identified in her written submissions was that the Bank had failed to establish a prima facie case and that was the first requirement. This issue had what appeared subsidiary issues to that *i.e.* that the motion judge erred in considering alternative claims not pleaded in the summary summons. Her final point in the written submissions was that the claim under loan agreement 937266 01995598 was statute barred. In oral submissions the Company's solicitor appeared to place reliance on two other aspects. The first is that there were untruths told which were not "harmless errors" by the Bank and the second is that the details of the claim indicate that there is no cause of action. This second aspect appears to be linked with her submission that any claim on the loan agreement is "statute barred"; this latter point was made by reference to a comparison of exhibits, where she maintains that the claim in the summary summons did not relate to the loan agreement corresponding with the number referred to earlier.

16. I consider that the solicitor is in essence making three arguments a) that the consequence of failing to establish a *prima facie* case is that the claim should be struck out; b) that because of "untruths" told by the Bank's deponents, all claims should be dismissed; and c) that no cause of action was established in the summary summons or on the evidence.

Ground (a) : The consequence of failing to establish a prima facie case is to strike out the claim

17. The solicitor relies upon *Bank of Ireland v. O'Malley* to submit that the first obligation on a person seeking summary judgment is to establish a *prima facie* case. She relies on a quote taken from para 5.3 of the judgment as follows "…it also seems clear that the obligation on a defendant to establish an arguable defence is, in reality, one which only arises if the plaintiff has first placed sufficient evidence before the court to establish *prima facie* the debt alleged is due." The solicitor submits that this obligation arises before a defendant has to present an arguable defence. The solicitor submits that where there is no *prima facie* evidence of the claim made in the summons, the judge must strike out the claim. She submits that the Bank's reliance on authorities such as *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R 607 and *Harrisgrange Limited v. Duncan* [2003] 4 I.R 1 is entirely misplaced as the Bank had not established a *prima facie* claim.

18. She refers to Order 2 of the Rules of the Superior Courts in which it is permitted to use the summary summons procedure in respect of recovery of a debt or liquidated amount arising in the situations set out in the order. She refers to Order 4 rule 4 to demonstrate the requirements of that special indorsement of claim. She relies upon the judgment of Kingsmill Moore J. in *Bond v Holton* [1959] 1 I.R. 302 where he stated that "unless an indorsement on a summary summons states the cause of action or states facts which, if true, unequivocally constitute a cause of action which may be brought by summary summons, it is a bad indorsement."

19. It is important to recall that Order 37 rule 7 provides as follows:

> " 7. Upon the hearing of any such motion by the Court, the Court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just."

20. From the rule it appears open to the High Court on an application for summary judgment to dismiss the claim. It is noteworthy that Ms. Nancy McNicholas in her affidavit sought an order to dismiss the claim whereas Mr. Peter McNicholas simply said that the Bank was not entitled to the relief claimed. That would appear to be a reference to the relief claimed in the motion i.e. summary judgment. The Company's argument on this aspect of the appeal is that where the judge is satisfied that no *prima facie* case has been established on the evidence he <u>must</u> therefore dismiss the claim. A close examination of the *O'Malley* judgment, which counsel for the Bank urged on this Court, and to which I will turn momentarily, reveals that the Company is mistaken in that view of the law.

21. Prior to looking at *O'Malley*, it is appropriate to indicate that a failure to establish a *prima facie case* on affidavit when applying for summary judgment is a different circumstance from the failure to establish *a cause of action* in the special indorsement of claim in the summary summons or in the affidavit/s grounding the motion for summary judgment. In one situation the summary summons may disclose a cause of action, but the evidence presented at the motion does not prove that particular claim even on a *prima facie* basis. In the other, no cause of action is disclosed in either the summons or the evidence. As the solicitor for the Company made claims in relation to lack of a *prima facie case* and failure to establish *a cause of action*, in this judgment I will address them under separate headings. I will consider the decision in *Bond v Holton* in the section headed "No cause of action has been established". Under the present heading I address whether the failure to establish a *prima facie case* (as distinct from a failure to establish a cause of action) <u>requires</u> the Court to strike out or dismiss the entire claim.

22. In *O'Malley*, as appears from the section of the judgment headed: "4. The Issues" (and 4.3 in particular), there were two issues before the Court. One was the level of detail that needs to be included in order for a special indorsement of claim to be compliant with the Rules of the Superior Courts in this type of claim for debt and the second was the evidence which needs to be put forward to justify the grant of summary judgment. Clarke CJ. relied upon O.4. r.4 in holding that "all necessary particulars" are required. In reliance on earlier case law he held that a defendant is entitled to have sufficient particulars to enable him "to satisfy his mind whether he ought to pay or resist". In *O'Malley* he held that the details were insufficient.

23. Importantly, the Chief Justice then went on to consider the evidence required. He held "it does seem to me that it is important to emphasise that there is an obligation on any plaintiff to produce, *prima facie* evidence of their debt if they wish the court *to grant summary judgment*…" (emphasis added). That is the context through which the Company's reliance on the dicta in para 5.3 of the judgment, to the effect that the obligation on a defendant to establish an arguable defence only arises if the plaintiff has first established a *prima facie* case, must be viewed.

24. The Chief Justice again refers to the consequence of the failure to establish a *prima facie* case later in para 5.3 when he states: “There are, therefore, two questions. The first is as to whether the plaintiff has put sufficient evidence before the court to establish a *prima facie* debt. If the answer to that question is no, then the plaintiff cannot be entitled to summary judgment in any event.” In *O’Malley,* having examined the evidence, the Chief Justice stated at para 6.9, “I would, therefore, conclude that there was insufficient evidence before the High Court to justify determining that Bank of Ireland had discharged the initial onus on it to produce *prima facie* evidence of its debt.”

25. Having found that both the detail in the indorsement of claim and the level of evidence was insufficient, the Chief Justice was of the view that the justice of the case would be fully met by allowing the appeal and remitting the case to the High Court to allow both an application to amend the special indorsement of claim and to tender further evidence as appropriate.

26. From the foregoing, it is clear that the finding that there is no *prima facie* evidence to support the debt, does not *of itself* oblige the High Court to dismiss the claim. Indeed, the opposite is the case: the decision in *O’Malley* is authority for the proposition that in circumstances where there is insufficient evidence to show a calculation and justify, on a *prima facie* basis, the sum claimed, the justice of the case appears to be met by allowing the plaintiff an opportunity to produce further evidence.

27. I consider that the principal finding of Meenan J. in respect of the loan agreement was that there was a failure to particularise the claim in the summary summons in accordance with *O’Malley*. In so far as the motion judge held that there was a failure to so particularise the claim, he could, in accordance with the justice of the case, have adjourned the matter to permit the Bank amend the pleadings. In my view the motion judge never made a finding that no *prima facie* case was established in the evidence produced by the Bank on affidavit. Indeed, it must be implied that he was so satisfied because he said, having referred to the affidavit of Ms. Nancy McNicholas, that he had "misgivings as to the way in which *these loans were entered int*o and the manner in which the plaintiff bank appeared to have been conducting the business concerning the loans (emphasis added)". Thus, he appears to accept the loans were entered into but is saying there was an arguable defence that the loans were not binding on the Company because of the evidence in the affidavit filed on behalf of the Company. That is an appropriate basis for sending a case to plenary hearing.

28. I would decline to interfere with the exercise of his discretion to send the matter for plenary hearing. It would be incorrect to now send the matter back to the summary summons list to be reconsidered in circumstances where a finding has already been made that there is an arguable defence. On the other hand, even if there had been a failure of the motion judge expressly to find that no *prima facie* case had been made out on the evidence before him, in circumstances where the order has already been made to send the matter to plenary hearing and the Bank do not contest that finding, I consider that the justice of the case from the point of view of the appeal also requires that there should be no interference with the finding that the matter should be sent to plenary hearing.

Ground (b): The claim should be dismissed/struck out because of "untruths"

29. A central feature of the Company's submissions is that Mr. McGuinness averred on affidavit to several acknowledged "untruths". There are the "untruths" in relation to the entering of a Bank guarantee and in particular the advancement to the Council of the sum claimed. There is also a number of acknowledged "untruths" about the loan agreement, in particular those matters which were addressed in Mr. McGuinness's "corrective affidavit".

30. The solicitor for the Company refers to Order 37 rule 1 which required the Bank to ground the motion for summary judgment on an affidavit "sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action." In her submission the "untruths" cannot be said to be a "harmless error" in the sense referred to by Irvine J. in *Danske Bank v Kirwan* [2016] IECA 99. In her written submissions, the solicitor makes this argument under the heading "Failure [by the Bank] to establish the alleged debt on a *prima facie* basis". To the extent that the appeal is advanced on this ground it is rejected for the reasons set out above; a failure to establish a *prima facie* case in the affidavit grounding the motion for judgment does not *require* the court to strike the entire case out.

31. In her oral submissions, the solicitor again relied upon that ground in the context of the *prima facie* case. Counsel for the Bank understood however, as did the Court, that the solicitor was seeking to make a wider point; that "untruths" in affidavits grounding motions for summary judgment should lead to a dismissal of the case. The case referred to by the solicitor was *Danske Bank v Kirwan*, but that case was entirely different. It was a case concerning a contested application of whether service of the summons should be deemed good. One of the arguments made by the defendant was that O.40 r.6 required the time of day to be inserted by the commissioner who witnessed the signature of the deponent. It was in the context of the judge having ruled it was not required but then saying if she was wrong on that "The failure to state the time on an affidavit is a defect of form only and can safely be regarded as a form of harmless error."

32. In that sense any "untruths", "errors" or "misstatements" as to facts supporting the application for judgment are not "harmless errors". The circumstances here however are different to those in *Danske Bank v Kirwan*. The Bank in this case is not relying on those averments (unlike *Danske Bank* where the plaintiff was relying on the entire affidavit). The

Bank here "corrected" the averments in the Court below and in any event are not relying on any of the affidavits to seek summary judgment because they have accepted the ruling of the High Court that the matter proceed to plenary hearing and because they have withdrawn their claim in respect of the guarantee.

33. That is not to say that a court should treat lightly an averment which is accepted to have been an incorrect statement as to a fact relevant to the point at issue. All parties and all deponents must take the solemn obligation to give correct evidence seriously, no matter whether that evidence is given in oral testimony or in the form of an affidavit/statutory declaration/statement of truth. It cannot be said however, that there is any single rule for how a court may deal with an averment that may turn out to be incorrect. In one sense incorrect averments are frequent in contested cases on their facts. Usually all the court can do is decide, on the totality of the evidence, whether the particular burden of proof has been met.

34. In other cases, an averment may be acknowledged to be incorrect, but even then, it is a matter for the court to assess in each individual case how best to deal with that; it could have an impact on overall credibility or on costs for example. It could even have no bearing at all in the proceedings. This is because an incorrect statement may be made in a wide variety of circumstances ranging from a completely innocent misunderstanding of a factual circumstance made without fault, through a negligent statement, and up to a deliberate falsehood made with intent to deceive the court.

35. This Court was not provided with any examples from case-law where the entire proceedings were struck out or dismissed because of incorrect averments, regardless of any further consideration of the evidence which actually supports the claim that the plaintiff makes. It may well be that in a particular case, dismissing the case would be appropriate. That however, is far from saying that a court *must* strike out where an incorrect averment (or averments) was made regardless of other evidence. The nature, context and any correction of the averments would all be matters to take into account when deciding what the interest of justice requires. That is not to say that negligence or sloppiness does not have an impact on the outcome, as a court is entitled to reflect in the costs order the manner in which a party has conducted the pleadings, a matter which is now given statutory recognition in s.169 of the Legal Services Regulations Act 2015.

36. Moving to the facts of this case, it is certainly concerning that the Bank would issue a summary summons claiming a liquidated sum based upon an advancement made under a guarantee, when that advancement had never in fact been made. It is even more concerning that a grounding affidavit would be sworn by a Bank official that such an advancement had been made; even to the extent of "correcting" a date set out on the summons. Furthermore, when the Bank swore a "correcting" affidavit in which they claimed the debt as some type of contingent liability, they never explained how or why that mistake had been made.

37. Those are serious matters, but it is not clear that they stem from dishonesty by the Bank and its deponents. It could be that the claim and grounding affidavit arise from errors, perhaps even amounting to grossly negligent ones, in the Bank's systems of recording loans. At this point however, the Bank is no longer pursuing that claim. I consider however that in the present case it would be appropriate to mark that situation with respect to costs. I will deal with that further below.

38. Should these incorrect averments prevent the Bank from pursuing the claim with respect to the loan agreement? I will consider that in combination with the alleged "untruths" in the loan agreement.

39. The matters to which the Company refer under the loan agreement which are said to be incorrect and now agreed by the parties are a) there was no alleged agreement for the purpose of an advance on 27 April 2010 and b) that the Plaintiff did not advance the sum of €211,619.00 on 27 April 2010. The claim the Bank was making was set out in the "corrective" affidavit of

Mr. Brian McGuinness, the relevant parts of which are set out above. In my view these are matters which on their face appear less concerning than the matters regarding the “advancing” of a payment to Roscommon County Council. The main point here is that there was a failure to state that the April 2010 facility was a “rollover” of an existing facility and that when the indorsement of claim (and affidavit) said “advanced”, this was really an extension of the original loan on new terms. However, even on the affidavit of Mr. McNicholas there was a rollover of a loan. He acknowledges that in his affidavit. It is unsatisfactory that the true position was not set out in the affidavit of Mr. McGuinness, but I consider this to be a situation which on its face is less serious than the situation with respect to the bank guarantee. I say *on its face* because these issues can all be addressed in cross-examination of the Bank’s witnesses at the plenary hearing.

40. The use of the words “untruths” certainly carries with it a very negative connotation. If what is being urged is something in the nature of a deliberate untruth or a lie or perjury, I do not consider that on the papers before this Court, it is possible to reach any such conclusion. Indeed, especially in the context where it is being urged that these “untruths” require the Court to dismiss the claim against the Company for the sum of €286,101.25, I do not consider that the interests of justice would require that in this case. The “errors” in the loan agreement claim are “errors” going to the manner in which the debt is said have been incurred; the circumstances of whether that claim is justified can be examined in full at the plenary hearing. Even when combined with the more seriously incorrect and unexplained averments in relation to the guarantee to the Council, I do not consider that this case comes close to a threshold where a court would be justified in dismissing the separate proceedings for the loan agreement. If there was a doubt that this was close to a threshold, I consider that in circumstances where there has been an acknowledgement by the borrower that the Company’s debt was in effect rolled over, even though the legally binding nature of that "rollover" is at issue, the justice of the case requires that these matters be left to the plenary hearing.

Ground (c): No cause of action has been established

41. The final point made on behalf of the Company is that the case should be struck out because no cause of action has been identified. The claim under this heading incorporated aspects of the matters referred to above but also goes further in pointing to specific details regarding the various exhibits set out in the affidavits which, the solicitor on behalf of the Company submits, demonstrates that the claim made in the special indorsement of claim did not establish a cause of action. The solicitor also submits that any new loan agreement, which the Bank might seek to make either at plenary hearing or in an amendment to the summary summons would be statute barred.

42. The solicitor has relied upon *Bond v. Holton* [1959] I.R. 302 in support of her proposition that the Court had a duty to strike out or dismiss the action. The case of *Bond v Holton* involved a receiver of lands who had left certain lands in the occupation of W. who then made a conacre letting to the defendant. A promissory note for the conacre was made by the defendant but which was discounted by W. The receiver issued a summary summons when the defendant remained in occupation of the land and did not pay the conacre money to the receiver. The High Court had adjourned the summary summons application for hearing in the Circuit Court. The defendant appealed to the Supreme Court that as no cause of action had been pleaded the matter should be struck out. On the facts of the case, the Supreme Court agreed.

43. The Supreme Court gave four separate judgments (Maguire C.J., Lavery, Kingsmill Moore and O'Daly JJ). Maguire J. agreed with the judgment of Lavery J. All the judges, save the Chief Justice, were in agreement that no cause of action had been pleaded. Lavery J. said that the receiver submitted that the claim was either one for rent or under contract but held that neither claim was pleaded. On that basis, namely that the originating summary summons disclosed no cause of action, it should be dismissed or struck out. He said "whichever order is made the plaintiff will have open to him to pursue any cause of action which he may consider he can sustain." Of significance is that Lavery J. having referred to the plaintiff's cause of action not being pleaded said;

> "This is not a pleading point or one of mere technicality. If the plaintiff wished to correct by amendment any defect in his pleading the High Court or this Court would have considered an application to amend. But the plaintiff, through his counsel, declined to make any such amendment and did so for reasons which I fully understand."

Lavery J. having observed that it was unnecessary to proceed further, gave his opinion that;

> "…where a plaintiff proceeds by summary summons he must not only plead a cause of action which under the Rules may be brought by summary summons, but must support his claim by evidence. If such evidence is not forthcoming the action should be dismissed. If there is evidence but it is controverted by other evidence on affidavit the judge may decide the controversy if he considers he can do so on affidavit, but if he thinks not he will, of course, send the case for plenary hearing."

Lavery J. went on to observe that a plaintiff may be permitted to make good deficiencies of an evidential nature when he said:

> "Passing over, therefore, the failure to allege a cause of action in the summons, it is my opinion that any cause of action which could possibly be spelled out of the pleading is not supported by evidence. Of course, the plaintiff might have asked for an opportunity to make good any deficiency in the affidavit and such an opportunity would probably have been given him. It was not sought, for—I repeat myself—reasons which I can fully understand"

44. Kingsmill Moore J. commenced his judgment by recounting that "the summary summons in this case is remarkable in that, as I read it, it does not purport to specify or disclose a cause of action." He went on to consider the rules and he held that "[u]nless an indorsement on a summary summons states the cause of action or states facts which, if true, unequivocally constitute a cause of action which may be brought by summary summons, it is a bad indorsement." He held;

> "…where the summons does not specify a cause of action or disclose facts which, if true, necessarily amount to a cause of action, the defendant is entitled to have the action dismissed or struck out. He should not be forced to a plenary hearing without knowing the cause of action which is alleged against him and the facts – as opposed to the evidence- which are relied on as proving the cause of action."

The brief judgment of O'Daly J. simply deals with the fact that the only argument presented to the Court was that the claim indorsed was for money due on foot of an agreement, express or implied. As the special indorsement of claim did not support a claim in contract, he said that the summons was to be dismissed.

45. In *Bond v Holton*, Lavery J. lends support to the proposition that the consequences of a failure to evince *evidence* of the cause of action set out in the summary summons is not fatal to the action as it suggests a plaintiff may be given an opportunity to remedy the evidential deficit. In my view, however, that issue must now be considered against the backdrop of the decision of the Supreme Court in *O'Malley,* where the *dicta* of the Chief Justice indicated that the consequences of a lack of a *prima facie* case meant that *summary* judgment could not be granted. As set out at para 26 above, the position is that where no *prima facie* evidence of the debt has been established by the Court the justice of the case will be met by allowing the plaintiff an opportunity to produce that evidence.

46. *Bond v Holton* does not provide any support to the Company in advancing the argument that the special indorsement of claim does not disclose a cause of action. As set out in para 2 above, the special indorsement of claim in this case clearly discloses a cause of action; a claim for recovery of a debt or liquidated demand in money payable by the Company based upon a contract. The pleading in the indorsement of claim is entirely unlike that in *Bond v Holton* which disclosed no cause of action.

47. In so far as the Company advances the case that the evidence disclosed by the Bank does not support the cause of action as set out in the summons, the situation this Court finds itself in is that an application for an amendment of the summons has been made to the High Court. This again is entirely unlike the situation in *Bond v. Holton* where no such application had been made *even at the appellate stage*.

48. I consider that in the circumstances of the present case, it would not be appropriate for this Court to engage in a minute examination of the exhibited documentation to see if the claim advanced in the special indorsement of claim precisely mirrored that in the affidavits filed on behalf of the Bank. The reason for this is that an application to amend the summons having been made, the evidence tendered in the application for summary judgment may well support that amendment. Moreover, in so far as the Company's position is that any amendment of the claim would be statute barred, this is a matter for the High Court to decide based upon the well-established and well-known principles relating to amendments of pleadings. The justice of this case undoubtedly requires the Court to refuse the relief sought by the Company and to permit the High Court to deal with the application to amend in the first place and make whatever orders are appropriate thereafter.

49. It is noted that the Company did not at any stage bring a motion to strike out on the basis that no cause of action was disclosed in the summons or that the case was bound to fail. On the basis of the decision in *Bond v. Holton* such an application would not be required where the defendant wishes to argue at the motion for summary judgment that the case should be struck out on that basis. There is an application to amend and no doubt the Company will seek to make arguments concerning the evidence already given by the Bank in support of whatever arguments of prejudice it may wish to make.

Ground (d): The Motion should have been adjourned

50. The judgment in *O'Malley* is certainly authority for the proposition that where a special indorsement of claim does not contain sufficient particulars of claim, the motion judge should consider whether the justice of the case will be met by adjourning to permit an application to amend the special indorsement of claim. The case also supports the proposition that the justice of the case may be fully met by the motion judge adjourning the case to permit further evidence to be furnished for the purpose of filling an evidential void. As Clarke CJ. said at para. 7.1;

> "It seems to me that the justice of this case would be fully met by allowing the appeal and by remitting the matter back to the High Court on the basis that Bank of Ireland can apply to amend the special indorsement of claim to include such details as they may think are appropriate in the light of this judgment and can also tender such further evidence as may be appropriate to fill the evidential void."

51. The Bank does not take issue with the view that it may have been appropriate for the motion judge to adjourn the case for the purpose of amending the summons. The Bank submits however that here, where the Bank has already issued a motion to amend the indorsement of claim and has a date for hearing of that motion, it would not be in the interests of justice to delay the matter by requiring this case to be remitted to the summary summons list for that very purpose.

52. The view of the solicitor for the Company appears to be that there is a prejudice to the Company if the case is not remitted to the summary summons list. This view appears to stem from the view that the entitlement to object to amendments would be lost if the Bank's motion is entitled to proceed. This concern is not justified. The High Court, regardless of whether it is hearing the motion under the common law motions list or under the summary summons list, has full power to ensure that any amendment may only be permitted in accordance with the well-known and well-rehearsed rules and principles relating to amendment of pleadings. Indeed, there is in fact a risk of further prejudice to the Company should this be remitted to the summary summons list; following a decision to amend the pleadings, the High Court could decide to rehear the application for summary judgment with the possibility of granting that judgment based upon the new pleadings.

53. The Bank has not urged upon the Court that the matter be remitted to the summons list. Given the stage these proceedings have reached, I do not consider that this Court should quash the order of the High Court on the basis that there was a remittal for plenary hearing rather than an adjournment for the purpose of amending the special indorsement of claim. As discussed above, the motion judge took a view that this matter should go to plenary hearing. He did so on the basis that there was an arguable defence.

Costs

54. The High Court reserved the costs of the motion for summary judgment to the hearing of the action. Prior to the hearing of the Company's appeal, the Bank withdrew its claim in relation to the Bank guarantee. That rendered the proceedings in respect of that part of the claim moot by reason of their unilateral act. The Bank through counsel sought to explain the decision not to pursue that claim as related to the Statute of Limitations where the letter of claim for the Council was more than 6 years ago. As the solicitor for the Company observed in reply, it seems that statute may have run even before the hearing of the motion in the High Court as the only letter calling in the guarantee exhibited is that of May 2012. Those proceedings in so far as they relate to the bank guarantee are at an end now. It is therefore appropriate for the Court to make a final order dealing with the costs of the action in so far as it relates to that claim.

55. The costs of the Bank's claim in relation to the bank guarantee must be awarded to the Company. The issue for the Court is whether those costs (in the High Court and on appeal) should be divided to reflect the fact that such a claim was only 50% of the claim advanced by the Bank.

56. Even though the motion concerned two claims, only one of which has been finalised, I am satisfied that the Company is entitled to its full High Court costs in respect of the motion for summary judgment. I am so ruling because a) the issue of the Council guarantee was a substantial part of the claim made by the Bank against the Company, b) the averments made by the Bank in respect of the guarantee in both the summary summons and the grounding affidavit were incorrect in a material and unexplained manner and c) the costs of the High Court motion would not be easily divided between work done on the guarantee and work done on the loan agreement.

57. I have considered carefully the issue of costs of the appeal. Based upon the particular circumstances of this case I have reached the following preliminary conclusions. The claim under the guarantee was withdrawn but not until at least 4 months after the filing of the notice of appeal. It is difficult to see why that decision was made so late. On the other hand, the Company persisted in its appeal with regard to the loan agreement and has lost that part of the appeal. Even though the bulk of the costs may well be in respect of the hearing of the motion, at which time the Company persisted in the appeal despite its knowledge of the position regarding the claim in respect of the guarantee, I consider that the justice of the case is apparently met, especially having regard to the full Order made in respect of the costs of the High Court motion, if the Court makes an Order for the payment of 50% of the costs of the appeal to the Company and reserves 50% of the costs to the determination of the action in the High Court.

58. The parties are free to make further written submissions in respect of the above orders. I will set down the following sequence as to how that ought to come about. Each party should indicate within 14 days if it wishes to make submissions to contend for a different order for the costs of the appeal. If both parties wish to so contend, that party has a further 7 days in which to make submissions in support of their contention. If only one party wishes to apply, that part has 7 days in which to make it submissions. The opposing party has a further 7 days after receipt of those submissions to reply. The costs of all written submissions may form part of the final costs order to be made by the Court.

Conclusion

59. For the reasons set out above, I propose to make the following orders:

a) Striking out the Bank's claim in respect of a bank guarantee to Roscommon County Council as set out in paragraphs 4,5,6 and 7 of the summary summons and also striking out as much of paragraph 8 as refers to the sum of €167,000 in respect of that bank guarantee to the Council.

b) Dismissing the Company's appeal in respect of the remaining claims in the summary summons.

c) Granting the Company the full High Court costs of the motion for summary judgment.

d) Subject to the parties contesting this view on costs, granting the Company 50% of the costs of this appeal and reserving 50% of the costs of this appeal to the determination of the action in the High Court.

Whelan and Ní Raifeartaigh JJ having read this judgment have indicated that they are in agreement with it and the proposed orders.