APPROVED **[2021] IEHC 134**

THE HIGH COURT

2013 No. 2633 S

BETWEEN

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

MATTHEW WALES

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 March 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to amend the special indorsement of claim in summary summons proceedings. The amendment application has been made in light of the Supreme Court judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84; [2020] 2 I.L.R.M. 423 ("***O'Malley***"). The judgment in *O'Malley* has clarified the manner in which a claim in summary summons proceedings should be pleaded and particularised. Relevantly, the Supreme Court held that the special indorsement of claim should specify the manner in which the amount said to be due is calculated, and whether it includes surcharges and/or penalties as well as interest.

PROCEDURAL HISTORY

2. The within proceedings were instituted by way of summary summons issued on 16 August 2013. The plaintiff in the proceedings had initially been ICS Building Society.

3. The Minister for Finance subsequently approved a scheme of transfer between ICS Building Society and the Governor and Company of the Bank of Ireland ("***Bank of Ireland***") by way of statutory instrument made pursuant to the Central Bank Act 1971 (S.I. No. 257 of 2014). Thereafter, by order dated 9 November 2020, the High Court (Simons J.) directed that the title of the present proceedings be amended so as to substitute the Governor and the Company of the Bank of Ireland as plaintiff. The order further directed that the amended title of the proceedings be duly entered in the Central Office of the High Court with the proper officer. These orders were made consequent upon section 41 of the Central Bank Act 1971, and in accordance with the principles set out in the judgment of the Supreme Court in *First Active Plc v. Cunningham* [2018] IESC 11; [2018] 2 I.R. 300.

4. Save where necessary to distinguish between ICS Building Society and Bank of Ireland, the term "***the plaintiff***" as used in this judgment should be understood as referring to whichever of the two financial institutions had carriage of the proceedings at the relevant time.

5. As appears from the special indorsement of claim, the proceedings seek to recover monies said to be owed by the defendant pursuant to two loans entered into with ICS Building Society. These loans are said to have been made pursuant to loan offer letters dated 1 August 2006, and 2 August 2006, respectively. It is pleaded that the loan offers were accepted in writing by the defendant on 7 August 2006, and that the monies on both loan accounts were duly drawn down by the defendant on 26 September 2006.

6. It is also pleaded that the respective loans had been secured by way of a legal charge over two properties, namely, 21 Roebuck Castle, Clonskeagh, Dublin 14 in the case of the first loan; and 50 Whitethorn Road, Clonskeagh, Dublin 14 in the case of the second loan ("***the mortgaged properties***").

7. It may be of assistance to the reader in understanding the arguments which the parties make on the amendment application to explain now that the two mortgaged properties have been sold, and that the sale proceeds have been credited against the debt. The manner in which the sale proceeds have been treated is a matter of considerable controversy between the parties. One of the many grounds upon which the defendant seeks leave to defend the proceedings is that he did not consent to accepting liability for any shortfalls whatsoever on the sale of both properties, and that the plaintiff, in allowing the sales to proceed, tacitly agreed that the defendant had no obligation for any shortfalls.

8. It should also be explained that the sale of the mortgaged properties and the corresponding reduction in the outstanding debt is <u>not</u> reflected in either the original nor the draft amended version of the summary summons. The special indorsement of claim seeks judgment in the sum of €620,781.84, together with interest from 2 August 2013. By contrast, the sum in respect of which it is sought to enter judgment is €159,035.74 (together with interest). This sum is significantly less than that claimed in the special indorsement of claim.

9. The plaintiff issued a notice of motion for liberty to enter final judgment on 20 February 2018. To date, that motion has not yet been heard. The application for liberty to enter final judgment had been grounded on an affidavit of Mr. Gerard Browne (sworn on 13 February 2018). This affidavit does not explain the significant discrepancy as between the amounts sought in the special summons, and notice of motion, respectively, other than referring to "all just credits and allowances" having been made.

10. The defendant, in his replying affidavit of 23 April 2018, criticises this lack of detail as follows.

> "11. As appears from the Plaintiff's Notice of Motion, I say that the Plaintiff seeks to now enter judgment in the sum of €159,035.74, and as appears from paragraphs 18 and 28 thereof I say and believe that it appears that this sum is comprised of €112,555.96 in respect of account number 1537572 and €46,479.78 in respect of account number 1538941. I say and believe that this is a fundamentally different claim than what is claimed in the Summary Summons, and I say and believe that the Plaintiff has not explained adequately or at all how the sum now claimed is due and owing, other than baldly stating its composition as between account numbers 1537572 and 1538941."

11. At paragraph 25 of the same affidavit, the defendant describes the plaintiff bank's grounding affidavit as "woefully inadequate" insofar as Mr. Browne has failed to depose to the sale of the properties against which the loans the subject of these proceedings were secured.

12. In response to these criticisms, a more detailed explanation has been provided, belatedly, by the plaintiff bank. See the second affidavit of Mr. Gerard Browne (sworn on 18 April 2019) as follows.

> "7. Thereafter the Borrowers engaged with the Plaintiff with a view to completing voluntary sales of the properties. The sale of the Whitethorn Road property closed in May 2013 and the net proceeds of sale, being €845,150.00 were applied to the Defendant's account 1538941 on the 17th day of May 2013. In this regard I beg to refer to the copy statement of account in respect of account number 1538941, which is at TAB 2 of the booklet of exhibits.
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> 8. The sale of 21 Roebuck Castle closed in July 2014 and the net proceeds of sale, being €477,176.34 were applied to the Defendant's account 1537572 on 29 July 2014. In this regard I beg to refer to the copy statement of account in respect of account number 1537572, which is at TAB 3 of the booklet of exhibits."

13. It should be explained that, in addition to seeking liberty to defend on the basis of what might be described as an implied waiver of the shortfall in the sale proceeds, the

defendant also makes a more general argument that the summary summons proceedings are incorrectly pleaded in circumstances where the mortgaged properties have been sold. In particular, it is said that the securities, as pleaded against him in the original version of the summary summons, are "extinguished".

14. Separately, the defendant has issued a motion seeking to dismiss the present proceedings for want of prosecution and/or on the grounds of inordinate and inexcusable delay. That motion was issued on 23 April 2018. Again, that motion has not yet been heard.

15. The hearing before me on 1 March 2021 was confined to the application to amend the pleadings. This application is said by the plaintiff to have been necessitated as a result of the judgment of the Supreme Court in *O'Malley*.

PRINCIPLES GOVERNING AN APPLICATION TO AMEND

16. Order 28, rule 1 of the Rules of the Superior Courts provides as follows.

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

17. The parties in the present proceedings are in broad agreement as to the principles governing an application to amend, and both sides cited the judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 I.R. 383 ("***Croke***"). The parties disagree, however, as to the outcome which follows from the application of those principles to the facts of the present case.

18. Geoghegan J., delivering the unanimous judgment of the Supreme Court in *Croke*, held that the primary consideration in an application for leave to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. Geoghegan J. observed that there had been an overemphasis

in the earlier case law on an obligation to give good reason for having to amend the pleadings. As to delay in the making of an application to amend, Geoghegan J. accepted that an application to amend might properly be refused if made at a very late stage of the proceedings; for example, if made shortly before the date scheduled for the hearing of the action. A court should, however, consider whether any prejudice to the other party could be addressed instead by an adjournment and an appropriate costs order.

19. Counsel on behalf of the defendant also cited the judgment of the High Court (Humphreys J.) in *Havbell DAC v. Harris* [2020] IEHC 147 ("***Harris***"). There, the High Court, in determining an application to amend a summary summons, had applied the following three-fold test: first, the proposed amendment should be arguable; secondly, there should be an explanation for the point not having been pleaded initially; and thirdly, the other party should not be irremediably prejudiced by the proposed amendment. The High Court derived this test from an earlier judgment given in the context of an application to amend judicial review proceedings, *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725, which judgment was subsequently upheld by the Court of Appeal, *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296; [2018] 2 I.L.R.M. 56.

20. Whereas I am in broad agreement with the approach adopted in *Harris*, I would respectfully differ on the appropriateness of introducing a requirement for "arguability" into private law proceedings. The requirement to assess the "arguability" of a proposed amendment in judicial review proceedings is a consequence of the fact that an applicant is required to obtain the leave of the High Court to institute judicial review proceedings in the first place. The requirement for leave to apply is a procedural protection intended to safeguard public authorities from frivolous and vexatious proceedings. As part of the leave application, an applicant must satisfy the High Court that the grounds advanced are arguable. This procedural requirement extends, logically, to an amendment application

made in the context of extant judicial review proceedings. The test for an amendment should not be any less than the test governing the initial application to apply for judicial review. It follows that the same criteria must be met in the context of an application to amend a statement of grounds. It would be anomalous were an applicant to be able to introduce new grounds post-leave without having to satisfy the arguability threshold.

21. The same considerations do not apply to private law proceedings. There is no requirement for, say, a financial institution to obtain leave prior to the institution of summary summons proceedings. Judicial consideration of the merits of the case does not, generally, occur until such time as an application to enter final judgment comes on for hearing. It is at that stage that the rights of defendants are protected, by applying the well-established principles as set out in authorities such as *Aer Rianta cpt v. Ryanair Ltd (No. 1)* [2001] 4 I.R. 607.

22. It would be anomalous, therefore, were the court to be required to address the merits of the case, even to the limited extent of applying a threshold of arguability, in the context of an amendment application. Whereas the court will, where relevant, consider the *nature and extent* of the amendments, with a view to identifying potential *prejudice* to a defendant, it will not normally be necessary to embark upon an examination of the merits of any newly introduced claim. As it happens, none of the proposed amendments in the present case introduce a new claim which could be subject to an arguability assessment in any event.

23. Subject to the observations above, I am in broad agreement with the approach adopted by the High Court in *Harris.* Leave to amend was granted in that case. Relevantly, the court held that the judgment of the Supreme Court in *O'Malley* provided an explanation for the application to amend. *O'Malley* was described as representing a "tangible modification to the previous law". It was suggested that it would be unfair "to visit the

inconsistencies of the legal system on litigants in general or the plaintiff here in particular".

24. As to prejudice to the other side, the court in *Harris* rejected an argument that leave to amend should be refused because the defendant was said to be prejudiced in having to meet a case which, absent the amendment, could not succeed. The court explained that requiring a party to answer a potentially winning argument is not legally cognisable prejudice in the context of an application to amend. The court then provided the following examples of the type of irremediable prejudice which might result in the refusal of leave to amend (at paragraph 15).

> "Prejudice for these purposes could, for example, involve a party having embarked on a particular course of action in reliance on a posture set out in the other parties' pleadings, such that it would be unjust to allow that other party to resile from such a posture; or perhaps derailing a date fixed for hearing. Such factors do not arise here, and any prejudice to the defendants can be addressed in terms of costs."

25. Humphreys J. stated his conclusion on the application to amend in *Harris* as follows (at paragraph 16).

> "My view that an amendment should be allowed here is reinforced by the fact that this is what happened in *O'Malley* itself. The court remitted the matter back to the High Court to allow the bank to apply to amend the summary summons there (see para. 7.1). In the light of all of these matters, the amendment should be allowed in the interests of justice and to allow the real issues in controversy to be addressed."

DISCUSSION AND DECISION

26. As appears from the case law discussed above, the primary consideration in an application for leave to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation.

27. The granting of leave to amend a pleading is, of course, discretionary. One of the factors to be considered is whether the making of the amendment would cause prejudice to the

other side. In assessing prejudice, it is relevant to consider whether any potential prejudice which might otherwise have arisen can be avoided by way of an adjournment or an appropriate order for costs. The court should consider whether there is some step, short of the refusal of leave to amend, which can be taken to ensure justice between the parties.

28. I am satisfied that the limited amendments sought in the present proceedings are necessary to ensure that the real questions of controversy in the litigation are before the court. The Supreme Court in *O'Malley* has clarified the manner in which a claim should be pleaded and particularised in summary summons proceedings. The judgment held, in relevant part, that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. The defendant to a summary summons is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist.

29. The requirement to provide sufficient particulars is intended as a protection to a defendant to debt collection proceedings. It is, therefore, perhaps surprising that a defendant would resist an application to amend a summary summons by providing proper particulars. Whereas a defendant might well be critical of the fact that the requisite particulars had not been provided by a plaintiff from the outset, it can hardly be said that the amendment is not necessary. The precise purpose of such amendments is to ensure that the defendant, and, ultimately, the court, has before it the details of the claim being advanced. It would not be an appropriate exercise of discretion to refuse an application to amend merely to "punish" or otherwise sanction a plaintiff for not having properly

pleaded their case from the outset. Different considerations would, of course, obtain were the delay to have caused prejudice to the defendant.

30. Counsel on behalf of the defendant in the present proceedings was critical of what he characterised as an attempt by the plaintiff to mend its hand, as it were, by introducing particulars which we now know, following the judgment in *O'Malley*, should have been included in the original summary summons when issued in August 2013.

31. The logic of the defendant's position, however, would be to create a form of Catch-22. A plaintiff would be criticised for not providing the proper particulars as required, but would then be precluded from making an application to amend the proceedings precisely because the particulars had not been provided in the first instance. This seems to me to be an overly technical approach, and would be contrary to the rationale underlying the judgment of the Supreme Court in *O'Malley*. The ultimate objective is to protect a defendant's rights of defence by ensuring that they have sufficient particulars of the case which they have to meet. Ideally, of course, this would be done at the time the summary summons issued. If, however, as is the case with a large number of proceedings which had already been issued prior to the delivery of the judgment of the Supreme Court in *O'Malley* in November 2019, the particulars are found wanting, then the remedy is to allow the plaintiff to amend the pleadings. This is subject to the following safeguards.

32. First, the purpose of the amendment is to allow particulars of debt to be provided. If a plaintiff attempts to go beyond this, and to introduce a new cause of action or to change the case in a significant way, then the court hearing the application for leave to amend would have to carefully consider whether such an amendment is appropriate. If, for example, an issue was to arise in relation to the Statute of Limitations, then it might be appropriate to refuse leave to amend.

33. Secondly, the court should have regard to any prejudice caused by a delay in seeking to amend. It is now some fifteen months since the judgment was delivered in *O'Malley*, and the further the remove from that date, the greater the prospect that an application for leave to amend will be refused by reason of delay. It is important, however, to emphasise that delay in and of itself is not necessarily inimical to the cause of justice; the delay would have to be shown to have caused some prejudice to the defendant.

34. On the facts of the present case, counsel for the defendant makes the point that his client has been seeking further and better particulars since 2018, that is, well in advance of the delivery of the judgment of the Supreme Court in *O'Malley* in November 2019. It is said that this feature distinguishes this case from other proceedings where an application to amend has been allowed (such as, for example, *Harris* discussed earlier).

35. With respect, I do not think that this distinction is decisive. It appears from the affidavits filed that the gravamen of the complaint being made on behalf of the defendant in 2018 was directed to particulars of the allocation of the sale proceeds of the two mortgaged properties as against the outstanding debt. There is only a limited overlap between the complaint raised by the defendant and the proposed amendments. The proposed amendments are confined to the calculation of the debt as it stood before any credit was allowed for the sale of the mortgaged properties. In this regard, it will be recalled that one of the very unusual features of the present proceedings is that the sum in respect of which liberty to enter final judgment is sought is significantly lower than that sought in the special indorsement of claim. This will remain the position even if the proposed amendments are allowed.

36. It is correct to say that a period of twelve months had elapsed between the date of the delivery of the judgment of the Supreme Court in *O'Malley* and the issuing of the motion to amend. However, for some nine months of this period, court sittings were restricted

in order to comply with the public health measures introduced in response to the coronavirus pandemic. Put otherwise, this was not a typical twelve-month period, and even had Bank of Ireland moved earlier, the motion might not have come on for hearing much sooner than it did (1 March 2021).

37. The other objections which the defendant makes to the proposed amendments to the indorsement of claim are ones which, in truth, go to the underlying merits of the proceedings. The defendant's answer to the proposed amendment is, in effect, to say that the proceedings are misconceived. The defendant has consistently complained that the within proceedings are irregular in circumstances where one of the mortgaged properties had already been sold by the time these proceedings were issued. The defendant also makes complaint in respect of the manner in which the plaintiff obtained orders for possession against him in proceedings issued before the Circuit Court. The defendant further asserts that the plaintiff, in allowing the sales of the mortgaged properties to proceed, tacitly agreed that the defendant had no obligation for any shortfalls. With respect, these are all matters which properly fall to be addressed in the context of an application to enter judgment, and not in the context of an amendment application.

38. The defendant complains that the proposed amendments entail the insertion, into the special indorsement of claim, of the terms of the mortgage deed. This is said to be inconsistent with the plaintiff's previous stated position that it is not relying on the mortgage deed. With respect, this complaint is not well made. It is apparent from the wording of the proposed amendment that the additional wording is referable to the letters of loan offer, and not to the subsequent mortgage deed. The letters of offer have been exhibited by Mr. Browne in his first affidavit, and include, as part of the general and special conditions, a clause in the following terms.

> "Interest at the fixed or variable interest rate prevailing from time to time during the term of the loan, shall be calculated on the daily

> balance outstanding and shall be compoundable at such monthly, quarterly or other period rests as the Society shall, from time to time and at any time, in its absolute discretion determine."

39. In truth, the proposed amendments are very minor in nature. They are directed, in the most part, to setting out the basis on which interest has been calculated.

40. The defendant also complains that the date to which interest has been calculated has been amended from 2 August 2013 to 31 July 2013. The wording of the proposed amendment explains that the latter date is the last rest date prior to the issue of the within proceedings. (As appears from the condition set out above, compound interest was to be calculated by reference to periodic rests). The defendant asserts that the plaintiff is statute barred in seeking, at this late stage, to amend the nature of the proceedings and to change material dates. No explanation has been provided, however, as to how the changing of a date in 2013 by a mere three days would have rendered proceedings, which had been issued within the very same year, statute barred. I am satisfied that this change causes no prejudice to the defendant.

CONCLUSION AND FORM OF ORDER

41. The proposed amendments are necessary to ensure that the real questions of controversy in the litigation are before the court. The making of the proposed amendments does not give rise to any prejudice to the defendant. Accordingly, an order will be made granting the plaintiff leave to amend the pleadings in accordance with the draft amended indorsement of claim exhibited in the grounding affidavit of 4 November 2020.

42. It should be emphasised that insofar as this judgment addresses the question of delay, it has done so in the very specific context of the delay in making the application to amend. This judgment has nothing to say on the question of delay in the proceedings more

generally. That remains a matter to be addressed in the context of the defendant's application to dismiss the proceedings.

43. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

44. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "*entirely successful*" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. Order 99, rule 2 of the Rules of the Superior Courts provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

45. The defendant has a *prima facie* entitlement to his costs of the motion in circumstances where the necessity for the application to amend arose as a result of shortcomings in the initial pleading of the case by the plaintiff. Whereas the defendant did oppose the application, unsuccessfully, I am nevertheless of the provisional view that he is entitled to his costs and that he was entitled to raise the issue of delay. An application to the court would have been necessary in any event.

46. If the plaintiff wishes to contend for a different form of costs order, then it should notify the defendant's solicitor accordingly and file written submissions within two weeks of today's date. Such submissions are not to exceed 2,000 words.

47. More generally, it seems to me that this is a case which would benefit from case management. I propose to list the matter before me on Tuesday 13 April 2021 at which stage I will give further directions in relation to the outstanding motion to dismiss the proceedings for want of prosecution and the application to enter final judgment.

Appearances

Nevin Powell for the plaintiff instructed by Fieldfisher Solicitors
Conor E. Byrne for the defendant instructed by Wales & Co. Solicitors

Approved Garrett Simons