

THE HIGH COURT

[2022] IEHC 247  
[2020/300 S]

BETWEEN

CABOT FINANCIAL (IRELAND) LIMITED

PLAINTIFF

AND

MICHAEL KEARNEY

DEFENDANT

**RULING of Mr. Justice Holland delivered on the 29<sup>th</sup> of April, 2022**

1. By notice of motion for summary judgment dated 31<sup>st</sup> May, 2021 and grounding affidavit of Tom Dillon sworn on that date, on foot of a summary summons issued 29<sup>th</sup> September 2020, the Plaintiff claimed judgment for €209,825.41, as the most recent assignee of the lender's interest in a loan made in August, 2000 by First Active plc to the Defendant<sup>1</sup>. The parties are agreed that the claim should go to plenary hearing<sup>2</sup>, but disagree as to the appropriate order for costs at this point.

2. The Defendant seeks the costs of the proceedings to date. The Plaintiff says that the costs of summary proceedings to date should either be made costs in the cause or be reserved. This judgment addresses only that issue of costs.

3. The Defendant says that this case should not have been commenced by summary summons, should have been commenced by plenary summons and that he has been unnecessarily put to the cost of the summary process to date. The Plaintiff says that it was legitimate to sue for a liquidated sum by summary summons – if only in the expectation that the summary process would make clear whether the Defendant would defend the action.

**Costs - General**

4. Insofar as here relevant, **Ss.168 and 169 of the Legal Services Regulation Act 2015** provide, as to costs, as follows

*“168. (1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—*

*(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or*

*.....*

*(2) Without prejudice to subsection (1), the order may include an order that*

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<sup>1</sup> The loan was made jointly to him and another person not involved in these proceedings. That is irrelevant to present concerns

<sup>2</sup> I have already made an order to that effect but in doing so reserved my decision as to costs.

*a party shall pay —*

- (a) a portion of another party's costs,*
- (b) costs from or until a specified date, .....*
- (c) costs relating to one or more particular steps in the proceedings,*

.....

*169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including —*

- (a) conduct before and during the proceedings,*
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
- (c) the manner in which the parties conducted all or any part of their cases,*

.....

*(2) .....*

*(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.*

**5. Order 99 of the Rules of the Superior Courts** provides, inter alia, as follows:

*"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*

*(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*

.....

*(3) 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."*

*3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, ..... shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.*

**Summary Procedure - General**

**6.** It is necessary to review the basis on which summary judgment may be sought and granted as that sheds light on the issue of costs which now arises.

7. In **Promontoria v Burns**<sup>3</sup> and **AIB v Cuddy**<sup>4</sup> Collins J observed that Order 37 RSC, which provides for summary judgment, “*is intended to provide a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly<sup>5</sup> due and owing.*” Collins J observed that:

*“It is obviously in the public interest, as well as the interests of creditors, that there should be such a mechanism and that it should operate effectively. It is not in the interests of the public - or in the interest of the parties - that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delays and cost that such a hearing involves and the additional burden thereby placed on the resources of the justice system.”*

8. However, Collins J provided vital context in observing that summary judgment can be obtained only within the “*proper parameters*” and “*critical guardrails*” provided by Order 37 RSC - for the very reason that:

*“A defendant against whom summary judgment is granted is thereby deprived of a full hearing on the merits. Ordinarily, they will not have an opportunity to cross-examine the deponent(s) for the plaintiff, will not be able to compel third parties to give evidence by way of sub-poena and will have no opportunity to seek discovery or avail of any of the other litigation tools available to parties in plenary proceedings. That is justified and proportionate where – and only where – “it is very clear that there is no defence”<sup>6</sup>: Harrisrange<sup>6</sup>, paragraph 9(ix).”*

9. Collins J spoke to a question whether a defendant had shown a bona fide defence but his rationale applies equally to the necessity of the Plaintiff’s first showing a prima facie claim. It is important that summary judgment be available as an option in claims for liquidated demands but also important that the “*guardrails*” reflect the fact that summary judgment deprives the defendant of trial – which is the default mechanism for resolving legal disputes.

10. In similar vein, McKechnie J in **Harrisrange**<sup>7</sup> described the guardrails in some detail. Here it suffices to note his view that the jurisdiction to give summary judgment must be exercised with “*discernible caution*” and that:

*“... the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.”*

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<sup>3</sup> Promontoria (Aran) Ltd v. Burns [2020] IECA 87 (Court of Appeal (civil), Baker J, Collins J, 7 April 2020)

<sup>4</sup> AIB v Cuddy [2020] IECA 211

<sup>5</sup> Emphasis added

<sup>6</sup> Harrisrange Ltd v Duncan [2003] 4 IR 1

<sup>7</sup> Harrisrange Ltd. v. Duncan [2003] 4 I.R. 1

11. It is important to state that there is nothing to prevent a plaintiff issuing a plenary summons claiming, with a view to trial in the ordinary way, repayment of a loan. The question, in deciding to issue a summary summons rather than a plenary summons is not whether the plaintiff is entitled to judgment but is whether it is entitled to summary judgment.

12. **Hyland**<sup>8</sup>, though not citing authority, sets out what appears to me to be a correct proposition that:

*“The operative considerations in initiating an action on summary summons are whether the action can be proved at trial on affidavit and documentary evidence and how the action will be defended. A plaintiff should not initiate an action on summary summons which cannot be proved on affidavit or documentary evidence and requires oral evidence; doing so will create an unnecessary step in the proceedings – the summary trial, prior to an inevitable plenary hearing.”*

Those who generate unnecessary steps in proceedings are at appreciable risk of having to pay the costs of those steps.

### **O’Malley**

13. By its 2019 decision in **Bank of Ireland Mortgage Bank v O’Malley**<sup>9</sup> (“O’Malley”) the Supreme Court considered, in a claim on a bank loan, both

- the level of detail of the debt which must be specially indorsed by way of particulars on the summary summons
- the evidence required to substantiate the claim for specifically summary judgment.

These were not precisely the issues Collins J had in mind in *Promontoria v Burns* and *AIB v Cuddy* when he referred to “guardrails” – but the word applies just as well to them and for the same reasons as stated by Collins J.

14. As the pleading and evidential obligations largely overlap, Clarke CJ in *O’Malley* considered both questions together. But it is important to observe, and is clear from the judgment of Clarke CJ, that the pleading and evidential obligations are separate and that the Plaintiff must satisfy both. That rule appears to go back at least to **Gold Ores Reduction Co v Parr**<sup>10</sup> and **Sheba Gold v Trubshawe**<sup>11</sup> cited in the **White Book 1997**<sup>12</sup> for the proposition that an affidavit grounding an

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<sup>8</sup> Summary Summons Practice and Procedure, Roundhall, 2021, §2.05

<sup>9</sup> [2019] IESC 84

<sup>10</sup> *The Gold Ores Reduction Company, Limited V. Parr* [1892] 2 QB 14, 61 LJQB 522, 40 WR 526, 36 Sol Jo 524, 66 LT 687 -

<sup>11</sup> *Sheba Gold Mining Company, Limited v Trubshawe* [1892] 1 Q.B. 674

<sup>12</sup> Vol 1 §14/1/4

application for summary judgment cannot correct or supplement an inadequate special indorsement on the summons, which must be complete and good in itself and must be amended if defective before judgment can be got on it.

15. Mr O'Malley did not dispute that he had taken the loan and was in arrears as to its repayment. Clarke CJ observed *"That quite a significant amount of money was likely to have been due can hardly be doubted .."*. Clarke CJ found that *"the elements of the claim other than those which related to the calculation of the amounts said to be due were adequately particularised in the summary summons. Those matters were also clearly established in evidence. The fact of the loan agreement, the drawdown, the existence of arrears and the calling in of the full sum were all fully established. The only question, therefore, concerns the detail of how the amount said to be due was calculated."* In many respects, therefore, Mr O'Malley's merits were poor – yet the Bank notably failed to get summary judgment.

16. Clarke CJ considered it *"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."* That is the first item on the agenda in a motion for summary judgment. Clarke CJ made clear that until it has met that obligation *"the plaintiff cannot be entitled to summary judgment in any event"* and the question whether the defendant has a defence does not even arise. Clarke CJ said *"..... the plaintiff must establish the liquidated debt on a prima facie basis before it is necessary for the defendant to establish any defence ..."*.

17. Clarke CJ noted that **O.4, r.4 of the Rules of the Superior Courts** required that the special indorsement of claim on a summary summons *"state specifically and with all necessary particulars the relief claimed and the grounds thereof"* and that the purpose of that rule was to ensure that the defendant properly knows the case he has to meet. Clarke CJ approvingly cited Cockburn C.J. in **Walker v Hicks**<sup>13</sup> as stating the relevant rationale:-

*"I think a party, who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist... It seems to me that a party is entitled, before summary proceedings for judgment are taken against him, to know specifically what is the claim against him."*

18. Clarke CJ observed that:

*"..... a party claiming a liquidated sum gets the benefit of the summary procedure precisely because it is said that a specified amount of money is due. In those circumstances, it is not*

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<sup>13</sup> (1877) 3 Q.B.D. 8, at p. 9

*unreasonable to require the plaintiff to show some basis to explain the calculation and justify, on a prima facie basis, the sum claimed.*"<sup>14</sup>

19. Likewise, in **Sheba Gold**, Lord Coleridge, C.J. said:

*"It is important that a man, who is to be proceeded against summarily for judgment, should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation."*<sup>15</sup>

20. Clarke CJ made clear that the summary summons must give particulars, in essence, of how the sum claimed is calculated. That can be done either by setting those particulars out in the summons itself or by stating in the summons that, as Clarke CJ put it, *"it is calculated in accordance with some identified document or documents already sent to the defendant, then he has sufficient information, provided that those documents, in turn, themselves provide the necessary detail"* – thereby and by reference incorporating those documents into the summons.

21. Mr O'Malley resisted summary judgment on the basis that the Bank had not identified or proved the amount of the principal sum still owing, the interest accrued and any surcharges and/or penalties applied and had not provided a calculation of the amount claimed. He complained, citing **AIB v Marino Motor Works**<sup>16</sup>, that neither he nor the court was in a position to check, on the information available, that the figures were correct.

22. The deficiency in the information available in O'Malley was that there was *"no indication in the Statement of Account as to how the so called "closing balance" of €221,795.53 was calculated"* – which amount was *"not specified as deriving from any particular form of calculation based on other figures contained in the Statement of Account"*. A particular difficulty was *"the absence of any indication on the Statement of Account as to the interest rate actually being applied from time to time would not have made it easy to ascertain whether the rates actually being applied were those which had been notified."* Clarke CJ continued:

*"6.7 But it does not seem to me to be too much to ask 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. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations.*

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<sup>14</sup> Emphases added

<sup>15</sup> Emphasis added

<sup>16</sup> *Allied Irish Banks v. Marino Motor Works Ltd.* [2017] IEHC 522

*A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard.*

*The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis.*

*Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court.*

6.8 *It does not seem to me that it is necessary to be prescriptive about precisely how a financial institution should set out such information, but it is obvious that the system which generated the Statement of Account must have had some inbuilt methodology for calculating the closing balance. The problem is that the relevant methodology is not clear from the document or from any other evidence. A defendant who wishes to proceed to a plenary hearing has to do more than merely assert a defence. This obligation cuts both ways. The particularisation of the amount of the claim must also go beyond mere assertion on the part of a plaintiff if they are to benefit from the use of the summary procedure.”*

**23.** O’Malley, though grounded in caselaw and rationale of considerable vintage, represented in practice a new view, more demanding of Plaintiffs, of the particulars and evidence required to get summary judgment on a bank loan or similar debt. Plaintiffs who issued their summary summonses before O’Malley was decided are not generally to be criticised for failing to meet its standards as to pleading, though they generally must amend their pleadings to render them O’Malley-compliant. The resultant applications to amend such summary summonses to comply with O’Malley are a commonplace at present.

**24.** Typically in practice, O’Malley compliance is met by the plaintiff’s having provided to the defendant, prior to issue of the summary summons and then referring therein to, a statement of the account from drawdown of the loan, including detail of any interest rate changes and interest and other charges imposed from time to time. These statements are then exhibited to the affidavit grounding the application for summary judgment.

### **Bank of Scotland v Fergus & Havbell v Harris**

**25.** In **Bank of Scotland v Fergus**<sup>17</sup> (“Fergus”) Charleton J cited O’Malley and observed that:

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<sup>17</sup> [2019] IESC 91 (Unreported, Supreme Court, Charleton J, 18th December, 2019)

*“The requirement for particularity, on a summary summons is necessary because if no appearance is entered<sup>18</sup> to a liquidated claim, judgment may be marked in the Central Office of the High Court.....When an affidavit explaining the nature of the debt is put in by a bank it is necessary for that bank to indicate clearly what sum is capital, arising from what loan, what sum is interest and charged on which account, if there are many, and how, if this arises, penalties are calculated by way of increased interest charges on overdue loans or overdraft facilities drawn in excess without permission.”*

**26.** This observation seems to me to reflect that fact that, even where a Defendant does not appear to proceedings, nonetheless the Plaintiff seeking judgment must plead and prove, by affidavit of debt, a prima facie case for judgment. If, for example, the summons and affidavit are not O’Malley-compliant, judgment will be refused. This implies that a Plaintiff, knowing it does not have the necessary proofs, is not entitled to issue an O’Malley-deficient summary summons and on foot of an O’Malley-deficient affidavit seek summary judgment on a *“let’s see if the Defendant denies it”* basis. I need not decide if issuing summary proceedings in those circumstances is proper: I need only decide where the costs of the summary process should lie if a Plaintiff takes that course and, for want of O’Malley-compliant pleas and proofs, is sent to plenary hearing.

**27.** Charleton J continued:

*“The nature of these requirements is to put a debtor in a position where on an individualised basis he or she may see where perhaps a mistake has been made or where interest may have been overcharged or penalties may have been misapplied. .... it is ... required of a plaintiff financial institution to make it clear as to the precise basis<sup>19</sup> that a sum of money is owed.”*

**28.** In **Havbell v Harris**<sup>20</sup> the plaintiff sued as assignee of a loan and the defendant cited O’Malley in resisting summary judgment. Inter alia, Humphreys J held that a plea in the summons that *“the defendants have been regularly supplied with statements of account ...”* does not constitute incorporation of an *“identified”* document in the summons by reference - as required by O’Malley.

**29.** Humphreys J also held that enabling a debtor *“to know whether interest may have been overcharged implies that the interest rate as it varies from time to time has to be specified together with the periods involved.”* Humphreys J considered Charleton J’s use in Fergus of the words *“precise basis”* an *“illuminating gloss”* on O’Malley such that, as to particulars of pleading, *“The jurisprudence is clear that the amount claimed must be explained and indeed explained precisely.”*

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<sup>18</sup> Emphasis added

<sup>19</sup> Emphasis added

<sup>20</sup> Havbell DAC v Harris & Anor [2020] IEHC 147 (High Court (General), Humphreys J, 21 February 2020)



## ACC v Hanrahan

30. The plaintiff relies on the Supreme Court decision in **ACC v Hanrahan**<sup>21</sup> (“Hanrahan”) - which preceded O’Malley. The defendants got their costs of two hard-fought summary judgment applications, which resulted in both proceedings being remitted to plenary hearing. The plaintiff appealed only the costs orders. Clarke J cited **Delany and McGrath**<sup>22</sup> as correctly stating the law as follows:

*“Where the motion for judgment is unsuccessful and the defendant obtains leave to defend, the court’s discretion is circumscribed by Order 99, rule 1(4A)<sup>23</sup> which requires the court, upon determining any interlocutory application, to 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. It can be argued that a defendant should be entitled to costs on the basis that he has been successful in defeating the motion for summary judgment. However, given that an application for summary judgment is an integral part of the summary summons procedure, that the threshold for being granted leave to defend is relatively low<sup>24</sup> and that the plaintiff may well succeed at the full hearing, it would seem that the best course of action in most cases is to make the costs of the application for summary judgment costs in the cause.”*

31. I of course accept the foregoing – but note the words “most cases” as necessarily implying the possibility of exceptions to the general rule that such costs be made “costs in the cause”.

32. Clarke J analysed the application of Order 99, rule 1(4A) to interlocutory determinations “where, at least to a material extent, some of the issues which are before the Court at an interlocutory stage arise or are likely to arise again at the trial in at least some form.” As to motions for summary judgment, he considered that there could be particular factors suggesting deferral to trial of a decision on the costs of the motion:

*“In many cases a defendant puts forward evidence of facts which, if they were to be established at trial, might well provide an arguable defence. But when the case goes to trial that evidence may well be rejected after careful analysis by the trial court. .... it may well not be just that a defendant should get the costs of a summary judgment motion (even if it was clear, on the basis of the affidavit evidence, that the matter would have to go to plenary hearing) if, with the benefit of hindsight after trial, it was clear that the facts asserted as providing a defence were not correct.”*

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<sup>21</sup> ACC Bank plc v. Hanrahan [2014] IESC 40, [2014] 1 IR 1

<sup>22</sup> Civil Procedure in the Superior Courts, Delany and McGrath, 3rd Ed. §26-87

<sup>23</sup> The relevant rules have since been replaced in the form of SI 584 of 2019, but to similar effect as relevant

<sup>24</sup> In Allied Irish Banks Plc v Purcell, [2018] IEHC 534 Barrett J said “the hurdle to be surmounted by the third-named defendant as regards having this matter sent to plenary hearing is notably low.”

3.7 For those reasons it seems to me that, certainly in cases where a material part of the defence put forward is based on an assertion of facts which are contested by the plaintiff, there will be many cases where it will not be possible to justly determine the costs of a summary judgment motion for a trial judge may be in a much better position to reach a judgment on such matters in the light of the ultimate outcome of the case on the facts.”

**33.** Clarke J considered that “in the majority of cases, the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause.”<sup>25</sup>

**34.** But Clarke J acknowledged that it was in accordance with the principle behind O.99, r.1(4A), that:

“..... the Court should retain, in an appropriate case, an entitlement to impose some or all of the burden of the costs of the motion for summary judgment on an unsuccessful plaintiff if the Court is satisfied that the plaintiff acted unreasonably in the way in which the motion was approached including any unreasonable failure to agree to a matter going to plenary hearing in the light of affidavits filed. In such a case a plaintiff who acts unreasonably in that manner must be at risk that any additional costs incurred by virtue of a lengthy and disputed summary judgment application (which becomes a centre of costs in itself) may be awarded against them.”

**35.** Clarke J considered that “there may be circumstances where the Court remitting the matter to plenary hearing is satisfied that a plaintiff has acted in a particularly unreasonable manner in not agreeing to the matter going to plenary hearing. In those circumstances the Court should consider whether the justice of the case requires that some or all of the costs of the summary judgment motion should be borne by the plaintiff who has acted in such a manifestly unreasonable way.” He held that:

“the proper question to be asked is as to whether it can be said that ACC acted in a manifestly unreasonable way in failing to agree that the matter should go to plenary hearing, at least when all of the replying affidavits had been filed, thus leading to a lengthy and costly hearing on the question of whether summary judgment should be granted. .... the proper course of action to adopt is for this Court to ask itself the question. Is there a sufficient basis on which it can be said that ACC acted in a manifestly unreasonable way so as to displace what might be considered to be the normal position of costs in cases such as this being directed to be costs in the cause or being reserved to the trial judge?”

**36.** On considering the evidence, Clarke J could not:

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<sup>25</sup> His elucidation of which is appropriate in a given case need not detain us here.

*“conclude that there is any legitimate basis for suggesting that ACC acted in a manifestly unreasonable way. It is true that ACC failed to secure summary judgment. However, that failure falls quite a distance short of establishing that ACC acted so unreasonably in putting forward argument on the matter that costs should be awarded against them. It seems to me to follow that the trial judge was incorrect to award costs against ACC and that the trial judge should, instead, have ordered that the costs be costs in the cause.”*

**37.** Some brief observations are appropriate at this point:

- Notably, what had been before the High Court in Hanrahan was a decision whether “a sufficiently arguable defence had been established to require that the case be remitted to plenary hearing”. No question appears to have arisen whether ACC had shown a prima facie case for judgment. So ACC was entitled to put the defendant to showing an arguable defence. The Plaintiff never reached that position in the present case.
- In the present case the matter never got to the hearing of the motion for summary judgment. The case is going to plenary hearing by consent because the Plaintiff accepts that, as yet at least, it cannot prove a prima facie case for summary judgment in the liquidated sum claimed. It also accepts that it has not pleaded its summary summons to the O’Malley standard.
- Hanrahan preceded O’Malley and the cases which have followed it.
- While the “manifestly unreasonable” standard clearly applies to a plaintiff’s decision to argue that a proffered defence is unarguable, it does not seem to me to follow, or be required by Hanrahan, that the same standard should necessarily apply to the earlier decision to issue summary rather than plenary proceedings or to pursue summary judgment by motion in the absence of the necessary evidence by reference to the question whether, in light of O’Malley, the Plaintiff can both plead and show by evidence a prima facie case for the specific liquidated sum claimed.

## Chronology

**38.** The chronology is important. It is as follows:

Date	Event	Comment
21 Aug 2000	The Defendant signed a Loan Offer and Loan Acceptance document proffered by First Active plc	
12 Jan 2018 &	Cabot Asset Purchases (Ireland) Limited acquired the loan from Promontoria and assigned it to the Plaintiff	

Date	Event	Comment
31 May 2019		
29 Nov 2019, 18 Dec 2019 & 21 Feb 2020	Supreme Court decisions in O'Malley and in Fergus and High Court decision in Havbell v Harris	
29 Sept 2020	Summary Summons Issued Inter alia it pleads that <i>"The Plaintiff claims the sum of €209,825.41 ..... full particulars of which have already Been furnished to the Defendant ..."</i>	<ul style="list-style-type: none"> <li>• No more detailed particulars are pleaded.</li> <li>• The Plaintiff must be taken to have issued this summons in the knowledge of O'Malley, Fergus and Havbell v Harris.</li> <li>• The summons does not contain the particulars required by those decisions. It is clearly not O'Malley-compliant.</li> </ul>
21 Oct 2020	The Defendant appeared in person to the summons.	
31 May, 2021	<p>The Plaintiff issued a motion for summary judgment</p> <p>Grounding Affidavit of Tom Dillon</p> <ul style="list-style-type: none"> <li>• This recites and exhibits copies of the First Active plc Loan Offer and Loan Acceptance signed by the Defendant on 21 August 2000.</li> <li>• It asserts, but exhibits no record of, drawdown of the loan and default by the Defendant. It does not specify the event or date of default.</li> <li>• It recites and exhibits records of the various assignments of the loan, ultimately to the Plaintiff.</li> <li>• It exhibits a demand for repayment, dated 6 January 2020, by the Plaintiff to the Defendant.</li> <li>• It asserts at §16 that <i>"Prior to 12 January 2018 the Defendant received Statements of account from the Plaintiff's predecessors confirming the outstanding balance due, details of all interest applied to the overdue account from the date of drawdown to that date and recording all</i></li> </ul>	<ul style="list-style-type: none"> <li>• The Plaintiff must be taken to have issued this motion in the knowledge of O'Malley, Fergus and Havbell v Harris.</li> <li>• The demand dated 6 January 2020 did not enclose any statements of account.</li> <li>• Neither §16 nor §19 of the Affidavit are O'Malley-compliant.</li> <li>• No calculations are interrogable in respect of the operation of the loan account in the 15 years from the drawdown of the loan to</li> </ul>

Date	Event	Comment
	<p><i>payments made by the Defendant prior to that date</i></p> <ul style="list-style-type: none"> <li>• It exhibits at §19, as “confirming the amount due and owing” a Statement of Account <ul style="list-style-type: none"> <li>○ It is dated 18/01/18.</li> <li>○ It is printed on the paper of Link ASI Limited which identifies itself as manager of the loan as a service provider to Promontoria (Finn) Limited</li> <li>○ Its first entry is dated 24/10/2015 and describes an “Opening balance” of “(190,472.31)”.</li> <li>○ Its last four entries, in 12/17 and 1/18, record a balance of “(209,825.41)” and sale of the loan to Cabot</li> </ul> </li> <li>• It exhibits an “Account details” document dated 24<sup>th</sup> May 2021 sub nom the Plaintiff and recording only an opening balance on 13/01/2018 of €209,825.41</li> </ul>	<p>the first entry in the exhibited statement.</p>
<p>5 July 2021</p>	<p>Solicitors came on record for the Defendant</p>	
<p>23 July 2021</p>	<p>Replying Affidavit of the Defendant.</p> <ul style="list-style-type: none"> <li>• Essentially this puts all matters in issue and the Plaintiff to their proof.</li> <li>• It complains <ul style="list-style-type: none"> <li>○ of failure to give proper particulars or evidence of calculation of the alleged debt, including as to the application of interest and any surcharges and penalties.</li> <li>○ that the Plaintiff has not provided statements of account for the period prior to 30 October 2015.</li> <li>○ of failure to give proper particulars or evidence of default.</li> <li>○ of various other matters of defence which I need not recite here.</li> </ul> </li> </ul>	

## Discussion & Decision

**39.** One could argue that there has been, as yet, no event from which costs should follow – the case is adjourned by consent to plenary hearing. But there is no doubt that the Plaintiff has failed to get the summary judgment it claimed and which was the specific purpose of its launching summary,

as opposed to plenary, proceedings. As **Hanrahan** explains, that ordinarily does not prompt an award of costs against a plaintiff – at least where the adjournment proceeds from the defendant’s having shown an arguable defence. But that is not why this case is being adjourned to plenary hearing. When the matter came before me on 25 April 2022, it was clear that the Plaintiff’s papers were not and had never been, as to particulars or evidence, O’Malley-compliant and that the Plaintiff could not have obtained summary judgment on those papers. While the matter was sent to plenary hearing by consent, it is clear that this was in reality the only course open to the Plaintiff short of abandoning the proceedings.

**40.** What the Plaintiff did abandon was its claim to specifically summary judgment and it did so not because of a defence put up but because of the deficiency in its own papers: there is here at least some analogy with S.169(4) of the 2015 Act – though I do not carry it too far.

**41.** O’Malley makes it clear that the summary summons must put the defendant in a position, inter alia by the particulars set out in the summons, to decide whether to consent to judgment. The summary summons in this case did not do so. It is deficient in that respect. So too the Grounding Affidavit.

**42.** Essentially, the Plaintiff is missing any record of the operation of the account for the 15 years to October 2015 and so cannot supply the calculations required by O’Malley either by way of particulars or by way of statements of account exhibited in evidence. It is also clear that the Plaintiff has at all material times been in that position and must have known at all material times that it was in that position by reference to the O’Malley criteria – at least in the sense that it has not been in possession of the relevant information. Whether it sought or could have got the relevant information at any material time, the Plaintiff did not reveal.

**43.** I observed at the hearing that it was apparent from the Defendant’s affidavit of 23<sup>rd</sup> July, 2021 that he raised the issue of the O’Malley-inadequacy of the particulars and evidence. I enquired of counsel for the Plaintiff why the matter had not been sent to plenary hearing as soon as that affidavit came to hand. He replied that from that point the Plaintiff had been entitled to enquire of its predecessors in title to the creditor’s interest in the loan as to the availability of the relevant documents. He said that it had at some point become apparent that those predecessors (he did not identify which but it does not matter) had decided to rely upon their entitlement, pursuant to the relevant assignments, to cease co-operation with the Plaintiff after a certain date. He did not say why it took from July 2021 to April 2022 for the Plaintiff to ascertain that position, or indeed identify when the Plaintiff ascertained that position. What is clear is that, prior to the Defendant’s affidavit, and indeed to date, the Plaintiff was not in possession of the relevant documents or information. Neither am I told that the Plaintiff was at any relevant time in a position to obtain them. Counsel for the Plaintiff was not able to tell me when the co-operation period expired, whether before the summons issued, whether before the notice of motion and grounding affidavit for summary

judgment issued, whether before the Defendant's affidavit of 23<sup>rd</sup> July, 2021 was sworn or whether at some point thereafter.

**44.** What is clear is that during all the time the Defendant was obliged – obliged by the Plaintiff - to attend to these proceedings seeking summary judgment and incur the cost, in time, money and stress, of doing so, the Plaintiff was, as to pleadings and proofs, not entitled to summary judgment and knew it. For all I know it may have believed, when issuing the Summary Summons, that it was likely to acquire the necessary proofs. But even if that is so, the Plaintiff took the risk of their non-acquisition and I see no reason why it should not bear the costs of the eventuation of the risk it knowingly took.

**45.** Even when issuing the summary summons, and evidential questions apart, the Plaintiff must have known that the summons was not adequately indorsed. That is no small matter when one remembers the very particular purpose of a special indorsement of claim, as identified in the cases, of enabling the defendant to decide whether to concede or defend specifically a claim not merely to judgment but to summary judgment. I need not, and as it was not argued do not, go so far as to say that it was in any degree improper to issue the summons. It suffices to merely say that, having taken the risk of issuing such a summons, I see no reason why the Plaintiff should not bear the costs of the eventuation of the risk it knowingly took.

**46.** It is to be remembered that what is at stake here is only the costs of the proceedings to date. The costs henceforth of the plenary action are a separate matter and are likely to follow the event at trial.

**47.** Counsel for the Plaintiff says that, once it is claiming a liquidated sum, it is entitled to issue a summary summons in the expectation that the summary process will reveal whether the Defendant will defend the action - the Defendant might consent to judgment or not defend the proceedings. There are a number of flaws in this proposition:

- The fundamental flaw, it seems to me, is that the Plaintiff's proceedings, for want of O'Malley compliance, do not properly enable the Defendant to decide whether to defend the action. So the Plaintiff is not entitled to expect such a decision of the Defendant.
- In the event of non-appearance, the Plaintiff could not have got judgment in the office or in court on these papers.
- The prospect that a properly advised Defendant would consent to judgment on such papers must be low. I cannot see that such an exercise in testing the waters can justify what Hyland calls the "*unnecessary step*" constituted by the summary process. Or, to put it another way, if the Plaintiff decides to gamble on that prospect and fails, I cannot see why he should not bear the costs of that failure.

- The Plaintiff could have put the Defendant in essentially the same position of having to make a decision by issuing a Plenary Summons and in due course a Statement of Claim for the alleged debt. The Defendant could have equally decided in that circumstance whether to defend the action. The possibility that the Defendant might have inferred from the issuing of a Plenary Summons that the Plaintiff was in some difficulty such that the Defendant would be more likely to defend the action is no answer to that proposition.
- The issue is not that the Plaintiff issued proceedings for the alleged debt – the issue is the form of proceedings it chose to issue and that it mounted a motion for summary judgment thereafter.
- The assertion that the Plaintiff was entitled to issue the summary summons and the motion for specifically summary judgment, knowing that it was not O’Malley-compliant as to either particulars or evidence, may or may not be legally correct. But whether or not it is, it was a form of legal bluff and I cannot see why the Plaintiff should not pay the Defendant’s costs of successfully calling that bluff.

**48.** As I have said, I am not persuaded that, not least after O’Malley, the Hanrahan test of manifest unreasonableness applies to proceedings sent to plenary hearing for want of a pleaded and evidenced prima facie claim - as opposed to by reason of the defendant’s raising a defence to a prima facie claim. But if it does, I would hold that it was manifestly unreasonable of the Plaintiff to issue a summary summons which it could not adequately specially indorse. If I am wrong in that regard, it was in any event manifestly unreasonable of the Plaintiff, having issued a motion for summary judgment (which it arguably had to do to progress the matter) in the absence not merely of O’Malley particulars but of the requisite evidence of the claim to the specific liquidated sum claimed – or, for that matter, of any liquidated sum - not to have thereupon adjourned the matter to plenary hearing. It may of course be that it will have such evidence by the occasion of a plenary trial but that is not the present point.

**49.** In all the foregoing, I bear also in mind that one of the underlying rationales for summary proceedings is that they are expected to be ordinarily more expeditious than plenary proceedings. By their issue, the Plaintiff asserts an entitlement to judgment sooner rather than later and to court resources to that end. To make that assertion knowing that one can’t, when issuing the proceedings, adequately plead or prove a prima facie case for judgment is inconsistent with the invocation of the summary process. I do not say that there is a hard rule in this regard – at least as to an expectation of getting the evidence after issuing the proceedings, whatever about ability to adequately plead the case. But on the facts of this case, the consideration seems to me a legitimate factor in the exercise of my discretion as to costs.

**50.** I also consider that, with reference to the matters set out in S.169(1) of the 2015 Act, as relevant by virtue of Order 99 rule 3(1) RSC, the conduct of the Plaintiff in pursuit from September 2000 to April 2022 of proceedings at no point capable of realising their necessary purpose –



judgment specifically summary - in circumstances in which the Plaintiff must at all material times have known they lacked that capacity, is a factor weighing in favour of costs against the Plaintiff. However, if I am wrong that the Plaintiff's actions are to be considered "conduct" for the purposes of S.169(1) of the 2015 Act, I would be content to rest my decision as to costs on the simpler proposition that, as set out in more detail above, the Plaintiff took a risk in launching specifically summary proceedings and should bear the costs of its eventuating by reason of the deficiencies in its own papers.

**51.** In the foregoing circumstances, I will adjourn the matter to plenary hearing and I will award the Defendant the costs of the proceedings to date, to be adjudicated in default of agreement. I will stay execution of those costs pending final orders after the trial of the action. Should the Plaintiff fail to progress the plenary action with ordinary expedition, the Defendant has liberty to apply to have the stay lifted.

**52.** This ruling is delivered electronically. If, on foot thereof, any issues require further consideration, the parties have liberty to apply within 14 days of delivery of this ruling. Failing such application, perfection of the order on foot of this ruling will proceed thereafter.

**David Holland**  
**29<sup>th</sup> April, 2022**