[2020] IEHC 249

THE HIGH COURT

[2017 No. 487 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

GERRY WARD

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 11th day of March, 2020.

1. The plaintiff seeks judgment against the defendant in the sum of €776,024.34 in respect of monies alleged due on foot of two mortgage loans. The plaintiff is the successor in title of Irish Civil Service Building Society ("*ICS*"). By a scheme of transfer approved by the Minister for Finance pursuant the Central Bank Act, 1971 (Approval of Scheme of Transfer between ICS Building Society and The Governor and Company of the Bank of Ireland) Order, 2014, implemented by S.I. No. 257 of 2014, certain assets and liabilities of the ICS, including the mortgages the subject matter of these proceedings, were transferred to the plaintiff on 1st September, 2014.

The pleadings

2. The summary summons was issued by the plaintiff on 21st March, 2017. By notice of motion dated 25th July, 2017, application was brought for liberty to seek final judgment against the defendant.

3. The procedural history of this matter has been addressed by the court in a previous judgment. The matter came before the Master of the High Court and ultimately was transferred to this Court. A number of motions were brought by Mr. Ward in the proceedings, relating to the jurisdiction of this Court and to cross-examination of deponents who have sworn affidavits on behalf of the plaintiff in these proceedings. This Court delivered judgments on the 8th February, 2019 and 9th April, 2019. The court also held that it has jurisdiction to deal with the case.

4. This application is grounded on the affidavit of Mr. Sean Buckley, a manager working with the plaintiff in its Arrears Support Unit. Further affidavits have also been filed in support.

5. In his affidavit sworn on 14th June, 2017, Mr. Buckley outlines the background to the case. He details of the scheme of transfer between ICS and the plaintiff. He avers that the plaintiff is a bank for the purposes of the Bankers' Book Evidence Act, 1879 and that the books were kept in the ordinary course of the bank's business and under its control. This is further elaborated upon by Ms. Jacinta White in affidavits sworn on 14th June, 2017, and 14th February, 2018. Ms. Marie Carey, legal case manager, has also sworn a similar affidavit.

6. Mr. Buckley avers that the defendant was indebted to the ICS in respect of two mortgage loan facilities which had been provided by the Building Society to him. Particulars of the sum alleged to be due were extracted from the original Banker's Book, a computerised mortgage account system known as "*MAS*". This is confirmed by Ms. Enright in her

affidavit. The MAS at all times was the only and ordinary Banker's Book of ICS, now the plaintiff, for the purposes of recording the defendant's liabilities and compiling the statements of interest to which Mr. Buckley refers in his affidavit. He avers that all entries on the MAS in relation to the defendant's liabilities were made in the usual and ordinary course of business of ICS, now the plaintiff, and that the MAS is and has at all material times been in the control of ICS and now of the plaintiff.

7. Mr. Buckley avers that the loans arise by mortgage loan offer letters of 13th December, 2006 and 15th December, 2006. In the former, the ICS offered the defendant a facility in the sum of €510,000 through account number ending 806 by which the defendant agreed to repay the sums due in accordance with the terms of the said letter. The loan offer was subject to general conditions. The funds were drawn down. Mr. Ward agreed to the terms of the loan offer and signed a form of acceptance of those terms. It is averred that he is in default of payment in respect of the loan and demand for repayment was made on 3rd December, 2014. At that time Mr. Ward was indebted to the plaintiff in the sum of €530,611.48 representing the principal amount together with loan interest and loan arrears amounting to €49,680.67. A further letter issued on 1st March, 2017 demanding repayment in the sum of €541,701.81. No payment has been made. As of 29th May, 2017, the sum due on that account, according to Mr. Buckley, is €542,915.28.

8. Similarly, in respect of the second mortgage loan offer of 15th December, 2006, the amount of this facility is €220,000 (account ending 408). Copies of the loan offer documentation are exhibited by Mr. Buckley, who avers that the funds were drawn down and Mr. Ward is in default on this account also. In accordance with the conditions of the loan offer, on 25th November, 2014, demand was made for repayment of the sum of €229,513.16 and on 1st March, 2017 a solicitor representing the plaintiff wrote to the defendant demanding repayment of the sum of €234,322.53. Despite demand, Mr. Ward has failed to pay the sums due. As of the date of the swearing of his affidavit on 14th June, 2017, the total sum of €777,762.70 is alleged to be due and owing by the defendant to the plaintiff.

9. From a perusal of the loans it seems that the monies were advanced to the defendant by the ICS, with a specified repayment period of 20 years and were provided in respect of the acquisition and/or funding of properties in Dublin 18 and Cherry Orchard, Dublin 10.

10. On 14th February, 2018, Mr. Buckley swore a further affidavit in which he exhibited copies of the entries in the Banker's Book as they relate to the loans the subject matter of these proceedings. Mr. Buckley avers that at no stage has the defendant engaged with the bank in a meaningful way with regard to the settlement of the claims and no payments have been made since a payment of €700 was made on 20th March, 2013; being a payment of €400 into one account and €300 into the other. He confirms that when the bank makes a decision to issue proceedings it relies on simple interest statements, as opposed to customer statements, giving the defendant the benefit of a lesser sum based on simple interest, rather than compound interest. He also exhibits a table calculating the simple interest for both accounts. The total sum outstanding as of

the date of swearing of his affidavit was €782,482.27. Mr. Buckley also exhibits statement of accounts, which appear to have been generated on 2nd February, 2018. As of 31st January, 2018, the sums due in respect of the two accounts were €546,209.76 and €236,272.50 respectively. Each of these sums was calculated on the basis of the principal and interest due on 29th May, 2017, as claimed in the summary summons, but updated to include interest accruing since that time. The statements which are exhibited in respect of each of the accounts, which are in the name of the defendant, are stated to commence in 2007, with a drawdown of €510,000 on 25th January, 2007 in respect of account ending 406, and drawdown of €220,000, on 19th February, 2007 in respect of account ending 408. The accounts are detailed and show the interest as calculated on a monthly basis. Given the date of the generation of the statement, it cannot be the case that Mr. Ward received these *particular* statements prior to the proceedings.

11. Mr. Buckley exhibits two simple interest statement of accounts which show the balance due as of 31st December, 2016. They state the amount of interest which accrued between that date and the institution of the proceedings on 29th May, 2017 (149 days) at an interest rate of 0.9%; and the interest which has accrued between 29th May, 2017 and 31st January, 2018, again all calculated on a simple interest basis of 0.9% (for this period 247 days).

12. In a further affidavit of 14th February, 2018, Ms. Enright confirms the maintenance of the accounts in electronic format known as MAS insofar as the updated amounts are concerned.

The defendants defence

13. Mr. Ward entered what he described as a conditional appearance on 23rd May, 2017. He protested that the defendant could not be lawfully before the court and that he did not submit to the jurisdiction of the court. He outlined grounds as to why he maintained that the court had no jurisdiction and why no basis existed for the claim. The first related to a Bill of Exchange served by him on 8th March, 2017. The second related to his contention that on 14th March, 2017, he had communicated with the solicitor representing the plaintiff, informing her that he had privately settled the matter with the group chief financial officer of the plaintiff. The third is a contention that the plaintiff was unlawfully and criminally withholding from him his right to inspect the original mortgage documents and further that the plaintiff and the court had failed or refused or neglected to address what is described as a "*Notice of Writ of Error (Corum Nobus)*", served on the plaintiff and the court on 29th June, 2016.

14. On 7th May, 2019, following the procedural rulings, the court granted Mr. Ward liberty to file and serve a replying affidavit outlining his defence. In his affidavit sworn on 20th May, 2019, he denies liability, continues to contest the jurisdiction of the court and complains that the affidavits sworn by Mr. Buckley and Ms. Enright are not properly before the court, principally because of inadequacies in the jurat.

15. Mr. Ward also maintains that there is no evidence that a liquidated sum is claimed and that the sum sought is not a liquidated sum, or figure, which is "*readily computed based*

upon an agreement's terms, pursuant to the Rules of the Superior Courts, Order 2." He avers that the plaintiff's application in these summary proceedings is not lawfully grounded upon a true and accurate liquidated sum. This objection and ground defence, however, as appears from the contents of paras 4 and 5 of the affidavit, to be related to the Bill of Exchange. He averred that the Court needs to fully satisfy itself and the defendant, that the plaintiff has lodged and issued proceeding that are in strict accordance with Order 2, and repeated his reference to the Bills of Exchange Act. He also raises his claim to cross-examine witnesses.

16. At para. 14 of his affidavit he avers that the plaintiff ought to know that the loan facility differs immeasurably from the sum certain and/or liquidated sum. He invites the court to test and satisfy itself that Mr. Buckley's affidavit is credible and legitimate but again the emphasis is placed by him on the understanding of the concepts of "*money of account*" and "*money of deposit*" and the relationship or lack thereof between the two.

17. At para. 17 he repeats that the plaintiff's application and grounds for application *via* the summary summons process is misconceived because the liquidated sum upon which the application stands is not correct, that one of the assets alleged to be attached has been sold and at para.18 he avers, that the court, in the interests of justice, satisfy itself that the alleged "*liquidated sum*" is accurate and true. He states that the plaintiff has relied on:-

> *"…an anomalous matrix of figures which they submitted as purported evidence in support of Sean Buckley's replying affidavit sworn on 12th January 2018. This said matrix of figures was on the face of it, contrived to support the plaintiff's alleged liquidated sum'."*

He maintains that the figures were created and were nothing other than Mr. Buckley being given a spreadsheet and being instructed to relay the figures in his affidavit. He avers that the figures in the affidavit are wholly inaccurate. Many different sets of figures have been advanced. He queries which figure the court is expected to rely on. He protests that the claim to compound interest on the original loan facility "is most certainly "*Not Certain*"." At para. 23, he avers that the figures vary between the summons, the alleged bank account statements, the letter of demand and the figures presented to the court.

18. Mr. Ward repeats his contention regarding the promissory note and refers to the decision of the Supreme Court in *Collins v. The Minister for Finance Ireland & Others* [2017] 3 I.R. 99 as highlighting the importance and significance of a Bill of Exchange. He also exhibits two academic articles, the subject matter of which are the creation of money in the modern economy and whether the banks are individually creating money out of nothing.

The plaintiff's response

19. Mr. Emmet Pullan, manager in the Arrears Support Unit of the plaintiff's bank has also sworn an affidavit in reply to Mr. Ward's affidavit on 22nd May, 2019. He deals specifically with the letter sent by Mr. Ward to the bank on 7th March, 2017 and avers

that the bank did not issue a response to the letter as it was a vexatious document which did not make sense.

20. Mr. Pullan outlines the circumstances in which a receiver was appointed to one of the properties which was sold at auction on 27th February, 2019. Immediately prior to closing, a search was conducted to ensure that all was in order for the purpose of completion of the sale. A *lis pendens* had been registered by the defendant. He exhibits communications from the Property Registration Authority, dated 2nd April, 2019 which confirmed that Mr. Ward applied for the registration of a *lis pendens*. He also states the Bank received a document entitled "*Cease and Desist – Notice/Demand*" in March, 2019, threatening legal action if advertisements offering the property for sale were not removed. Despite the bank's solicitor's assurances to the purchaser that the receiver had every right to sell the secured property given that an injunction had been obtained from this Court, the purchaser notified the solicitors that they were no longer proceeding with the sale in light of the registration of the *lis pendens*.

21. Mr. Pullan confirms that the amounts due as at the date of the swearing of his affidavit, in respect of the mortgage loan, concerning one property, to include interest was €552,553.85, and in respect of the other property, including interest as of 22nd May, 2019, was €239.016.77. Thus, at the date of the swearing of his affidavit, the total sum due by Mr. Ward to the bank is €791,570.62 with continuing interest at a rate of 0.9% from 23rd May, 2019 to the date of judgment.

Summary judgment

22. This is an application for summary judgment. When the matter first came before the court, a considerable focus at hearing was whether the defendant had advanced an arguable grounds of defence; such analysis occurring in the context of the principles outlined in *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607, where Hardiman J. observed that the test was whether it was clear that the defendant had no defence. The principles were expanded upon and were re-stated in *Harrisrange v. Duncan* [2003] 4 I.R. 1, by McKechnie J.

Further submissions following the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. Joseph O'Malley* [2019] IESC 84.

23. After the court had reserved its decision on the application, but before judgment, the Supreme Court delivered its decision in *Bank of Ireland Mortgage Bank v. Joseph O'Malley* [2019] IESC 84. The court invited the parties to address it on the impact, if any, which this decision may have on the issue in this case. The court also wished to be addressed on two other decisions which came to its attention since its earlier ruling, in connection with the defendant's continuing request to cross examine certain deponents: *Irish Bank Resolution Corporation v. Quinn* [2012] IEHC 510 and *Ulster Bank Ireland Limited v. Quinn* [2015] IEHC 376. The implications of the decision in *O'Malley* must first be considered.

24. In *O'Malley*, the court described the question which lay at the heart of the case as being the level of detail of the relevant debt which must be set out, both in the summons issued

by a plaintiff using summary procedure and, potentially, in the evidence which must be put before the court to substantiate the claim.

25. Clarke C.J. observed that the obligation on a defendant to establish an arguable defence only arises if the plaintiff has first placed before the court sufficient evidence to establish *prima facie* that the debt alleged is due. If not, then the matter cannot proceed to summary judgment. If yes, then the court must consider whether, in accordance with established jurisprudence, the defendant has advanced an arguable ground or grounds of defence.

26. Thus the onus lies on the plaintiff to establish its claim on a *prima facie* basis, and this must be addressed before it is necessary to consider whether arguable grounds of defence have been advanced.

27. This in turn requires a consideration of O. 4, r. 4 of the Rules of the Superior Courts as interpreted and explained in *O'Malley*. The defendant had there argued that particulars of the amount of the principal due and owing, the amount of interest accrued and its method of computation, were matters which must be established to the satisfaction of the court before it can be satisfied that the plaintiff has discharged the onus of proof.

28. The Supreme Court, noting that it is well settled that the general obligation to provide sufficient particulars in a summary claim has the objective of ensuring that litigants properly know the case which they have to meet, clarified what is required in order to ensure, per Cockburn C.J. in *Walker v. Hicks* (1877) 3 Q.B.D. 8, that a defendant has sufficient particulars to enable him/her to satisfy his/her mind whether he/she ought to pay or resist payment. In *Walker*, Cockburn C.J. stated at p. 9:-

> *"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."*

The Defendant's submissions

29. In response to the court's invitation for further submissions, Mr. Ward filed an affidavit sworn by him on 21st February, 2020. It appears that it was his understanding that there was an onus on the parties to file affidavits, but such is and was not the case. The court treated Mr. Ward's affidavit as being his submissions which were supplemented by oral submissions at the resumed hearing. The plaintiff made submissions in writing, which were also supplemented by oral submissions. Mr. Ward submits that the plaintiff has not established a *prima facie* case and should not be entitled to judgment. He relies on the contents of his affidavit and maintains that the sums outlined in the special indorsement of claim of the 28th February, 2017 conflict with the bank statements for that date and reiterates many of grounds advanced by him in earlier affidavits.

30. He reiterates that O. 37, r. 2, O. 2 and O. 40, r. 4 fully support his position that the plaintiff does not qualify for summary judgment and that he has an arguable defence in law.

The Plaintiff's submissions

31. Counsel for the plaintiff, Mr. Wade B.L., submits that at no stage has the defendant taken issue with the level of detail in the summons or the evidence within the affidavits as to the calculation of the amount due. He submits that Mr. Ward's principal objection was to the admissibility of the affidavits in the first instance. Other grounds of defence, it is submitted, have nothing to do with the particularity with which the claim has been pleaded in the summary summons. He further submits that the detail of the pleading is adequate and complies with the requirements as stated by the Supreme Court in *O'Malley*. Further, he submits that the pleadings in this case are more detailed than those considered by the Court of Appeal in *Allied Irish Banks v. Pierce* [2015] IECA 87. It is contended that this is a more relevant decision which was not detracted from in *O'Malley* and is binding on this court. Mr. Wade B.L. also accepted that the pleadings do not refer to a statement of account, a matter to which I shall return later in the judgment.

32. Mr. Ward, in reply, submits, *inter alia*, that the plaintiff effectively concedes that the summons is deficient and now wishes to repair it but that he will oppose any such application. He reiterates his contention that he has a right to cross examine the witnesses who have sworn affidavits on behalf of the plaintiff and contends that the plaintiff is distracting the court from the facts of the case and that it has not addressed the substantial defence raised by him regarding the proferring of a bill of exchange. He submits that the plaintiff received a capital payment *i.e*. by way of promissory note, and this is not reflected in the summons, no liquidated sum is due and he maintains that he has disputed the figures claimed at all stages. In an exchange with the court, when requested to clarify what the reference to capital payment meant, he confirmed that this related to the promissory note.

The level of detail in the evidence may exceed the level of detail in the special indorsement of claim in the summons.

33. In *O'Malley*, the court noted that it was clear from the decision of Butler J. in *Allied Irish Banks v. The George Ltd* (Unreported, High Court, Butler J., 21st July 1975) that the level of detail which requires to be given in evidence may exceed the level of detail required to be pleaded in a special indorsement of claim. In *The George Ltd* the pleadings were sufficient but the evidence did not go far enough. Clarke C.J. was also satisfied that on the facts in *O'Malley*, there was an inextricable link between the pleadings and the evidence, sufficient to permit Mr. O'Malley to argue that the detail in either or both the pleadings and the evidence was insufficient to justify granting judgment.

34. It followed that two separate questions arose, the first concerned the level of detail necessary to be included in the special indorsement of claim for it to comply with the Rules of the Superior Courts and the second being the evidence which needs to be advanced in order to justify the granting of judgment.

Order 4, rule 4 of the Rules of the Superior Courts

35. Order 4, r. 4 of the Rules of the Superior Courts provides:-

> *"The indorsement of claim on a summary summons and on a special summons shall be entitled 'special indorsement of claim' and shall state specifically and with all necessary particulars the relief claimed and the grounds thereof. The indorsement of claim on a summary summons or a special summons shall be in such one of the forms in Appendix B. Part III as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require."*

36. Considering the wording of O. 4. r . 4, in O'Malley it was observed that the real question is what particulars are "*necessary*". The rationale for this derives from *dicta* of Cockburn C.J. in Walker referred to at para. 28 above.

The level of detail in the special indorsement of claim and incorporation by reference

37. Clarke C.J. stated at para. 5.5 of *O'Malley*:-

> *"it does seem to me that a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings. The procedures are intended to be summary. They are not intended to involve an overly detailed account of every twist and turn of a banking relationship which might go back many years and involve, in at least some cases, thousands of transactions or measures potentially affecting the liability of the borrower. The more detail the borrower has been given in advance, the more it may be possible to justify a relatively shorthand way of describing how the amount due is calculated. But even there, it seems to me that it is necessary for a plaintiff, if they wish to rely on previously supplied details, to at least make some reference to those details in its special indorsement of claim."*

38. Thus, if the indorsement of claim specifies the liquidated sum due but pleads that it has been calculated in accordance with some identified document or documents, already sent to the defendant, then the defendant will have sufficient information, provided that those documents in turn prove the necessary detail. In *O'Malley*, no details were pleaded as to how the sum claimed was calculated. While the sum had been mentioned on a statement of account previously supplied, that fact would, in the Court's view have at least been sufficient to transfer the analysis of the sufficiency of the details provided from the indorsement of claim to the statement of account, if there had been some reference to it in the special indorsement of claim. On the facts, the special indorsement of claim was insufficient because there were no details of how the sum said to be due was arrived at. While there were more than adequate particulars as to how it was said generally that the monies are due, having regard to the asserted loan, drawdown and failure to pay, *why* the *particular amount due* should be *the sum claimed* was not at all clear (emphasis added). Clarke C.J. continued at para. 5.9:-

> *"If the special indorsement of claim had gone on to make specific reference to the relevant sum being calculated by reference to the details set out in the Statement of Account, then I would be happy that the document concerned would be incorporated by reference into the special indorsement of claim and regard could be had to it in deciding whether adequate particulars had been given. But even that simple step was not taken in this case. I would, therefore, conclude that the special indorsement of claim was not adequate. It will be necessary to return to the consequences of that finding in due course. However, it will be necessary to look again at the Statement of Account in the context of whether it provides sufficient evidence as to the amount said to be due, having regard to what is set out in that account and the terms and conditions of the loan which were established in the evidence. In that context, it may also be useful to indicate my views on whether, had the Statement of Account been incorporated by reference into the summary summons, it would have been sufficient to adequately particularise the claim for the purposes of the special indorsement of claim."*

39. Thus, the court was satisfied that the elements of the claim other than those which related to the calculation of the amount said to be due were adequately particularised in the summons. They were also established in evidence. The statement of account gave a clear picture as to why it was said the monies were due at the time of the statement and as to the amount of monthly repayments which varied on occasion. It was also clear that the interest rate was variable and therefore it would not be unreasonable to infer that the change in the amounts of the monthly instalments was due to a change in the interest rates. However, there was nothing in the statement of account which specified that there had been a change of interest or as to what change actually occurred. While the court had some sympathy with the argument of the bank that the indicative monthly instalments specified in the loan agreement were actually larger than any of the monthly instalments in the statement of accounts, to the extent that it might be inferred that the rate of interest applied was lower than the rate of interest originally indicated, nevertheless, 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 when those which had been notified.

40. In all the circumstances, the court was not satisfied that it would have been obvious to the reasonable person as to how the sum claimed was calculated. It was not an amount specified as deriving from any particular form of calculation based on other figures contained in the statement of account. Reference in the special indorsement of claim to the statement of account would not have been sufficient to remedy the lack of detail in the special indorsement of claim itself because there were insufficient details to be found in the statement of account to explain how the sum said to be due was calculated.

41. Observing that a defendant who wishes to proceed to a plenary hearing had to do more than merely assert a certain defence, such obligation "*cut both ways*". The particulars of the amount of the claim must go beyond mere assertion if a plaintiff is to benefit from the use of the summary procedure.

42. While the court held that there was insufficient evidence to justify determining that the bank had discharged the onus on it to produce *prima facie* evidence of the debt and therefore that it should not be entitled to summary judgment, the consequence of the finding, and the justice of the case was fully met by allowing the appeal and remitting the matter back to the High Court on the basis that the bank could apply to amend the pleadings to include such details as considered appropriate in the light of the judgment; and to tender such further evidence as may be appropriate to fill any evidential gap which had been identified. It is then a matter for the High Court judge to consider whether the lack of detail identified in the Supreme Court's judgment had been remedied.

Application of the *O'Malley* principles to this case

43. It seems therefore that the first issue which the court should consider is whether the special indorsement of claim in the summary summons is in compliance with O. 4, r. 4 RSC. If the necessary particulars are not expressly pleaded in the summons, the court is entitled to consider any documents which have been referred to in the summons to assess and analyse whether it is apparent therefrom that the necessary details and particulars as required by the rules to be pleaded, have been notified to the defendant. There may be an inextricable link between the pleadings and the evidence when the court carries out such analysis and assessment. It appears to me that consistent with *Pierce*, as discussed and analysed in *O'Malley*, as part of its overall assessment of whether a defendant knows or is aware of what is specifically claimed against him or her, the court ought to take into consideration whether he or she could be said not to have raised or asserted confusion or uncertainty as to the sum claimed. Once the court is satisfied that there is compliance with the requirements of O. 4, r.4 then it ought to consider whether, on the basis of those pleadings and the supporting affidavit evidence, the plaintiff has established, on a *prima facie* basis, that the alleged sum is due.

The contents of the special indorsement of claim

44. In the special indorsement of claim, the following particulars are supplied in respect of each of the loans:-

> *"3. The Plaintiff's claim against the Defendant arises out of facilities provided by ICS to the Defendant and is for the sum of €776,024.34 together with continuing interest.*
>
> *Letter of Loan Offer dated 13 December 2006 – Loan Account No. [ending 806]*
>
> *4. By way of mortgage loan offer letter in writing dated 13 December 2006 between ICS of the one part and the Defendant of the other part (the "Loan Offer [ending 806]") whereunder, ICS agreed to provide a facility in the sum of €510,000 to the Defendant agreed to repay same, together with contractual interest thereon, in accordance with the terms of the Loan Offer ending 806. The Defendant signed a form of acceptance of Loan Offer ending 806 on 15 January 2007 and ICS duly made the said facility available to the Defendant.*
>
> *5. Loan Offer ending 806 was at all time subject* inter alia *to the general conditions attached to the said loan offer.*

6. *In breach of Loan Offer ending 806 the Defendant has failed to operate the said facility within its terms and by letter dated 3 December 2014 demand was made on the Defendant to discharge immediately the monies then due and owing by the Defendant to the Plaintiff.*

7. *Particulars of the sums due and owing on foot of Loan Offer ending 806 together with interest therein have been furnished to the Defendant and notwithstanding a further demand by the Plaintiff's solicitors, the Defendant has failed, refused and/ or neglected to discharge the monies advanced or the interest thereon.*

8. *The Plaintiff also claims further interest at the rates currently in force on the principal due on foot of Loan Offer ending 806 until payment or judgment, and interest pursuant to statute, as well as such further or other relied as this Honourable Court may seem fir and the costs of these proceedings.*

9. *As of 28 February 2017, the total sum of €541,701.81 is due and owing on foot of Loan Offer ending 806 by the Defendant to the Plaintiff above all just credits and allowances, which said sum is made up as follows:*

1 February 2017	*To principal as set at date in margin*	*€541,341.41*
28 February 2017	*To interest accrued as at date in margin*	*€360.40*
28 February 2017	*To principal and interest accrued as at date in margin*	*€541,701.81*

Contractual interest continues to accrue on the principal sum less payments made from 1 March 2017 until payment.

Letter of Loan Offer dated 15 December 2006 – Loan Account No. ending 808.

10. *By way of a mortgage loan offer letter in writing dated 15 December 2006 between ICS of the one part and the Defendant of the other part ("the Loan Offer ending 808") whereunder, ICS agreed to provide a facility in the sum of €220,000 to the Defendant through loan account number ending 808 and the Defendant agreed to repay same, together with contractual interest thereon, in accordance with the terms of Loan Offer ending 808. The Defendant signed a form of acceptance to Loan Offer ending 808 on 15 January 2007 and ICS duly made the said facility available to the Defendant.*

11. *Loan Offer ending 808 was at all times subject* inter alia *to the general conditions attached to the loan offer.*

12. *In breach of Loan Offer ending 808 the Defendant has failed to operate the said facility within its terms and by letter dated 25 November 2014 demand was made*

on the Defendant to discharge immediately the monies then due and owing by the Defendant to the Plaintiff.

13. *Particulars of the sums due and owing on foot of the Loan Offer ending 808 together with interest thereon have been furnished to the Defendant and notwithstanding a further demand by the Plaintiff's solicitors, the Defendant has failed, refused and/or neglected to discharge the monies advanced or the interest thereon.*

14. *The Plaintiff also claims further interest at the rates currently in force on the principal due on foot of Loan Offer ending 808 until payment or judgment, and interest pursuant to statute, as well as such further or other relief as this Honourable Court may seem fit and the costs of these proceedings.*

15. *As of 28 February 2017, the total sum of €234,322.53 is due and owing on foot of Loan Offer ending 808 by the Defendant to the Plaintiff above all just credits and allowances, which said sum is made up as follows:*

1 February 2017	*To principal as set at date in margin*	*€234,166.63*
28 February 2017	*To interest accrued as at date in margin*	*€155.90*
28 February 2017	*To principal and interest accrued as at date in margin*	*€234,322.53*

Contractual interest continues to accrue on the principal sum less payments made from 1 March 2017 until payment."

45. Thus, the pleadings refer to the account numbers, the date of the loan, the letters of loan offer, and the general conditions attached to the loan offers. They also refer to the demand letters of 25th November, 2014 and 3rd December, 2014. Although it is pleaded that the particulars of the sums due on foot of the loan offers together with interest thereon have been furnished to the defendant, from what I can observe, such pleading is referable to the demand letters. The principal sum claimed is that stated to have been calculated as of the 1st February, 2017. It is true that the interest calculated since 1st February, 2017 is pleaded. Further, Mr. Buckley explains in his affidavit by reference to a table, the basis for the calculation of the simple interest claimed since the 1st February, 2017.

46. As in *O'Malley*, the indorsement of claim sets out in considerable detail the terms of the loan, that monies were drawn down, that there was a failure to repay but there is an absence of pleading of how the sum alleged to be due is calculated. While interest has been calculated as from 1st February, 2017, I am unable to discern the basis upon which the principal sum is claimed to be due on that date is or was calculated. It is therefore difficult to conclude that the special indorsement of claim, on its own, and without

analysing the documents referred to therein, can be said to comply with the requirements or O. 4, r. 4 as clarified and explained in *O'Malley*.

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47. It is therefore necessary to consider the documents referred to in the pleadings, being the letter of loan offer and the demands for payment.

48. Regarding the loan offers, it is clear that these documents specify the sums advanced and the interest rates applicable and also that the loan was advanced on an interest payment basis. However, there is nothing in the letters of offer which assist in the calculation of the sum claimed to be due.

49. With regard to the letters of demand, the letter of the 25th November, 2014 stated as follows:-

"Re:	*Account No.*	*Redemption Balance*	*Current Outstanding Arrears*
	…808	*€229,513.16*	*€19,859.00*

> *... This letter is a demand for early repayment of your mortgage loan account(s) under your mortgage loan offer letter(s) and Mortgage Deed and the total amount you now owe at the date of this letter is quoted above. Interest continues to accrue daily at the rate(s) applicable to your mortgage loan account(s)."*

The letter of the 3rd December, 2014 is in similar terms and relates to account number ending 806. The redemption balance at that date was €530,611.48 and the current outstanding arrears of €49,680.67.

50. Mr. Wade B.L. fairly accepts that if there is a deficiency in his indorsement of claim, it is that it does not refer to a statement of account. Nevertheless, he also submits that there can be no debate but that the details supplied in this case were far greater than the details supplied in *Pierce*, which was accepted by the Court of Appeal. On the face of it, this would appear to be a reasonably arguable proposition, although it is not entirely clear what particulars or details were supplied in respect of the loan account in *Pierce*.

51. It will be recalled that in *Pierce*, Hogan J. observed that the particulars supplied by the bank in the indorsement of claim referred to the sum outstanding, the date of the demand and the relevant account; and that it was clear, from correspondence from a financial adviser which had been exhibited in the grounding affidavits filed on behalf of the bank that she was fully acquainted with the nature of the bank's claim against her and that it could not be said that she had asserted any confusion or uncertainty as to her liability. Counsel submits a similar situation pertains here, that Mr. Ward cannot assert, and has not realistically attempted to assert, that there is any uncertainty as to his liability.

52. Nevertheless, having considered the replying affidavit of Mr. Ward wherein he raises the issue of the amount of the liquidated sum claimed, or whether it is a liquidated sum, and where he describes "*this anomalous matrix of figures*", it seems to me that in all the circumstances, including the absence of reference to a statement of account and as to how the sums described as the principal in the summons have been calculated, I could not find that he has not expressed such uncertainty or confusion.

53. While it is undoubted that a considerable amount of detail has been provided both in the pleadings and on affidavit, the question which the court has to address is whether *necessary* details have been given. Clarke C.J. explained the rationale for this approach at para. 6.7 in *O'Malley*:-

> *"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. 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."*

54. Having considered the pleadings and the documents referred to in the indorsement of claim together with the affidavits sworn in support of the application, I do not believe it can be said that the indorsement of claim specifies "*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 same may also be said about the documents referred to in the indorsement of claim, and indeed to the documents referred to in the grounding affidavits.

55. In all the circumstances it does appear to me that absent a pleading, breakdown and explanation of how the sum alleged to be due has been calculated, as between interest, capital sums or any surcharges (if any), and absent any reference in the summons to any document which might be incorporated to provide details of how that sum was assessed, the court is unable to conclude that the summons together with the documentation referred to in the summons provide a straightforward calculation of how the sum due has

been arrived at and must therefore find that the plaintiff has not discharged the onus of proof which it bears on this application to produce *prima facie* evidence of its debt.

56. In summary, therefore, I must conclude that the indorsement of claim is not in accordance with the requirements of O. 4 r. 4 , as clarified in *O'Malley*, and therefore the plaintiff has not established its case on a *prima facie* basis. Insofar as the indorsement of claim refers to letters of demand or indeed the loan agreement or the loan offer, while a considerable amount of information is supplied as to the basis upon which the parties have entered into a contractual arrangement, it cannot be said that the letter of demand provides any clearer detail of how the sum referred to in those letters were calculated, or the basis for such calculation. It seems to me that the same may be said of the letters before action of 1st March, 2017; they do not provide any greater detail of how the sum claimed is calculated.

57. This application must therefore be refused and it is therefore unnecessary to consider the grounds of defence or other issues raised by Mr. Ward.

58. However, in my view, the justice of the situation is also best addressed by granting the plaintiff liberty to bring an application to amend the indorsement of claim in the summons and to tender such further evidence as may be appropriate "*to fill the evidential gap identified.*"