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THE COURT OF APPEAL

Appeal Number: 2021/294
High Court Record No [2017] 487 S
Neutral Citation Number [2023] IECA 25

Barniville P.
Faherty J.
Pilkington J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/
RESPONDENT

- AND -

GERRY WARD

DEFENDANT/
APPELLANT

Judgment of Ms. Justice Faherty delivered on the 9th day of February 2023

1. This is an appeal by Mr. Ward (hereinafter "the defendant") from the judgment of the High Court (MacGrath J.) of 7 October 2021 and the consequent Order of 28 October 2021 (as perfected on 11 November 2021) whereby the summary summons issued by the plaintiff (hereinafter "the Bank") was to be amended in accordance with the judgment of the court, with the Bank to have two weeks to deliver the amended summary summons to

the defendant, and a further two weeks to serve further affidavits, already filed in the proceedings, on the defendant. The defendant was given four weeks from the receipt of these documents to file and serve any responding affidavit should he wish to do so. Service of the documents on the defendant was to be by way of ordinary pre-paid post pursuant to previous orders of the court. The High Court made no order for costs in respect of the motion to amend and refused the defendant's application for a stay.

Background and procedural history

2. The summary summons issued on 21 March 2017. The Bank sought: (a) judgment in the sum of €776,024.34; (b) interest pursuant to contract, or alternatively pursuant to statute; and (c) costs.

3. The defendant entered a conditional appearance on 23 May 2017 wherein it was asserted, *inter alia*, that there was no lawful cause of action, that the defendant had made a lawful payment to the Bank on 8 March 2017 which was accepted, such that his alleged indebtedness had been discharged under the Bills of Exchange Act 1882, that the Bank had been advised that the matter had been privately settled with the Group Chief Financial Officer with the Bank, and that the Bank were "unlawfully and criminally" withholding from the defendant his right to inspect their "alleged original mortgage documents" and had failed to address the defendant's "NOTICE OF WRIT OF ERROR" which had been served on the Bank on 29 June 2016.

4. By notice of motion dated 26 June 2017, returnable to 25 July 2017, the Bank sought liberty to enter final judgment against the defendant in the sum of €777,762.70, together with interest pursuant to contract, or, alternatively, pursuant to statute. That application was grounded on the affidavit sworn on 14 June 2017 by Sean Buckley, Manager.

5. In his affidavit Mr. Buckley averred that the defendant was indebted to the ICS Building Society ("ICS") in respect of two mortgage loan facilities which had been provided by the ICS to the defendant. Mr. Buckley went on to detail the scheme of transfer between ICS and the Bank whereby certain assets and liabilities (including the defendant's loan accounts) of ICS were transferred to the Bank on 1 September 2014. He averred that the Bank was a bank for the purposes of the Bankers' Books Evidence Act, 1879 and that the books were kept in the ordinary course of the Bank's business and under its control at all relevant times. This was further elaborated upon by Ms. Jacinta Enright, Legal Case Manager, in her affidavit sworn on 14 June 2017.

6. Mr. Buckley stated that particulars of the sum alleged to be due were extracted from the original Banker's Book, being a computerised Mortgage Account System known as "*MAS*". This was confirmed by Ms. Enright in her affidavit. The MAS at all times was the only and ordinary Banker's Book of ICS, and now the Bank, for the purposes of recording the defendant's liabilities and compiling the statements of interest to which Mr. Buckley referred in his affidavit. Mr. Buckley averred that all entries on the MAS in relation to the defendant's liabilities had been made in the usual and ordinary course of business of ICS, and that the MAS was and had at all material times been in the control of ICS and now the Bank.

7. Mr. Buckley outlined that the loans arose by mortgage loan offer letters of 13 December 2006 and 15 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 defendant agreed to the terms of the loan offer and signed a form of acceptance of those terms. The funds were drawn down. It was averred that the defendant was in default of payment in respect of the loan and demand for

repayment was made on 3 December 2014. At that time his indebtedness to the Bank was 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 1 March 2017 demanding repayment in the sum of €541,701.81. No payment had been made. As of 29 May 2017, the sum due on account ending -806, according to Mr. Buckley, was €542,915.28.

8. In respect of the second mortgage loan offer of 15 December 2006, the amount of this facility was €220,000 (account ending -808). Copies of the loan offer documentation were exhibited by Mr. Buckley, who averred that the funds had been drawn down and that the defendant was in default on this account also. In accordance with the conditions of the loan offer, on 25 November 2014, demand was made for repayment of the sum of €229,513.16. On 1 March 2017, the Bank's solicitors wrote to the defendant demanding repayment of the sum of €234,322.53. Despite demand, the defendant had failed to pay the sums due.

9. Altogether, as of the date of the swearing of Mr. Buckley's affidavit on 14 June 2017, the total sum of €777,762.70 was alleged to be due and owing by the defendant to the Bank.

10. On 14 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. He averred that at no stage had the defendant engaged with the Bank in a meaningful way with regard to the settlement of the claims and no payments had been made since a payment of €700 was made on 20 March 2013 into account ending -806 and a payment of €400 was made into account ending -808. Mr. Buckley confirmed 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 exhibited a table calculating the simple interest for both accounts.

11. Mr. Buckley exhibited statements of account, which appear to have been generated on 2 February 2018. As of 31 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 29 May 2017, as claimed in the summary summons, but updated to include interest accruing since that time. The statements exhibited in respect of each of the accounts, which were in the name of the defendant, were stated to commence in 2007, with a drawdown of €510,000 on 25 January 2007 in respect of account ending -806, and a drawdown of €220,000 on 19 February 2007 in respect of account ending -808.

12. Mr. Buckley also exhibited two simple interest statements of account which showed the balance due as of 31 December 2016. They stated the amount of interest which accrued between that date and the institution of the proceedings on 29 May 2017 (149 days) at an interest rate of 0.9%; and the interest which has accrued between 29 May 2017 and 31 January 2018, again all calculated on a simple interest basis of 0.9% (for this period 247 days). The total sum outstanding as of the date of swearing of Mr. Buckley's affidavit of 14 February 2018 was said to be €782,482.27. In a further affidavit of 14 February 2018, Ms. Enright confirmed the maintenance of the accounts in MAS insofar as the updated amounts were concerned.

13. Prior to the Bank's application for summary judgment coming on for hearing, the defendant issued some four motions in the within proceedings. The first, dated 19 July 2017, sought to dismiss the Bank's case on jurisdictional grounds. By motion dated 3 December 2017, the defendant sought the determination of certain points of law, including the applicability of the Bills of Exchange Act 1882 in circumstances where the defendant

claimed he made a lawful payment to the Bank for value in accordance with the Bills of Exchange Act 1882 and that this had been accepted by the Bank. Para. 1(b) of this motion claimed that the affidavits sworn by the Bank in the proceedings were unlawful and invalid. On 11 January 2018, the defendant issued a third motion seeking a determination of certain points of law, specifically that the Bank's affidavits were not lawful and that the failure to produce a written order from the Master of the High Court (who had transferred the proceedings to the High Court list) meant that the defendant had been denied his right of appeal. The defendant also sought to have the Bank and its counsel held in contempt of court for not addressing his conditional appearance. It was contended that until the court addressed the issues raised in the motion, the court had no jurisdiction to proceed and could not be recognised as a properly constituted court. The defendant issued a further (fourth) motion dated 9 February 2018 seeking orders that the solicitors for the Bank produce Mr. Buckley and Ms. Enright for cross-examination.

14. On 18 June 2018, MacGrath J. determined that he had jurisdiction to hear the various applications.

15. In a judgment delivered on 8 February 2019, ([2019] IEHC 208), MacGrath J. addressed the defendant's various motions. At para. 29 of the judgment, he noted that he had already accepted jurisdiction and he did not see any basis upon which it could be contended that the court did not have jurisdiction to hear and determine an issue in the case solely on the basis that an allegation was made that either a form of compromise had been arrived at (which the Bank did not accept) or that the affidavits were improperly before the Court for the reasons alleged. In either eventuality, it seemed to the Judge that the court had jurisdiction to hear and determine the issues before it. In so far as it might be contended that any issue arose by virtue of the fact that an order of the Master of the High Court might be the subject of an appeal, the Judge noted that the case had been transferred

into the court's list and that the defendant himself had brought applications to the court seeking to cross-examine deponents. In the circumstances, the Judge was satisfied of the following:

- The court had jurisdiction to hear and determine the motions and the Judge saw no reason to depart from the High Court Order already made in this regard on 18 June 2018 even if he had jurisdiction to do so.
- The court had jurisdiction to admit in evidence the affidavits, even if they were not in perfect form, as per the *dicta* of the Court of Appeal and the Supreme Court in the case law cited in the judgment. No reasonable grounds had been advanced by the defendant, why, in the interests of justice, the affidavits should not be so admitted. To refuse to admit the affidavits would result in a potentially grave injustice to the Bank. Further and in so far as was necessary, it was appropriate for the court to exercise its jurisdiction to receive and admit the affidavits.

16. In the view of the Judge, while an affidavit may not be in perfect form, that did not, in any event, go to the root of the court's jurisdiction to entertain the proceedings or to deal with any applications which may be made within the proceedings particularly where such imperfection was capable of being dealt with by the court. He was satisfied, therefore, on the law, that not alone did the court have jurisdiction, but that no reasonable grounds had been adduced as a basis upon which the court should exercise its jurisdiction otherwise than to admit the affidavit evidence. Thus, the affidavits should be admitted, subject to any entitlement of the defendant to cross-examine the deponents of those affidavits.

17. The Judge then turned to the issue of whether the defendant was or should be entitled to cross-examine the deponents on their affidavits. He noted that the rules would suggest that if notices are served within the time prescribed, the leave of the court was not required. The Judge found that on any analysis, the time had expired for the defendant to

have served a notice of cross-examination as of right. Therefore, leave of the court was required.

18. Ultimately, it seemed to the Judge that the issue to be addressed was whether the interests of justice dictated that cross-examination should be permitted. Thus, while prepared to treat the application before the court as an application for an extension of time within which to serve notice to cross-examine the deponents in question, the Judge, however, saw no good reason to depart from the directions which had been given by the High Court (McDermott J.) that the defendant was required to place on affidavit the reasons why he wished to have the deponents examined. The Judge took the view that this had not been done. MacGrath J. noted that a potential reason raised in submissions was that the defendant did not have the addresses of the deponents of the affidavits to enable him to serve proceedings on them because their true addresses did not appear in the affidavits, and the defendant wished to examine them on at least this aspect of the affidavit. The Judge noted that there may also be other reasons, including that certain matters were not provided to the defendant prior to the institution of the proceedings and that cross-examination would clarify the issues. In any event, the application to cross-examine was refused.

19. On 7 May 2019, following the rulings on the defendant's motions, the Judge granted the defendant liberty to file and serve a replying affidavit outlining his defence to the summary summons proceedings.

20. In his replying affidavit sworn on 20 May 2019, the defendant denied liability for the sums claimed by the Bank and continued to contest the jurisdiction of the court. He complained that the affidavits sworn by Mr. Buckley and Ms. Enright were not properly before the court, principally because of inadequacies in the jurat.

21. He also maintained that there was no evidence that a liquidated sum had been claimed and that the sum sought was not a liquidated sum or figure which was "readily computed based upon an agreement's terms, pursuant to the Rules of the Superior Courts, Order 2." He averred that the Bank's application in the summary proceedings was not lawfully grounded upon a true and accurate liquidated sum. He stated that the court was required to fully satisfy itself, and the defendant, that the Bank had lodged and issued proceedings that were in strict accordance with Order 2 RSC and repeated his earlier reference to the Bills of Exchange Act. He also raised his claim to cross-examine witnesses.

22. At para. 14, he averred that the Bank ought to know that the loan facility differed immeasurably from a "SUM CERTAIN" and/or a liquidated sum. He invited the court to test and satisfy itself that Mr. Buckley's affidavit was credible and legitimate. He placed emphasis on the understanding of the concepts of "money of account" and "money of deposit" and the relationship or lack thereof between the two.

23. At para. 17, the defendant repeated his contention that the Bank's application and grounds for application for a procedure *via* the summary summons process was misconceived because the "liquidated sum" upon which the application stood was not correct and that one of the assets alleged to be attached had been sold. He queried why the Bank had not sought to amend its pleadings on foot of that sale. At para.18 he averred that, in the interests of justice, the court must satisfy itself that the alleged "liquidated sum" is accurate and true. He contended that the Bank had 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'." (at para. 20)

24. The defendant also maintained that the figures were nothing other than Mr. Buckley having been given "a spreadsheet of sorts" and instructed or ordered to relay the figures in his affidavit. He averred that the figures in the affidavit were wholly inaccurate. Many different sets of figures had been advanced. He queried which figure the court was expected to rely on. He protested that the claim to compound interest on the original loan facility "is most certainly **'Not Certain'**". At para. 23, he averred that the figures varied between the summary summons, the alleged bank account statements, the letter of demand and the figures presented to the court.

25. The defendant repeated his contention regarding the promissory note and referred 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 exhibited an article, "Money creation in the modern economy", Quarterly Bulletin (2014) QI, the subject matter of which was how money is created in the modern economy and the role of the commercial banks in this regard.

26. On 22 May 2019, Mr. Emmet Pullan, Manager in the Arrears Support Unit of Bank, swore an affidavit in reply to the defendant's affidavit. He dealt, *inter alia*, with the letter sent by the defendant to the Bank on 7 March 2017, averring that the Bank did not issue a response to the letter as it was considered a vexatious document which did not make sense. He stated that at no time had the defendant entered into an agreement with the Bank regarding the debt due.

27. Mr. Pullan outlined the circumstances in which a receiver was appointed to one of the secured properties of the defendant which was sold at auction on 27 February 2019. Immediately prior to closing, a search had been 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 and Mr. Pullan exhibited communications from the Property Registration

Authority dated 2 April 2019, which confirmed that the defendant applied for the registration of a *lis pendens*. He also stated that the Bank had 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. Mr. Pullan averred that 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 the High Court on 25 April 2016, the purchaser had notified the solicitors that they were no longer proceeding with the sale in light of the registration of the *lis pendens*.

28. Mr. Pullan confirmed 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. In respect of the other mortgage loan, including interest as of 22 May 2019, the amount due was €239.016.77. Thus, at the date of the swearing of Mr. Pullan's affidavit of 22 May 2019, the total sum claimed by the Bank was €791,570.62 with continuing interest at a rate of 0.9% from 23 May 2019 to the date of judgment. On 23 May 2019, Ms. Marie Carey, Legal Case Manager, swore a verifying affidavit.

29. The Bank's application for summary judgment duly came on for hearing following which the MacGrath J. reserved judgment. Before judgment was delivered, the Supreme Court delivered its judgment in *Bank of Ireland v. O'Malley* [2019] IESC 84 ("*O'Malley"*). The Judge duly invited submissions from the parties on foot of *O'Malley*. In the course of its submissions, the Bank claimed that at no stage had the defendant taken issue with the level of detail in the summary summons. The defendant swore an affidavit on 21 February 2020 which was treated by the High Court as his submissions. In his affidavit, the defendant claimed that the Bank had not established a *prima facie* case. He characterised the Bank's proceedings as a "lie". He sought the dismissal of the Bank's

proceedings or, alternatively, an order that the Bank's deponents be produced for cross-examination.

30. The Judge delivered judgment on the Bank's application for summary judgment on 11 March 2020 ([2020 IEHC 249).

31. Applying the *O'Malley* principles, the first issue which the Judge had to consider was whether the special indorsement of claim in the summary summons was in compliance with Order 4, r. 4 RSC. He noted (at para. 46), *inter alia,* that, as in *O'Malley,* the indorsement of claim set out in considerable detail the terms of the loan, that monies had been drawn down and that there was a failure to repay. He considered, however, that there was an absence of pleading of how the sum alleged to be due was calculated. While interest had been calculated from 1 February 2017, the Judge was unable to discern the basis upon which the principal sum was claimed to be due on that date or how it was calculated. It was therefore "difficult to conclude that the special endorsement of claim, on its own, and without analysing the documents referred to therein, can be said to comply with the requirements of O. 4, r.4 as clarified and explained in *O'Malley*" (at para. 46).

32. The Judge then considered the document referred to in the pleadings, namely the letter of loan offer and the demands for payment. He noted that the Bank had conceded that the special indorsement of claim did not refer to a statement of account. The Bank, however, had submitted that there was sufficient detail in the pleadings.

33. Having considered the defendant's replying affidavit wherein he had raised the issue of the amount of the liquidated sum claimed, or whether it was a liquidated sum, and where he had described an "anomalous matrix of figures", it seemed to MacGrath J. that in all the circumstances, "including the absence of reference to a statement of account as to how the sums described as the principal in the summons have been calculated", it could not be said that the defendant had not expressed uncertainty or confusion (at para. 52). The Judge

found that while it was undoubtedly the case that a considerable amount of detail had been provided by the Bank both in the pleadings and on affidavit, the necessary details had not been given.

34. With reference to the *dictum* of Clarke C.J. at para. 6.7 in *O'Malley,* and having considered the pleadings and the documents referred to in the indorsement of claim together with the affidavits sworn in support of the application for summary judgment, MacGrath J. did not believe that it could be said that the indorsement of claim specifies, in the words of Clarke C.J., *"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"*. (at para. 54) The same could be said about the documents referred to in the indorsement of claim and the affidavits. Absent a pleading, breakdown and explanation of how the sum alleged to be due had 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 the sum was assessed, the Judge was unable to conclude that the summons together with the documentation referred to in the summons provided a straightforward calculation of how the sum due had been arrived at and, thus, was satisfied that the Bank *"has not discharged the onus of proof which it bears on this application to produce prima facie evidence of its debt"* (at para. 55).

35. Accordingly, MacGrath J. refused liberty to enter summary judgment. This was, as found by the Judge, because the indorsement of claim on the summary summons was not in accordance with Order 4, r. 4 RSC as clarified by the Supreme Court in *O'Malley*.

36. However, in line with the judgment in *O'Malley,* he went on the find that the *"justice of the situation"* was best addressed by granting the Bank 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"* (at para. 58)

The motion to amend

37. By notice of motion returnable for 19 July 2021, grounded on the affidavit of Noreen McGovern, solicitor for the Bank, sworn 28 October 2020, the Bank sought an order pursuant to Order 28, r.1 RSC and/or the inherent jurisdiction of the court granting liberty to amend the special indorsement of claim on the summary summons. Ms. McGovern's affidavit exhibited the proposed the amended summary summons to which she, *inter alia* appended a statement of account.

38. The defendant swore a supplementary affidavit on 30 June 2021 in response to the Bank's application. Therein, he claimed, *inter alia,* that the Bank was out of time to seek to apply to amend the summary summons and he maintained that the figures presented by the Bank were false. He averred that the purported amendment pleading failed to address the judgment of MacGrath J. of 11 March 2020 and that there continued to be "the lack of a sum certain and liquidated sum as per the requirements of Order 2 [RSC]". He reiterated that he had discharged the alleged debt by way of his promissory note of 7 March 2017. The defendant did not accept that justice would be served by granting the Bank liberty to amend its pleadings. In addition to taking issue with the draft amended summary summons, the defendant also criticised aspects of the judgment of MacGrath J.

39. The Bank's motion to amend the summary summons came on for hearing on 19 July 2021. At the hearing of the motion, counsel for the Bank advised the Judge that the Bank was applying pursuant to the inherent jurisdiction of the court for leave of the court to adduce further evidence on affidavit. The further evidence was contained in an affidavit sworn on 14 July 2021 by Mr. Pullan of the Bank. A verifying affidavit was sworn by Mr. Ian O'Reilly of the Bank on the same date. This aspect of the Bank's application was not

contained in the Bank's notice of motion. However, on the day of the hearing, counsel for the Bank advised MacGrath J. that its intention to apply to adduce further evidence had been notified to the defendant by letter on 13 July 2021. As we shall see, the Judge duly acceded to this application.

The judgment under appeal

40. As already referred to, judgment on the Bank's application was delivered by MacGrath J. on 7 October 2021.

41. In his judgment, the Judge was at pains to emphasise that the court was only concerned with the Bank's application for liberty to amend the summary summons and the application to adduce further evidence, and not with the merits of the claim. Nor was the court embarking on a substantive consideration of whether any *"gaps"* had been filled by the amendments the Bank sought to make and/or by the evidence it sought to adduce. Nor, according to the Judge, was it his function (at this juncture) to critically analyse the basis upon which the Bank's calculations were said to be made.

42. In aid of his application for liberty to amend the summary summons, counsel for the Bank placed considerable reliance on the decision in *Governor and Company of the Bank of Ireland v. Wales* [2021] IEHC 134 (*"Wales"*). The defendant disputed its applicability, asserting that *Wales* was distinguishable on its facts.

43. *Wales* concerned an application by the plaintiff bank to amend its summary summons in light of the decision in *O'Malley*. The plaintiff bank's proceedings sought to recover monies said to be owing by the defendant, Mr. Wales, pursuant to two loans entered into with ICS and which had been secured by way of way of legal charge over two properties. When the application to amend the proceedings was brought, the plaintiff's motion for liberty to enter final judgment had not yet been heard. Mr. Wales' replying affidavit to the motion seeking liberty to enter final judgment, variously, highlighted

discrepancies between the sums claimed in the summary summons with those claimed in the motion seeking summary judgment, the failure of the plaintiff bank to explain adequately how the sums claimed were due and owing and its failure to depose to the sale of the charged properties. Mr. Wales' defence to the proceedings, as reflected in his replying affidavit, was that the securities pleaded against him in the original version of the summary summons had been "extinguished" and he asserted an implied waiver by the plaintiff of the shortfall in the proceeds of sale of the properties in question.

44. However, the hearing which led to Simons J.'s judgment was confined to the plaintiff bank's application to amend its proceedings pursuant to Order 28, r.1. After a consideration of relevant case law (*Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 IR 383 and *Havbell DAC v. Harris* [2020] IEHC 147), Simons J. determined 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"* (para. 26). A factor to consider when considering an application for leave to amend was *"whether the making of the amendment would cause prejudice to the other side".* He stated that 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's focus should be *"to ensure justice between the parties".* Noting the clarification made by the Supreme Court in *O'Malley* to the manner in which a claim should be pleaded and particularised in summary summons proceedings, *Simons* J. was satisfied that the *"limited amendments"* being sought by the plaintiff bank were necessary to ensure that the real questions in controversy were before the court. He went on to state:

> *"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." (at para. 24)

45. In response to the argument put by counsel for Mr. Wales that the plaintiff bank should not be permitted to mend its hand by introducing particulars that ought properly have been in the original summary summons, Simons J. found that the defendant's position *"would be to create a form of Catch-22"* where the plaintiff *"would be criticised for not providing the 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"* which to Simons J seemed *"an overly technical approach"* and contrary to the rationale in *O'Malley.* He continued:

"31. ...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."

Applying those principles to the case before him, Simons J. found the plaintiff bank's proposed amendments *"to be very minor in nature"*, being directed in most part *"to setting out the basis on which interest has been calculated".* For the reasons he set out, Simons J. was satisfied that the proposed amendments did not give rise to any prejudice to the defendant.

46. I return now to the judgment under appeal. Having considered the submissions of the parties, MacGrath J. was satisfied that he ought to approach the application to amend the summary summons in the manner stated by Simons J. in *Wales.* He was not satisfied that *Wales* was distinguishable on the facts as had been suggested by the defendant. According to the Judge, the principles applied in *Wales* were equally applicable in the present case. He was satisfied that *"the amendments sought by [the Bank] in this case are*

necessary to ensure that the real questions of controversy in the litigation are before the court", noting the observations of Simons J. in *Wales* that the requirement to provide sufficient particulars was intended as a protection to a defendant to debt collection proceedings and that it was surprising, therefore, that a defendant would resist an application by a plaintiff to amend a summary summons by providing proper particulars. MacGrath J. considered that similar considerations arose in the present case. He further noted the observations of Simons J. at para. 29 of *Wales* that *"[t]he 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."*

47. Addressing the defendant's submission that the Bank was out of time to seek to amend its pleadings, MacGrath J. stated:

> *"In considering the delay, it is to be recalled that it was the court itself, following hearing the application and before judgment, requested be addressed on the effect of O'Malley. That was done by the parties. The court issued its decision on 11th March 2020, on the eve of the country going into national lockdown due to the coronavirus pandemic".* (at para. 17)

48. While it was a factor to be considered that the court had directed that the application to amend be brought within two weeks of the delivery of its decision on 11 March 2020, the Judge found that *"[g]iven the unprecedented situation then facing the country, the effective closure of the courts for physical hearings, and in light of the letters written to Mr. Ward by the plaintiff's advisors on 19th and 25th March 2020, whereby they set out the difficulties they encountered in issuing the notice of motion"*, the approach of the Bank was not unreasonable. While the defendant had maintained that he had not received those letters at the time, the Judge did not believe it necessary to determine that particular matter.

He stated, at para. 18:

> *"In my view the letters which I accept were sent but may not necessarily have been received by Mr. Ward, illustrate the reasonableness of the approach which the plaintiff was taking in this matter."*

49. The Judge next addressed the defendant's complaint that attempts had been made by the Bank to process applications without reference to him. The Judge considered however that the defendant's concerns that matters had sought to be progressed in his absence were based on a misunderstanding of what had occurred. He was satisfied that the fact that the motion to amend did not receive a return date until July 2021 was not a delay for which the Bank could be criticised in all the circumstances. He was further satisfied, as was the case in *Wales*, that given the court's availability and the schedule of sittings, *"even had [the Bank] brought the application to amend earlier, the motion might not have come on for hearing much sooner than it did. If an extension of time to make this application is required, then sufficient grounds clearly exist upon which to do so."* (at para. 20)

50. The Judge then addressed the submissions of the parties in regard to the manner in which the Bank sought liberty to adduce additional evidence. He was satisfied that the court ought to entertain the application. He stated:

> *"23…[The defendant] was on notice of the proposal to make the application in the context of the hearing of a motion to amend upon which he was on notice. I am not satisfied that prejudice has been identified which requires the Court to refrain from dealing with the plaintiff's application for liberty to file further affidavits*
>
> *24. To the extent that affidavits of Mr. Pullan and Mr. O'Reilly were not sworn until 14th July 2021, consideration of those affidavits display that their purpose is to provide updated particulars of debt and the basis of calculation of those amounts,*

and not to advance a new or different case or to alter the case in any significant way. In my view, the tendering of such evidence, and the making of application to be permitted to do so, is no more than the following of the process envisaged by the Supreme Court to "fill any evidential gap", as the plaintiff perceived them to be. It is the type of application envisaged by the Supreme Court in O'Malley which ought to be permitted in order to meet the justice of the case. While [the defendant] may dispute the existence of the debt, the amounts claimed on the basis of their calculation, in my view, prejudice has not been established such that the court ought to exercise its discretion to refuse the application. In so ruling, however, the court is not making any observation on the merits of the claim now advanced, nor is it embarking, or purporting to embark on a consideration of whether such gaps as exist may have been filled. Such matters remain to be considered in due course."

The Judge was duly satisfied that the Bank should be granted liberty to amend its pleadings and to tender the further affidavit evidence of Mr. Pullan and Mr. O'Reilly.

The appeal

51. In summary, the defendant's grounds of appeal are as follows:

- The judgment of the High Court giving liberty to the Bank to amend its pleadings is unconstitutional and contrary to statute law;
- The judgment has been created solely for the benefit of the bank;
- The Bank's proposed amendments do not meet the requirements of Order 28, r. 1 RSC;
- The Judge acceded to the Bank's application to adduce further evidence in breach of fair procedures;
- The Judge created a fictitious inherent jurisdiction in order to grant leave to the Bank to adduce further evidence.

52. In its respondent notice, the Bank opposes each of the grounds of appeal.

Discussion

53. As can be seen from the notice of appeal, the defendant appeals both the amendments to the summary summons permitted by the High Court and the liberty given to the Bank to adduce further evidence on affidavit. In his written and oral submissions, he canvasses specific arguments in respect of each of those matters. However, before I address the defendant's arguments in these regards, it is appropriate, at this juncture, to deal with the defendant's contention that the issuing of his promissory note of 7 March 2017 is dispositive of the Bank's proceedings, and indeed other arguments the defendant canvassed which touch upon the merits of the Bank's summary summons proceedings.

54. It will be recalled that as far back as 14 March 2017, the defendant informed the solicitors for the Bank that any alleged indebtedness on his part had been discharged by the issuing of a promissory note/bill of exchange on 7 March 2017. On this basis, the defendant asserts that the Bank's proceedings should be dismissed.

55. In aid of his argument that the issuing of the promissory note is sufficient to bring an end to the Bank's proceedings, the defendant relies on *Collins v. Minister for Finance* [2016] IESC 73. There, the plaintiff challenged the lawfulness of the provision of funding by the Minister for Finance to Irish Bank Resolution Corporation ("IBRC") (the successor to Anglo Irish Bank Corporation ("Anglo")) and the Educational Building Society ("EBS") in the form of promissory notes pursuant to the provisions of the Credit Institutions (Financial Support) Act 2008. The defendant pointed to evidence given in that case by Ms. Ann Nolan, Second Secretary in the Department of Finance, to the effect that the promissory note had been regarded by the recipient banks as the equivalent of capital and had been treated as such in Anglo's balance sheet. He pointed to Ms. Nolan's testimony that "the fact is the promissory note was a payment upfront". He also relied on evidence

given by a Professor Shivdanasi that the promissory notes had economic value to the institutions in question and represented "a contribution of capital", and his evidence that "from a financial markets perspective, financial support was provided by the Minister for Finance at the date of issue of the promissory notes". Professor Shivdanasi's evidence in cross-examination was also relied on by the defendant, namely that "the financial supported started and ended at the date at which the promissory notes were issued". In the High Court, Kelly J. summed up that evidence in the following terms:

> *"Well, I think what his evidence boils down to is this, that even Parliament cannot un-ring a rung bell. The support is given when the pro-note is issued. There are obligations that arise on foot of the pro-note but the Minister cannot withdraw the support that has already been given. It may be that he will dishonour the pro-note. That is a different thing."* (at para. 47)

56. This, the defendant asserts, is sufficient to dispose of the Bank's proceedings against him in circumstances where the Bank now agrees it received the promissory note (albeit it had not previously acknowledged the defendant's correspondence) and where MacGrath J., in his judgment, also noted that the Bank had received the promissory note. The defendant says that it was on the foregoing basis, namely that the Bank had been paid, that he had challenged (in his conditional appearance) the jurisdiction of the High Court to entertain the Bank's proceedings.

57. The first observation I would make is that the breadth of the defendant's arguments in this appeal are too expansive, going beyond, as they do, the parameters of the High Court Order of 28 October 2021. His argument that he has discharged his indebtedness to the Bank by means of a promissory note is one such example of the defendant going beyond the confines of the Order made on 28 October 2021. The defendant's contention clearly goes to the merits of the Bank's claim against him. However, that was not the issue

that the Judge determined on 7 October 2021, nor was it the subject of the 28 October 2021 Order which only concerns the Bank's application to amend the summary summons and its application for leave to adduce the further evidence of Mr. Pullan and Mr. O'Neill as encompassed in the affidavits they swore on 14 July 2021. Those were the only matters with which the Judge dealt. The Judge was not concerned with the merits of the Bank's claim, as indeed is emphasised by the Judge at paras. 11 and 24 of his judgment. Thus, the defendant's application, as made in his notice of appeal and in his submissions, to have the Bank's proceedings dismissed is misconceived.

58. In summary, therefore, insofar as the defendant purports to raise in this appeal matters that go to the merits of the action, in particular his attempt to establish that he has a stateable arguable defence to the proceedings by virtue of his having issued a promissory note, this is an argument which can be made by the defendant, in due course, in answer to the Bank's application for summary judgment, when the hearing of that application is resumed. The same can be said of the other arguable defences the defendant has raised, namely that the Bank defaulted on its contract of 15 October 2008 when it removed the "repo rate" and applied an interest rate that is contrary to its letters of offer, and his claim that the Bank is not in possession of the alleged original mortgage contract which the defendant says "further invalidates their bona fides as a valid or lawful plaintiff to these proceedings".

59. I turn now to the defendant's specific arguments which touch upon the Order of 28 October 2021 which gives rise to this appeal. In essence, the defendant canvasses three main arguments.

60. The first relates to the Bank's delay in bringing the application to amend the summary summons. It will be recalled that on 11 March 2020 the Judge gave leave to the Bank to apply to amend the summary summons within two weeks of 11 March 2020 (i.e.

by 25 March 2020). This followed the Judge's refusal of the Bank's application for summary judgment on the basis of noncompliance of Order 4, r. 4 RSC. The defendant says that it took some 15 months before the Bank's application to amend came to court. Hence, his legal argument in the High Court was that the Bank was grossly out of time in bringing its application. More egregious, the defendant submits, was the mechanism ultimately used by the Bank to bring their leave application to court, namely applying to the Judge *ex parte* on 3 June 2021. It is submitted that for those reasons alone, the Bank's application to amend the summary summons should not have been permitted by the Judge.

61. With regard to the complaint the defendant makes that the Bank delayed in bringing its motion to amend the proceedings, counsel for the Bank submits that the High Court was entirely correct in accepting that the effect of the Covid-19 pandemic provided an adequate explanation for the Bank's delay in making its application. He submits that the chronology in this case supports the Bank's position. It is thus necessary to consider the relevant chronology.

62. On 20 March 2020, some nine days or so after judgment was delivered by MacGrath J. on 11 March 2020, the courts were subject to the most severe restrictions due to the Covid-19 pandemic. On the day prior to that, the Bank's solicitors wrote to the defendant seeking an adjournment of three months by reason of the Covid-19 pandemic. They wrote again to the defendant on 25 March 2020 advising that it was not possible to issue the necessary motion in all the circumstances that pertained.

63. Ultimately, on 8 December 2020, the Bank's motion was posted to the Central Office for filing and the Central Office were advised by the Bank's solicitors that MacGrath J. had seisin of the matter. On 15 December 2020, the Bank's solicitors received the motion as issued from the Central Office. The motion had been made returnable for 21 January 2021 before the Master of the High Court. On 5 January 2021,

the Bank's solicitors advised the Central Office that the motion had been made incorrectly returnable before the Master of the High Court and requested that the papers be returned in order that the return date could be amended for the purpose of bringing the motion before MacGrath J. This correspondence was acknowledged by the Central Office on 6 January 2021. Thereafter, the Bank's solicitors followed up on 13 January, 19 January and 2 March 2021 (the gap in the timeline being accounted for by Covid-19 level 5 lockdown restrictions) with further correspondence. The Bank's solicitors were duly advised that the motion could not be given a date in the intervening period. On 5 March 2021, it was confirmed to the Bank's solicitors by the High Court registrar that the motion could not be given a date until the country was out of level 5 restrictions.

64. There was further correspondence between the Central Office and the Bank's solicitors in the period 18 May 2021 to 31 May 2021 when the filed papers were ultimately returned to the Bank's solicitors.

65. Following the return of the papers, on 3 June 2021, the Bank's solicitors attended before the High Court (MacGrath J.) *ex parte* and sought a new return date. The Judge duly granted a new return date for 19 July 2021 and fixed the matter for physical hearing on that date.

66. All of the aforesaid history was duly accepted by the Judge as an adequate explanation for the delay in the bringing of the application to amend the summary summons, as is clear from paras. 18-20 of the judgment of 7 October 2021. As stated by the Judge, the delay could be accounted for by *"the unprecedented situation then facing the country, [and] the effective closure of the courts for physical hearings"*. Thus, in the view of the Judge, the approach of the Bank was not unreasonable. The Judge also noted that the Bank's solicitors had written to the defendant on 19 and 25 March 2020 setting out the difficulties they were encountering in issuing the motion and suggesting a three-month

adjournment (which counsel for the Bank advised the Judge was part of a general strategy and approach being taken by the Bank to its cases at the time). The fact that the defendant contended that he did not receive those letters at the time did not, in the view of the Judge, detract from the reasonableness of the Bank's approach. Moreover, the Judge was satisfied (at para. 21) that no *"real prejudice"* or irremediable prejudice was suffered by the defendant as a result of the delay. Insofar as the defendant might be prejudiced by virtue of increased or additional costs, that was something that could be addressed by an appropriate order of the court. Save for repeating the arguments he made in the court below, the defendant does not say how it is the Judge erred in reaching the above findings. There is nothing in the arguments canvassed by the defendant which persuades me that the Judge erred or acted outside of his jurisdiction in either his assessment of the consequences of the Covid-19 pandemic on the courts, or his assessment that the defendant was not irremediably prejudiced by the delay in bringing the amendment application to the court.

67. Insofar as it is said by the defendant that it was procedurally unfair for the Bank to have been given a return date for its motion on 3 June 2021 in the absence of the defendant, I find no basis for this complaint. All that the Bank did on that date was to seek a return date for its motion and all the Judge did on the same date was to grant such a date. As is evident from the judgment under appeal here, the substantive arguments in respect of the Bank's motion were heard only when the application came on for hearing and when the defendant was present to advance his opposition to the application, as he undoubtedly did.

68. The second ground upon which the defendant seeks to impugn the Order made on 28 October 2021 concerns the draft amended summary summons itself. He submits that neither the draft amended summary summons nor the statement of loan account attached thereto address the deficiencies inherent in the summary summons as issued by the Bank.

69. The defendant points to Order 28, r. 1 RSC which provides:

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement 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."

70. The defendant submits that the Order made by the High Court on 28 October 2021 allowing amendments to be made to the summary summons is not compliant with Order 28, r. 1 RSC. This is so in circumstances where, the defendant says, the amendments provide no extra clarification to the proceedings and are, in any event, only minor amendments, as the Bank itself conceded. In those circumstances, he asserts that the amendments are not necessary for the purpose of determining the real questions in controversy between the parties. It is further submitted that the proposed amendments do not comply with Order 4, r. 4 RSC as clarified by the Supreme Court in *O'Malley* and the defendant further points to the findings made by MacGrath J. in his 11 March 2020 judgment in this regard. He contends that the proposed amended summary summons is still without the required evidence as identified by MacGrath J. in his 11 March 2020 judgment.

71. The defendant also argues that the draft amended summary summons does not correct the lack of a liquidated sum as highlighted in the defendant's 20 May 2019 affidavit opposing the Bank's application for liberty to enter summary judgment and which is required by Order 2 RSC. He further says that the Bank in its proposed amended summons has failed to address the point raised at paras. 55 and 56 of the judgment of MacGrath J. of 11 March 2020, namely that the Bank had not in its pleadings addressed how the sum sought was calculated and the inadequacy of the letters of demand. Thus, the defendant's contention is that the proposed amendments do not address the real questions in controversy "namely the defects identified by Justice MacGrath at point 55 & 56 of his judgment…"

72. The defendant further argues that, more fundamentally, the Bank continues to seek judgment in the sum of €776,024.34 which sum is fraudulent in circumstances where the Bank sold one of the properties for which the loan monies were advanced for some €180,000. He further submits that no amendment can fix a summary summons that is fundamentally flawed from the outset by reason of the fact that the defendant has already discharged any alleged indebtedness to the Bank by means of the promissory note issued on 7 March 2017, and in circumstances where the defendant has other defences to the proceedings by reference to the interest rate being charged by the Bank and the Bank's suppression of title documents.

73. I have already addressed earlier in the judgment the defendant's arguments regarding his claim to have discharged his indebtedness to the Bank, having found that that argument, and indeed other arguments such as his claim that the charged interest rates are wrong and that the Bank has suppressed title documents, are matters to be advocated by the defendant when the Bank's application for summary judgment comes on for hearing.

74. As regards the arguments the defendant canvasses in respect of the Bank's proposed amendments, again, in my view, the defendant has conflated his arguments regarding the scope of Order 28, r. 1 RSC with his arguments concerning the merits of the Bank's application for summary judgment. Thus, insofar as it is contended that the proposed amendments do not cure the frailties identified by MacGrath J. in his 11 March 2020 judgment, that argument, like the other defences on which the defendant relies, falls more properly to be raised at the hearing of the Bank's application for liberty to enter final judgment. As I have said already, the merits of the application for summary judgment did not fall for consideration by the Judge in the judgment under appeal, and, indeed, there was, quite properly, no such consideration embarked on by the Judge. Nor is it the function of this Court to embark upon such consideration.

75. As far as the application pursuant to Order 28, r. 1 RSC is concerned, as the Judge rightly acknowledged, his function was to determine whether the amendments to the summary summons which the Bank has sought were necessary to determine the real questions in controversy in the litigation. That is what he did, and I am satisfied that the Judge was correct to find as he did. As noted by the Judge at para. 4 of the judgment, *"[t]he proposed/draft summons purports to specify and particularise the principal and interest sums which are sought to be recovered from Mr. Ward together with the basis on which they are said to have been calculated. It also purports to incorporate the loan account statements as a schedule to the draft. The two accounts in respect of which [the Bank] seeks to recover from Mr. Ward have been referred to in the court's previous judgments…Thus [the Bank] seeks to amend the summons by including in the pleadings reference to the principal sought, the interest sought and details of the manner in which the interest has been calculated, in an attempt to cure any deficiencies in the pleadings arising from the effect of the decision in O'Malley."*

76. I am satisfied that in allowing the amendments the Bank sought, the Judge correctly applied the principles set out in the case law, including *Wales.* Nothing the defendant has advocated in his submissions to this Court persuades me that the Judge was in error when he found (at para. 16) that the amendments sought by the Bank were necessary to ensure that the real questions of controversy were before the court. The Judge was also undoubtedly correct in quoting the *dicta* of Simons J. in *Wales,* namely that *"the requirement to provide sufficient particulars is intended as a protection to a defendant to debt collection proceedings"* and that *"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."* Clearly, the proposed amendments, on their face, speak directly to the claim being advanced by the Bank. To that extent, they are necessary to ensure that the real

questions of controversy are before the court. That being said, it is another question altogether whether the amendments are sufficient to cure the frailties in the Bank's claim which the Judge identified in his earlier judgment of 11 March 2020, but, as I have said already, and as the Judge opined in the judgment under appeal (at para. 11), that question is for another day.

77. Insofar as the defendant in his submissions to this Court repeats his argument that *Wales* is distinguishable on its facts from the present case, even if that is so that cannot assist him since it was the principles identified by Simons J. in *Wales* to which the Judge looked, and not the factual matrix that pertained in *Wales*. In any event, I do not believe that the defendant's contention that in *Wales* Mr. Wales was only challenging the alleged monetary shortfall following a consent to the sale of the properties arguing that by such sale, the plaintiff bank had waived any residual debt, is a contention that is well made. As the judgment of Simons J. shows, Mr. Wales was also challenging the proceedings on other grounds, including that the summary summons proceedings were incorrectly pleaded (an argument that the defendant here also makes). Therefore, I do not consider the basis upon which the defendant seeks to distinguish *Wales* to be made out. In any event, it is certainly not a basis upon which to find that the Judge here erred in his application of the relevant principles when determining the Bank's application to amend its proceedings.

78. I also agree with counsel for the Bank that in circumstances where the defendant, either in the High Court or in this Court, has not identified any irremediable prejudice, the amendments permitted by the High Court ought to be allowed to stand. Contrary to the assertion of prejudice the defendant makes, the amendments to the summary summons permitted by the Judge will ensure that the defendant knows the case that he has to answer. As said by the Judge, it will be for the court, in due course, to consider the merits of the Bank's application for liberty to enter summary judgment, including as to whether any

"gaps" in the Bank's claim have been filled, and, even if such *"gaps"* can be deemed to have been filled, whether, by reference to the low threshold established by case law for cases such as the present to be remitted to plenary hearing, the defendant has established that he has an arguable defence to the Bank's proceedings.

79. The third component of the defendant's appeal is that the Judge erred in permitting the Bank to adduce the further evidence of Mr. Pullan and Mr. O'Reilly, as contained in their respective affidavits sworn on 14 July 2021. In the first instance, the defendant asserts a procedural unfairness in the manner in which the Bank was permitted to make its application seeking leave to adduce this affidavit evidence. In this regard, he points to correspondence he received from the Bank's solicitors on 13 and 14 July 2021, respectively. In their 13 July 2021 letter, the Bank's solicitors make reference to the motion to amend the summary summons made returnable for 19 July 2021. In the 14 July letter, they enclose a supplemental affidavit sworn by Mr. Pullan of the Bank on 14 July 2021 together with a verifying affidavit sworn by Mr. O'Reilly on the same date. The defendant says that these letters said nothing about the Bank's intention to seek the leave of the court to adduce further evidence. He asserts that, as a result, he was taken by surprise on 19 July 2021 when the Bank sought to invoke the "inherent jurisdiction" of the High Court (and the defendant disputes that same subsisted in the court, a matter to which I shall return) when seeking leave to adduce the further evidence of Mr. Pullan and Mr. O'Reilly. The defendant submits that the actions of the Bank in this regard trampled on his right to be on notice of any such application in order to be able to defend himself properly.

80. Both in the court below and at the appeal hearing, the defendant's position was that he did not receive a further letter from the Bank of 13 July 2021 which advised as follows:

> "Dear Mr. Ward,
>
> Further to our notice of motion to amend the summary summons in the aforesaid matter dated 14 November 2020, served upon you on the 8th of June 2021 and listed before Mr. Justice MacGrath on 19th July next pursuant to the relief granted by him in his judgment dated 11th March 2020 (at paragraph 58), we wish to advise that our client intends to apply to the Court for an order pursuant to the inherent jurisdiction of the Court granting leave to the plaintiff to tender further evidence in the application herein seeking judgment against you. The said evidence will be in the form of a sworn supplemental affidavit of Emmet Pullan and a verifying affidavit of Ian O'Reilly. To allow you sufficient time to deal with our client's motion to amend on 19 July next we enclose copies of the said affidavits in draft format and confirm we will be seeking leave of the court to introduce same duly sworn and filed as the further evidence of the plaintiff in these proceedings."

Notwithstanding the defendant having advised the Judge that he did not receive this letter, the Judge nevertheless allowed the Bank to proceed with its application to adduce further evidence. The defendant maintains that the Judge erred in so doing.

81. The Bank submits that the defendant was sufficiently on notice of the Bank's intention to apply to admit the evidence of Mr. Pullan and Mr. O'Reilly. Counsel points to the Judge's finding, at para. 22 of the judgment, that the defendant *"was on notice of the proposal to make the application in the context of the hearing of a motion to amend upon which he was on notice."*

82. In all the circumstances of this case, I find nothing in the defendant's arguments that persuades me that the Judge was in error in permitting the Bank to make its application to adduce further evidence. As noted by the Judge, the defendant did not identify prejudice

such as would have required the court to refrain from dealing with the Bank's application on 19 July 2021. More significantly, as is clear from the correspondence which the defendant accepts he received from the Bank, the defendant had sight of the draft affidavits of Mr. Pullan and Mr. O'Reilly in advance of 19 July 2021 as they were attached to the 13 July 2021 letter sent to the defendant and which he has acknowledged receiving. Thus, irrespective of whether or not the defendant was in receipt of a further letter dated 13 July 2021 wherein it was advised the Bank was going to seek leave at the hearing of the motion to amend the summary summons to adduce further evidence, it is the case that the defendant had sight of the affidavit evidence prior to the hearing and, as such, he could not be said to have been overly surprised at the Bank's application. Over and above all of the foregoing, I am also satisfied that the defendant could not be said to be prejudiced by the fact that the application to file further affidavits was moved by the Bank on 19 July 2021 in circumstances where in his judgment of 11 March 2020, the Judge invited the Bank to make observations on *O'Malley* and in doing so set out that what was potentially at issue was the Bank seeking liberty to amend the summary summons and *"to tender such further evidence as may be appropriate 'to fill the evidential gap identified'"* (at para. 58) (emphasis added).

83. As said by the Judge in the judgment under appeal, at para. 23, the purpose of Mr. Pullan and Mr. O'Reilly's affidavits was *"to provide updated particulars of debt and the basis of calculation of those amounts, and not to adduce a new or different case or alter the case in any significant way"*. I agree entirely with the Judge's view that the tendering of new evidence logically followed on from the process envisaged by the Supreme Court in *O'Malley.*

84. It bears emphasising that what was permitted by the Judge was the filing of two further affidavits for consideration when the Bank's application for liberty to enter final

judgment is resumed. As reiterated by the Judge at para. 24 of the judgment under appeal, in permitting the Bank to tender further evidence, *"the court is not dealing with the merits of the claim made"*. It will also be recalled that the 28 October 2021 Order gave the defendant four weeks from the time the affidavits were served on him within which to serve any responding affidavit.

85. I turn now to what can be described as the defendant's overarching submission in respect of the Judge having granted leave to the Bank to adduce the further evidence contained in the affidavits of Mr. Pullan and Mr. O'Reilly as sworn on 14 July 2021. The defendant contends that the Judge's determination of this issue pursuant to the inherent jurisdiction of the court was in error in that the Judge created "a fictitious 'inherent jurisdiction' to interfere with and/or pervert the course of justice", to the benefit of the Bank. The defendant asserts that "this 'fictitious jurisdiction' does not exist under the Constitution, the law, in the Irish Statute Book [or in] the Rules of the Superior Courts". He says that the Judge's invocation of this inherent jurisdiction has created "a Constitutional Conflict in Law" in complete contradiction of Article 15.2.1 of the Constitution and Article 6 of the European Convention on Human Rights ("ECHR").

86. The defendant points to the provisions of Article 15.2.1 of the Constitution which provide that "[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has the power to make laws for the State", and Article 15.2.2 which provides that "[p]rovision may however be made by law creation or recognition of subordinate legislatures and for the powers and functions of these legislatures".

87. The defendant's contention is that the RSC derives their power from the statutory instruments under which they were created and, therefore, the RSC cannot be usurped by any "fictitious 'inherent jurisdiction'" of the High Court. He submits that the Bank's

contention in its respondent's notice that Article 34.3.1 of the Constitution invests such inherent jurisdiction in the High Court as was exercised here constitutes an attempt by the Bank to rewrite the Constitution, in particular Article 34.3.1. He asserts that the Bank misrepresents and manipulates the text of the Constitution by substituting "full original jurisdiction" for "inherent jurisdiction". He submits that any inherent jurisdiction that the High Court enjoys is a vestige of English common law which has been ousted and displaced by the express statute laws of the State. The defendant says that the RSC are derived from statutory instruments and thus represent the will of the Oireachtas and that it is not for the courts or the judiciary to override the will of the Oireachtas. To do so would constitute an unwanted trespass on the legislative function of the Government and would create "a conflict of law which invalidates the presumption of the constitutionality of statutes". In aid of his argument, he cites the *dicta* of Hanna J. in *Pigs Marketing Board v. Donnelly* [1939] IR 413. He argues that the judgment of MacGrath J. "which is predicated upon an inherent jurisdiction is clearly in defiance of the express statute law/Rules of the Superior Courts (Order 28 rule 1, rule 4 and Order 2 rules 1 and 2), is unconstitutional".

88. I am satisfied that the defendant's arguments disputing the High Court's inherent jurisdiction are misconceived. Article 34.3.1 of the Constitution invests such inherent jurisdiction in the High Court, vesting it with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal". This inherent jurisdiction is critical to enable the courts exercise their full judicial powers in all matters concerning the general administration of justice. The existence of the RSC does not mean that the court is devoid of an inherent jurisdiction.

89. I agree with counsel for the Bank's submission that while the RSC are very important, they are in effect tools to assist the High Court to carry out a fair and reasonable execution of its full original jurisdiction (including its inherent jurisdiction) and to ensure

that justice is done. The interests of justice and the inherent jurisdiction of the court is such that no rule is meant to or can supersede the inherent jurisdiction vested in the High Court pursuant to Article 34 of the Constitution.

90. As said by Geoghegan J. in *Dome Telecom v. Eircom* [2008] 2 IR 726, rejecting any idea that the right to discovery of documents should be exclusively based on an interpretation (literal or otherwise) of the relevant rule of court:

> *"In modern times, courts are not necessarily hidebound by interpretation of a particular rule of court. More general concepts of ensuring fair procedures and efficient case management are frequently overriding considerations. The rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it."*

91. In *McCambridge Ltd v. Joseph Brennan Bakeries* [2013] IEHC 569, citing *Dome Telecom v. Eircom Ltd.*, Kelly J. put it thus:

> *"The court is master of its procedures and is, as Geoghegan J. observed, not necessarily hide bound by the interpretation of a particular rule of court. Indeed if, as he says, there is no rule in existence precisely covering a given situation the court has an inherent power to fashion its own procedure. Even if there is a rule applicable the court is not necessarily bound by it. It is, however, important to draw attention to the fact that, as is clear from the quotation from his judgment, such an approach by the court is only permissible if there is an obvious problem of fair procedures or efficient case management."* (at para. 55)

92. Here, the High Court correctly applied its inherent jurisdiction to allow the Bank's application to admit the further evidence of Mr. Pullan and Mr. O'Reilly. This was, in my view, an exercise by the court of efficient case management, the Judge having given due consideration to whether the defendant would be caused irremediable prejudice by the court dealing with the application. He found, however, that that would not be the case, a finding which I have upheld for the reasons already stated.

93. I note that in aid of his submissions that the Judge's invoking of an inherent jurisdiction was impermissible, the defendant relied on *G.McG. v. D.W.* [2000] 4 IR 1 citing Murray J. at pp 26-27:

> *"The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possess implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express.*
>
> *What we are concerned with in this case is the jurisdiction of the courts to join the Attorney General in proceedings brought pursuant to s. 29 of the Act of 1995. The jurisdiction of the courts to join the Attorney General as a party to such proceedings is expressly addressed in the provisions of section 29. Can the courts be called upon to exercise an unspecified inherent jurisdiction in the face of the jurisdiction delineated by the Oireachtas in s. 29 concerning the Attorney General as a party?*

> *Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

94. Murray J. was of the view that neither the High Court nor the Supreme Court *"can attribute to itself some inherent jurisdiction going beyond the scope of that conferred expressly on the High Court by the Oireachtas in that Act."*

95. Clearly, in that case, the power to join the Attorney General to proceedings under the Family Law Act 1995 was so expressly delineated by statute that, as Murray J. said, it left no room for the court to exercise some other jurisdiction in pursuit of the same objective. However, in my view, the issue at play in *G.McG v. D.W.* is not one at play here. The defendant has not pointed to any statutory provision which, either expressly or impliedly, circumvented the exercise of the Judge's inherent jurisdiction pursuant to Article 34.3.1 of the Constitution. In those circumstances, the defendant's reliance on *G.McG v. D.W.* is misconceived.

96. For the reasons given, I find that the Judge did not err in fact or in law in determining, pursuant to the court's inherent jurisdiction, the application made by the Bank seeking liberty to adduce the further affidavit evidence of Mr. Pullan and Mr. O'Reilly despite the admission of those affidavits not being specifically referred to in the terms of the notice of motion that was before the court.

97. As can be seen from the terms of the Order of 28 October 2021, as perfected on 11 November 2021, the Judge made no order for costs in respect of the Bank's motion to amend the summary summons. Albeit not raised in his notice of appeal, in his written submissions furnished to the Court at the appeal hearing, the defendant seeks an order for his costs in the High Court and relies in part on the views expressed by Simons J. in *Wales*. With reference to Part II of the Legal Services Regulation Act 2015, which provides that a party who has been *"entirely successful"* in proceedings is *prima facie* entitled to costs against the unsuccessful party, Simons J. noted (at para. 44) that the court still retains a discretion to make a different form of costs order. He further noted that Order 99, r. 2 of the RSC provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible to adjudicate upon liability for costs on the basis of the interlocutory application. In *Wales*, Simons J. found that the defendant there (who was legally represented) had a *prima facie* entitlement to costs in circumstances where the motion to amend brought by the plaintiff bank *"arose as a result of the shortcomings in the initial pleading of the case by the plaintiff".* Accordingly, Simons J. was of the *"provisional"* view that the defendant, was entitled to his costs and that he was entitled to raise the issue of delay.

98. In reliance on the *dicta* of Simons J, the defendant here (who is self-represented) seeks an order for costs and he says that he has expended monies on stamp duty and postage, amongst other things.

99. While the defendant has cited the views expressed by Simons J. in *Wales* in aid of his submission that the High Court should have awarded him a sum to cover his expenses, I do not find that a sufficient basis upon which to disturb the "no costs" order made by MacGrath J. on 28 October 2021. Clearly, the Bank was the successful party in respect of the application to amend its pleadings. As is clear from the face of the Order, the Bank

sought an order for costs in its favour. Moreover, as is also clear from the face of the Order, the defendant made no submissions in respect of the Bank's application for costs. Ultimately, the Judge made no order as to costs. Given all these circumstances and even taking account, as I do, of the fact that the motion to amend was necessitated by deficits in the Bank's original pleadings, it seems to me that the order made by the Judge met the justice of the situation. Nothing the defendant has said satisfies me that the Judge erred in making the order he did as regards costs.

Summary

100. For the reasons set out in this judgment, I would dismiss the defendant's appeal on all grounds.

Costs

101. The defendant has not succeeded on any of the grounds in the appeal. It follows that the Bank should be awarded its costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 21-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

102. As this judgment is being delivered electronically, Barniville P. and Pilkington J. have indicated their agreement therewith and with the orders I have proposed.