THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 9
Record Number: 2019/417

UNAPPROVED
NO REDACTION NEEDED

Whelan J.
Murray J.
Binchy J.

BETWEEN/

KBC BANK IRELAND PLC

RESPONDENT

- AND –

HUGH CORRIGAN

DEFENDANT

AND

ANITA CORRIGAN

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 18th day of January 2021

Introduction

1. This is an appeal from the order of the High Court (Noonan J.) of 11 July 2019, perfected on 13 August 2019, wherein the respondent ("the Bank") was granted summary judgment in the sum of €363,445.52 plus costs against the appellant on foot of a notice of motion of 23 March 2017.

2. The appellant's notice of appeal dated 9 September 2019 stated that if successful she sought the following orders: -

i. an order setting aside the order of Noonan J. dated 11 July 2019 as perfected on 13 August 2019, and

ii. an order that the matters at issue the subject of the summary summons be set down in the High Court for full hearing.

3. Following the High Court hearing and service of the notice of appeal, the Supreme Court delivered its judgment on 29 November 2019 in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84. Arising therefrom the Bank notified the appellant in writing on 20 July 2020 that it intended to seek to amend the summary summons and to apply to the Court of Appeal to have the proceedings remitted to the High Court for that purpose. The appellant refused to consent. In August 2020 the Bank offered to withdraw its defence to the appeal with no order as to costs, without prejudice to its right to pursue the appellant on foot of the underlying proceedings if its application to amend the proceedings were successful before the High Court. The appellant insisted in continuing with her appeal.

4. In written submissions dated March 2020 the appellant stated that "this court is asked to apply the law as specified by the Chief Justice and strike out the Order of the High Court". At the appeal hearing a dismissal of the proceedings was sought.

Background

5. The first named defendant and the appellant are estranged husband and wife. In 2007 they applied for a joint loan facility from the Bank. The appellant signed the joint facility application form on 11 July 2007. Certain declarations and authorities attached thereto were signed by the appellant on 27 June 2007.

6. By letter of offer dated 23 July 2007, the Bank offered the appellant and her husband an advance of €333,000 for acquisition of a dwelling house comprised in Folio 32860F, Co. Wexford to be secured on the said property. By form of acceptance signed on 31 August 2007, they accepted the said offer of advance on the terms and conditions set out in the letter of offer

or thereby incorporated. The appellant's signature was witnessed by her then solicitor, Macarten O'Gorman of Anthony F. O'Gorman & Co., solicitors.

7. The joint facility was drawn down by the appellant and her husband on 30 November 2007 on a joint loan account.

8. By indenture of mortgage dated 4 December 2007, the appellant and her husband granted the Bank a first legal mortgage over the property comprised in Folio 32860F, Co. Wexford. The appellant's execution of the charge was witnessed by Macarten O'Gorman.

9. By letter dated 16 April 2013, the letter of offer was amended. The appellant accepted this amendment on 18 April 2013.

10. Defaults occurred and as of 20 May 2014, there were arrears of €35,566.01 on the joint loan account. By letters of demand dated 20 May and 23 July 2014, the Bank demanded that the appellant and her husband pay the said arrears within ten business days.

11. As of 28 October 2015, the sum of €353,076.07, comprised of principal of €352,836.38 and €239.69 for interest, was due, owing and payable by the appellant and her husband. By letters dated 28 October 2015, addressed to the appellant and her husband, the Bank demanded payment of the said sum.

Summary summons and notice of motion

12. The within proceedings were initiated by way of summary summons dated 14 July 2016. At para. 26 of the special indorsement of claim, the Bank claimed that, as of 7 July 2016, €354,987.64 remained due and owing by the appellant and her husband with interest continuing to accrue on that sum pursuant to contract. Judgment in the said sum plus interest was claimed against both the appellant and her husband.

13. The appellant entered an appearance in person on or about 1 December 2016.

14. By notice of motion of 23 March 2017, the Bank made an application to the Master of the High Court for *inter alia*:-

i. an order granting the Bank liberty to enter final judgment against the appellant in the sum of €356,810.44;

ii. interest pursuant to contract or, in the alternative, pursuant to Statute; and,

iii. such further or other order as the court deemed fit.

15. That application was grounded on the affidavit of Shane O'Connor, Head of Corporate Receiverships in the Bank, sworn on 21 March 2017. At para. 22 thereof, Mr. O'Connor averred that interest continued to accrue on the sum claimed at a rate of €7.33 *per diem*.

Replying affidavit of the appellant

16. In her affidavit sworn 16 June 2017, the appellant averred at para. 4:-

> "…I say I never had any relationship with the Plaintiff. I say that the 1st Named Defendant conducted all the transactions with the entity. I say I was never consulted by the Plaintiff as to my views regarding my spouse's contractual relations with it. I say it now appears I am being asked to accept liability for borrowing to which I received no benefit from in the Plaintiff's quest to expand its loan book. I say the Plaintiff knew or ought to have known the 1st Named Defendant was highly exposed financially at the time this facility was approved and had the financial expertise to prevent the exposure from increasing. I say the 1st Named Defendant placed his influence upon me in entering the contract to procure my signature for the facility."

She also deposed that, if granted a two month adjournment, "I will not be requiring any further adjournments in the matters" (para. 7).

Affidavit of Shane O'Connor of 3 October 2017

17. At para. 5 *et seq.* of his affidavit of 3 October 2017, Mr. O'Connor, on behalf of the Bank, addressed the allegation of a lack of relationship between the appellant and the Bank. He referred to the joint facility application form; the letter of offer; the form of acceptance; the joint loan account; the first legal mortgage over the property identified in the letter of offer and

the registered charge over the said property; the appellant's acceptance of the amending facility letter of 16 April 2013; and correspondence sent by the Bank to the appellant.

18. At para. 14 Mr. O'Connor stated that the appellant had failed to provide any details of the alleged "influence" exercised by the appellant's husband over her. At para. 15 Mr. O'Connor noted that both the facility letter and charge were executed by the appellant in the presence of her solicitor and that the Bank regularly issued correspondence to her regarding the joint loan account.

Strike out and reinstatement of the Bank's motion

19. By order of the Master of 7 July 2017, the Bank's motion was struck out and costs were awarded to the appellant.

20. By order of Costello J. of 9 October 2017, the order of the Master was set aside and the Bank's motion of 23 March 2017 was reinstated against the appellant. The matter was transferred to the Non-Jury List to fix a date for hearing.

Directions hearing of 23 October 2018

21. The Bank's motion was listed to be heard on 23 October 2018. On 22 October 2018, the appellant wrote to the Bank's solicitors informing them that she would be unable to attend court due to her "current domestic situation" and certain "medical issues". The court was made aware of this correspondence the following day. Counsel for the Bank indicated that it would consent to an adjournment in such circumstances. The directions judge listed the matter peremptorily against the appellant and directed that the appellant was not entitled to file any further affidavits as the matter was listed for hearing. The Bank's solicitors subsequently informed the appellant of the said directions.

Affidavit of Andrew Groarke Keenan of 5 July 2019

22. An affidavit was sworn by Andrew Groarke Keenan, solicitor on behalf of the Bank, on 5 July 2019, less than a week before the hearing, for the purposes of updating the court on the

outstanding sums due and owing by the appellant. He averred that, as of the said date, €363,445.52 (inclusive of arrears of principal in the sum of €132,323.13) was due and owing by the appellant. He referred to a loan account statement in this regard. The appellant does not appear to have objected at any time during the hearing to the deployment by the Bank of this affidavit.

***Ex tempore* judgment of the High Court of 11 July 2019**

23. In his judgment Noonan J. stated that he was obliged to apply the law and the jurisprudence on applications for summary judgments was "very well-settled".

24. The trial judge outlined the relevant loan documentation before the court. He noted that the loan application was a very detailed document and contained a lot of information which could only have come from the appellant and her husband. He considered the appellant's assertion that she did not fill out the loan application. He concluded that it was clear that she had signed it and gave her credit for her honesty and the fact that she was not claiming that her signature was a forgery.

25. The trial judge noted that, in addition to signing the letter of offer of 23 July 2007, the appellant had the benefit of legal advice from her solicitor when she did so. He further noted that the loan offer was accepted on 31 August 2007 and that that was followed by the execution of a mortgage over the property, the security provided for in the loan document. While the appellant had informed the court that she did not live in the house and that it was a "buy to let" property, the trial judge noted that the "key thing" was that the mortgage was executed by the appellant and her husband on 4 December 2007. Their signatures were witnessed by their then solicitors "who no doubt advised them fully in relation to the matter at the relevant time" (lines 17 to 18, p. 15).

26. The trial judge noted that years later defaults in repayments occurred:-

> "Here again there is significant documentation exhibited in the Bank's affidavit, all of which is signed by Mrs. Corrigan, so clearly some years after the event she was still actively involved, to the extent that she signed all of the relevant documents. It is also, I think, of particular importance to note that Mrs. Corrigan became, jointly with her husband, the registered owner of this property on foot of the mortgage arrangements and the advance of monies to the Corrigans. That property is the subject matter of Folio 32860F of County Wexford, and a copy of the folio discloses that Mrs. Corrigan and her husband remain registered as the owners of the property." (lines 22 to 30, p. 15)

He continued:-

> "In substance, it seems to me that all of the documents that one would expect to prove the debt exist, and again, to be fully fair to Mrs. Corrigan, she has not denied that the sums claimed are due and she has not contested the amounts of the claim or made any of the other allegations one frequently sees being made by defendants." (lines 32 to 34, p. 15 and line 1, p. 16)

Rather her defence was contained in para. 4 of her affidavit, quoted at para. 16 above.

27. In relation to the appellant's assertion that she received no benefit from the transaction, the trial judge observed:-

> "Unfortunately, it seems to me that Mrs. Corrigan is wrong about that. She clearly did receive a benefit. She, with her husband, is the registered owner of the property, so that can't be gainsaid. It is there clearly to be seen on the record. It is also not correct for Mrs. Corrigan to say that she never had any relationship with the plaintiff. As far as she is concerned that may be correct, but of course she does have a legal relationship with the plaintiff by virtue of the fact that she has signed all of the documents to which I have referred." (lines 13 to 19, p. 16)

28. Noonan J. referred to para. 13 of *Ulster Bank (Ireland) Ltd. v. Roche* [2012] IEHC 166, [2012] 1 I.R. 765 wherein Clarke J. (as he then was) reiterated his statements in *ACC Bank plc v. Kelly* [2011] IEHC 7 and those of Kelly J. (as he then was) in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2011] IEHC 470:-

> "…a person who signs a document which may well have significant legal effect and does so, either without reading the document or without applying themselves to the content of the document, 'must accept the consequences of having signed a commercially binding agreement in those circumstances' and will, *prima facie,* be bound by what they have signed."

29. The trial judge then turned to consider the appellant's further allegation at para. 4 of her affidavit noting that it had not been advanced to any significant extent at the hearing. He characterised this as an allegation of reckless lending, which, he noted, has been well-settled in many cases to form neither a defence nor the basis for any actionable tort known to Irish law.

30. The trial judge considered the appellant's assertion, at para. 4 of her affidavit, that her husband had used his influence over her to procure her signature. The trial judge stated:-

> "No more detail of any kind is given in relation to that, no particulars or how precisely the other defendant is alleged to have placed his influence on her, as she describes it, and of course it is now well-settled beyond any debate that mere assertions of this kind cannot of themselves furnish the basis to the defendant for having a defence." (lines 8 to 12, p. 17)

In this respect, the trial judge referred to the judgments of Clarke J. (as he then was) in *I.B.R.C. Ltd. v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749 and Peart J. in *ACC Bank plc v. Walsh* [2017] IECA 166.

31. He observed:-

> "It seems to me that are no such other facts pointed to in this case. It is, in terms, the barest conceivable assertion by Mrs. Corrigan of the alleged influence. And insofar as she attempts to expand those assertions in her legal submissions that were produced to the plaintiff for the first time this morning, obviously, as I indicated to her, they are not evidence. I cannot have any regard to allegations, new allegations of fact contained in those submissions, I can only have regard to the legal submissions on points of law as they have been presented to the Court." (lines 23 to 30, p. 17)

Accordingly, the trial judge found that there was no basis raised in the appellant's affidavit upon which the court would be entitled as a matter of law to refer the matter to a plenary hearing.

32. The trial judge was further satisfied, after considering all of the documents, in particular the loan contract, that there were no terms which could be regarded as unfair within the meaning of the relevant consumer legislation. The court also noted that there was an onus on it to consider those terms of its own motion in the light of various decisions, including *Aziz (Case C-415/11)* EU:C:2013:164, [2013] 3 C.M.L.R. 5 and *Allied Irish Banks plc v. Counihan* [2016] IEHC 752.

33. Judgment was granted for the Bank in the sum of €363,445.52.

Notice of Appeal

34. In her notice of appeal of 9 September 2019, the appellant raised eight grounds. She contended that the trial judge erred in law by acting in a manner prejudicial to her in:

i. making a direction in the absence of the appellant on 23 October 2018 that she file no further affidavits in the proceedings;

ii. permitting the Bank to issue and file an affidavit on 9 July 2019 which was not served on the appellant until she arrived in court on 11 July 2019; and,

iii. allowing the presentation of a further authority by the Bank on the morning of 11 July 2019.

35. In the respondent's notice filed 15 October 2019, the Bank opposed the appeal in its entirety.

Submissions of the appellant

36. In her notice of appeal, the appellant contends that there was an unfairness exhibited by the trial judge in his treatment of her and that the direction of 23 October 2018 "effectively prevented the admittance of sufficient grounds to invoke the [*Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607] and [*Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1] principles as a defence to summary judgments." The appellant contrasts that no such order was made against the Bank which had relied on an affidavit sworn by Andrew Groarke Keenan on 5 July 2019 and which she had received a copy of shortly before the hearing.

37. The second ground of appeal claimed that there was undue influence brought to bear upon her by the first named defendant and that the Bank had constructive notice of the same. She contended she had been precluded from setting out and particularising the undue influence by virtue of the direction made by the trial judge on 23 October 2018 aforesaid:-

> "Had the learned judge not unnecessarily imposed such draconian directions through the prohibition of a further affidavit, some eight months previously, the situation referred to would not have arisen as the sworn evidence would have been properly before the court."

38. At paras. 3 and 4 of her written submissions filed 13 March 2020, the appellant asserts that the trial judge's direction of 23 October 2018 that she file no further affidavits was unfair. She submits that "[t]he permitting of a filing an affidavit would not have prejudiced the plaintiff but did effectively prejudice the appellant." She further submits that permitting the Bank to file a further affidavit on the morning of the hearing was unfair and that "[e]quality of arms was denied."

39. The appellant contends that at the High Court hearing counsel for the Bank tried to suggest that she lived in the property the subject of these proceedings. She denies such suggestion and contends that she could have deposed evidence on the matter but for the trial judge's direction of 23 October 2018.

40. The remainder of the appellant's written submissions consist of extracts from the Supreme Court decision in *Bank of Ireland Mortgage Bank v. O'Malley*, delivered on 29 November 2019, nearly three months after the appellant delivered her notice of appeal. She submits that the circumstances in *O'Malley* mirror this case. She contends that the demands of the Bank were not particularised to the standard set by the Supreme Court in *O'Malley* and asks this court to set aside the order under appeal.

Correspondence *inter partes* in 2020

41. By letter dated 20 July 2020 solicitors for the Bank wrote to the appellant:-

> "Please note that arising from the Supreme Court's recent decision in the *O'Malley* case, it is the Bank's intention - to permit it make an application to amend it [*sic*] underlying summons herein - to apply to the Court of Appeal to remit the within proceedings back to the High Court.
>
> You might please confirm whether you consent to the case being remitted to the High Court, and if so, you might please confirm same by email to us."

By email of 21 July 2020 the appellant responded observing, *inter alia*,:-

> "A further option is to issue fresh proceedings; however that option will be opposed on the *Henderson* principles, which you are aware of, or may have relied on in previous litigation with other parties, who did not litigate matters correctly in the first instance."

42. On 18 August 2020 the Bank wrote once more to the appellant:-

> "Given the Bank's view of the summons, and noting your suggestion (in your letters dated 1st April last and 25th June last) that the Bank's defence to your appeal ought to

be 'dismissed' and/or 'struck out', the Bank has instructed us to confirm that it is willing to withdraw its defence to your appeal, with no order as to costs, without prejudice to its right to pursue you on foot [of] the underlying proceedings should it successfully apply to amend same before the High Court."

43. On 25 August 2020 the appellant responded to the Bank, indicating that any application to have the matter remitted to the High Court would be opposed: -

"Mr. Justice Noonan made a 'final order' in the High Court. I have appealed as against the order. You have every chance to oppose my appeal. It is the right of your client, as you well know. If I lose, the Court of Appeal will affirm the order of the High Court as you asked it to do in your respondents [*sic*] notice. If I am successful, the Court of Appeal will set aside the order. The order shall then be expunged.

That will be the end of the line as regards these 'underlying proceedings' whereby you may issue entirely new proceedings or in the alternative advise your client as to what occurred in the drafting process of this litigation for reasons I stated above."

Oral submissions on behalf of the appellant

44. Shortly before the hearing of this appeal the appellant instructed solicitors and counsel. At the hearing of this appeal, in response to a question from the court in relation to the consequences of the Bank conceding the appeal, counsel for the appellant indicated that she wished the court to consider issues outside the scope of the notice of appeal. She also suggested that the case be referred to the Supreme Court although no such application was before this court.

45. In response to a question from the court in relation to the order being sought, counsel for the appellant indicated that she now was seeking to have the findings of the trial judge dismissed and was seeking to have the proceedings against her struck out.

46. In her submissions to the court, counsel for the appellant was highly critical of the Bank and their legal advisors for alleged flaws in the summary summons. She suggested that the Bank should pursue a remedy against its own legal advisors for any deficiency in the summary summons, rather than her client, asserting that the *O'Malley* decision did not substantially alter the law on summary summonses, but rather confirmed principles enunciated in *Walker v. Hicks* (1877) 3 Q.B.D. 8. It was contended that the law had been clear since 1877 and the Bank was not entitled to rely on the decision in *O'Malley simpliciter* in support of its application

47. It was submitted that it was not permissible for the Bank to introduce "fresh evidence" before the High Court in relation to the particulars in the summary summons at a late stage. Counsel for the appellant relied on *Minister for Agriculture v. Alte Leipziger A.g.* [2000] 4 I.R. 32 in this regard and referred to the rule in *Henderson v. Henderson* (1843) 3 Hare 100 and the judgment of this court in *Flanagan v. AIB Private Banking* [2020] IECA 57. The appellant also placed reliance on the decision of *Lynagh v. Mackin* [1970] I.R. 180 where the Supreme Court identified the special grounds upon which it would exercise its power to permit further evidence to be adduced. However no further evidence was sought to be adduced by the respondent in this court in connection with this appeal. Therefore the relevance of *Lynagh v. Mackin* is not understood.

New arguments

48. Counsel for the appellant in the course of lengthy oral submissions made a variety of new arguments not raised in the notice of appeal or in any written submissions filed on behalf of the appellant. It was argued that the Bank had not conceded the appeal but "only wished this court to believe that it did so"; that this court should have regard to the fact that the Bank had failed to comply with the directions order of McGovern J. in this court requiring the Bank to file its submissions on or before 20 March 2020; and that the Bank had the option of issuing a fresh set of proceedings. The appellant opposed the matter being remitted to the High Court

notwithstanding the position in *Bank of Ireland Mortgage Bank v. O'Malley*; that insofar as there were deficits in the pleadings and non-compliance with O. 4, r. 4 of the Rules of the Superior Courts ("RSC"), the Bank should not now be permitted to amend its proceedings in circumstances where the drafting of the summons was undertaken by a solicitor and/or counsel and further in circumstances where no application to amend the summons was moved before the High Court in Cork in July 2019 at the hearing of the motion for summary judgment.

49. It was argued on behalf of the appellant that the court should have regard to the fact that, notwithstanding directions given by Costello J. in this court on 23 July 2020 at a remote callover hearing, no application was moved by the Bank pursuant to O. 86, r. 10 RSC seeking to amend the underlying summons despite liberty to do so having been granted by the court.

50. The appellant cited the *ex tempore* judgment of Power J. in *Danske Bank v. Kelly* [2020] IECA 126. However at issue in that case was whether the decision of McKechnie J. in *Harrisrange Ltd. v. Duncan* and the principles identified by him therein had been correctly applied by the trial judge in reaching a conclusion as to whether it was very clear that the defendant in the case did not even have an "arguable defence". The decision is of no relevance to any live issue in this appeal.

Submissions of the Bank

51. In written submissions the Bank noted that the appellant appears to misunderstand the effect of this court setting aside the order of the trial judge. It contended that the relief that the appellant now sought (*viz.* an order striking out the proceedings in their entirety) is inconsistent with that detailed in her notice of appeal. The appellant has not sought to amend her notice of appeal to expand the reliefs sought.

52. The Bank argued that no issue was taken in the notice of appeal with the calculation of the sum claimed in the summary summons and that the original grounds of appeal raised by the

appellant had been "essentially abandoned" in her written submissions. Instead, her submissions focus almost entirely on *Bank of Ireland Mortgage Bank v. O'Malley*.

53. The Bank submitted that, even if the appellant had sought in her notice of appeal an order striking out the proceedings, the proper and usual approach for an appellate court would be to remit the proceedings to the High Court to enable an amendment application to be made. While the appellant would not be prejudiced by a remittal, to strike out the proceedings would "visit an extraordinary injustice" on the Bank. Responding to the appellant's suggestion that the Bank could issue new proceedings, reference was made to *Clifford v. Minister for Education and Science* [2005] IEHC 288 wherein it was held that the fact that new proceedings could be taken is not a good ground for refusing leave to amend. It was also noted that the appellant indicated in her email of 21 July 2020 that she would oppose any new proceedings on the grounds of the rule in *Henderson v. Henderson.* The Bank noted that to ask this court to strike out the proceedings is to ask an appellate court to determine a question not considered in the court below which is not the function of an appellate court and reliance was placed on *Danske Bank v. Kelly* in this regard. The Bank argued that the appellant's insistence on prosecuting the appeal when it had already been substantially conceded operated to waste valuable court time and resources.

54. In response to criticisms of the summary summonses advanced on behalf of the appellant, counsel for the Bank referred to the judgment of Humphreys J. in *Havbell DAC v. Harris* [2020] IEHC 147 wherein it was stated at para. 10:-

> "…I think it is fair to say that there has been a certain element of inconsistency or at least development in the caselaw; and it seems unfair to visit the inconsistencies of the legal system on litigants in general or the plaintiff here in particular."

55. In relation to the issues raised with the trial judge's direction of 23 October 2018, counsel for the Bank confirmed that it would not oppose an application by the appellant to file a further affidavit if the case was remitted back to the High Court.

Discussion

56. In considering the appellant's new ground of appeal launched in oral submissions that the proceedings against the appellant should be struck out, it must be borne in mind that the jurisprudence operative at the date of institution of the proceedings by the Bank in 2016 included *Allied Irish Banks plc v. Pierce* [2015] IECA 87 which had considered the earlier decision of *Allied Irish Banks Ltd. v. The George Ltd.* (Unreported, High Court, Butler J., 21 July 1975) where one issue raised was whether the standard form of indorsement of claim used in the summary summons proceedings by the bank had satisfied the requirements of the then operative version of O. 4, r. 4 RSC. Butler J. had concluded that the special indorsement of claim in the summary summons "complies, though not perhaps ideally, with these requirements". He considered that: -

> "…it would have been preferable if the agreement to pay interest at the normal rate had been more particularly pleaded and that it had been indicated whether the loan was by way of overdraft or special advance or term loan or whatever might be the case. All this, however, is something which is clearly within the knowledge of the defendant so as to determine his attitude towards the claim and with the reservations I have stated, I am prepared to accept this special indorsement of claim as sufficient."

57. The caselaw shows that subsequent to the decision in *Allied Irish Banks Ltd. v. The George Ltd.* the general view was taken, particularly in the High Court when issues concerning compliance with O. 4, r. 4 were raised, for the court to consider in the context of such an application whether any omission had given rise to uncertainty, doubt or confusion in the mind

of the defendant as to what the nature and extent of the liability being claimed for, or the basis for same, might have been.

58. Generally, in the absence of a clear averment by the defendant casting doubt on the accuracy of the sums claimed, the courts tended to reject objections raised by defendants based on O. 4, r. 4. Hogan J. in this court in *Allied Irish Banks plc v. Pierce* at para. 17 noted: -

> "I do not doubt but that there might be special cases involving proceedings brought by way of summary summons where more elaborate particulars might be required. Yet such cases are likely to be unusual - perhaps even exceptional - and no objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the effect that, absent such additional particulars, the fair defence of the proceedings would be compromised."

It was the view of both Kelly and Hogan JJ. in *Pierce* that the Master of the High Court and the High Court in turn had erred in concluding that the summons was defective for failure to disclose adequate particulars regarding interest. At para. 15 of his judgment Hogan J. concluded:–

> "In the present case the particulars supplied by AIB in the indorsement of claim refer to the sum outstanding, the date of demand and the relevant account. To my mind, this is sufficient, at least so far as the present case is concerned. It is clear from the correspondence from her financial advisor which has been exhibited in the grounding affidavits filed on behalf of AIB that she is fully acquainted with the nature of the bank's claim against her."

59. In the later decision *Allied Irish Banks plc v. Doran* [2018] IEHC 2, delivered prior to the hearing of the motion for summary judgment in the instant case, very comprehensive arguments were advanced on behalf of the defendant that the special indorsement of claim had failed to set out properly the plaintiff's claim including the calculation for interest and

particulars with regard to the demand made. Barrett J., following the decision in *Pierce* and particularly relying on the judgment of Hogan J. therein, which in turn had placed reliance upon the principles stated by Cockburn C.J. in *Walker v. Hicks* at p. 9 and of Mellor J. in the said judgment, rejected the arguments and concluded that it was generally desirable that an indorsement of claim on a summary summons would be pithy and concise. Barrett J. observed that Hogan J. had noted that: -

> "…it would be 'special', 'unusual', 'perhaps even exceptional' cases where more elaborate particulars might be required." (para. 13 of judgment of Barrett J.)

60. The decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* represents a recalibration in judicial thinking as to what is required of a plaintiff in summary proceedings to comply with O. 4, r. 4 RSC. The Supreme Court restated the general obligation on a plaintiff to provide sufficient particulars in a summary claim and imposed a higher standard than had hitherto been acknowledged to be the case even in *Allied Irish Banks Ltd. v. The George Ltd.*

61. Cockburn C.J. stated at p. 9 in *Walker v. Hicks*:-

> "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."

Later decisions of this court and the High Court referenced above, where the above dictum of Cockburn C.J. was considered but nevertheless the court concluded on the facts that the level of knowledge and awareness by the defendant of the details regarding the loan agreement was such as might reasonably be considered sufficient notwithstanding non-compliance with O. 4, r. 4, are now probably of doubtful authority.

62. Clarke C.J. was satisfied on the evidence in *O'Malley* that there was a clear and 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 on the facts.

63. The approach of the Supreme Court engaged two distinct considerations: firstly, the level of detail required in a special indorsement of claim in a summary summons to ensure that it complies with O. 4, r. 4 RSC; and, secondly, the evidence required to be adduced by a plaintiff to warrant the granting of judgment in the sum claimed to the plaintiff. At para. 5.5 Clarke C.J. observed 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. …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."

64. It was a failure to allude to previously supplied details in the special indorsement of claim that presented a fatal difficulty for the bank in the *O'Malley* case. In concluding that the special indorsement of claim was not adequate, at para. 5.9 the Chief Justice observed:–

> "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."

65. In the years between the judgment in *Allied Irish Banks Ltd. v. The George Ltd.* and the judgment in *Bank of Ireland Mortgage Bank v. O'Malley*, the nuanced approach of Butler J. had fallen into desuetude and the decision of Cockburn C.J. in *Walker v. Hicks* was increasingly narrowly construed. This evolved over time into an approach that a summary summons ought not be held insufficient having regard to O. 4, r. 4 unless a defendant could prove convincingly by way of a replying affidavit that absent such additional particulars the fair defence of the proceedings would be compromised. This view is reflected in the language of Hogan J. in *Allied Irish Banks plc v. Pierce.*

66. The Supreme Court in *O'Malley* recalibrated the balance in favour of the defendant, reflecting the underlying fact that frequently in summary proceedings neither a defendant nor the court can confidently carry out a verification exercise to ensure that the constituent elements of the sums claimed are correct - especially where aspects such as interest, penalties, surcharges and fees are all rolled up into an omnibus sum. Such opaqueness, as the Supreme Court held, failed to meet the test of Cockburn C.J. in *Walker v. Hicks* that the particulars pleaded should be sufficient to enable a defendant "to satisfy his mind whether he ought to pay or resist."

67. The approach of this court to an argument based on the decision in *Bank of Ireland Mortgage Bank v. O'Malley* being raised for the first time on appeal is succinctly set out in the decision of Haughton J. in *Allied Irish Banks plc v. O'Callaghan* [2020] IECA 318:-

> "61. The decision in *O'Malley* was handed down some six months after the decision of the trial judge in the present appeal. However, it was at all times open to the appellants to agitate any concerns they had as to the adequacy of the particulars endorsed on the Summary Summons in this case, before the High Court. As I noted earlier in this judgment the adequacy of particularisation of the claim in the Summary Summons was

not raised in the High Court. Had it been raised – as it could have been under the Rules of the Superior Courts and existing jurisprudence on the level of particularisation required in a Summary Summons - it is likely that the trial judge would have afforded the Bank an opportunity to amend the Summary Summons and/or file additional affidavit evidence. A lack of particularisation was also not a Ground of Appeal. In my view therefore the appellants should not be permitted to raise this entirely new issue/argument at this stage. This is particularly so in circumstances where no denial is made in respect of the draw down of the sums borrowed originally in 2005, or the sums drawn down pursuant to the loan sanction dated 29 January 2009 upon which the proceedings are based or where the appellants have never claimed prejudice of any kind arising from the level of particularisation in the proceedings. Furthermore, as Clarke C.J. observes in para. 5.5 of *O'Malley* '…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 court was therefore entitled to take into account the three bank statements exhibited by Mr. McGuinness in his first affidavit. Minimalist as they were, they do on their face indicate that they were addressed to the appellants, they all bear the date 1st June 2017, and they set out the balances due as at that time."

Undue influence

68. Undue influence is a species of equitable fraud. As such it is incumbent on a defendant in summary proceedings who asserts same to depose on affidavit with particularity as to all facts, matters and circumstances being relied upon in support of the contention that undue influence was exerted of such a kind or degree as would vitiate a disputed transaction or obligation so that the plaintiff has an opportunity to consider the allegation and evaluate it in

all material respects. In *Delany and McGrath on Civil Procedure* (4th Ed., Round Hall, 2018) the authors observe at para. 5-87, in the context of plenary proceedings, that:-

> "…The rationale of this requirement was explained by Barrington J. in *Hanly v. Finnerty* [[1981] I.L.R.M.198], in relation to a plea of undue influence as follows:
>
> > 'Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests'."

The same principle applies, *mutatis mutandis*, to summary proceedings.

Determination

69. It is not in dispute that the Bank complied with a data access request made by the appellant and provided to her the documents sought on 25 July 2017. In her affidavit of 16 June 2017 she deposed that she required same to observe the figures available to the Bank in assessing the proposal and the strategy of the Bank in involving her in the transaction.

70. Notwithstanding receipt of the data fourteen months before the directions hearing of 23 October 2018, no further affidavit was ever filed by the appellant. No effort was made by her to explain that delay apart from the birth of a child in August 2018. She did not appeal the directions of the High Court judge that she was not to file any further affidavits nor did she apply to him to vary or modify the direction of which she was on notice. There is no suggestion that she ever prepared a further affidavit and she never applied to the High Court for leave to file an affidavit setting out any grounds on which she opposed judgment in the further intervening eight months prior to the hearing date in July 2019.

71. There was no evidence properly before the trial judge at the hearing such as would have entitled him to conclude that a plea of undue influence was established. There are distinguishing elements between the caselaw relied on by the appellant's counsel at the hearing such as *Ulster*

Bank (Ireland) Ltd. v. Roche, *Ulster Bank (Ireland) Ltd. v. de Kretser* [2016] IECA 371 and *Bank of Ireland v. Curran* [2016] IECA 399. Critically, the evidence shows that the appellant was registered in 2008 as joint owner of the property in Folio 32860F, Co. Wexford - a fact incompatible with the claim that she took no benefit under the loan.

72. There is no presumption of undue influence arising as a result of the relationship of husband and wife, as the jurisprudence makes clear. Unlike many of the authorities sought to be relied upon concerning vulnerable sureties or where an individual enters into an obligation such as a guarantee for the exclusive benefit of another, the evidence demonstrates that the loan was advanced in 2007 to the appellant and her husband jointly. She availed of the services of a solicitor in connection with the transaction and he attested her signature in several documents including a charge and all relevant instruments. The monies advanced to the appellant and her husband were applied towards the purchase of a dwelling-house comprised in Folio 32860F of the register of freeholders, Co. Wexford and same was registered in their joint names. The charge was registered on Part 3 of that folio on 9 April 2008.

73. The argument advanced by counsel for the appellant that it was incumbent on the Bank to pursue an application pursuant to O. 86, r. 10 RSC in circumstances where Costello J. had granted liberty to do so on 23 July 2020 is wholly misconceived. The authorities alluded to, as cited above, were inapposite and not relevant to any specific and net issue arising in the instant case.

74. I am satisfied that no reasonable basis was identified to support the proposition that the Bank was in a position to anticipate the outcome of the litigation and the tenor of the judgment in *Bank of Ireland Mortgage Bank v. O'Malley*. Such an argument is unsound and inconsistent with the jurisprudence as it stood on the date of institution of these proceedings including the *Pierce* decision of this court.

75. The final issue raised by the appellant is reliance on the Supreme Court decision in *Bank of Ireland Mortgage Bank v. O'Malley.* Since the respondent readily acknowledges the validity of that ground, the matter falls to be remitted to the High Court on that ground alone. I am satisfied that the order of Noonan J. made on 11 July 2019 ought to be set aside solely based on the application of the Bank in that behalf.

76. In determining where the justice of the case lies, regard must be had to the judgment of *Bank of Ireland Mortgage Bank v. O'Malley* aforesaid where the Chief Justice observed at para. 7.1:-

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

77. In the instant case I am satisfied that the respondent has established an entitlement to an order that the order of the High Court ought to be set aside and the matter remitted to the High Court to enable the respondent to apply to amend the special indorsement of claim as it proposes. The appellant is to be permitted to file such further affidavits in opposition to any such motion. In the event that the Bank succeeds in its application to amend the special indorsement of claim, the appellant is to be entitled to file such affidavit identifying such defences or otherwise as she may be advised. In all other respects it will be a matter for the High Court judge having *seisin* of this matter to deal with such applications as may arise from time to time in relation to same by either party.

Conclusions

78. It is significant that the appellant took no issue with the particulars of the claim advanced by the Bank before the High Court and in particular did not contest the considerable

detail embodied in the underlying exhibits to the various affidavits sworn in the course of the proceedings. However, in light of the *O'Malley* analysis, counsel for the Bank adopted the position that pursuant to O. 4, r. 4 RSC the Bank would seek leave of the High Court to amend the particulars of the summary summons itself, contending however that on its facts this case falls at the more compliant end of the *O'Malley* spectrum of cases. The Bank has come to a view that it was required to present a more robust summons and I am satisfied that it ought to be permitted to do so. I am satisfied that the new arguments launched by the appellant at the hearing of this appeal formed no part of the grounds of appeal advanced on behalf of the appellant and were not addressed in the written submissions filed on her behalf.

79. The appellant did not appeal the direction of Noonan J. of 23 October 2018, nor seek at any time over the ensuing nine months its variation nor apply to file a supplemental affidavit. She could have appealed against that ruling at the time had she wished to do so.

80. It is unrealistic for the appellant now to argue that pending the comprehensive judgment delivered by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley,* the respondent Bank ought to have anticipated the outcome of that decision.

81. No argument advanced by the appellant in the course of the appeal is sustainable apart from the *O'Malley* point which was conceded by the Bank months before. Entirely new grounds as the appellant sought to argue at the hearing cannot be entertained in the absence of any notification to the respondent in that behalf, particularly having regard to their novel nature, the fact that they necessarily involve new evidence and that same were not raised at all in the High Court. Basic fairness requires that a respondent ought not be blindsided by the launch of unheralded novel points at an appeal hearing without even an application for leave being brought. The circumstances where an appellant would be permitted to advance an argument not made in the High Court were explored by O'Donnell J. in the Supreme Court in *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227. The new

grounds lie at the extreme end of the spectrum where leave should not be granted. The risk of prejudice and injustice to the respondent in permitting such an approach has been adequately demonstrated.

The justice of the case

82. With regard to the appropriate approach to be adopted by this court, I am satisfied that, in light of the affidavit sworn by the appellant on 16 June 2017, in assessing what the appropriate order of this court might be regard must be had to the justice of the case and that same would be fully met on the facts by making an order setting aside the order of Noonan J. made on 11 July 2019 which is the relief sought by the appellant in Part 4 of her notice of appeal dated 9 September 2019. The second order sought by the appellant was that the matter at issue the subject of the summary summons be set down in the High Court for a full hearing. I am satisfied that such an order is not appropriate since no ground raised in the original appeal has been established and that the justice of the case will be fully met by remitting the matter back to the High Court on the basis that the Bank bring an application on notice to amend the special indorsement of claim in the summary summons to include such particulars and details as it may consider appropriate in light of the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley*. The appellant is entitled to file such affidavits in accordance with the Rules in relation to any procedural or substantive orders the Bank seeks.

Costs

83. From 20 July 2020, in light of the terms of the letter furnished on that date, it was evident to the appellant that the Bank was not opposing the appeal but was seeking to have the matter remitted to the High Court to "permit it to make an application to amend its underlying summons" in light of the decision in *Bank of Ireland Mortgage Bank v. O'Malley*. This was reiterated by the respondent on 18 August 2020.

84. By insisting that the appeal hearing proceed notwithstanding the concessions on the part of the respondent, the conduct of the appellant led directly to the incurrence of additional wasted costs. Such conduct is material having regard to ss. 169(1)(a) and (c) of the Legal Services Regulation Act 2015 which has been operative since 7 October 2019. The insistence in pursuing the full appeal and launching new grounds and arguments without warning to the respondent and without any application for leave to do so was not reasonable in circumstances where the grounds raised were not maintainable and did not succeed. This is material within s. 169(1)(b) of the said Act.

85. Having considered the decision of Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, recast O. 99 and s. 169 of the Legal Services Regulation Act 2015, in all the circumstances the justice of the case warrants that the order for costs made in the High Court be vacated. There should be no order as to costs of the High Court or in respect of this appeal up to 1 September 2020. There will be an order that the appellant pays one half of the respondent's costs incurred from and after 1 September 2020, to be assessed in default of agreement. Should either party disagree with this proposal they should file a written submission no longer than 1,000 words with the Office of the Court of Appeal within 10 days of delivery of this judgment, the other party having a like further time to file its submission in response. In default, the order as to costs as proposed will issue.

86. Murray and Binchy JJ. are in agreement with this judgment and the orders proposed above.