[2020] IEHC 359

THE HIGH COURT

[2017 No. 1806S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

DONAL MCNEELA

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 24th day of June, 2020.

1. This is the defendant's application made by way of notice of motion dated 14th February, 2019 for an order pursuant to O. 13, r. 11 of the Rules of the Superior Court to set aside a judgment obtained against him in default of appearance in the Central Office of the High Court, on 15th May, 2018. He claims that judgment was obtained by surprise and that he was unaware of the proceedings. Previously, by motion dated 8th November, 2018, application was brought by him to the Master seeking an extension of time within which to appeal. This did not proceed, possibly for procedural reasons, and was struck out. The application before the court, therefore, proceeds on the basis of the motion of 14th February, 2019.

Judgment in default of appearance in the Central Office

2. Order 13, r. 3 of the Rules of the Superior Courts provides:-

> *"3. Where an originating summons (whether plenary or summary) is indorsed with a claim for a liquidated demand, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment in the Central Office for such sum as is mentioned in the affidavit required by rule 18 not exceeding the sum indorsed on the summons, together with interest (if any) to the date of the judgment and costs…"*

Delaney and McGrath on Civil Procedure (4th ed, Round Hall, 2018) state at para. 27.28 that judgment will be for the sum specified in an affidavit of debt as the sum actually due, which cannot exceed the sum indorsed on the summons.

The Rules and principles applicable in an application to set aside judgment

3. Order 30, r. 11 of the Rules of the Superior Courts provides:-

> *"Where a final judgment is entered pursuant to any of the preceding rules of this order it should be lawful for the court to set aside or vary such judgment upon such terms as may be just."*

4. In *Allied Irish Banks plc v. Lyons* [2004] IEHC 129, Peart J. observed in relation to this rule:-

> *"Clearly a wide discretion is given to the court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the court in considering the interests of each party."*

Delay

5. Delay in making an application such as this may be fatal particularly where it is significant and unexplained. While the issue of delay was raised by the plaintiff, nevertheless, I am satisfied that within a relatively short period of becoming aware of the judgment, the defendant communicated with the plaintiff, sought information and, albeit perhaps using the incorrect procedure, brought the application of 8th November, 2018 with reasonable expedition. In the circumstances, I am satisfied that any delay on the defendant's part in bringing this application is not such as to justify the court in exercising its discretion to refuse the application solely on such ground. If there has been delay, it is excusable.

Regularly and irregularly obtained judgments

6. A distinction is drawn between cases in which judgment has been obtained in a regular manner from those where it has been obtained in an irregular manner. Where a judgment is obtained irregularly, the court will invariably set aside the judgment without enquiring into the merits of the proposed defence. In *Ótuama v. Casey* [2008] IEHC 49, Clarke J. stated that where judgment has been obtained regularly the court may nonetheless be persuaded to set aside judgment so as to permit the defendant to defend the proceedings but will do so only after considering the possible merits of the defence which the defendant seeks to advance.

7. Counsel for the plaintiff submits judgment has been obtained in a regular manner and thus the court must adopt the test which was outlined in *The Saudi Eagle* [1986] 2 Lloyd's Rep. 221, endorsed by the Supreme Court in *O'Callaghan v. O'Donovan trading as Cork City Football Club* (Unreported, Supreme Court, Lynch J., 13th May 1997). There, the court noted that the expression "*an arguable case*" and/or its equivalent had occurred in some of the reported cases. It continued:-

> *"This phrase is commonly used in relation to rules of the Supreme Court O. 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment it does not accord in our judgment with the standard indicated by each of their Lordships in Evans v. Bartham. All of them clearly contemplated that a defendant who was asking the court to exercise its discretion in its favour should show that he has a defence which has a real prospect of success."*

8. This reasoning was applied by Baker J. in *Ulster Bank Ireland Limited v. Brid Kavanagh trading as Barony B&B* [2014] IEHC 299. Having distinguished between judgments which have been regularly obtained from judgments which are irregularly obtained she stated, in respect of the former, at para. 9:-

> *"To set aside a judgment obtained by default the court must be satisfied that there is a good defence of a claim, and the basis of the court's jurisdiction is to ensure that an injustice does not result from the preclusion of a claim by a defendant who has a good defence on its merits. The court does not need to be satisfied that the defendant will succeed, rather that there is a point which has a real prospect of success."*

9. The first issue to be considered, therefore, is whether this judgment was obtained in a regular or irregular manner. If the court is satisfied that it was irregularly obtained, such as where the rules have not been complied with or where there is impropriety or frailty in respect of service, then it should not embark on an inquiry into the merits and judgment ought to be set aside. On the other hand, if satisfied that judgment was obtained in a regular manner, the court should consider whether a ground of defence advanced has a real prospect of success.

10. On the 31st January, 2020, the Court ruled that judgment had been obtained in a regular manner and sought further submissions from the parties in respect of the effect, if any, of the recently delivered decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 on the remaining issues in the case. Additional oral and written submissions were made by the parties.

11. The court's reasons for its decision that judgment was regularly obtained and its decision on the remaining issues in the case are set out hereunder.

Background

12. The plaintiff instituted proceedings by way of summary summons on 12th September, 2017. The claim is set out as follows in the Special Indorsement of Claim:-

> *"The Plaintiff's claim is for*
>
> *1. The sum of €144,901.11 together with continuing interest as hereinafter specified, being money payable by the Defendant to the Plaintiff, for money lent by the Plaintiff to the Defendant, for money paid by the Plaintiff for the Defendant as bankers for the Defendant at his request and for interest agreed to be paid upon money due from the Defendant to the Plaintiff, (full particulars whereof have already been furnished by the Plaintiffs to the defendant and short particulars whereof are hereinafter set forth) together with continuing interest at the rates hereinafter set forth until payment or judgment and subject to variation in accordance with the customs of bankers. The contract between the parties was made and intended to be performed within the jurisdiction of the Honourable Court, and further the debt the subject matter of these proceedings was incurred within the last six years.*
>
> *2. Continuing interest at the rate or rates applicable to the account or accounts of the Defendant from time to time prevailing until judgment or payment, whichever is earlier.*
>
> *3. Interest pursuant to the Courts Act 1981*
>
> *4. The costs of these proceedings*
>
> *SHORT PARTICULARS OF AMOUNT DUE*

To Principal due on foot of Term Loan Account No XXXX818 as at 8 September 2017 ……..€112, 436.74

To Principal due on foot of Current Account No. XXXX252 as at 8 September 2017 …….€ 32,464.37

Total sum due as at 4 September 2017…….€144,901.11"

13. The plaintiff contends that it had difficulty serving the summons. *Ex parte* application was made on 10th January, 2018 for an order for substituted service and such order was granted by Meenan J. That application was grounded on the affidavit of Ms. Teresa Murphy, O'Donovan Baker, solicitors on record for the plaintiff and also on the affidavit of a summons server sworn on 2nd November, 2017, Mr. Gintaras Kanapskis.

14. Ms. Murphy averred that she was instructed that the defendant's principal place of residence was 41 Montrose Drive, Artane, Dublin 5. She instructed Mr. Kanapskis to serve the summons. She also attempted to serve the summons by sending a copy of it by registered post to Mr. McNeela at his address in Artane, Dublin 5. The letter was returned by the postal authorities marked "*not called for*". The plaintiff had written to the defendant at that address on 17th July, 2017 demanding repayment of the monies. The defendant wrote to Messrs O'Donovan Baker on 14th September, 2017. His letter contained the same address - 41 Montrose Drive, Artane, Dublin 5. He queried discrepancies in the demand letter and sought clarification of what he considered to be the accusations and insinuations in the letter of demand. He wrote:-

> *"are you suggesting that this Account number is of a personal nature, and that same was set up by me personally in a personal capacity in any context whatsoever, when you can facilitate payment of deposits and/or can service any form of loan …"*

He raised queries concerning whether a formal instruction to close the account had issued and as to the balance on that account.

15. Mr. Kanapskis in his affidavit averred that he attended at 41 Montrose Drive, Artane, on six occasions. On 10th October, 2017 he attended on two occasions, 3:30pm and 7:50pm. He spoke with a person on the property who informed him that the defendant was the landlord and was "*currently residing at that address*". Mr. Kanapskis confirmed that he spoke to neighbouring residents both of whom confirmed that Mr. McNeela resided at that address. He was unable to personally serve the summons but was of the belief that the defendant resided at 41 Montrose Drive, Artane. For the above reasons Ms. Murphy believed that the defendant was attempting to evade service.

16. On 22nd January, 2018, Meenan J. made an order that service of the summary summons be effected on the defendant at 41 Montrose Drive, Artane, Dublin 5, by ordinary pre-paid post.

17. Mr. McNeela takes issue with the contents of the affidavits upon which the application for substituted service was grounded. He also contends that he was not at the address upon which service was effected at the relevant time and that a phone call would have been sufficient to clarify matters.

18. The fact of service was deposed to by Mr. Caroline Leahy, Legal Executive, in an affidavit sworn by her on 22nd March, 2018. She avers that on 1st February, 2018 she served a true copy of the summary summons together with the order of Meenan J. by ordinary pre-paid post on Mr. McNeela at 41 Montrose Drive, Artane, Dublin 5. She exhibits the certificate of posting. On Thursday, 1st February, 2018, within three days of service, she endorsed details of service on the summons. The envelope was not returned.

19. The plaintiff then sought judgment in default of appearance in the Central Office of the High Court. An affidavit of debt was sworn on 23rd April, 2018 by Mr. Gavin Rothwell and filed in the Central Office on 15th May, 2018, in which he averred, *inter alia*:-

> *"2. by letter of 17 July 2017, as it was entitled to so do, the Plaintiff through its solicitors wrote to the Defendant calling on him to discharge all sums then due and owing from him to the Plaintiff…*
>
> *3. The sum of €144,901.11 being the sum for which the Plaintiff seeks Judgment, against the Defendant, is now actually due by the Defendant to the Plaintiff over the above all just and fair allowances.*
>
> *4. For the purposes of obtaining Judgment the Plaintiff hereby waives its claim to interest pursuant to the Courts Act 1981 and otherwise until the date that final Judgment is marked.*
>
> *5. Value added tax is payable by the Plaintiff on the costs of the within proceedings and any such Value Added Tax is not recoverable by the Plaintiff by the Revenue Commissioners."*

20. On 15th May, 2018, the plaintiff obtained judgment in the Central Office in default of appearance for €144,901.11 and €416.00 for costs. On 15th May, 2018 an order of *fieri facias* was addressed to the Sheriff for County Dublin. Mr. McNeela informed the court that he received a letter which enclosed that order and he became aware that judgment may have been obtained. He sent an email to the solicitors representing the plaintiff on 8th June, 2018, informing them that he had recently been made aware that an application had been made to the High Court and "*apparently you obtained some form of judgment against me in the matter of case number 2017/1806S."* He continued:-

> *"If you have such a judgment why was I not informed before now?*
>
> *If such a judgment exists, please forward me copies of all documentation relating to the matter and take notice that I have a right of appeal and intend to exercise all of my rights inter alia to appeal."*

21. On 9th July, 2018 he sent a further email requesting copies of the judgment and all documents submitted in support of the application for judgment. On 28th August, 2018, he wrote to Ms. Murphy, informing her that when he requested a copy of the judgment and supporting documentation, the Registrar was unable to furnish them to him and suggested that he contact Ms. Murphy.

22. The judgment was sent to the Property Registration Authority for registration against his interest in certain of his properties.

23. The application to the Master of the High Court was grounded on the defendant's affidavit and was replied to by Ms. Murphy and Mr. Kanapskis. Those affidavits were also relied upon in support of the subsequent application which is now before this court.

24. In his affidavit sworn on the 8th November, 2018, Mr. McNeela avers that he was never personally served with the summons and that when the summons was sent to his address on 1st February, 2018 he was not in full time residence at that address. He states that the solicitors on record for the plaintiff at all material times had the means to contact him by telephone and service could have been arranged in that way. The essence of his claim in this regard is that the judgment was obtained by surprise. Mr. McNeela claims that he was not residing at the address in Artane at the time of service of the summons, not that it was served on the wrong address or was not served in accordance with the order of Meenan J. The case he makes is that when service was effected in February, 2018, because of work commitments as acting caretaker of other premises, he was residing at Robinhood Road.

25. Mr. McNeela avers to his belief that Meenan J. was misled. He does not accept that there was evidence before the court of an attempt by him to evade service. He claims that judgment was entered against him by surprise and that he has a *bona fide* defence. A number of grounds of defence are advanced. Many of Mr. McNeela's complaints are directed at the manner in which the order for substituted service was obtained, rather than the manner in which judgment was obtained on foot of the order for substituted service. He highlights what he considers to be the unreliability of the evidence placed before Meenan J. In later affidavits, he goes further and alleges impropriety on the part of the deponents who swore affidavits in support of that application.

26. By way of preliminary observation, it should be noted that the court is not here concerned with an application to set aside the order for substituted service, rather it is concerned with an application to set aside the judgment obtained in the Central Office. The two issues, however, have become conflated and the complaints made on this application have effectively been advanced against both orders.

27. It must be seriously questioned, therefore, whether the order of Meenan J., or the basis upon which it was obtained, is open to review in the manner in which Mr. McNeela seeks to do. Although no formal application has been brought to set aside the order for substituted service, the effect of any failure by Mr. McNeela to take such step has not been the subject of significant objection or procedural criticism by the plaintiff. It is not

claimed that the procedure adopted by the defendant amounts to an impermissible collateral challenge to the validity of the order of Meenan J. He is a litigant in person and in all the circumstances and in the interests of justice, the court has considered the matter as advanced, but without necessarily deciding whether such approach accords with principle.

28. Mr. Kanapskis in an affidavit in reply sworn on 19th December, 2018 recounts the attempts made by him to serve the proceedings between 29th September, 2017 and 19th October, 2017. He avers that he spoke to a gentleman at the address who described himself as one of the defendant's tenants. He spoke with two neighbours who also confirmed that the defendant resided there. On his third visit on 10th October, 2017, he telephoned the defendant on his mobile phone and spoke with him. He avers that Mr. McNeela would not meet him, nor would he accept service. On his final visit on 19th October, 2017 he attempted to telephone the defendant, but the call would not connect. It appeared to him that the defendant had blocked his number.

29. Ms. Murphy in her affidavit in reply sworn on 3rd January, 2019 reiterates the attempts made to effect service. She exhibits a letter written to her firm by Mr. Kanapskis on 20th October, 2017 in which he outlined the attempts made by him to effect service and refers to the conversation which Mr. Kanapskis states that he had with the defendant, a conversation which was not referred to by Mr. Kanapskis' in the affidavit sworn by him on 2nd November, 2017 for the purposes of the *ex parte* application for substituted service. Ms. Murphy avers that the summons was served in accordance with the order of Meenan J. The defendant did not enter an appearance and the plaintiff successfully applied to the Central Office for judgment in default of appearance. She denies that Meenan J. was misled and suggests that the defendant, by stating in his affidavit that 41 Montrose Drive is not his full time address, effectively concedes that he does reside at that address.

30. The motion now before the court was issued on 14th February, 2019, in support of which Mr. McNeela swore a further affidavit reiterating that no fair or reasonable attempt had been made to serve him and repeating what he had said in his earlier affidavit. In the context of a particular ground of defence advanced by him, Mr. McNeela refers to a letter received by him from the plaintiff dated 13th February, 2018. He avers as follows:-

> *"I say that the plaintiff's so called 'Liquidated Amount' is spurious and cannot be legally or otherwise verified by the Plaintiff or it's legal representatives. The amount of €144,901.11 claimed by O'Donovan Baker Solicitors on behalf of the plaintiff and attested to in the same amount by Gavin Rothwell of the Governor and Company of the Bank of Ireland filed on 23 April, 2018 cannot be correct if only the fact of a letter from the Bank of Ireland admitting overcharge of interest in correspondence dated 13th February, 2018."*

The letter of 13th February, 2018 was addressed to Mr. McNeela at 41 Montrose Drive, Artane, Dublin 5 and it referred to interest charges which applied to one account, and in respect of which a refund of €15.01 was to be lodged to his account before Friday, 16th February, 2018. It was confirmed that the transaction fee would not be applied. I note

from exhibit "*TM 8*" to a further affidavit Ms. Murphy sworn on 26th April, 2019 in which she exhibits statement in respect of both accounts, that the fee of €15.01 was refunded on 9th February, 2018. At para. 11 of that affidavit, she advised that the error was identified as part of a remediation program carried out by the bank in 2018.

31. Mr. McNeela also refers to correspondence sent to him from the debt recovery section of the bank on 14th June, 2016 and 6th September, 2016. It is to be noted that they were sent to other addresses. One was addressed to Mr. McNeela and two other named individuals at Seapark, Malahide, Co. Dublin; and the other to Mr. McNeela and one other person at Howth Road, Killester, Dublin 5. In these letters he was advised that because of his unsatisfactory relationship with the plaintiff bank, it was no longer prepared to offer him banking facilities with effect from 60 days after the date of the letter. He was therefore requested to close his account as soon as possible and he was advised that if he did not do this the bank would close the facilities, the balance would be offset against any outstanding debt and any remaining balance due would be forwarded to him. He was advised that all bank cards, direct debits and standing order instructions held by the branch would be cancelled and all cheques direct debits and other debits on the account would be returned unpaid. The accounts in question appear to be other accounts held by Mr. McNeela at branches of the plaintiff bank in Killester, Finglas and O'Connell Street, Dublin and which were in credit.

32. Ms. Murphy also emphasises that correspondence from Mr. McNeela following the obtaining of judgment in August, 2018, bear his address at 41 Montrose Drive, Artane, Dublin 5.

33. The matter first came before this court in April, 2019 when Mr. McNeela sought the opportunity to adduce further evidence to substantiate his claim that at the time of service of the summons pursuant to the order of Meenan J, he was residing in a house owned by his employer. He swore a further affidavit on 18th April, 2019 in which he averred that he was in fact residing in Malahide, and not in Artane, in September, October and December, 2017. He re-agitated issues regarding the application for the order for substituted service, protesting that he did not receive a phone call from Mr. Kanapskis and questioning the contents of his affidavit, laying particular emphasis on the fact that matters were averred to by Mr. Kanapskis in the affidavit sworn by him in support of this application which were not averred to in his affidavit grounding the application for substituted service. These include reference to contact with a female tenant who informed Mr. Kanapskis that Mr. McNeela was not in residence at the address at that time.

34. Mr. Edward Culligan, the defendant's employer swore an affidavit on 10th April, 2019 in support of the defendant's position. He is a director of a company which had purchased industrial premises in Robinhood Road on 1st February, 2018. The property comprised two industrial units and a three-bedroomed cottage. It was not possible to obtain insurance immediately because of the absence of an alarm and Mr. McNeela offered to remain in the cottage to provide security while stock, plant and machinery from premises

elsewhere were moved to the new property. Mr. McNeela provided security at the property for several months until after 19th July, 2018 when insurance was obtained.

35. Further affidavits were exchanged. Ms. Murphy avers that at no stage in the course of her office's lengthy dealings with the defendant did he inform her that between February, 2018 and June/July, 2018 he resided at Robinhood Road. Mr. McNeela replied once again highlighting inconsistencies in the affidavits sworn for the purpose of obtaining the order for substituted service and alleging that Mr. Kanapskis deliberately withheld information in relation to the conversation which he had with people at the address.

Discussion and decision

(a) Was judgment obtained in a regular or irregular manner

36. The first issue which must be addressed is whether the judgment was regularly or irregularly obtained. If regularly obtained, then the court must consider the merits of any proposed defence and the overall justice of the case in accordance with the jurisprudence referred to above.

37. The order for substituted service directed that service be effected by serving a copy of the summary summons together with a copy of the order for substituted service by way of ordinary prepaid post on the defendant at the address at 41 Montrose Drive, Artane, Dublin 5. Ms. Leahy avers to having done this. I am satisfied that the proceedings were served in accordance with the requirements of the order of Meenan J. It is also clear that no appearance was entered and therefore the plaintiff was entitled to seek judgment in the Central Office of the High Court, given the nature of the claim.

38. On the application for judgment the Central Office, an affidavit of debt was submitted. It is in short form. The deponent, Mr. Rothwell, referred to and exhibited the letter of demand of 17th July, 2017 and averred to a sum that was then due and owing of €144,901.11. Judgment was obtained.

39. Many of the 'irregularities' alleged by Mr. McNeela, in my view, are more directly relevant to substantive defences on the merits which he advances, rather than irregularity in the obtaining of the judgment. In his affidavit sworn on 23rd July, 2019, Mr. McNeela raises issues in relation to the identity of the plaintiff and the capacity of Mr. Rothwell to swear the affidavit. He suggests that the title of the Governor and Company of the Bank of Ireland is a trading name, that it is necessary to name a particular plaintiff and that the plaintiff is unidentified. The central thrust of his claim is that no contract or loan exists. This, he contends, is the irregularity.

40. It is instructive that the letter of claim of 17th July, 2017 from the bank is headed "*Governor and Company of the Bank of Ireland v You".* No issue was taken on this by the defendant in his reply of 14th September 2017, the opening sentence of which states "*I refer to your communication of July 17th wherein your heading "The Governor and Company of the Bank of Ireland v You infers the existence of a live legal case between the Bank of Ireland and myself which both factually and legally does not exist*." No issue was raised as to the defendant's understanding of the identity of the body claiming to be

owed money. In an affidavit sworn on 14th February, 2019 Mr. McNeela avers that the plaintiff denied him facilities to open a bank account in 2007. He also exhibits statements of account and letters from the Bank of Ireland in relation to a number of matters. While various letters exhibited by Mr. McNeela are headed "*Bank of Ireland*", a footnote of the letters state "*Bank of Ireland - The Governor and Company of the Bank of Ireland incorporated by charter in Ireland with limited liability*". I have no doubt that the defendant was aware that he was dealing with the plaintiff. In so far as any technical objection to the title of the proceedings is concerned, I am satisfied that this is misplaced. I am not satisfied that it has been established that the plaintiff has been incorrectly described or that insofar as this ground is advanced as one of irregularity, rather than a substantive ground of defence any such irregularity has been established.

41. I am also not satisfied that a basis has been established for contending that Mr. Rothwell did not have the right, authority or capacity to swear the affidavit of debt on behalf of the plaintiff. He is described as a bank official with the plaintiff's credit operations legal team and avers that he made the affidavit from his perusal of the books and records of the bank.

42. In *Delaney and McGrath on Civil Procedure* (4th ed., Round Hall, 2018), the authors state at para. 4-45:-

> *"Even if the court accepts the evidence of defendant that he was not served with and was not aware of the existence of the proceedings, there will be no irregularity if service has been effected in accordance with the order for substituted service."*

43. The authors note that the position will be otherwise if the address on which service was effected is incorrect. There is no suggestion or evidence that the summons was not served in accordance with the order of Meenan J., or that the address on which service was effected was incorrect.

44. The affidavit of debt, although terse, avers to the amount due and owing, which amount does not exceed that which is pleaded in the special indorsement of claim. I am satisfied that the judgment was regularly obtained, and I do not see that the arguments advanced by Mr. McNeela form a basis for the contention that it was irregularly obtained.

(b) Surprise and the order for substituted service

45. The court has difficulty in accepting that the defendant was taken by surprise. Nothing suggests that he was incapable of attending at his Artane address to obtain post in the period when he was residing in Robinhood Road. As referred to earlier, the Finglas branch of the plaintiff wrote to the defendant on 13th February, 2018 regarding overcharging and refund. The letter was addressed to the him "*T/A Oisin Gallery 41 Montrose Drive Artane Dublin 5"*, the same address at which service was effected by Ms. Leahy. This letter was exhibited by Mr. McNeela at "*DMN-B5*" in his affidavit sworn on the 14th February, 2019 and he places much reliance on it in advancing a proposed defence. He makes no complaint on affidavit of any delay or difficulty in receiving this letter. This raises questions as to whether he was, at minimum, in contact with the house in

February, 2018, a short period after the proceedings were served. His letter of 20th August, 2018 was also sent again from the Artane address. It is not suggested in that letter that he was neither resident at the Artane address nor that he did not have access to those premises at relevant times.

46. When Mr. McNeela communicated with the bank during 2017 and 2018, it was to and from the Artane address. On 14th September, 2017, he communicated from his Artane address. This letter was in response to a letter sent to that address in July, 2017. In the letter of September, 2017, he raised a number of issues and signed off by stating that he eagerly awaited a response. Nowhere in that letter is it suggested that he was not, as of 14th September, 2017, residing at the Artane premises. Nowhere is it suggested that his address was likely to change, and no other address is provided. Somewhat cryptically the bank statements appear to be addressed to premises in Seapark, Malahide. It is clear, nevertheless, from Mr. McNeela's affidavits that not only did he correspond from the Artane address in 2017 and 2018 but he also did so in 2015 and 2016.

47. Mr. Kanapskis in his affidavit sworn on 2nd November, 2017 in support of the application for substituted service, averred that he attended at the premises on six separate occasions including on 29th September, 2017 and on occasions between 2nd October, 2017 and 19th October, 2017. It is to be noted that the first of these occasions of attempted service occurred just in excess of two weeks after the defendant wrote a letter to the plaintiff from that address.

48. The suggestion by Mr. McNeela that he had been living in Malahide in September, October and December, 2017 is one which was made quite late in the application and is quite vague. How he came to reside at this address is also short on detail.

49. In his extensive affidavit sworn on 23rd July, 2019, Mr. McNeela's makes considerable complaint regarding the affidavits sworn by Mr. Kanapskis. He seeks to have the court draw inferences as to the unreliability of those affidavits on the basis, *inter alia*, Mr. Kanapskis goes into greater detail in response to this application than he did in his affidavit sworn for the purposes of obtaining the order for substituted service. He makes allegations of impropriety on the part of deponents in respect of affidavits sworn on this application and also in respect of the application for substituted service. For the most part the allegations focus on the identity of the described plaintiff and discrepancies which he contends arise between the contents of affidavits sworn in support of the application for substituted service and as subsequently deposed to on this application. To a large extent the latter contentions focus on the emergence of further information that a female tenant with whom the summons server made inquiries had informed him that the defendant did not reside at the Artane address. This was not referred to in Mr. Kanapskis' original affidavit. Ms. Murphy in reply refers to a telephone conversation which Mr. Kanapskis had with the defendant wherein he refused to accept service – a matter that was not referred to in his first affidavit. The evidence was that neighbours and at least one other tenant, confirmed that he resided there. Mr. McNeela disputes that this person was a tenant and

emphasises what he describes as the withholding of information regarding the female tenant's denial of his residence at the address in the application for substituted service.

50. While it may have been preferable had Mr. Kanapskis gone into greater detail in his affidavit to ground the application for substituted service, the fact that he did so in the later affidavits does not, in my view, detract from what went before. In my view, Mr. McNeela's allegations of serious impropriety on the part of deponents who have sworn affidavits on behalf of the plaintiff in these proceedings are unfounded and have done nothing to advance his case.

51. I am therefore satisfied that the judgment was obtained in a regular manner and Mr. McNeela has failed to establish that it was obtained by surprise. He was clearly aware that proceedings were threatened and at all relevant times he communicated with the bank from his address in Artane.

(c) The Test

52. As is apparent from the court's analysis of the test to be applied on an application such as this where judgment has been obtained in a regular manner, I am satisfied that the plaintiff is correct in its submissions that the decisions on which Mr. McNeela relies, which concern the test applicable on a summary judgment application, do not apply in this case. The test which is applicable is not whether the plaintiff has an arguable defence, rather whether he has established that he has a defence which has a real prospect of success, which imposes a higher threshold.

(d) Grounds of defence advanced

53. Mr. McNeela advances a number of grounds of defence, including that he did not sign a contract, that the sum claimed is not a liquidated sum, that he was denied facilities by the plaintiff and that accounts were closed in an irregular way.

54. Mr. McNeela contends that, apart from the claim not being liquidated, which I shall address below, there is no contract to which the bank can point to substantiate the claim. He maintains that the indorsement of claim lacks particularity and fails to identify any instrument upon which liability arises, being some form of loan agreement, which is binding on the parties. He describes the claim as being spurious which cannot be legally or otherwise verified, and one which the court has no jurisdiction to entertain. He contends that the alleged contract presented by the bank and the form of acceptance attached to the document does not and cannot relate to any loan facilities accepted by him. He contends that judgment was entered without jurisdiction as it was based on what he describes as a factually and legally non-existent loan agreement and letter of offer. He places significance on the absence of an identifiable loan contract and maintains that the plaintiff has been unable to demonstrate that it has a legally valid contract made in or about 17th September, 2010. He requires to be provided with an original signed contract, proof of the advancing of funds in line with the contract and he believes that it is legally impossible for the plaintiff to do this as no such contract exists and no such amounts were ever borrowed by him. Addressing the alleged creation of the contract between the parties at that time he maintains that the form of acceptance was not signed by him. Mr.

McNeela avers that a subsequent offer of facilities was made by the bank on 18th March, 2011 for a lesser amount in the sum of €125,000. Subsequent to the offer and sanction the bank provided €124,884.07 on 25th March, 2011 and payments of €970.45 commenced on 3rd May, 2011. He also states that he has the means to settle all his lawful obligations and refers to another account which is described as being fully paid.

55. Ms. Murphy, in her affidavit of 26th April, 2019, exhibits extracts from statements in respect of two accounts which she contends demonstrates the existence of a contractual relationship. She also exhibits statement of accounts which reflect amounts outstanding, as of April, 2019, in the sum of €113,340.13 in respect of the term loan account and €32,449.36 in respect of the current account.

56. Mr. McNeela contends that in 2007 the plaintiff denied him the facility to open a bank account. The nature of the defence on this point is not clearly formulated but he claims that data is stored on retrieval systems from which the plaintiff might take repayments in contravention of his statutory and legal rights which he enjoys under European Union law. It is claimed that the bank took repayments from a business overdraft account. He argues that when the bank decided to withdraw banking facilities in breach of his statutory rights, he was requested to, and proffered a final amount to settle any overdraft. He paid this to clear the account but because of *some form of trickery* on its part, the bank caused a small and insignificant amount to remain on the account, thereby keeping it open and then applying funds without his consent. He alleges, therefore, that the plaintiff was intent on keeping overdraft accounts open from which to service repayments and that such action was unlawful. He alleges that repayments were deliberately taken from the mortgage account which was for a business which had ceased trading, and which was not his personal account.

57. In his affidavit of 14th February, 2019, Mr. McNeela reiterates that the claimed amount of €144,901 could not be correct if only by reason of the acknowledgement of overcharging by the plaintiff in the letter of 13th February, 2018. He makes a complaint about the interest charges. At para. 14 of his affidavit, he avers:-

> *"I say that this action on the part of the plaintiff is wholly illegal where the plaintiff was earning interest on the mortgage repayments and now applying yet another outrageous interest rate (overdraft interest rate) and charges on top of interest rate of the mortgage, which is unjust and immoral to say the least."*

58. Mr. McNeela also raises issues in relation to the manner in which accounts were closed.

59. Ms. Murphy avers that the letter of 13th February, 2018 does not admit to overcharging, rather it accepts that a maintenance fee was incorrectly levied on the account. This was subsequently refunded and thus the defendant is not at a loss. She avers that any alleged impropriety in respect of other accounts cannot amount to a defence in respect of the judgment obtained. She emphasises that the defendant acknowledged on affidavit that funds were provided to him by the plaintiff and that he commenced making repayments on a monthly basis in the sum of €970.45.

60. The defendant also seeks to rely on the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 and the earlier decision of the Court of Appeal in *Allied Irish Bank v. Pierce* [2015] IECA 87 regarding the particularisation of the claim in the pleadings. In *O'Malley*, Clarke C.J. referred to the requirement placed on a financial institution suing for a liquidated sum to at least put forward a simple account of the basis upon which it is said the precise amount claimed is due. He continued:-

> *"That obligation is prior to and independent of the obligation of a defendant to put forward a positive defence. In other words, the plaintiff must establish the liquidated debt on a prima facie basis before it is necessary for the defendant to establish any defence which meets the threshold for plenary hearing."*

61. Although it is argued that *O'Malley* does not apply retrospectively, nevertheless, it seems logical that the court consider the issue relating to the pleadings in the first instance. If the defendant is successful in persuading the court that he has a real prospect of success in relation to this ground of defence based on this ground, then, save in respect of one aspect of the defences advanced relating to the contention that the claim is not for a liquidated sum, it may not be necessary to make a determination in respect of the other issues raised by him.

62. To the extent that it is contended that the pleadings are deficient and not in accordance with the provisions of the Rules of the Superior Courts because the amount claimed is not a liquidated amount, it seems appropriate that the court should rule on this issue at this stage.

(e) Liquidated Claim

63. Pursuant to the provisions of O. 2, r. 1. of the Rules of the Superior Courts, proceedings for liquidated claims may be commenced by summary summons where a plaintiff seeks to recover a debt or liquidated demand in money arising upon a contract, express or implied (as for instance, on a bill of exchange, promissory note, a cheque or other simple contract debt), and in certain other circumstances which are not germane to this case.

64. In *Motor Insurers Bureau of Ireland v. Hanley* [2006] IEHC 405, Peart J. accepted the definition of debt contained in Murdoch, *Dictionary of Irish Law* (4th ed., Round Hall, 2004) as being a sum of money which one person is bound to pay to another. These include simple contract debts, specialty debts created by a document under seal, debts of record and secured debts for which security has been given.

65. In *Delaney and McGrath* at p. 1139, it is stated that the essence of this class of claim is that it is either for a debt or for a liquidated sum of money, *i.e.* a sum which has been ascertained or is capable of being ascertained by mere calculation or arithmetic. The authors refer to the decision of Peart J. in *Hanley* as authority for this proposition. Peart J. referred with approval to a passage from Supreme Court Practice (The White Book, 1999) p. 40 as follows:-

"Debt or liquidated demand – a liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must already be ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages."

I am satisfied that the plaintiff's claim as advanced is a claim for a liquidated sum. Whether there is a substantive defence to the claim is a different matter. It seems that it is nevertheless appropriate to outline the nature of each of the defences advanced.

(f) Particulars of claim and Order 4., r. 4 RSC

66. Order 4, r. 4 RSC provides:-

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

67. In *O'Malley*, Clarke C.J. referred to *dicta* of Cockburn C.J. in *Walker v. Hicks* [1877] 3 QBD 8, at p. 9:-

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

68. Having concluded that the special indorsement of claim contained insufficient details of how the sum claimed was calculated so as to meet the requirements of O. 4, r. 4, he observed at para. 8.1:-

"In so holding, I have indicated that, in my view, it is possible to rely on documentation available to a defendant (such as bank statements or statements of account) for the purposes of providing sufficient particulars in a special indorsement of claim, but only where the document or documents in question are incorporated by reference into the text of the indorsement. No such incorporation occurred in this case and I am, therefore, of the view that, even if the Statement of Account provided sufficient particularisation of the claim, the special indorsement of claim would nonetheless be defective because that document is not referred to."

69. Mr. McNeela relies on this decision. He submits that in his case far less information has been provided in the Indorsement of Claim than was pleaded in *O'Malley*, where the fact

of the loan agreement, the drawdown of the loan, the existence of arrears and the calling in of the full sum were all referred to. Therefore, the only question which arose concerned the detail of how the amount said to be due was calculated.

70. Mr. McNeela also relies on the earlier decisions of the Court of Appeal in *Allied Irish Bank v. Pierce* [2015] IECA 87, where Hogan J. indicated that the level of detail required to be sufficient must include:-

    (i) the sum outstanding,

    (ii) the date of demand,

    (iii) the relevant account.

71. Mr. McNeela submits that the affidavit of debt verifying the claim pleads only to a single amount but does not identify the principal or interest, the rate of interest applied during the currency of the debt nor does it refer to the normal bank charges due in the same period. He submits that this is contrary to *dicta* of Butler J. in *Allied Irish Bank v. The George Limited* (Unreported, High Court, 21st July, 1975) where it was stated that in such an affidavit it is necessary to:-

> *"…identify and prove the amount of the principal and to aver and prove what was the current rate of interest in force during the currency of the debt and if applicable to aver and prove what were the normal bank charges due in the same period. If the computation of debt corresponds with the particulars of the special endorsement then the bank is entitled to judgment ..."*

72. Mr. McNeela submits that on the information available neither the defendant nor the court is in a position to check whether the figures are correct. Documentation which was sent to him prior to the institution of proceedings contains little detail of the debt.

73. Ms. Bannerman B.L., counsel on behalf of the plaintiff, submits in reply that at no point during the course of the lengthy exchange of affidavits in this case, did the defendant advance a defence based on noncompliance with O. 4, r. 4.

74. Counsel submits that to the extent that the law has been developed or advanced in *O'Malley*, the court having ruled that the judgment was not obtained irregularly, the order for judgment is final. The circumstances in which a final order may be amended or varied are limited, such as for example those provided for in O. 13, r. 11 RSC. Counsel submits that as a matter of principle this has important implications for the application of the *O'Malley* decision. The authorities establish that a point previously decided and finally determined cannot be reopened in the light of new precedent. Reliance is placed in this regard in the decision in *A v. the Governor of Arbour Hill Prison* [2006] 4 I.R. 88.

75. A similar question was considered by Baker J. in *Kavanagh*, who, relying on the principle of *A v. Governor of Arbour Hill Prison*, stated:-

> *" … the defendant was in a position to raise the procedural defences raised by the defendant in Bank of Scotland v. Stapleton and Ulster Bank v. Dermody in defence of the summary proceedings. In the circumstances, it seems to me that it would be contrary to the principles of justice and fairness to the plaintiff in this case, that a procedural matter which was not raised in defence seven years ago could be raised now . . .. Certainty and finality in litigation is an essential cornerstone of the rule of law and I cannot ignore the fact that to allow the defendant to reopen the matter at this stage some seven years after the proceedings for debt were commenced would offend against this principle."*

76. At para. 12, Baker J. stated:-

> *"It used to be said that judges did not make law but merely declared the law as it had always been. This proposition is now recognised as overly simplistic and as having evolved to explain the role of the judge who develops the law but yet does not displace the Oireachtas as law maker. The legal fiction developed to reconcile the interpretative interplay of the roles of stare decisis on the one hand and the fact that the court applies the law in an individual case and may in so doing have to explain or develop a principle only tangentially dealt with in other authorities or may have to distinguish it by reference to some others."*

Baker J. accepted that the defence argument in that case was tantamount to arguing that more recent jurisprudence had retrospective effect and concluded that this was impermissible.

77. It is therefore submitted that the *O'Malley* decision does not apply as a matter of principle and to retrospectively apply the principles enunciated in *O'Malley* would cause an injustice to the plaintiff who had obtained judgment in good faith and acted upon the finality of the decision by registering a number of judgment mortgages. To do so would further undermine an important objective of the administration of justice which is finality and certainty in justiciable disputes.

78. It is further submitted, in the alternative, that on the application of the "*consequences*" as outlined by Clarke C.J. even if the court is to find that that decision in *O'Malley* is applicable, it does not afford the defendant a defence that has a real prospect of success. Following the procedures outlined by Clarke C.J. in *O'Malley*, a plaintiff must be given an opportunity to amend its special indorsement of claim.

79. Counsel for the plaintiff, very candidly does not purport to suggest that the indorsement of claim in this case is, or would have been, in compliance with the requirements as stipulated in *O'Malley*, if applicable.

80. I am satisfied that Ms. Bannerman B.L. is correct that insofar as it may be said that the decision of the Supreme Court in *O'Malley* has refined or developed the particularisation requirements of pleadings in a special indorsement of claim where the plaintiff wishes to obtain judgment on a summary matter, it does not apply retrospectively. I do not see any

reason why the principle of non-retrospectively should not apply to a judgment obtained in default of appearance in the Central Office, as it does to judgments obtained in court. The fundamental legal objection remains; such retrospective application would undermine an important objective of the administration of justice being finality and certainty in justiciable disputes. I am satisfied that if the court were to apply the principles enunciated in *O'Malley* to a judgment which was obtained almost 18 months previously it would be unjust to the plaintiff. Counsel for the plaintiff maintains, and I accept, that the plaintiff obtained the judgment in good faith and acted upon the finality of the decision by registering a number of judgment mortgages.

81. Nevertheless, Mr. McNeela submits that he does not have to rely on the *O'Malley* decision and that in accordance with the jurisprudence which pertained prior to *O'Malley* and at the time judgment was obtained, the summons was in the form which did not have the necessary specificity and particularisation required by O. 4. r. 4 RSC, as interpreted by the Court of Appeal in *Pierce*.

82. In *Pierce*, the indorsement of claim contained the following particulars:-

> *"'The plaintiff's claim is for €785,928.24 against the defendant together with continuing interest at current bank rates being monies due by the defendant to the plaintiffs for monies leant by the plaintiffs to the defendant forborne at interest by the plaintiffs from the defendant and paid by the plaintiffs as bankers for the defendant at her request within the last six years."*
>
> *Particulars:*
>
> *Loan Account Number [details supplied]*
>
> *23rd April 2013:- amount formally demanded: (total): €785,928.24"'"*

83. Hogan J. observed that as a matter of general principle, the object of pleadings and specifically the requirement contained in the Rules of the Superior Courts regarding particulars was articulated by Henchy J. in *Cooney v. Browne* [1984] I.R. 185 at p. 191 as follows:-

> *"... where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial."*

The shared common objective of the various rules relating to particulars is:-

> *"... to ensure that litigants properly know the case that they have to meet. The obligation to supply particulars, is accordingly, not an end in itself."*

84. Hogan J. held that on an application for summary judgment a defendant is accordingly entitled to sufficient particulars as will enable him to determine whether he is obliged to

pay the sum claimed. Relying on *dicta* of Cockburn C.J. in *Walker v. Hicks* and having considered *The George Limited*, Hogan J. stated:-

> *"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 adviser 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. Adopting the words of Ryan J. in Bank of Ireland v. Keehan [2013] IEHC 631, it cannot be said that this defendant "has asserted…any confusion or uncertainty as to his liability.""*

85. Noting that counsel for the defendant had suggested that the bank could and should have provided certain details regarding interest, the nature of the loan and the repayments, he stated:-

> *"Doubtless all of this information could have been supplied, save that in that situation the indorsement of claim would have taken on the character of a bank statement rather than a pleading. It is clear, however, from the language of Ord. 4, r. 4 that this is what the drafters of the Rules sought to avoid: they aimed instead for a pithy and concise statement of the claim".*

Importantly, Hogan J. stated at para. 17:-

> *"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."*

He was satisfied that nothing of the sort arose in that case and he noted that counsel for the defendant had freely conceded that the objection was based on a pure pleading point to the proceedings as cast in their present form. He was satisfied that the indorsement of claim complied with the requirements of O. 4, r. 4, and further observed, in allowing the appeal, that the bank had supplied adequate particulars for the purposes of that rule, specifically:-

> *"... as there was no suggestion at all that this defendant did not know the nature of the case which she had to meet, it cannot be said that these particulars were inadequate in any way. There may, perhaps, be special cases where more particulars might be required, but such cases are likely to be unusual, even exceptional. Certainly, the question of further particulars could not arise unless the defendant first demonstrates by cogent affidavit evidence that the matter cannot be fairly determined in the absence of such particulars".*

86. While these principles have been developed in *O'Malley*, the question which this Court has to address is whether, in all of the circumstances, on the basis of the jurisprudence as developed prior to *O'Malley*, Mr. McNeela has a real prospect of success on this point.

87. Perhaps while not of central relevance, it should also be noted, as appears from certain of the facts adverted to by Hogan J. in *Pierce*, that the affidavits filed on behalf of the plaintiff in that case gave further details of the account and accrued interest. In addition, one of the documents therein exhibited was an open letter from the defendant's financial adviser to AIB. Hogan J. observed *"[i]t is, perhaps, striking that this letter did not seriously dispute the debt and gave details of settlement proposals which had been advanced on her behalf."* Here Mr. McNeela vehemently disputes the amount or indeed the accounts, on which the claim is said to arise. Nevertheless, although also not central to the court's consideration, I am cognisant of the fact that when the matter first came before the court Mr. McNeela accepted that he owed *some money* to the plaintiff but that he required to see certain documents. In submissions made on a later occasion Mr. McNeela sought to clarify that this was not intended to be an acknowledgement of the debt claimed in these proceedings, rather it was reference to money due in respect of a mortgage. No evidence has been advanced to this effect.

88. While in *Pierce* the court was concerned with an application for summary judgment, again it would appear to me, as a matter of principle, that the same reasoning ought to apply to the determination of whether a defendant has advanced a real prospect of defence on an application to set aside a judgment which has been obtained in default of appearance in the Central Office.

89. Turning then to the special indorsement of claim on the plaintiff's summons, it is pleaded that the claim is:-

> *"… for money lent and agreed to be paid by the Plaintiff for the Defendant as bankers for the Defendant at his request and for interest agreed to be paid upon money due from the Defendant to the Plaintiff (full particulars had already been furnished by the Plaintiffs to the defendant and short particulars whereof are hereinafter set forth) together with continuing interest at the rates hereinafter set forth until payment or judgment and subject to variation in accordance with the customs of bankers."*

Despite this express pleading, the summons contains no breakdown of the calculation of the sum claimed as between principal and interest, nor is there a pleading as to the rates of interest. Further, despite also expressly pleading that full particulars had already been furnished and that short particulars were being set out in the special indorsement of claim, none are pleaded, except by reference to the account numbers.

90. In the affidavit of debt, Mr. Rothwell avers only to the letter which was sent to the defendant on 17th July, 2017, which does not give a breakdown as between principal and interest or as to their calculation. The letter of demand is referred to as an exhibit in the affidavit of debt, but no such particulars are provided in that letter either.

91. In *Kavanagh*, Baker J. observed that the rules of the Superior Courts permit the court to set aside a judgment in the interests of fairness, "*and this means fairness to both sides.*" The interests of both parties must be balanced. Taking everything into consideration, bearing in mind the decisions of the Court of Appeal in Pierce and dicta of Butler J. in *The George Limited*, and, in particular, having regard to the manner in which the claim has been expressly pleaded by the plaintiff, I cannot be satisfied that the defendant does not have a real prospect of successfully arguing that the indorsement of claim does not comply with the provisions of O. 4, r. 4, as interpreted in jurisprudence as it was before further development in *O'Malley* and I therefore conclude that it is in the interests of justice that the judgment should be set aside subject, however, to the court's observations at paras. 93 and 94 below.

92. In the circumstances, I do not consider it appropriate to express a view on whether the other grounds of defence advanced have a real prospect of success.

93. I am also satisfied, in accordance with the principles outlined in *Petronelli v. Collins* (Unreported, Costello P., 19th July, 1996) and *EMO Oil Ltd. v. Willowrock Ltd* [2016] IECA 200, that in balancing justice as between the parties, this is an appropriate case in which consideration ought to be given to the imposition of terms on the order which this court proposes to make.

Conclusion

94. The Court therefore proposes to make an order setting aside the judgment obtained by the plaintiff against the defendant in default of appearance in the Central Office on 15th May, 2018 subject to the consideration of submissions from the parties on whether terms should be imposed on that order and, if so, what those terms should be. The court also invites the parties' submissions on costs.

95. Subject to any representation to the contrary, the plaintiff should serve such submissions as it wishes to make on Mr. McNeela within twenty one days from the date hereof, or such further period as may be agreed or ordered, and Mr. McNeela shall have twenty one days or such further period as may be agreed or ordered from receipt of the plaintiff's submissions to reply, should he so wish. The exchange of submissions should be by electronic means.

96. Finally, although on this application the court has not determined that the pleadings do not comply with the provisions of O. 4, r. 4 RSC rather that there is a real prospect that the defendant may establish such defence, I am also satisfied that it is open to the plaintiff to make application to seek to amend its pleadings if it so wishes.