Neutral Citation Number: [2006] IEHC 405

THE HIGH COURT

Record Number: 2004 No. 528 S

BETWEEN

MOTOR INSURERS BUREAU OF IRELAND

PLAINTIFF

AND
JOHN HANLEY

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 18th day of December 2006

Introduction

1. These proceedings arise out of a motor accident which occurred on the 27th June 1996. On that occasion the defendant was driving a vehicle when uninsured, and a third party sustained personal injuries and other losses. On the 15th July 1997, the third party issued proceedings in the High Court against the defendant, John Hanley and the Motor Insurers' Bureau of Ireland ("the Bureau"), seeking damages for those injuries and losses. A firm of solicitors came on record on behalf of both defendants on the 17th July 1998. The Bureau in due course settled those proceedings and paid over to the third party a sum of €127,170.07 pursuant to its obligations under the MIBI Agreement. The Bureau submits that this was not a voluntary payment, but was made pursuant to its legal obligations.

2. On the 15th September 1997 the defendant, John Hanley, signed a Mandate Form which states as follows:

> *"(A) I consent to the Motor Insurers' Bureau of Ireland taking over and conducting in my name the defence of any claim or action for damages for personal injury made against me arising out of an accident which occurred on the day of 19 (sic)*
>
> *(B) The Motor Insurers' Bureau of Ireland will be entitled to make such admissions on my behalf as appear to it to be necessary in the conduct of the proceedings and I undertake to give them all possible assistance and information in the handling of the claim and conduct of proceedings.*
>
> *(C) In the event of my having a claim for contribution against any person or party I authorise the Motor Insurers' Bureau of Ireland to prosecute such claim in my name for its benefit.*
>
> *(D) [DELETED -- see below]*
>
> *(E) I understand that the Motor Insurers Bureau of Ireland will where necessary and at its own expense instruct solicitors to act on my behalf."*

3. This Mandate Form has been signed by the defendant, but before signing same he deleted paragraph (D) which reads:

> *"I hereby accept liability for all sums paid by Motor Insurers Bureau of Ireland in respect of any settlements effected by it or on foot of any award of judgment made arising from the said accident."*

4. The Bureau nevertheless instituted summary summons proceedings on the 30th April 2004 which contains a Special Indorsement of Claim which states:

> 1. The plaintiff indemnifies uninsured drivers pursuant to an agreement dated the 21st December 1988 and made between the Minister of the Environment of the one part and the Motor Insurers Bureau of Ireland of the other part. The plaintiff has offices at 39, Molesworth Street, Dublin 2.
>
> 2. Pursuant to the said agreement ands as a consequence of the defendant executing a mandate the plaintiff agreed in the case of an accident occurring on or about the 27th June 1996 to be liable for the payment of compensation to Peter O'Riordan the victim of this road traffic accident involving the defendant who was an uninsured driver.
>
> 3. The plaintiff's claim is for €127,170.07 being money due and owing by the defendant to the plaintiff under and by virtue of the abovementioned mandate agreement whereby the defendant in consideration of the plaintiff paying over to Royal & Sun Alliance Insurance PLC the said sum of €98,921.62 on or about the 15th May 2003 and the said sum of €28,248.45 on or about the 25th September 2003, he authorised the plaintiff to deal with the defence of the above named Peter O'Riordan's claim against him. In breach of agreement the defendant refuses to repay the said monies.
>
> 4. Further or in the alternative on or about the 15th May 2003 the plaintiff paid out €98,921.62 and on or about the 25th September 2003 the plaintiff paid out €28,248.45 for the benefit of and on behalf of the defendant and at his request, implied or otherwise.
>
> Particulars:
>
> The plaintiff had indemnified the defendant in an action arising out of a road traffic accident in which the defendant was uninsured, in the sum of €127,170.07. This indemnification was granted not only in consideration of an express mandate signed by the defendant dated the 15th September 1997 but in addition as a consequence of the plaintiff's obligations under the said agreement dated the 21st December 1988.
>
> 5. In the premises, the defendant became and is liable to repay the said sum to the plaintiff by reason of an implied or express subrogation or otherwise under the principles of recoupment/restitution.

5. Following the service of these proceedings on the defendant on the 22nd July 2004, an appearance was entered by the defendant's solicitors. Thereafter, as required by Order 37 of the Rules of the Superior Courts, 1986 ("RSC") the plaintiff issued and served a Notice of Motion dated 1st June 2005 seeking liberty to enter final judgment for the amount of €127,170.07, together with

interest and costs. That motion came before the Master of the High Court first of all on the return date the 4th October 2005. It seems to have been adjourned until at least the 17th November 2005 since there is a letter dated 14th November 2005 from the defendant's solicitors to the plaintiff's solicitors in which they state:

> *"Further to recent correspondence herein please note we will not be contesting your application on Thursday 17th November 2005. We will not be in attendance."*

6. Nevertheless, according to the affidavit grounding the present motion, it appears that the Master of the High Court took the view that the claim was not one which could be the subject of a summary summons, and directed that the matter be listed before the President of the High court. On the 30th January 2006 the learned President directed that the present motion be issued and that the defendant be put on notice thereof. The present motion was issued by the plaintiff on the 15th February 2006 and seeks the following reliefs:

> *"1. A declaration that the plaintiff is entitled to pursue its action herein as against the defendant by way of Order 2 of the Rules of the Superior Courts, 1986.*
>
> *2. Directions as to the joinder of the Minister for Transport as a notice party.*
>
> *3. Such further and other order or directions as this Honourable Court seems just.*
>
> *4. Costs."*

7. It is the first of these reliefs which really needs to be addressed in this judgment.

8. The Court has been informed by Brian O'Moore SC for the plaintiff that it has been agreed between the plaintiff and the defendant that whatever the result of this present application, the Bureau will be discharging the defendant's costs of this application, since it is a matter which the Bureau is anxious to have clarified by the Courts. Henry Hickey SC has appeared on the defendant's behalf.

9. An averment in the affidavit of John Casey sworn for the purpose of grounding the present motion states:

> *"In addition this affidavit sets out the fact that Mr Hanley signed a mandate but on legal advice of Holmes O'Malley Sexton* ***deleted the part that would make Mr Hanley contractually liable to the MIBI*** *for the payment out of monies to Mr O'Riordan. I say and believe and I am advised that notwithstanding this deletion the plaintiff herein is still liable to pay out the monies on behalf of Mr Hanley and this duty is as set out in the relevant European Directives having direct effect in this jurisdiction…"*

10. In the affidavit which grounded the Notice of Motion before the Master of the High Court, Brenda Kearns on the plaintiff's behalf averred at paragraph 6 of her affidavit as follows:

> *"6. I say that as can be seen from the mandate form, Mr Hanley deleted Paragraph D which I have been advised by Counsel means that the plaintiff is* ***not entitled to claim Judgment from any contractual obligation*** *owed by the defendant herein to the plaintiff arising out of paragraph D which had been deleted as aforesaid.* ***Judgment is therefore sought for the liquidated sum*** *claimed on an action for recoupment instead as claimed in paragraph 5 of the Special Endorsement of Claim."*

11. I refer to these passages since Mr Hickey places reliance upon them when he submits that it is clear that the claim made herein is not a claim under a "contract, express or implied" and therefore outside the scope of the type of claims which are permitted to be commenced by way of summary summons under Order 2 RSC. The remainder of the affidavits do not need to be set out in detail. I will if necessary refer to other passages as required, but in general they set out some factual background relating to the claim being made, the settlement of the claim of Mr O'Riordan, and the basis on which the plaintiff feels that the defendant is liable to recoup to the plaintiff the sum claimed, and its belief that the settlement achieved in respect of the claim of Mr O'Riordan was a good settlement from the Bureau's point of view given the potential for the claim to achieve a higher amount of damages, including social damages if it went to trial. It is submitted by the plaintiff that it is without doubt that the Mandate Form by which the defendant authorised the Bureau to take over and defend the claim being made against him included an authority to settle the claim ahead of any trial if it was considered advantageous.

Submissions

12. The defendant submits that although the sum claimed by the plaintiff is a liquidated sum, it is not claimed or due on foot of any contract, express or implied, since paragraph (D) has been deleted, and that in so far as it remains a claim for recoupment of a sum paid out to the injured third party, it is a claim outside Order 2 RSC and ought to be commenced by way of Plenary Summons. In his written submissions, Mr Hickey has submitted that in summary summons proceedings, the Court can on affidavit evidence alone grant judgment on the basis of affidavit evidence alone provided that it is satisfied that there is no bona fide defence to the claim, and that the defendant is denied the opportunity to put the plaintiff on full proof of each and every aspect of the plaintiff's claim. He submits therefore that the Court should not lightly extend the ambit of Order 2 RSC to claims not referred to specifically therein, and should interpret the rule strictly.

13. The defendant submits that in the present case the mandate is not an agreement by the defendant to reimburse the plaintiff in the amount it might pay to the injured party. He submits that in the face of the deletion of the clause from the mandate, the plaintiff could have refused to come on record for the defendant, but chose to do so and to deal with the claim by the injured party. It is submitted that by so doing it accepted the defendant's terms, namely that he would not have any liability to the plaintiff for any sum paid out by the plaintiff. He also submits that the payment made by the plaintiff was a voluntary payment and that it was under no compulsion to make it.

14. Mr Brian O'Moore SC for the plaintiff has submitted that the plaintiff's claim is for a liquidated sum and that the deletion of paragraph (D) simply means if he chose to do so, the defendant could defend the claim by asserting that the amount of the settlement of the claim by the plaintiff was an improvident settlement, but that it does not result in the plaintiff's claim being other than one on foot of the contract/mandate. Mr O'Moore submits that under the MIBI Agreement the plaintiff is compelled to make the payment and that it cannot be described as a voluntary payment, albeit one made in settlement of proceedings, rather than on foot of a judgment of a Court. He submits also that in so far as Ms. Kearns in her affidavit states that the plaintiff is "not entitled to claim Judgment from any contractual obligation owed by the defendant herein to the plaintiff arising out of paragraph D", that is not an acknowledgment that no claim arises on foot of a contract. He submits that all she is stating therein is that no claim can arise on foot

of the deleted paragraph itself.

The history of Order 2 RSC

Common Law Procedure Amendment Act (Ireland) 1853, 16 & 17 Vict. Cap. 113

15. This Act made statutory provision for rules of procedure in personal proceedings in Ireland.

16. The expressed purpose of this Act was to "*simplify and amend the course of procedure as to the process, practice, pleadings, and evidence in the Superior Courts of Common Law in Ireland, so as to make the same dilatory and expensive and to prevent substantial justice from being defeated by reason of the variety of forms of action, and the technicalities and prolixity of pleadings ……*"

17. Under the provisions of this Act, all previous forms of personal action were abolished and replaced by a new "personal action", and by s. 8 of the Act was to be instituted by "a writ of summons or plaint". Section 6 thereof provided that:

> *"6. The right to recover any debt or damages or personal chattel, in respect of any matter of contract or of tort… which might have been heretofore the subject of any action of debt….. shall and may be enforced in an action to be called "a personal action…"*

18. Section 16 made wide provision for amendment of the writ by the Court so that the proceedings would no longer be held to be void on some technical ground and set aside, as happened before the passing of the Act.

19. The Act went on to make provision for most matters one has come to expect in Rules of Court even nowadays. It is striking how familiar many of the provisions are, and what similarity many of them bear to those which have still find their rightful place over one hundred and fifty years later in the current Rules of the Superior Courts. Indeed it can be easily and accurately described as the progenitor or *fons et origo* of the current rules of court.

20. Of particular interest in this respect are the provisions of **s. 96** which related to marking judgment by default. It provides:

> *"96. No rule to compute shall be necessary or used; but where the plaintiff's claim is for a* ***debt or liquidated demand in money****, with or without interest, arising upon a contract, express or implied in default of such defence or demurrer filed ……it shall be lawful for the plaintiff, on filing an affidavit of the service of the writ and plaint …… to sign final judgment etc. " (my emphasis)*

21. There is a footnote to this rule in Bewley and Naish: *The Common Law Procedure Acts*" published in 1871 at p. 100 to the effect that:

> *"A 'liquidated demand in money' means such a one as the plaintiff can by calculation ascertain the amount of ……, and accordingly a plaintiff is entitled under the above section to mark a final judgment by default, not only in the class of actions in which before the passing of the Act a rule to compute, or as it was commonly called, a rule to tot, might have been obtained, but also, in actions for liquidated money demands, which, though not technically actions of debt, yet the basis for having been first ascertained by the confession of the defendant, the amount is mere matter of calculation ……. Thus where an action is brought against a surety on a guarantee, the plaintiff is entitled to mark a final judgment under this section, whenever the claim is against the principal is in respect of a liquidated demand……"*

22. On the other hand, these authors note at the time that where the demand was in the nature of a quantum meruit the amount of which cannot be arrived at by numerical calculation, judgment (described as 'interlocutory judgment' rather than 'final judgment') had to be sought under s. 98, rather than under s. 96. This view, formed from then existing case-law, was found not to be correct in subsequent cases to which I refer later.

23. A footnote to s. 98 states in relation to the phrase "substantially a matter of calculation" that there was no precise rule, and that it depended on the circumstances of each case.

24. An interesting and helpful case on the question of what type of claim was intended to be the subject of such a special indorsement of claim, as already referred to, is *Connolly v. Teeling*, 12 Irish Common Law Reports (Appendix) 29, and I will return to that decision later in my judgment.

25. After some years, these statutory provisions for rules of court, first introduced here under the **Common Law Procedure Amendment (Ireland) Act, 1853**, were replaced, though not substantially altered, by the **Rules of the Supreme Court (Ireland), 1891.**

26. Of relevance to the present issue is that under **Order III, rule 6** of those Rules, it was provided:

> *"6. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A)* ***upon a contract, express or implied*** *(as for instance on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B) …… the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled…"*

27. A footnote to that rule in Wylie's Judicature Acts, 1900 at p. 189 makes reference to many cases which deal with what is or is not to be regarded as a claim for a debt or liquidated demand. What seems clear is that such a claim had to be for a specific sum of money, although a claim by a solicitor for costs not yet taxed and ascertained was included under the rubric. It refers also to the forms of claim contained in Appendix A, Part III, sec. II of those Rules, for upwards of fifty types of claim for debt or liquidated demand, such as goods sold, money lent, arrears of rent, general average contribution, fees for work done by a solicitor, return of premiums paid on a policy of insurance, money paid by a mistake, to set forth only a few. It is a very wide-ranging list of such claims.

28. It is worth noting that by the time Wylie published his work in 1900, it had been decided that claims by way of *quantum meruit* could also be the subject of a special indorsement, and therefore capable of coming within the rule for recovery of a debt or liquidated demand, even though the rule itself had not altered in any material way. Cases which were thought to have held the other

way, were held not to be authority for that.

29. In *Stephenson v. Weir* 4 LR. Ir. 369, decided in **1879**, for example, the plaintiff sued to recover a sum for work and labour on a *quantum meruit*. The defendant contended that as the price had not been fixed by contract the demand was not "a debt or liquidated demand in money" within the meaning of the rule. Palles C.B. looked at the history of the rule under consideration, evolving as it did by way of the English Common Law Procedure Act, 1853, which for England, abolished the former matter of form, just as the Irish Act already referred to did here, and replaced it with a rule, whereby it was the substance and nature of the claim which was examined, rather than the form of the proceedings commenced, in order to determine whether it was a claim in which judgment could be marked. Palles C.B. having noted that the term "debt or liquidated demand in money" was used in s. 93 of that Act to describe a claim in which an action in debt would have lain under the former regime, stated that it was therefore clear that the effect of that section was "*to enable final judgment to be marked without a writ of inquiry in any case in which before the statute an action of debt might have been maintained*" He went on:

> *"There can be no doubt that an action in debt could have been maintained for work and labour upon a quantum meruit. …… When it was said that an action of debt would lie only for a sum certain, it was sufficient that the sum should be capable of being ascertained by a jury by positive data, and not merely measured by opinion or conjecture. In the present case, for instance, when the value of the work was ascertained, the sum to be recovered became definite, and the case would not be one like assault in which there were not any certain data to fix the amount of damages."*

30. Palles C.B. went on to state that the judgment in *Connolly v. Teeling* 12 Ir. C.L.R. (Appendix) 29, previously relied upon for the belief that *quantum meruit* claims could be regarded as being a debt or liquidated demand, was not authority for that proposition, and that statements therein which suggested it were obiter.

31. In **1881**, a similar judgment was given in *Kilgariff v. McGrane* 8 LR. Ir. 354 where the plaintiff, a doctor, sued the defendant for the recovery of a sum of £90 for medical attendance on the defendant's deceased wife. Dowse B. decided that a claim for work and labour is a liquidated demand, and recalled that the Court had previously decided that a solicitor's claim for his work and labour had been similarly regarded, entitling the plaintiff to final judgment.

32. In *Lagos v. Grunwaldt* [1910] 1 KB. 41 CA, another case in which a solicitor sued for a bill of costs, Farwell L.J. referred to the old division of common law actions to be found in Bullen & Leake, 2nd ed. Those authors refer to the former divisions of counts such as money counts or common counts, and to the fact that these categories of claims, as well as other counts such as *quantum meruit and quantum valebat* "*which were adopted where there was no fixed price for work done or goods sold etc*", had fallen into disuse and had been superceded by the general application of the indebitatus counts. Farwell L.J. stated then:

> *"In my opinion that is the true view; everything that could be sued for under those counts comes within the description of debt or liquidated demand".*

33. In other words, it appears that under the then new rules, it was intended that, in the same way as under s. 96 of the 1853 Act rules, all claims in which the amount claimed was for a sum certain, it could be regarded as a debt or liquidated demand and could be specially indorsed for the purpose of Order III, r. 6 of the then new 1891 Rules, so that judgment could be obtained in the manner equivalent to our present day summary summons procedures.

34. Commenting on the equivalent rule in England, *Bullen & Leake, Precedents of Pleadings*, 8th edition, 1924 comments at p.50:

> *"The words 'debt or liquidated demand' in Ord. III, r. 6 are not restricted to cases in which a fixed amount was expressly agreed to by the parties when they entered into the contract; they includes cases in which the plaintiff is entitled to be paid according to prices current in the trade or to the scale of charges recognised in his profession…… Whenever the amount which the plaintiff may recover depends upon all the circumstances of the case and on the conduct of the parties, so that it can only be fixed by a judge and jury, the damages are unliquidated and the case is not within the rule."*

35. **The Rules of the Supreme Court (Ireland), 1905** which came into effect on the 25th October 1905 annulled all previous rules, including those of 1981 referred to, and provided for an identical rule in Order III, rule 6 thereof, to its equivalent in the 1891 Rules.

36. Following the passing into law of the Courts of Justice Act 1924, **Rules of the High Court and Supreme Court, 1926** were introduced pursuant to powers contained in s. 36 thereof.

37. Order 1, r.1 thereof announced immediately that:

> *"the practice and procedure heretofore in force with regard to civil proceedings…shall apply to similar proceedings…in all cases in which no provision or incomplete provision is made by the Act, or by these Rules, save in so far as such procedure is inconsistent with the procedure required by the Act, or these Rules."*

38. As pointed out by Hanna J. in *Caulfield v. Bolger* [1927] IR. 117 at p. 123, (another case of a solicitor suing for his costs) it is important to note that while there was provision made in the Act that permitted of a rule such as O.1, r. 1 above to cover a '*casus omissus*' in the rules made, the provisions of s. 36 must not be overlooked since that section empowered the relevant Minister to make Rules of Court for, inter alia, "*pleadings, practice and procedure generally (including the entering up of judgment and the granting of summary judgment in appropriate cases) in all civil cases*" – in other words, for the very type of case under consideration in that case and as it happens, in the present one.

39. Those 1926 rules provided for a summons in lieu of the previous 'writ' and provided for a 'plenary summons' in cases where pleadings and oral evidence were required, and for a 'summary summons' for the commencement of summary proceedings without pleadings.

40. Order III, rule 1 provided specifically for procedure by way of summary summons in the case of a claim, *inter alia*, for a liquidated sums due on foot of a contract, express or implied.

41. In *Caulfield v. Bolger* [supra], Hanna J. stated at p.124:

> *"the words 'claims for liquidated sums' may be deemed to be the substantial equivalent of and covers the various forms used under the previous rules .l. in respect of claims which might have been specially endorsed on the writ…".*

42. He went on:

> *"This seems to assist one to the conclusion that there has been no casus omissus in the making of the Rules to deal with summary judgment in appropriate cases as directed in s. 26 of the Act."*

43. The case itself does not concern the issue in the present motion and concerns the need for a special indorsement to be fully particularised on the summary summons, describing the indorsement of claim on such a summons as "the analogue of the statement of claim in plenary proceedings", and the requirement that it must "connote such particulars as are essential to make the indorsement a good statement of claim both in particularity and in law". In that case, the indorsement was found to lack sufficient particularity, as would the affidavit of debt filed before the Master of the High Court when the matter came before him. Judgment was refused and the proceedings were adjourned to plenary hearing as if they had been commenced by way of plenary summons, and were in fact transferred down to the Circuit Court since the amount claimed was within that jurisdiction in monetary value.

44. But the case is interesting in view of the reference to the specific legislative reference to making rules for summary judgment cases, and in this way it can be suggested that the jurisprudence in cases predating the passing of that Act and the rules thereunder have more limited value than if the new Rules had simply, by way of the casus omissus rule referred to, adopted the old rules into the new rules.

45. Order IV, r.2 of the 1926 Rules provided that such claims must be fully particularised in the Special Indorsement of Claim, as had been required under the equivalent rule in Order III, r. 6 of the Rules of the Supreme Court (Ireland) 1905. Cases such as *Caulfield v. Bolger* [1927] IR 117, and *Starkey v. Purfield* [1946] IR 359, curiously also brought by solicitors suing for their costs, have emphasised the necessity for scrupulous adherence to the requirement under the rules for full particularisation of claims the subject of a special indorsement of claim on a summary summons. The summary summons in the present case does not seem to be at risk of failing in that respect at least. If there was any doubt about that absolute requirement, it was again confirmed by the judgment of Murnaghan J. in *Stacey & Harding Ltd v. O'Callaghan* [1958] IR. 320. He stated in that regard at p. 322:

> *"It is not easy, nor do I propose, to lay down any hard and fast rule as to what is and what is not a sufficient indorsement within r. 2 of Or. IV. Each case must be considered in the light of the particular claim made, and must depend on the particular circumstances. I will say, however, that such particulars must be given in every case as may reasonably be necessary to enable the defendant to know whether he ought to pay or resist…"*

46. In **Bond v. Holton [1959] IR 302**, a question arose as to whether the claim brought by way of summary summons disclosed a cause of action capable of being brought by summary summons under Order III of the 1926 Rules, and, in particular one "*on foot of a contract, express or implied*". The defendant contended that no such cause of action was shown on the summons. The facts were that the plaintiff had been appointed as receiver over certain lands owned by a judgment creditor named Walsh. The receiver had power to make lettings of the land. The defendant, Holton, took a letting of the land directly from the judgment creditor, Walsh and not from the plaintiff receiver, in the full knowledge that the plaintiff had been so appointed. The plaintiff informed the defendant that this letting was made without authority and was void, but indicated that if the defendant was to pay the sum of £558 rent to him, he would ratify the letting. The defendant elected to adopt that course, remained upon the lands, but did not pay the rent, stating that he had paid it already to the judgment creditor, Walsh. The plaintiff sued for the rent of £558 and submitted that the cause of action was a claim for rent "*or, if that term be thought inappropriate, for a sum claimed under an agistment or conacre letting, for money due under an eleven months letting for grazing or agistment, or alternatively for use and occupation.*"

47. The case was dismissed in the High Court as disclosing no cause of action against the defendant under the Rule. The Supreme Court pondered the question as to whether there was any contract express or implied pleaded in the indorsement of claim. Lavery J. was prepared to see the existence of an offer, albeit that the plaintiff would have had no power to ratify a void letting. But he stated: at p. 307:

> *But to constitute a contract either express or implied an offer is not enough; there must be an acceptance. Is an acceptance pleaded? I have set out para. 7 of the summons. It alleges that the defendant 'elected to occupy and enjoy the lands let to him under the said memorandum of agreement'. The alleged 'election', it is said, is the acceptance of the offer. A pleading should state the fact on which the pleading party relies. The use of the word 'elect' is not a statement of fact. Paragraph 7, in my opinion, alleges no more than that the defendant did occupy or continue to occupy, as I think, the lands in question. The fact that he did so cannot be referred to the offer alleged. An offer may of course be accepted by conduct, but there is nothing alleged which could possibly relate the conduct of the defendant to the plaintiff's alleged offer. The defendant was already – as I think is plain – in occupation of the lands under his agreement with Mr Walsh. I think that is disclosed by the pleading. His continuance in such occupation should naturally be referred to the right, or claim of right, on which he entered until displaced by some allegation that he surrendered the claim and accepted other obligations as a condition of his continuance in occupation."*

48. Lavery J. went on to suggest that if he was wrong in what he stated, then the defendant was a trespasser, and not a tenant under any contract, either express or implied. This was not pleaded and the plaintiff declined to apply for any amendment for reasons which the Court stated were understandable. The claim for the rent was dismissed, even though that claim was for a liquidated sum.

49. In **The Annual Practice** 1941, (The White Book) there is a footnote on p. 17 under the heading 'debt or liquidated demand' in the context of O.3 r. 6 RSC – judgment in default. The footnote, as relevant, states:

> *"… In order to come within the definition 'liquidated demand' a claim on a contract must (a) state the amount demanded, or be so expressed that the ascertainment of the amount is a matter of mere calculation; and (b) must give sufficient particulars of the contract to disclose its nature. It is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim, or fails to bring it, within the definition."*

50. Order 2, rule 1 of The **Rules of the Superior Courts 1961** is in precisely the same terms as Order III, r. 6 of the 1926 Rules. The current Rules of the Superior Courts, 1986 do likewise in Order 2, r. 1 thereof.

60. **Order 2, rule 1 (1) of the 1986 Rules of the Superior Courts** ("RSC") makes provision for the issue of a summary summons for the types of claim set forth therein, and in respect of which under O. 13, r. 3 RSC final judgment in default of appearance can be marked in the Central Office, subject to certain specified exceptions, such as where the plaintiff is a money lender or the claim arises under a hire purchase agreement where leave is required to be obtained first from the Master or the Court. Following entry of appearance by the defendant, the plaintiff must make application to the Master for leave to enter final judgment, as provided in Order 37 RSC.

61. O 2, r.1 provides as follows, relevant to the present motion:

> "*1. Procedure by summary summons may be adopted* ***in the following classes of claims****:*
>
> > *(1) In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising –*
> >
> > > *(a) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or*
> > >
> > > *(b) …*
> > >
> > > *(c) …*
> > >
> > > *(d) …*
> > >
> > > *(e) …* " (my emphasis)

62. The words "following classes of claim" bears some scrutiny. The use of the phrase "classes of claim" suggests a broad approach to definition, rather than a restrictive one. It suggests cases coming broadly within a class, rather than being tightly confined. It can be seen as inclusionary rather than exclusionary in nature. The reference in parentheses to " *a bill of exchange, promissory note, or cheque, or other simple contract debt*" is identical to the wording originally contained in s. 96 of the Common Law Procedure Amendment Act (Ireland) 1853, and later in Order III, rule 6 of the 1896 Rules already referred to.

62. The type of claim which fits into the "class" specified could enlarge from time to time as it has clearly done since 1853. In the intervening years many types of contract debt or liquidated demand not envisaged in the nineteenth century have evolved.

63. As stated by Mr O'Floinn in a footnote to this rule appearing at p. 5 of his invaluable *work Practice and Procedure in the Superior Courts, Butterworths, 1996*, it was held in *Bond v. Holton* [1959] IR 302 that the indorsement upon the summons must specify a claim "of a type falling within this Order".

64. It is relevant therefore to look at the history of the current rules and the way in which rules evolved so as to bring within its grasp all claims which were in the nature of a debt or liquidated demand even where the precise figure is not contained in the' express or implied' contract. Of particular relevance to the present issue appears to be the inclusion within the term debt or liquidated demand, a *quantum meruit* claim. Similarly a claim by a solicitor on foot of a bill of costs came within the term, even though the precise amount finally to be paid might be yet to be ascertained on taxation before the Taxing Master. In a very broad way, all the old indebitatus claims became merged into the new category of 'debt or liquidated demand'. The Common Law Procedure Amendment Act (Ireland) 1853, s. 6 can clearly be seen, given the preamble quoted above, as being introduced to replace the previous categories which had given rise to complexity, delay and uncertainty, as well as increased costs.

65. The ability to mark judgment in claims which did not require any assessment of damages by a jury, and the amount of which could be readily ascertained from documents, mere calculation arithmetic, was something considered desirable, in the interests of efficiency and cost. It applied even where the amount was yet to be clarified and ascertained with precision such as quantum meruit or solicitors' costs. In such claims there is no question of there being any aspect of what are now terms general damages to be assessed by a judge or a jury without reference to documents or sheer arithmetic. A procedure could be adopted which by-passed the more cumbersome procedures for other actions, where pleadings were filed and delivered, ahead of a plenary trial. It provided a simple, informal, expeditious and inexpensive method of obtaining a final judgment, requiring only that particulars of the claim be set forth in the special indorsement of claim on the summons or writ, and the filing of a verifying affidavit known nowadays as an affidavit of debt.

66. I note in passing that the **Rules of the Circuit Court of Justice, 1930** introduced by the Minister for Justice on the 1st January 1932 provided in O. II, rule 7 that:

> *"Whenever the demand in a Civil Bill is for a liquidated sum only the amount claimed for costs shall be stated and a note added etc. ……"*

67. Order XV, rule 3 of the same rules provided, where the claim was for, *inter alia*, 'a debt or liquidated demand', that judgment in default of appearance could be obtained in the Office by the filing of an affidavit of debt.

68. Order XVI, rule 1 provided:

> "Where an appearance has been entered the plaintiff may apply as prescribed for summary judgment with costs where the claim is:--
>
> > *(i) on a promissory note, bill of exchange, or other security for money due;*
> >
> > *(ii) for a liquidated amount of money;*
> >
> > *(iii) …*
> >
> > *(iv) …*
> >
> > *(v) …"*

69. That application for summary judgment, after appearance, was to the Court, and was heard on affidavit initially, and if necessary could be adjourned to a plenary hearing.

70. The **Rules of the Circuit Court 1950** made with the consent of the Minister for Justice by the Circuit Court Rules Committee, made similar provisions in Orders 23 and Order 25 thereof, but where an appearance was entered, Order 25 provides for the application to Court for summary judgment in respect of "a debt or liquidated demand in money", and not as in the previous rule to "a promissory note, bill of exchange or other security for money due" or "a liquidated amount of money".

71. The **Rules of the Circuit Court, 2001**, Orders 26 and 28 respectively make identical provision for summary judgment in default of appearance, and following the entry of appearance, as was contained in the 1950 Rules, referring only to "debt or liquidated demand in money", without any reference to "*a promissory note, bill of exchange, or other security for money due*". There is no reference to a 'contract, express or implied'.

72. I draw attention to the fact that there is nothing contained in these rules which qualifies the basis on which the liquidated sum arises such as there is in the Rules of the Superior Courts by reference, for example, to "a contract, express or implied". Clearly in the Circuit Court, any claim whatsoever which seeks to recover a certain sum of money as opposed to general damages can, where not defended, be the subject of a default judgment to be marked 'in the office' on proof thereof by affidavit, or in the case of an appearance being entered, can be the subject of an application to the Court for final judgment.

73. The **Supreme Court Practice (The White Book) 1999**, at p. 40 has the following commentary in relation to the equivalent rule at that time in England:

> *"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 either be ascertained or capable of being ascertained as a 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*
>
> *The words 'debt or liquidated demand do not extend to unliquidated damages, whether in tort or in contract be named as a definite figure, even though the amount of such damages…… A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of liquidated demand".*

74. In such cases, and in the absence of any notice of intention to defend being entered by the defendant, the plaintiff, under O. 13, r. 1 of the English rule, could enter **final judgment** against the defendant. Such a final judgment in respect of a liquidated claim is to be distinguished from an 'interlocutory judgment' under O. 13, r. 2, where the judgment is interlocutory only as to amount but final as to the plaintiff's entitlement to recover an amount to be assessed. The latter obviously equates to judgment being obtained in default or appearance or defence on foot of a Statement of Claim in this jurisdiction, where the assessment of damages only awaits the trial.

75. Summary judgment rules now, both in the Circuit Court and the High Court, though differently worded in each, are designed to facilitate a swift and inexpensive procedure, and can be seen as the direct descendants of equivalent rules in existence in one form or another since 1853, allowing easily new types of claim, coming into being as the commercial and other life of society developed, to be included without having to necessarily amend the rules to include each such. In this way, form is not allowed to triumph over substance – an aspiration finding its roots, as I have already referred to, in the 1853 Act's preamble recital.

76. I have already set forth the pedigree of this rule, including the fact that claims coming under the term 'debt or liquidated demand' are those claims capable of calculation by simple arithmetic, as opposed to general damages to be assessed by a jury or the Court. They are claims which are intended to be, and are capable of being dealt with in summary manner on affidavit, especially where they may be uncontested.

77. In *Conolly v. Teeling* [supra] there was a claim by a builder for work done. Some of the claim was liquidated but there was included in the claim work done over and above the contract work. The Court decided that it was neither a claim for a debt or for a liquidated demand, even though part of it was such. Much of the claim was held to be of a nature that the amount due could not be ascertained without the assistance of a jury. In other words it was not a claim ascertainable by mere calculation or arithmetic, because the basis of calculation of the extra work was not contained in the contract between the parties.

78. The rules make provision also for cases in which the claim is for a specified sum of money, yet the defendant may contest the amount thereof. That element of dispute or contest does not take the claim outside the summary summons rules. That is important to note. The structure of the summary summons provisions anticipates and provides for cases where the defendant may appear to defend the claim not on the basis that there is no liability but rather the amount specified in the special indorsement of claim by the plaintiff. These rules are not confined to claims where there can be no dispute as to amount where liability is established. The defendant may succeed in establishing that while he/she admits liability under the contract, express or implied, the amount properly due is less than is claimed.

79. There is some need to point to the distinction between a claim for a debt and a claim for a liquidated sum of money. *Murdoch's Dictionary of Irish Law*, 4th ed. contains the following in respect of these terms:

> *"Debt" – a sum of money which one person is bound to pay to another. Debts are (a) simple contract debts; (b) specialty debts; (c) debts of record e.g. recognizances and judgment debts; (d) secured debts, for which security is given; (e) preferential debts…"*

80. It is clear enough that the claim by the Bureau is not a "simple contract debt" as so defined, since the amount is not specified as such in the Mandate and, in any event, clause D has been deleted thereby removing any acknowledgement by the defendant that he was liable under contract to the Bureau.

81. What remains is whether the claim by the Bureau can be classified as a liquidated demand on foot of a contract, express or implied.

82. "Liquidated demand" is defined by Murdoch as:

> *"an ascertained demand in money. The recovery of such a demand with or without interest must be by summary summons where proceeded with in the High Court: RSC Ord 2 r 1(1). The indorsement of claim on such a summons must state the amount claimed and must state the amount claimed for costs and state that on payment of such amounts within six days after service, further proceedings will be stayed."*

83. It is helpful to look at the entire summary summons structure in order to conclude the question as to whether a claim such as that made in these proceedings by MIBI, being for a specified sum, is one capable of being seen as being for "a debt or liquidated demand … upon a contract express or implied" and fitting within the "class" of claim contemplated for a summary summons, in view of the deletion of clause 4 of the mandate the defendant by which he appears to have desired to retain the ability to question the amount for which he may ultimately be liable to the MIBI in the event that it pays compensation to the injured party, or indeed even

whether he is liable at all, rather than accept liability for any sum so paid.

84. Order 1, rule 3 RSC provides for "an originating summons for commencement of summary proceedings without pleadings and to be heard on affidavit with or without oral evidence" for any claim coming within O.2, r. 1 RSC already set forth. The form which such a summary summons takes is provided at Form 2 in Appendix A to the Rules. Much is made by Mr Hickey on the defendant's behalf of the fact that the defendant has deleted paragraph D by which the defendant would have acknowledged himself liable to the Bureau for whatever sum was paid in respect of the claim. In such a situation the amount would have constituted a debt on foot of an express contract, being a sum for which the defendant had acknowledged himself bound to pay.

85. But procedures in relation to summary summons claims permits of a situation where the defendant disputes his liability at all for the sum claimed, or disputes only the amount claimed. The Rules provide that upon an entry of appearance to the summary summons, the plaintiff must seek liberty to enter final judgment before the Master of the High Court. On such an application the Master will consider any affidavits filed by the defendant in reply by the defendant, and where a bona fide *prima facie* defence to the claim appears, the Master may adjourn the matter for plenary hearing or transfer the matter to a judge's list. Clearly where a liquidated sum is claimed on foot of a contract, the claim can be litigated by way of summary summons, even if the defendant disputes the claim. It follows that the deletion of paragraph D itself is not a bar to commencement by way of summary summons, since its purpose was simply to enable the defendant to acknowledge himself liable to the Bureau, thereby foreclosing any dispute by him in any application for final judgment which was made to the Master of the High Court following the entry of appearance by him. The deletion of paragraph D does not take the claim out of the class of cases referred to as a liquidated demand or liquidated sum.

86. If one looks at the Mandate, it is certainly a contract by which legal obligations and consequences are contemplated. The defendant clearly is authorising the Bureau to take over and conduct in his name the defence of the third party claim and is authorising the Bureau to make admissions on his behalf, and he undertakes to assist them "in the handling of the claim and conduct of proceedings". That must in my view be taken as including the settlement of those proceedings. He also agrees that if he has any claim for contribution against any other person, the Bureau way prosecute that claim in his name but for the benefit of the Bureau. Whatever way one looks at this document it is a contract of some kind. Legal consequences flow in either direction from it. For example, the defendant could sue the Bureau in the event that it failed or refused to discharge the defendant's liability to the third party. Equally, the Bureau could sue the defendant for breach thereof if he failed to give them necessary information ands assistance. It is a contract. There is consideration passing. There is offer and acceptance. It is a document intended to give rise to legal obligations and consequences.

87. If the Bureau claims that it is due money from the defendant arising out of this contract, and the sum claimed is an ascertained sum or even one capable of ascertainment by mere calculation or arithmetic, it is a claim contemplated as being one to be brought by way of summary summons, even if the defendant wishes to deny liability or otherwise defend the claim. That denial and defence does not alter the character of the claim changing it to one for a liquidated sum other than on foot of a contract. The claim is still maintained on foot of the mandate even if the defendant disagrees that he is liable for that sum. Procedures have been specifically put in place to litigate such a dispute in summary summons claims.

88. If the defendant had not entered an appearance to this summary summons, the claim is so particularised in the Special Indorsement of Claim and is so clearly an ascertained or liquidated sum that there is no difficulty presented to the officials in the Judgments Office of the High Court in entering up judgment in default of appearance. That is the purpose of the rule in the first place, namely to enable a plaintiff cheaply and expeditiously to enter final judgment for such simple claims, not requiring assessment by a jury or a judge, and where undisputed by the defendant. There is no reason why such a plaintiff should have to endure the trouble, expense and lengthy delay of plenary procedures before obtaining final judgment in such claims. I see no reason why, as a matter of principle, the present type of claim should be any different.

89. As far as the particular claim is concerned, the defendant has through his solicitor has indicated that the application for judgment is not being opposed. But that is not the point for the purpose of this judgment. I see no reason for concluding that the mandate/contract entered into between the Bureau and persons such as this defendant, even with the deletion of paragraph D therefrom, should take the claim for the liquidated demand in money paid by the Bureau in any particular case outside the scope of Order 2, RSC. It is still a claim being made for a liquidated sum on foot of an express contract, and in the event of the claim being disputed, that dispute can under the rules for summary summons, be heard and determined. Where no dispute is raised, summary summons procedures enable the plaintiff to quickly and easily obtain final judgment. The Special Indorsement of Claim itself contains the clarity and certainty as to amount claimed which enables the claim to be brought by Summary Suumons.

90. The distinction between a claim for a debt and a claim for a liquidated demand in money is an important one to note.

91. I have gone to some pains, perhaps needlessly, to set out the history of the development of the procedure by which claims for a liquidated demand in money have been provided for in Rules of Court since 1853. It is relevant in my view that the present rules of court are in all relevant ways precisely the same as their progenitor. I have examined some case-law which has dealt with what types of claim may or may not be brought by way of summary summons, ands in particular those on foot of a contract, express or implied. In some quantum meruit claims, where the basis of calculation is clear, enabling the sum to be ascertained by mere calculation, the claim has been found capable of being brought by way of summary summons. Such claims by their nature required calculation before judgment, in contrast to a sum actually set forth in a contract. In a claim on foot of the Bureau's mandate, the sum itself cannot be set forth at the time the mandate is signed since the claim at that stage has not been determined as to amount. Once the amount is ascertained, either by settlement or by judgment of the court, it is ascertained or "liquidated". I see no difficulty, and I certainly cannot see any distinction in meaning or principle by reference to the several cases to which I have referred above, so that such a claim would not be capable of being dealt with under Order 2 RSC.

92. In the event that any doubt is thought to remain about whether a claim of this kind by the Bureau against an insured driver on whose behalf it has acted and paid a sum to an injured party is capable of being brought by way of Summary Summons, I would recommend that Order 2 RSC be amended by the Rules Committee to make specific provision, since the nature of such claims is such as to be appropriate of disposal under the procedures provided for by Order 2 RSC.

93. I therefore make the declaration sought by the plaintiff in paragraph 1 of its Notice of Motion issued on the 15th February 2006.