Neutral Citation: [2015] IEHC 869

THE HIGH COURT

[2013 No. 1912S]

BETWEEN

EIREBUS LIMITED

PLAINTIFF

AND

TONY McCONN

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 13th February 2015

Introduction
1. In these proceedings, the plaintiff ("Eirebus") seeks summary judgment against the defendant ("Mr McConn") in the sum of €100,000, together with interest and costs.

The claim made
2. The proceedings are brought on foot of a Summary Summons issued on the 14th June 2013.

3. In the Special Indorsement of Claim therein, Eirebus pleads as follows. By contract in writing dated January 2009 and made under seal, Eirebus and Mr McConn, together with others, entered into an agreement ("the agreement") for the purpose both of regulating the affairs and business of a company named Flybus Transport Limited ("Flybus") and defining the respective obligations of the parties to the agreement in relation to that company and each other.

4. Under the 'Interpretation' section of the agreement at Clause 1.1, the "Business" to be regulated thereby was defined to mean "the operation of a scheduled bus service, under licence from the Department of Transport, Energy and Communications, between the geographical area of West Dublin and Dublin Airport."

5. Clause 17 of the agreement is headed "Route Licence and Operation" and provides as follows:

"17.1 The route licence in respect of the Business is currently held by Dualway Coaches Limited ["Dualway"], a company over which [Mr McConn] has a beneficial interest. The said licence shall by used and operated by[Flybus], by contracting annually by [Eirebus] or some other agreed bus operator, and [Flybus] shall fully indemnify and hold harmless [Dualway] in the operation and use of the licence and the licensed activity.

17.2 [Mr McConn] will take all necessary steps to arrange for the transfer of the issuing of the licence, either directly or indirectly, into the name of [Flybus]. [Dualway] will be paid a sum in respect of research and development costs upon the successful issue of the licence into the name of [Flybus], such sum to be agreed between the shareholders which will not exceed the amount of €150,000. In the event agreement cannot be reached the parties agree that the amount shall be determined by an independent valuation to be carried out jointly by a valuer who shall be nominated by the then President of the Association of Chartered Accountants in Ireland, which valuer shall act as an expert and not as an arbitrator and whose decision shall be final and binding upon the parties."

6. Eirebus claims that, in consideration for Mr McConn's agreement under Clause 17 to transfer the route licence concerned to Flybus, Eirebus subscribed and fully paid for 100,000 redeemable preference shares in Flybus at €1 each.

7. Eirebus contends that, in clear breach of the agreement, Mr McConn has failed or refused to take all (or any) necessary steps to arrange for the transfer or issuing of the licence, either directly or indirectly, into the name of Flybus.

8. In the premises, Eirebus pleads that there has been a failure of consideration by Mr McConn and that he is therefore liable to Eirebus in the amount of €100,000, being the amount it paid to subscribe for 100,000 redeemable preference shares in Flybus.

9. By letter dated the 4th July 2013, the plaintiff demanded payment by the defendant of the sum of €100,000 that it claims as due and owing within 14 days of that date. Although a Summary Summons had by then already issued on the 14th June 2013, the evidence before the Court is that it was not served upon the defendant until the 26th July 2013.

The test for summary judgment
10. There is no issue between the parties on the test to be applied.

11. In *First National Commercial Bank v Anglin* [1996] 1 I.R. 75, the Supreme Court (per Murphy J., Hamilton C.J. and Denham J concurring) endorsed the following test laid down in *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Rep 21, which had been referred to by the President of the High Court and reaffirmed in *National Westminster Bank Plc v Daniel* [1993] 1 W.L.R. 1453:

> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

12. Murphy J. continued:

> "In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-

> 'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.' "

13. Murphy J. prefaced the Court's adoption of that test by stating (at pp. 78-9 of the report):

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see Irish Dunlop Co. Ltd. v Ralph (1958) 95 I.L.T.R. 70)."

14. In considering the *Anglin* test in *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607, McGuinness J. pointed out that it is not for the Court to weigh the affidavit evidence adduced by the parties or to attempt to resolve any factual contradictions contained within it, before stating (at p.615):

> "In deciding whether the defendant may have a "credible" defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether [the defendant's] account of events is probable, or likely to be true; nor does it ask whether [the plaintiff's] account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

15. In the same case, Hardiman J. examined the historical antecedents of the present summary judgment procedure, locating the origin of its modern form in the Judicature Acts. Hardiman J. cited the following passage from the judgment of Lord Esher in Sheppards and Co. v Wilkinson and Jarvis (1889) 6 T.L.R. as the most clear expression of the criteria for the exercise of the power:

> "…The rule which had always been acted upon by this Court in considering cases under [the relevant Order] was that the summary jurisdiction conferred by that order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counter-claim pure and simple. To shut out such a counter-claim if there was any substance in it would be an autocratic and violent use of [the relevant Order]. The Court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

16. Hardiman J. found Lord Esher's statement of the rule to be perfectly consistent with the following observation of Lavery J. in Prendergast v Biddle (Unreported, Supreme Court, 31st July, 1957):-

"The procedure by summary summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined."

17. Hardiman J. also quoted, with approval, the following statement of O'Brien C.J. in *Crawford v Gillmor* (1891) L.R. Ir. 238:

> "I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

18. Considering these cases in conjunction with more recent Irish authority, Hardiman J. noted (at p. 621) "that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is to be used with great care", before concluding (at p. 623):

> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable case?"

19. A very helpful distillation of the principles to be derived from the jurisprudence is set out in the judgment of McKechnie J. in *Harrisgrange Ltd. v Duncan* [2003] 4 I.R. 1 (at pp. 7-8):

> "From these cases, it seems to me that the following is a summary of the present position:-
>
> (i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
>
> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendants says credible?", which latter phrase I would take as having against the former an equivalence of both meaning and result:
>
> (viii) the test is not the same and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient that there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine case of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

20. Mindful of the test the court is required to apply, I now proceed to consider the facts of this particular case.

Background
21. A number of propositions of fact are common case between the parties. In December 2007, Mr McConn (who controls Dualway) and Mr Patrick Kavanagh (who controls Eirebus) agreed to form a new joint venture company, Flybus, to operate the scheduled bus service between West Dublin and Dublin Airport for which Dualway then held a licence issued by the Department of Transport, Energy and Communications.

22. Further, Mr McConn acknowledges that Eirebus and Dualway invested €200,000 in Flybus in circumstances where I do not understand it to be seriously contested that half of that figure (i.e. €100,000) was invested by Eirebus.

23. The original of the Shareholders Agreement now at issue was admitted into evidence for the purpose of the present application by agreement between the parties. The First Schedule to that agreement records Eirebus as the holder of 100,000 redeemable preference shares in Flybus.

24. Mr McConn does not dispute that he has failed to take all necessary steps (or any step) to arrange for the transfer or issue of the relevant bus route licence, either directly or indirectly, into the name of Flybus.

25. It is common case that Flybus no longer has any funds; that, as a director of Flybus, Mr McConn has refused to sign the Auditor's Engagement Letter to enable the preparation, signing and filing of the necessary annual accounts; and that Mr McConn is proposing instead that Flybus should be wound up.

The defences advanced
26. Against the background of the established or undisputed facts set out above, I do not believe it is unfair to observe that the various proposed defences upon which Mr McConn seeks to rely are largely, if not entirely, technical in nature. I will endeavour to deal with each of them in turn.

Eirebus not a party to the agreement
27. The first proposed defence that Mr McConn wishes to advance is that Eirebus is not a party to the agreement and, accordingly, has no locus standi to seek relief in respect of any alleged breach of that agreement by Mr McConn.

28. That argument is based on Mr McConn's repeated averment that, at all material times, he understood that the agreement he entered into in January 2009 (described on its face as a "Shareholders Agreement") was an agreement only with Mr Kavanagh (in his personal capacity) and Flybus. In support of that assertion, Mr McConn relies upon the opening text of the agreement, which recites that it made between (1) Mr McConn and (2) Mr Kavanagh, as "[e]ach a "Shareholder" (which term shall where the context so admits include his heirs, administrators and assigns) and together the "Shareholders", and (3) Flybus, as "each a "Party" and together "the Parties"."

29. While that argument is superficially attractive by reference to the text just quoted, in order to properly identify the parties to the contract it is necessary to construe the relevant document as a whole. In conducting that exercise, a number of other aspects of the agreement merit particular attention.

30. First, in the interpretation section at Clause 1 of the agreement, Clause 1.1 clearly and simply states:

"'Shareholders' means the parties whose names and addresses are listed in the First Schedule hereto."

As I have already noted, Eirebus is one of the four parties whose names and addresses are listed in the First Schedule to the agreement, together with Mr McConn, Mr Kavanagh, and Dualway. The text of the agreement is replete with references to the various rights and obligations of the shareholders under the agreement, including (at Clause 19.11) an acknowledgment by each of the "Shareholders" that he has been advised of the terms and conditions of each of the covenants set out in the agreement and has entered into each such covenant voluntarily as a fundamental part of the agreement and with full knowledge of the effect of such provisions and agrees that the various covenants are reasonable and shall be binding upon him in all circumstances.

31. Second, while the signature page at the conclusion of the main body of the agreement is entirely blank, the company seal of Eirebus is affixed to the Fourth Schedule of the agreement, headed "Deed of Adherence", accompanied by the signature of two directors of Eirebus (one of whom is Mr Kavanagh) on behalf of that company. That part of the agreement has also been signed and sealed on behalf of Dualway and Flybus, and has been separately signed by Mr Kavanagh and Mr McConn, each in his personal capacity. The said deed of adherence recites the agreement of those persons "to comply with and be bound by all of the provisions" of the Shareholders Agreement attached in all respects as if they were parties thereto…."

32. Nowhere in any of the three affidavits sworn by Mr McConn for the purpose of the present application does he attempt to explain on what basis he felt entitled to disregard the foregoing matters in purporting to form the view that he was contracting only with Flybus and with Mr Kavanagh. In particular, Mr McConn does not explain on what basis he appended his own signature as a director of Dualway present when the seal of that company was affixed to the deed of adherence set out in the fourth schedule to the agreement at issue, if neither Dualway nor Eirebus was perceived by him as a party to, or bound by, that agreement.

33. To the foregoing observations, Eirebus adds the argument that it is entitled to place reliance on the presumption in commercial arrangements of an intention to create legal relations, the rebuttal of which entails a heavy onus.

34. The question of whether the first line of defence being advanced in opposition to the present application has a fair and reasonable probability of amounting to a real and bona fide one turns on what Hardiman J. has described in *Aer Rianta v Ryanair Ltd* (with reference to the circumstances in which the same issue arose in *First National Commercial Bank v Anglin*) as "the indisputable documentation of a commercial transaction."

35. In *McGrath v O'Driscoll* [2007] 1 ILRM 203, Clarke J. identified the correct approach as follows (at p. 210 of the report):

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

36. This dictum was endorsed by the Supreme Court (per Denham J., Hardiman and Finnegan JJ. concurring) in *Danske Bank a/s v Durkan New Homes* [2010] IESC (at paragraph 19), subject to the significant clarification (at paragraph 20) that there is no obligation to resolve issues of law (or, presumably, issues of construction) on an application for summary judgment and that the test remains whether the defendant has established an arguable defence. The Supreme Court was satisfied that, by reference to the particular factual matrix in which the parties specifically negotiated the contract in that case, an arguable defence arose on the construction of the loan agreement between the parties.

37. In the particular circumstances of this case, I am satisfied that the question of construction that now arises is relatively straightforward and that there is no real risk of injustice being done in determining that question within the limited framework of the present application.

38. I am further satisfied that the meaning that the agreement and, in particular, the fourth schedule to the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, is that Eirebus is a party to the agreement, with all of the rights and obligations ascribed to each of the "Shareholders" thereunder.

39. For the avoidance of doubt, I conclude also that Mr McConn's averments concerning his belief that he was contracting solely with Mr Kavanagh in his personal capacity and with Flybus amount, in the circumstances, to what Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203 (at 210) described as "the mere assertion of a defence", unsupported by any, or any sufficient, evidence of fact that would, if true, arguably give rise to a defence.

Failure of condition precedent

40. The second putative defence advanced by Mr McConn on affidavit is that, on a proper construction of Clause 17.2 of the agreement, the payment to Dualway of a sum to be agreed between the shareholders of Flybus in respect of research and development costs is a condition precedent to any obligation on the part of Mr McConn to arrange the transfer or issue of the relevant bus route licence to Flybus, and that, since the relevant payment was never agreed or made, the relevant obligation on the part of Mr McConn does not arise. I am satisfied that, as with Mr. McConn's first proposed defence, the relevant question of construction is relatively straightforward and that there is no real risk of injustice being done in determining that question within the limited framework of the present application. I am further satisfied that on the plain and ordinary meaning of the words used in Clause 17.2 the payment concerned is a condition subsequent to the discharge by Mr McConn of his obligation under that sub-clause and not a condition precedent to it. Accordingly, I conclude that, in this regard also, Mr McConn has failed to establish a fair or reasonable probability that he has a real or bona fide defence.

No prior demand

41. The third defence put up on Mr McConn's behalf relies on the proposition set out at para. 26-08 of Delaney and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Dublin, 2012) that "although reference is made in Order 2, rule 1 [of the RSC] to a debt or liquidated demand in money, it should be noted that it is not necessary that a prior demand for payment be made, provided that the debt or sum of money is payable at the time of issue of the summons…." It is submitted, in effect, that in this case no sum of money was payable when the Summary Summons issued on 14th June 2013. This argument in turn rests on the fact that a letter of demand was written on behalf of Eirebus on the 4th July 2013, after the issue of the summons (although more than three weeks prior to the service of the proceedings on Mr McConn).

42. Having carefully considered this argument, I am satisfied that it does not give rise to a fair or reasonable probability of a real or bona fide defence. As is addressed at greater length below, the claim advanced by Eirebus is restitutionary in nature. It is not a claim for damages for breach of contract or for misrepresentation. No authority has been produced for the proposition that the issue of proceedings in a claim for restitution or recoupment must be preceded by a letter of demand in order to be valid. In relation to Mr McConn's failure to arrange the transfer or issue of the relevant bus route licence to Flybus in breach of the express obligation to that effect which he undertook in the Shareholders Agreement that he entered into in January or February 2009, there is no reason whatsoever to suppose that an entitlement on the part of Eirebus to seek restitutionary relief in that regard could not have arisen by the 14th June 2013, over four years later, whether or not the issue of the relevant proceedings was preceded by a letter of demand. Nor is there any reason or basis to suppose that the parties had agreed that an actual demand would be a necessary condition precedent to the issue of proceedings advancing any such claim.

Past consideration

43. A fourth ground of purported defence was advanced at the hearing of the application before me, although it had not been previously flagged in the affidavits sworn by Mr McConn in opposition to the application. It is that the claim advanced by Eirebus offends against the rule that past consideration is no consideration, such that it cannot be argued that the prior acquisition by Eirebus of 100,000 redeemable preference shares in Flybus, to the value of €100,000, was valid consideration for Mr McConn's promise in the Shareholders Agreement to arrange for the transfer or issue to Flybus of the relevant bus route licence. In my view, this argument is also incapable of providing Mr McConn with a fair or reasonable probability of a real or bona fide defence.

44. In the first place, it is the uncontroverted evidence of Mr Kavanagh on behalf of Eirebus, at paragraph 9 of the affidavit sworn by him on the 27th January 2014, that the relevant shares were only issued to Eirebus after it entered into the Shareholders Agreement (albeit, an agreement in which it was referred to as an existing shareholder).

45. Second, I am quite satisfied that, even if the relevant shares had been subscribed for prior to entering into the Shareholders Agreement, the established or undisputed facts in respect of the relevant transaction make it quite clear that if falls within the established exception to the rule against past consideration under *Lampleigh v. Braithwait* (1615) Hobart 105, whereby the fact of a past service raises an implication that at the time it was rendered it was to be the subject of a reciprocal commitment, such that it

can be sufficient consideration for a subsequent promise to perform that commitment. In this case, it is clear that Eirebus subscribed for shares in Flybus to the value of €100,000 at Mr McConn's request (just as Dualway did at Mr Kavanagh's request); that the parties understood at the time that Mr McConn was to arrange for the transfer or issue of the relevant bus licence to Flybus in exchange for the provision of those subscriptions; and that Mr McConn would have been able to enforce the agreement to make those subscriptions had he arranged the transfer of the bus route licence to Flybus in advance of their being made.

46. Even if that were not so, I am equally satisfied that Eirebus provided significant present or future consideration in exchange for Mr McConn's contractual promise to arrange for the transfer or issue of the relevant bus route licence to Flybus. It did so by agreeing the following: that it would not compete with the business to be operated by Flybus (at Clause 8); that it would not divulge the confidential information of the business operated by Flybus (at Clause 9); that it would be constrained in its ownership rights over its shares in Flybus in accordance with the terms of Clause 10 of the agreement; that it would be constrained in its right to transfer its shares in Flybus in accordance with the terms of Clauses 11, 12 and 13 of the agreement; that it would be bound by the agreement in relation to the allotment of new shares under Clause 14 of the agreement and by the provisions concerning the resolution of any deadlock between shareholders under Clause 15; and so on.

47. Accordingly, I am satisfied that this argument also fails to provide Mr McConn with a fair and reasonable probability of having a real or bona fide defence.

No actionable loss

48. The fifth ground of defence is based on various averments made by Mr McConn to the effect either that Eirebus has suffered no actionable loss or that Mr McConn is entitled to maintain a counterclaim against Eirebus, such that the relevant matters can only properly be resolved through a plenary trial. These arguments derive primarily from the outworking of Clause 17.1 of the Shareholders Agreement whereby the business in which Flybus was to be involved (the operation of the relevant bus route) was to be carried out "by contracting annually with [Eirebus] or some other agreed bus operator."

49. Mr McConn avers, and it does not appear to be in dispute, that Eirebus did indeed provide the buses and drivers in respect of the business of Flybus between the date of the Shareholders Agreement and the 3rd August 2012. However, Mr McConn goes on to assert that the service provided (presumably, by Eirebus to Flybus) fell short of the standards expected in terms of punctuality and in other unspecified ways, and that not all receipts were returned (again, presumably, by Eirebus to Flybus). Mr McConn further alleges more specifically that Eirebus withheld from Flybus the customer receipts from the operation of the bus route in question during the period between the 18th July 2012 and the 3rd August 2012 when Eirebus ceased providing the relevant service. Mr McConn also alleges that the €200,000 in capital invested in the business by Flybus and Eirebus has been entirely depleted by Flybus in paying Eirebus for the provision of the relevant services in respect of the relevant bus route.

50. As against those claims, it should be noted that Mr Kavanagh avers, on behalf of Eirebus, that it is still owed €86,000 by Flybus in respect of the provision of the relevant services; that Eirebus has confirmed to Flybus that it holds €19,250 in cash collected on behalf of Flybus on the relevant bus route in the period between the 18th July 2012 and the 4th August 2012 (which Mr Kavanagh avers was the notice period in respect of termination of the relevant service agreement between Eirebus and Flybus) and that those monies are being held by Eirebus in lieu of services provided during that period to the value of €21,857.

51. I have come to the conclusion that the various assertions made by Mr McConn in this regard are incapable of providing him with a fair or reasonable probability of a real or bona fide defence for two reasons: first, because any apparent cause of action or counterclaim based on those assertions can only logically be brought by Flybus (which is not a party to the present application) and not by Mr McConn; and second, because those claims appear to me to fall into the category of mere assertion, unsupported by evidence of any fact which would, if true, arguably give rise to a defence on the part of Mr McConn, even assuming that such a defence (or counterclaim) was Mr McConn's to assert.

Defences of procedure and form

52. As a further ground or grounds of defence on behalf of Mr McConn, Counsel on his behalf submitted that the summary summons procedure has been wrongly invoked in the circumstances of the case and, in addition, argued that, even in the context of that procedure, there are a number of deficiencies of form in the manner in which the claim has been brought.

53. For example, it was submitted that the complaints disclosed in the Summary Summons and in the various affidavits filed in support of the application for summary judgment should more properly have been pleaded as a claim in breach of contract or as one in misrepresentation on the particular facts alleged and that, since neither of those types of claim relates to the recovery of a debt or a liquidated demand, the summary summons procedure is inappropriate and ought not to have been adopted. Accordingly, it was submitted that the Court should dismiss the present application and strike out the proceedings on the basis that Eirebus should have commenced them by way of Plenary, rather than Summary, Summons.

54. Further or in the alternative, it was submitted that the form of the Summary Summons in this case fails to comply with the requirement of Order 4, rule 4 of the RSC that the "Special Indorsement of Claim" therein state specifically and with all necessary particulars the relief claimed and the grounds thereof. Counsel for Mr Mcconn relied on the statement by Kingsmill Moore J. in *Bond v Holton* [1959] I.R. 302 (at 310-311) that "[u]nless an indorsement on a summary summons states the cause of action or states the facts which, if true, unequivocally constitute a cause of action which may be brought by summary summons, it is a bad indorsement." In addition, Counsel for Mr McConn invoked the meaning ascribed to the phrase "necessary particulars" by Hanna J. in *Caulfield v. Bolger* [1927] IR 117 (at 124) in the following terms:

> "In my judgment it connotes such particulars as are essential to make the indorsement a good statement of claim both in particularity of fact and in law. It is the analogue of the statement of claim in plenary proceedings. While it contemplates an abbreviated and concise form, this is no bar to its containing all the essentials of a correct pleading."

It seems to follow that it is Mr McConn's contention that the Summary Summons issued on behalf of Eirebus is fatally defective either in failing to disclose any cause of action or in failing to properly plead the facts necessary to subtend whatever cause of action there may be.

55. I do not consider that there is merit in either of the preceding submissions for the following reasons. First, it is my understanding that a plaintiff is entitled to plead its case entirely as it sees fit, subject obviously to the requirement that it identifies some cause of action known to law and properly particularises the relevant facts necessary to support that claim.

56. In this case, from the matters set out in the Special Indorsement of Claim it is clear that the claim being advanced is not one for damages for breach of contract or for misrepresentation but rather one for quasi-contractual or restitutionary relief in respect of what

is asserted to be a total failure of consideration moving from Mr McConn to Eirebus for its promise both to acquire shares in Flybus to the value of €100,000 and to enter into a Shareholders Agreement in respect of that company; see, for example, Clark, Contract Law in Ireland (6th ed., Dublin, 2008) at pp. 653-655. In that context, no argument has been advanced to the Court in support of the proposition that the Special Indorsement of Claim fails to identify that cause of action or that it fails to state facts which, if true, would unequivocally make out that claim. Equally, no argument has been advanced that the indorsement is not a good statement of claim in not particularising a claim to restitutionary relief sufficiently whether in fact or law.

57. Accordingly, I base my conclusions on the fact that the plaintiff's claim for €100,000 by way of restitutionary relief stands uncontested, as a matter of law, for the purposes of the present application. In the circumstances, I do not express any view on the nature and scope of the jurisdiction to grant such relief.

58. It is interesting to note that the claim at issue in Motor Insurers Bureau of Ireland v Hanley [2007] 2 IR 591, as pleaded in the Special Indorsement of Claim in that case, was one for monies due and owing under an agreement or "otherwise under the principles of recoupment/restitution." Peart J. had no hesitation in concluding that the relevant claim was properly brought by way of Summary Summons within the parameters of Order 2, rule 1 of the RSC, as an action to recover a liquidated demand in money arising upon a contract, express or implied, and in this case I take the same view.

Conclusion
17. By reference to each of the specific arguments that he has raised, whether considered individually or collectively, the defendant has failed to satisfy me that he has a fair or reasonable probability of having a real or bona fide defence. Bearing in mind the constitutional basis of the right of access to justice of both plaintiff and defendant, I therefore conclude that the plaintiff is entitled to summary judgment in the sum of €100,000.