

THE HIGH COURT

[2017 No. 2583 P.]

BETWEEN

VINCENT O'DONOGHUE

PLAINTIFF

AND

AIB MORTGAGE BANKS PLC,

MINISTER FOR FINANCE OF IRELAND, GOVERNMENT OF IRELAND,

IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Paul Gilligan on the 26th day of May, 2017

1. The plaintiff in these proceedings describes himself as a gentleman who resides at 67 Church Street, Dublin 7.

2. The plaintiff claims by way of interlocutory relief:-

- An order restraining the defendants or any of them from taking any steps in pursuit of the disposal of all or part of the Government of Ireland shareholding in the first named defendant bank.

3. In the statement of claim as delivered on 29th March, 2017, the plaintiff sets out that Allied Irish Bank plc (AIB) is the largest retail commercial bank in Ireland with 2.3 million retail and business customers. It has the largest bank distribution network in Ireland with 297 locations, 982 ATM points, and a strategic partnership with An Post and its 1,100 Post Offices.

4. The plaintiff is of the view that AIB is a bank that is too big to fail. The plaintiff contends that AIB is congenitally incapable of operating in a lawful, responsible and compliant manner and instances difficulties encountered by AIB in respect of the Insurance Corporation of Ireland, John Rusnak, Faldor, non-resident deposit accounts, foreign exchange overcharging, the 2009 bailout, and tracker mortgage overcharging.

5. The plaintiff contends that in private ownership, AIB will serve only one master and have a singular focus being the relentless pursuit of profits for shareholders, the majority of whom will be foreign institutional investors who have little or no regard for the interests or wellbeing of the citizens of Ireland.

6. The plaintiff is concerned that a disposal of the State shareholding in AIB will leave the citizens of Ireland at the mercy of a privately owned virtual banking duopoly which will expose them to exploitation and overcharging and undermine the urge of national policy agenda to resolve the deepening housing crisis and that such an outcome would be unconscionable and contrary to the common good.

7. The plaintiff relies extensively on Article 6 of the Constitution of Ireland which provides:-

"(1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

(2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

8. The plaintiff takes the view that a sale of some or all of the State's shareholding in AIB is contrary to the interests of Irish citizens and of the common good and that in these circumstances the court on the application of a concerned citizen namely the plaintiff must act to ensure that such a potentially catastrophic decision does not take effect. In the grounding affidavit of Vincent O'Donoghue he refers to the various matters in the same terms as set out in the statement of claim and expresses the concern that steps are currently being taken to advance the disposal by the State of part of its shareholding in the first named defendant bank and that unless an injunction is granted the disposal may occur before the within proceedings come on for hearing thereby rendering the proceedings moot. The plaintiff avers that he is aware that a consequence of any such order as he seeks is that he may be required to give an undertaking in damages and he confirms to this Court that he is aware of the significance of such an undertaking.

9. What has then occurred in this matter is that the defendants not only contest the right of the plaintiff to interlocutory relief pending the determination of these proceedings but in addition by way of notice of motion they seek an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the within proceedings and/or striking out the plaintiff's plenary summons and statement of claim as against the defendants on the grounds that they fail to disclose a reasonable cause of action and/or for being frivolous or vexatious and/or for being bound to fail. Further an order on the same terms pursuant to the inherent jurisdiction of the Court dismissing or striking out the proceedings.

10. Taking into account the urgency of the situation and allowing for the very substantial overlap not only in the content of the various affidavits as delivered but in respect of the submissions as made to the Court I dealt with both applications together.

11. In the replying affidavit to the plaintiff's application for interlocutory injunctive relief Desmond Carville on behalf of the State defendants avers and sets out in a substantial way the view of the State defendants. He has clarified that it is the second named defendant being the Minister for Finance and not the Government that owns approximately 99.87% of the issued share capital of AIB through the Ireland Strategic Investment Fund which was established by the National Treasury Management Agency Amendment Act 2014.

12. He avers that it has always been the policy of the Government to return AIB to private ownership when conditions permit and this is particularly referred to in the Program for a Partnership Government which set out Government policy across a wide range of topics

and which was published in May 2016. It is envisaged that the Minister might sell up to 25% of his shareholding in AIB prior to the end of 2018 and the primary objective in the disposal of these assets would be in recovering the maximum amount of money possible for the Exchequer.

13. According to a recent valuation the value of the Minister's shareholding as of 31 December, 2016 is a sum in the region of €11.3 billion.

14. The proposal by the Minister to sell part of his shareholding in AIB will likely take the form of an Initial Public Offering (IPO) probably on the Irish and London stock exchanges. It is envisaged that the preparation for a transaction of this magnitude is specialised and complex and involves considerable financial expenditure and in the view of Mr. Carville who has to be regarded as an expert in these matters is not something that one can stop and start. If this Court were to grant the relief as sought by the plaintiff potential optimal market windows will be lost and a very considerable amount of public money will have been spent and wasted on an abortive process.

15. The Court observes the averment of Mr. Carville that the vast majority of the work underpinning the IPO is nearing completion and since capital markets appear to be currently receptive to an IPO of this nature it is absolutely imperative that the Minister maintains the upmost flexibility to initiate and execute an IPO in the first possible window of May-June 2017. Further opportunities to make such offerings in capital markets can suddenly close due to macro events or changed investor sentiment often without notice.

16. As a result of the financial crisis the Credit Institutions (Financial Support) Act 2008 was passed into law. The Government undertook to guarantee until the 28th of September, 2010 all of the otherwise unguaranteed deposit liabilities and private third party debt of participating institutions. AIB was named as a specific institution within the meaning of s. 6 by the Credit Institutions (Financial Support) (Specification of Institutions) Order 2008 and as a result very substantial investment was made in AIB but eventually the Minister through ISIF ended up owning approximately 99.8688% of AIB's ordinary shares as issued.

17. The Minister owns the said shareholding in AIB like any other shareholder and is entitled to sell or otherwise dispose of or deal in his shares as an ordinary incident of his ownership albeit in his capacity as the Minister for Finance.

18. Pursuant to the public record of the policy of the Government the proposal is to return AIB and all of the State's banking investments to private ownership when conditions permit and this is also in keeping with the expressed provisions of s. 6(4) of the 2008 Act.

19. It is clear that very substantial sums of money totalling many billions of euros of public funds have been invested in AIB since 2009. To date the State has recouped approximately €6.6 billion of the money originally invested.

20. In December, 2015 the Minister for Finance appointed Rothschild and Co. as an independent financial advisor to advise on the options available to the State for recouping its investment in AIB in the best interest of the taxpayer including a private sale and/or a sale of shares through the stock market. Further the Minister has sought the advice of Bank of America Merrill Lynch, Davy and Deutsche Bank as global coordinators to assist in a potential future IPO and in this regard Citi Group Global Markets Ltd., Goldman Sachs International, Goodbody Stockbrokers, J.P. Morgan Ltd. and UVS Ltd. have all being appointed as book runners. Investec Bank plc. was named as co-lead manager to the selling syndicate for an IPO.

21. There has been extensive work carried out by the Minister for Finance and his department with regard to a possible flotation of part of the Minister's shareholding and if an optimum market window is missed, the resulting loss to the taxpayer will be extreme and the value of the State's shareholding in AIB could suffer if an abortive process takes place.

22. The effect of the relief as sought by the plaintiff would be to sterilise the Minister's shareholding and render it to all intents inalienable save where the court was persuaded in proceedings in the future that same would be in the public interest.

23. The reality of the situation is that s. 6 of the 2008 Act has already been expressly held to be constitutional by the Supreme Court decision in *Collins v. Minister for Finance* [2016] IESC 73 and s. 6(4) of the 2008 Act specifically requires the Minister ultimately to recoup any financial support given to credit institutions so far as is possible.

24. Insofar as the plaintiff pleads the requirements of the common good, he does not do so against the background of any disclosed financial knowledge or expertise and adduces no evidence by way of affidavit from any distinguished financial expert which would sustain the plaintiff's opinion that it is for the common good that the sale of the Minister's shares should not proceed.

25. It is also the case that the plaintiff makes no claim that his own personal or financial interests will be adversely affected or that they stand in real or imminent danger of being adversely affected by the proposed sale of the Minister's shareholding in AIB.

26. Insofar as the plaintiff refers to the potential for a sale of shares resulting in a privately owned virtual banking duopoly it does not appear to this Court that there is any factual basis for such a contention as AIB appears to compete primarily with the other banks in Ireland and a number of other financial institutions based in Ireland and the sale of the Minister's shareholding in AIB will have no direct impact on this competitive environment.

27. As set out at length by Mr. Carville in his affidavit there is a very significant European dimension to these proceedings and more particularly the approval for State aid as furnished to the Government from the European Commission which requires that any State aid received is either redeemed over time or is remunerated according to normal market conditions thereby ensuring that any form of additional State aid is terminated.

28. The reality is that the granting of the relief as sought by the plaintiff herein would run completely contrary to the restructuring arrangements that are in place between the Government of Ireland and the European Commission.

29. The activities of AIB in Ireland are regulated and supervised by the Central Bank of Ireland under the Central Bank Acts 1942 to 2015 and by the European Central Bank under the single supervisory mechanism.

30. AIB holds its banking license pursuant to s. 9 of the Central Bank Act 1971 issued prior to the commencement of the European Union (Single Supervisory Mechanism) Regulation 2014 (SI No. 495 of 2014) (the 'SSM Regulations 2014') and that situation is now deemed to be an authorisation granted by the ECB under that SSM Regulation. In fact AIB is now directly regulated by the ECB with the assistance of the Central Bank and thus the Bank is now operated under a different regime to that which pertained prior to the 4th of November, 2014 when the supervisory responsibilities and decision making powers moved to the ECB under the SSM Regulation.

In essence a different regime to that which existed previously now manages and regulates AIB.

31. The object of the present regime is to ensure the safety and soundness of the European Banking System and to increase financial integration and stability in Europe.

32. Insofar as the plaintiff has made certain allegations as regards certain stress tests undertaken by the European Banking Authority in 2016 any implication that AIB failed this exercise appears not to be correct and in fact the stress test result for AIB was 7.4% a figure in excess of the 5.5% benchmark referenced by the ECB.

33. Insofar as one of the plaintiff's complaints is that foreign investors may purchase any shares that may be offered for sale by the Minister for Finance in AIB any restriction on foreign investors purchasing the shares is inconsistent with the principle of the free movement of capital which is one of the four pillars of the European Single Internal Market as enshrined in Article 26 and Chapter 4 of Title IV of the Treaty on the Functioning of the EU. It would be unlawful to promote a discrimination between Irish and non-Irish citizens of the European Union investing in AIB as a company listed on the stock exchange.

34. The plaintiff's case is that his own personal argument as to what is good for the people of Ireland should prevail over the views of the elected members of Government.

35. It is also clear that the proposed disposal of shares by the Minister for Finance is a very important step in the return of AIB to private ownership over time and that in effect would bring about a situation of enormous benefit both to the business of AIB and to the economy in general as part of the next phase of normalisation of the Irish banking sector. The forthcoming IPO appears to be a crucial step in a carefully orchestrated process involving multiple stakeholders and is critically dependent on both internal factors such as sustained profitability and external factors including regulatory and shareholder approvals, investor appetite and market conditions encompassing both the domestic and international political and economic climate.

36. Currently the situation is that only 0.1% of shares in AIB are available to be freely traded.

37. The Court particularly notes the averment of Helen Dooley in her affidavit as sworn on the 24th day of May, 2017 on behalf of AIB that any delay in the process as proposed would result in AIB being exposed to incalculable damage.

38. In all the circumstances as outlined the plaintiff does not satisfy this Court that there is an issue to be tried between himself and the defendants. The aspect of damages from the plaintiff's perspective does not appear to arise as he is not making out any claim as such for damages as he has no personal financial risk but it is quite clear that from the defendants' perspective the damages that would be suffered by them both may range somewhere between extreme and incalculable and yet the plaintiff offers no comfort as to how he could sustain any award of damages that may be made against him if the injunction was granted by this Court and later was to be set aside at the hearing of the action.

39. It is the view of this Court in the circumstances outlined that the balance of convenience has to favour the defendants and in particular the State defendants who are exercising statutory powers. There is however, another important aspect which is that the plaintiff has to have been aware for quite some time past of the proposals by the Minister for Finance to place on the open market for sale approximately 25% of his shareholding in AIB. He delayed until 20th of March, 2017 to institute these proceedings and delivered a statement of claim on the 29th of March, 2017 and then delayed until the 19th of May, 2017 to institute this application by way of a notice of motion for equitable relief. No reasoned explanation has been offered by the plaintiff as to why he delayed the institution of these proceedings until the 20th of March, 2017 against the position of the Minister for Finance which has been in the public domain for a considerable period of time, and now brings an application to stop the IPO just at that point in time when the IPO may be about to take place.

40. In all of the circumstances pertaining herein the interlocutory relief as sought by the plaintiff herein pending the determination of these proceedings by way of an order restraining the defendants or any of them from taking any steps in pursuit of the disposal of all or part of the Government of Ireland shareholding in the first named defendant Bank is refused.

41. The second aspect that then arises is the motions of both defendants as brought seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court dismissing the plaintiff's proceedings on the grounds that they fail to disclose a reasonable cause of action and for being frivolous and vexatious and bound to fail.

42. Order 19, rule 28 of the Rules of the Superior Courts states as follows:-

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

In addition to O. 19, r. 28 the court pursuant to its inherent jurisdiction has the power to strike out proceedings if they are bound to fail.

43. It has to be accepted that the jurisdiction to strike out proceedings is one to be exercised sparingly and only in clear cases and generally the court should be slow to entertain an application of this kind. The court has to bear in mind that it must be confident that the plaintiff's claim cannot succeed no matter what may arise in discovery or at the trial of the action and if the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed. In considering the application, the plaintiff's claim has to be taken at its high watermark and the burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail and the court can only exercise a jurisdiction to strike out a claim on the basis that on admitted facts it cannot succeed. It is also a matter for the court hearing the application within the scope of its discretion to determine whether any points of law raised can be so clearly and readily resolved in favour of the defendant that to allow the action to proceed would constitute an abuse of the process of the court and further that legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of the action in the proceedings. It is of particular significance that in exercising its inherent jurisdiction the court is not limited to considering the pleadings of the parties but can look to some extent at the factual basis of the plaintiff's claim relating to the issues in the matter

44. In approaching the decision to be arrived at in respect of the relief as sought I approach the matter on the basis of the statement of claim as delivered on the 29th day of March, 2017. From the point of view of Allied Irish Banks plc., no claim is apparent on the face of the statement of claim and as the plaintiff states at para. 5 his case is that having regard to the matters set out there

under, a decision by the second and third named defendants to dispose of part or all of the State's shareholding in the first named defendant is unlawful on the grounds that it is contrary to the common good. As is deposed on the State defendants' behalf it is the Minister for Finance in that capacity who holds over 99% of the shares and it is he who is proposing to sell the shares and while the shares maybe shares in Allied Irish Banks plc., the Minister is not selling them on behalf of AIB, and they do not have a direct influence on whether the Minister sells the shares or not other than it is quite apparent that they support the sale but they do not have any control over it.

45. The content of the statement of claim is critical of AIB and the manner in which it has been run and references previous difficulties it has encountered but it is quite apparent that the claim of the plaintiff is that the exercise by the Government of its executive functions is circumscribed by a constitutional constraint that its decisions and actions must align with the interests of the common good. Further the plaintiff's claim is that it is not within the competence of the Government or indeed the Oireachtas to free themselves from the constraints of the Constitution and a decision by the Executive to dispose of some or all of the State's shareholding in AIB is contrary to the interests of Irish citizens and of the common good and the courts on the application of a concerned citizen must act to ensure that such a potentially catastrophic decision does not take effect.

46. The reality of the situation is that no claim is made out against the first named defendant in the statement of claim and no basis is put forward or advanced by the plaintiff in his submissions to the Court for any claim. The plaintiff does submit that if he had the benefit of a defence from the first named defendant or had the opportunity for discovery of documents as against the first named defendant then his position would in some way be strengthened. I do not accept this contention as made by the plaintiff as insofar as the plaintiff sets out his claim in the statement of claim he does so in a reasoned and full manner but even allowing for this fact a defence as a matter of probability is not going to assist in his claim as against the first named defendant and no particular basis is advanced as to any particular aspect in which discovery of documents would assist the plaintiff. Accordingly, the plaintiff does not satisfy this Court that in some way a delivery of a defence or an order for discovery would give rise to a situation where the plaintiff having regard to the very basis of his claim would have his position enhanced or strengthened. The plaintiff does not make out any case for a future amendment of his pleadings or as to what the nature or extent of such an amendment would be. In the circumstances as presented to this Court I take the view that the plaintiff's case as against the first named defendant discloses no cause of action, is bound to fail, is frivolous and vexatious within the legal meaning of those terms and as regard to the circumstances as set out in the various affidavits as delivered on the defendants' behalf and the plaintiff's submissions in respect thereof the plaintiff's case is bound to fail.

47. Accordingly, pursuant to O. 19, r. 28 of the Rules of the Superior Courts and in the exercise of the inherent jurisdiction of the Court I dismiss the plaintiff's claim as against the first named defendant.

48. As regards the plaintiff's claim against the State defendants, the plaintiff does not point to any statutory impediment to the sale or statutory requirement that the State defendants retain its current level of shareholding in AIB nor does he refer in any way to the fact that what is proposed at this point in time is the sale of approximately 25% of the Minister's holding and thus the Minister will retain a majority shareholding in the Bank.

49. It is the case that the State has been involved in Irish banks previously such as ACC, ICC, and the TSB Bank.

50. In essence the plaintiff is advancing a plea pursuant to Article 6 of the Constitution that he is entitled to rights arising from the reference to the common good in the Article against a background where the courts have shown to date considerable reluctance to extend the Constitution in the protection of positive socio-economic rights setting out that this is essentially a matter for the other organs of the State.

51. It is actionable to vindicate the rights of the people within the constitutional landscape, to ensure that popular sovereignty is untrammelled except where the people themselves decide otherwise, as for example in *Crotty v. An Taoiseach* [1987] I.R. 713 where the Supreme Court considered that the ratification of the Single European Act would entail restrictions on popular sovereignty guaranteed under Article 6 that the Executive could not impose without reference to the people.

52. It is the situation that besides electing directly and indirectly members of the Oireachtas and thereby designating the rulers of the State the only means whereby a person such as the plaintiff can become involved in questions of national policy, pursuant to Article 6, is by Referendum. Beyond that the State acts through the agency of its branches of government as per McMahon J. in *Kemmy v. Ireland* [2009] 4 I.R. 74 at p. 80 where he states:-

" 'The State' is an abstract concept but it exercises its powers and discharges its duties and obligations through its three constitutional organs, namely its legislative, executive and judicial organs. Article 6.2 of the Constitution provides that the State's powers are 'exercisable only by or on the authority of the organs of State established by this Constitution.'"

53. The separation of powers demands that it is for the political branches of Government being the Legislative and the Executive to decide questions of distributive justice and the courts are not competent to pronounce on such matters.

54. The decision of the Supreme Court in *Collins v. Minister for Finance* is particularly apt in the circumstances that arise. In that case the Court held that s. 6 of the Credit Institutions (Financial Support) Act 2008 was constitutional even insofar as it permitted the Minister to issue promissory notes in excess of €30 billion to the Irish Bank Resolution Corporation and to the Education Business Society in 2010. This was at least partly on a separation of powers basis wherein at para. 86 of the court's judgment it was stated that:-

"This Court has no function, however, in considering the wisdom of decisions taken by the other branches of government, only the limited capacity to review that judicial review constitutes. It is this Court's function to ensure that the constitutional organ which has responsibility to make such decisions, whether they be wise or foolish, trivial or far reaching, is allowed to do so within the limits imposed by the Constitution."

55. The legal reality of the situation that arises herein is that it is simply not open to this Court to entertain a case such as is before the Court that requires this Court to decide upon matters of political economy. There is no legal competence for this Court, but also no practical expertise, to make a judgment on such matters. The issues in this case are pure political questions and as such are committed to the Legislative and the Executive to decide as between themselves.

56. This Court is of the view that it cannot entertain an issue as regards the aspect of the State's shareholding in AIB and whether it should be sold back into private ownership and such a matter in the view of this Court is clearly a political issue and not one for the judiciary to intervene in.

57. As a matter of European Union law and as set out in Article 29.4.6 of the Constitution no provision in the Constitution invalidates acts or measures by the State which are necessitated by EU membership. In the circumstances that arise the plaintiff's claim implicitly advocates breaches in European law insofar as it denies State aid and provisions.

58. The Minister has put several capital injections into AIB between 2009 and 2011 by way of State aid within the meaning of Article 107(1) TFEU and the European Commission approved that State aid as afforded to AIB pursuant to Article 107(3)(b) TFEU on the grounds that it was to remedy a serious disturbance in the economy of the State.

59. However, the approval of the State aid to AIB was conditional and time limited and expressly given in circumstances where the State had provided a comprehensive restructuring plan showing how the long term viability of the Bank would be restored without further State aid within a reasonable period of time and within a maximum over five years.

60. The plaintiff's claim is predicated on absolute prohibition on redeeming that aid by means of a sale of the Minister's shareholding and a return of the Bank to private ownership.

61. Furthermore, in regard to freedom of capital movement as enshrined in Article 26 and Chapter 4 of Title IV of the TFEU, any restrictions on share dealings are prohibited by Article 63 TFEU. The plaintiff in asserting that public ownership of AIB is required for the common good *inter alia* to avoid foreign investment in the Bank seeks to promote a discrimination as between Irish and non-Irish citizens or entities regulated in the EU investing in AIB as a public listed company and such a contention is unlawful and cannot be supported by this Court.

62. Accepting as I do that the jurisdiction to strike out proceedings is one to be exercised sparingly I am satisfied that this is a clear case. This Court is confident the plaintiff's claim cannot succeed no matter what may arise in the defence or by way of in discovery or by way of some as yet unknown amendment. In the view of this Court the state defendants have discharged the burden of proof in establishing that the plaintiff's claim is bound to fail. The points of law that arise in the view of this Court can be readily resolved in favour of the state defendants and in the view of this Court to allow the action to proceed would constitute an abuse of the process of the Court. The pleadings as laid against the state defendants are frivolous and vexatious within the legal meaning of that term and the plaintiff's case is bound to fail.

63. Accordingly, pursuant to O. 19, r. 28 of the Rules of the Superior Courts and in the exercise of the inherent jurisdiction of the court I dismiss the plaintiff's claim as against the state defendants.

64. For the sake of completeness having regard to my findings I have not considered it necessary to arrive at a reasoned decision on the issue of the *locus standi* of the plaintiff.