

**THE HIGH COURT****COMMERCIAL****[2014 No. 9156 P]****[2014 No. 175 COM]****BETWEEN****JOHN MORRISSEY****PLAINTIFF****AND****IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION), LSREF III STONE INVESTMENTS LIMITED,  
KIERAN WALLACE, EAMONN RICHARDSON, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL****DEFENDANTS****JUDGMENT of Ms. Justice Costello delivered on 27th day of November, 2015.**

1. On 11th March, 2015, I struck out these proceedings insofar as they related to the first to fourth named defendants. By Notice of Motion dated 20th October, 2015, the fifth, sixth and seventh named defendants ("the State defendants") sought an order dismissing the proceedings against them for want of standing and/or for failing to disclose a maintainable cause of action.

**The relevant background**

2. The plaintiff ("Mr. Morrissey") had a long history of banking with Anglo Irish Bank Corporation Limited ("Anglo") and ultimately borrowed many millions of euro from that bank. The Anglo Irish Bank Corporation Act 2009 was passed and the ownership of Anglo was transferred to the Minister for Finance. In July, 2011 Anglo and Irish Nationwide Building Society were merged to form Irish Bank Resolution Corporation ("IBRC"). In 2013, pursuant to the Irish Bank Resolution Corporation Act 2013, IBRC was placed into special liquidation with Mr. Kieran Wallace and Mr. Eamonn Richardson being appointed Special Liquidators. During the course of the liquidation of IBRC, the Special Liquidators offered portfolios of loans held by IBRC for sale to third party investors. In March, 2014 the Special Liquidators entered into an agreement to sell a portfolio of loans to a third party. The portfolio included the loans of Mr. Morrissey and the proceedings brought against Mr. Morrissey by IBRC in proceedings entitled *Irish Bank Resolution Corporation Ltd. (In Special Liquidation) v. John Morrissey*, Rec. No. 2011/1548 S ("the Debt proceedings"). On 11th July, 2014, by Deed of Transfer the Special Liquidators transferred, *inter alia*, Mr. Morrissey's loans and the Debt proceedings to the purchaser of those loans, LSREF III Stone Investments Limited ("Stone").

3. In 2011, IBRC instituted the Debt proceedings against Mr. Morrissey claiming approximately €31 million due in respect of loans previously taken out by Mr. Morrissey with Anglo. The case proceeded as a modular trial and a number of issues were fully contested and five written judgments have been delivered by judges of the High Court and a number of rulings handed down during the course of the proceedings. Certain issues relevant to the Motion with which this judgment is concerned were dealt with during the hearings in the Debt proceedings.

4. Mr. Morrissey claims that there had been systematic and deliberate overcharging of interest on the part of Anglo and this was continued by IBRC and the Special Liquidators of IBRC. Kelly J. in the High Court ruled that Mr. Morrissey could not maintain a claim in relation to alleged systematic overcharging of interest; he was confined to a claim that interest was overcharged in respect of his own loans. Finlay Geoghegan J. in the High Court, in a lengthy judgment, ruled that there had been overcharging in respect of the loans. This was based on the difficulties created in construing the contractual terms of the loans in the light of the conversion from the Irish pound to the euro and other technical issues. Specifically she did not hold that there was a deliberate overcharging on behalf of Anglo or IBRC or the Special Liquidators. She gave full credit to Mr. Morrissey in respect of the amount of interest actually overcharged.

5. Mr. Morrissey applied to amend his Defence and Counterclaim to raise issues based upon the Directive 2001/24/EC of the European Parliament and of the Council of 4th April, 2001, on the Reorganisation and Winding Up of Credit Institutions. Finlay Geoghegan J. refused to allow this amendment.

6. Before the proceedings had concluded, IBRC (In Special Liquidation) entered into an agreement to sell and subsequently transferred Mr. Morrissey's loans to Stone. It was necessary for Stone to be substituted as plaintiff in lieu of IBRC (In Special Liquidation) in the Debt proceedings. Mr. Morrissey raised a number of issues challenging the validity of the intended and then completed assignment of his loans and the proceedings to Stone.

7. Finlay Geoghegan J. delivered a judgment whereby she permitted Stone to be substituted as plaintiff. This was without prejudice to any arguments that Mr. Morrissey might wish to raise as to the validity of the Assignment. She rejected Mr. Morrissey's argument that the Sale Agreement and the Deed of Transfer were void by reasons of the rules prohibiting champerty and maintenance. She held that the Special Liquidators of IBRC had capacity to sell Mr. Morrissey's loans and the associated Debt proceedings pursuant to s. 231 of the Companies Act 1963.

8. Stone asserted that the Assignment was a valid and enforceable assignment on three grounds: (a) the general conditions of Mr. Morrissey's loans with Anglo expressly authorised that the Bank could transfer the loans to third parties; (b) the Assignment had been effected in accordance with the requirements of the Supreme Court of Judicature Act (Ireland) 1877; and finally, in the alternative, (c) by virtue of the provisions of s. 12 of the Irish Bank Resolution Corporation Act 2013, the Assignment was valid.

9. Section 12 of the Act of 2013 provides as follows:-

*"(1) The sale or transfer of any asset or liability by IBRC, acting through a special liquidator, or by a special liquidator where such asset or liability has vested in the special liquidator, to any person or the assumption of any obligation or liability relating to such sale or transfer shall take effect notwithstanding—*

*(a) any provision of any enactment, rule of law, code of practice, contract, or other agreement—*

*(i) providing for or requiring—*

*(I) notice to be given to any person,*

*(II) the consent, approval or concurrence of any person,*

*or*

*(III) any other step, consent, notification, authorisation, licence or document to similar effect,*

*or*

*(ii) prohibiting that sale or transfer,*

*or*

*(b) any other legal or equitable restriction, inability or incapacity relating to the sale or transfer of any asset or liability or the assumption of any obligation or liability relating to such sale or transfer.*

*(2) On the sale or transfer of any cause of action or proceedings by IBRC, acting through a special liquidator, or by a special liquidator where such cause of action has, or proceedings have, vested in the special liquidator, to any person—*

*(a) that person assumes all of the rights and obligations in relation to the cause of action or proceedings which IBRC had immediately before that sale or transfer, other than the obligations of IBRC to which paragraph (b) relates, and*

*(b) IBRC retains obligations in relation to the defence of or liability for any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off and, in respect of such defence or liability, IBRC has full rights in relation to, and is solely liable for, any remedy awarded in relation to any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off.*

*(3) Any obligation incurred, security created, payment made or act performed by IBRC (whether or not acting through a special liquidator) at any time (whether before or after the passing of this Act) in favour of the Bank, whether or not all or any part of the Bank's interest in such obligation, security, payment or act has been transferred to another person, shall be taken to be valid and enforceable in all respects notwithstanding any enactment or rule of law, which validity and enforceability may not be challenged by any person including a special liquidator, and, without prejudice to the foregoing, shall not be invalidated or rendered void or voidable as against the Bank or any other person—*

*(a) by section 60, 99, 100, 101 or 111 of the Act of 1963,*

*(b) by section 29 or 31 of the Act of 1990,*

*(c) on the grounds that, in relation to IBRC, it was ultra vires,*

*(d) by reason that IBRC may not have been able to pay its debts as they fell due at the time the security was given or that the directors of IBRC ceased to have the power to create that security,*

*(e) by reason that the grant of the security may not have been duly authorised by IBRC or may not have been for the benefit of IBRC,*

*(f) by reason that the consent of a party required for the creation of the security may not have been obtained, or*

*(g) by reason that the security was created by IBRC in favour of the Bank prior to the making of the Special Liquidation Order.*

*(4) Unless the terms of sale specifically provide otherwise, security over property provided to the Bank by IBRC in connection with a loan made or credit facility provided by the Bank to IBRC or any other amount owing by IBRC to the Bank—*

*(a) shall be available to, deemed provided to, and may be relied on by, any person who purchases such a loan or credit facility or other amount, or a part thereof, from the Bank (in this subsection referred to as a "purchaser") to secure the indebtedness of IBRC under that loan or credit facility or other amount, or part thereof, to the purchaser, and*

*(b) where so purchased, such security, or part thereof, which relates to such purchase, shall be held by the Bank in trust for the benefit of the purchaser concerned as if that purchaser was a secured creditor under the relevant document creating such security.*

*(5) Notwithstanding any enactment or rule of law, IBRC, acting through a special liquidator, or a special liquidator, where such cause of action has vested in the special liquidator, may sell or transfer, on such terms and conditions and to such person as the special liquidator thinks fit, any cause of action, howsoever arising, which has accrued or will accrue to IBRC.*

*(6) In this section references to a special liquidator shall include references to a special liquidator when acting as a receiver, where he or she is appointed as a receiver by the Bank."*

the Act of 2013. He alleged that it was incompatible with the provisions of the Constitution, that it infringed his rights as guaranteed under the European Convention on Human Rights and that it infringed the Charter of Fundamental Rights of the European Union.

11. He instituted these proceedings by a plenary summons dated 28th October, 2014. Insofar as it is relevant to the issues to be decided in this judgment, he sought declarations that ss. 12(1) and/or 12(5) of the Irish Bank Resolution Corporation Act 2013 were invalid having regard to the provisions of the Constitution including Articles 34, 40.1, 40.2, 40.3, 41, 42 and 43. He sought a declaration that ss. 12(1) and 12(5) of the Act of 2013 violates Articles 15, 16, 17, 20 and 47 of the Charter of Fundamental Rights of the European Union.

12. When I delivered my earlier judgment in these proceedings on 11th March, 2015, striking out the claim as against the non-State defendants, I indicated that Mr. Morrissey:-

"should not be debarred from challenging whether s. 12 of the Irish Bank Resolution Corporation Act 2013 is compatible with the Constitution if Stone should succeed in obtaining judgment against him in the Debt proceedings on the basis of the section."

I indicated that Mr. Morrissey could pursue the one remaining issue in the Debt proceedings by availing of the procedures provided in O. 60 of the Rules of the Superior Courts or he could continue to maintain the plea in these proceedings. I ruled that he could not maintain a challenge to the constitutionality of the provisions of s. 12 of the Act of 2013 in the Debt proceedings without engaging in the O. 60 procedure. In the event, Mr. Morrissey decided not to avail of the O. 60 procedure and he was not permitted to argue that the provisions of s. 12 of the Act of 2013 were incompatible with the provisions of the Constitution or violated Articles of the Charter of Fundamental Rights of the European Union in the Debt proceedings.

12. On 5th October, 2015, I gave judgment in the Debt proceedings. I held that IBRC (In Special Liquidation) had a contractual right to assign Mr. Morrissey's loans to Stone. I held that the Assignment was valid under the terms of the contract. In the alternative, I held that the Assignment complied with the requirements of the Supreme Court of Judicature Act (Ireland) 1877. I held that the assignment of the chose in action was valid and I did so without relying upon the provisions of s. 12 of the Act of 2013. I therefore held that it was neither necessary nor appropriate to consider the constitutionality of the section. I gave judgment in favour of the plaintiff, Stone, against Mr. Morrissey in the sum of €30,180,489.00. In calculating this sum the credit in respect of the overcharging of interest identified by Finlay Geoghegan J. in the sum €143,676.64 was given together with credit in respect of other payments that have been made to the credit of Mr. Morrissey's accounts by receivers appointed to certain properties.

13. It is against this procedural and factual background that the State defendants brought this Motion to dismiss these proceedings as against the State defendants. Mr. Morrissey seeks final declarations in relation to ss. 12(1) and 12(5) on the grounds that the section is incompatible with the provisions of the Constitution or that it violates the provisions of the Charter of Fundamental Rights of the European Union.

#### **Submissions on behalf of the State defendants**

14. Counsel on behalf of the State defendants, Mr. McBride B.L., pointed to the fact that the Debt proceedings had been resolved without the Court relying upon s. 12 of the Act of 2013. Therefore Mr. Morrissey had no standing to maintain proceedings seeking declarations that ss. 12(1) and 12(5) of the Act were incompatible with the provisions of the Constitution or violated Articles of the Charter of Fundamental Rights of the European Union. Mr. McBride referred to the decision of *Cahill v. Sutton* [1980] I.R. 269 where Henchy J. held at p. 282 that:-

*"[t]his general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right."*

He stated at p. 286 that:-

*"[t]he primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."*

Mr. McBride pointed out that Henchy J. noted that this was a rule of practice and may be subject to expansion, exception or qualification when the justice of the case so required. He pointed to the fact that even if Mr. Morrissey were to succeed in full in this action he would obtain no benefit as a result. All of the declarations sought are directed towards striking down the Assignment of the loans and the chose in action to Stone. Judgment has been entered in Stone's favour against Mr. Morrissey. Even if he were to succeed in full in this action this would not affect the validity of the Assignment or the judgment. On the other hand it could potentially have very grave consequences for other parties not before the Court.

15. At paras. 20 to 23 of the Statement of Claim, Mr. Morrissey sued the Minister for Finance as the shareholder in Anglo following the nationalisation of Anglo pursuant to the Anglo Irish Bank Corporation Act 2009. The complaints made against the Minister for Finance relate to Mr. Morrissey's allegation that there was deliberate, wrongful overcharging of interest in respect of his accounts. This issue as a matter of fact has been dealt with by Finlay Geoghegan J. in the Debt proceedings. No relief is sought against the Minister in these proceedings. Mr. Morrissey has received his full remedy in relation to his claim that interest was overcharged on his account. Credit in the amount of the overcharged interest has been given in full in the judgment of 5th October, 2015, in the Debt proceedings. Mr. Morrissey cannot now seek to recover for the same loss against the Minister. Finlay Geoghegan J. did not hold that there had been any deliberate or unlawful overcharging of interest by Anglo or its successors and therefore any case that the Minister is somehow liable for such action cannot succeed. For these reasons the proceedings should be dismissed as failing to disclose a maintainable cause of action.

#### **Mr. Morrissey's submissions**

16. Mr. Morrissey accepted that the test provided in *Cahill v. Sutton* is whether the challenger has been a detrimentally affected by the challenged provision. In this case he argued that the existence of the section itself amounts to a prejudice, notwithstanding the fact that the Assignment of the loans and the chose in action to Stone was upheld without recourse to the section. It was said that the judgments in the Debt proceedings are to be appealed. If Mr. Morrissey succeeds in his appeal, this will be to no avail because by virtue of the provisions of s. 12 of the Act of 2013 the Assignment will be validated. He says that he suffered detriment by virtue of the fact that any challenge to the Assignment was doomed to failure because even if he succeeded on traditional grounds in establishing that the Assignment was invalid, it would be deemed valid by virtue of the provisions of s. 12. In addition and separately

he said that he suffered detriment from the very existence of the section as he suffered anxiety and psychological damage as a result of the stress arising from the effect of s. 12. He argued that the breach of a Constitutional right warrants a remedy.

17. In relation to the Charter of Fundamental Rights of European Union, he submitted that once the State is implementing EU law a person may invoke the Charter and in particular Article 47, the right to an effective remedy and to a fair trial. In relation to the pleadings advanced against the Minister, it was stated that the claim was not about money, it was about Mr. Morrissey being denied his Constitutional rights.

### **Discussion**

18. In these proceedings Mr. Morrissey seeks six declarations in relation to s. 12 of the Act of 2013. Reliefs 28, 29 and 32 are predicated upon the premise that the sale or transfer of the loans of Mr. Morrissey are prohibited by any enactment, rule of law, contract or agreement. I found as a fact in my judgment in the Debt proceedings of 5th October, 2015, that the sale and transfer of Mr. Morrissey's loans and the right to prosecute the Debt proceedings was expressly permitted by the terms of his loan agreements. Therefore the premise upon which the declarations were sought fails by reason of this ruling.

19. I held that the assignment of Mr. Morrissey's loans and of the conduct of the Debt proceedings was valid based upon the terms of the loan agreements and the Supreme Court of Judicature Act (Ireland) 1877. My decision was not based upon the provisions of s. 12. This matter has been decided. Mr. Morrissey's interests have not been adversely affected by the operation of the statute. Nor do they stand in real or imminent danger of being so affected. The Debt proceedings concluded without reliance upon the section. It follows that to permit this litigation to continue would be to permit the trial of a hypothetical issue.

20. I do not accept that Mr. Morrissey continues to be adversely affected or in danger of being adversely affected by this section now that the Debt proceedings have concluded. I do not accept that the fact that those proceedings are under appeal is sufficient to justify the continuance of these proceedings. On the contrary, it may well be preferable that all matters are dealt with together in due course by the Court of Appeal.

21. In reliefs 30, 31 and 33, Mr. Morrissey seeks declarations in relation to ss. 12(1) and/or 12(5). These reliefs are predicated on the argument that the subsections authorise the first, third and/or fourth named defendants to sell or transfer a cause of action or an asset. Finlay Geoghegan J. has already held that the Special Liquidators (the third and fourth named defendants herein) had power to enter into the Loan Sale Agreement and the Deed of Transfer. They had power to assign the conduct of the Debt proceedings to Stone pursuant to s. 231 of the Companies Act 1963. It is clear therefore that the assignment of the loans and the conduct of the Debt proceedings was pursuant to s. 231 of the Companies Act 1963 and not pursuant to s. 12 of the Act of 2013. Thus the premise upon which these three declarations are sought fails as a matter of fact.

22. In addition, as I have pointed above, I reached my decision that the assignment of Mr. Morrissey's loans and the conduct of the Debt proceedings was valid based upon the terms of his loan agreements and also based upon compliance with the requirements of the Supreme Court of Judicature Act (Ireland) 1877.

23. Simply put, in theory, s. 12 of the Act of 2013 could have been relevant to Mr. Morrissey's loans and the assignment of those loans and of the chose in action but as a matter of fact it was not. He therefore has no standing to seek the reliefs remaining against the State defendants remaining in these proceedings.

24. In my judgment of 11th March, 2015, I struck out Mr. Morrissey's claims based upon the Charter of Fundamental Rights of the European Union. I did so on the basis that Finlay Geoghegan J. had previously refused to permit Mr. Morrissey to amend his pleadings to include pleas based upon the Directive 2001/24/EC. It was accepted by counsel for Mr. Morrissey that the Charter is only engaged once the State is implementing EU law. This issue therefore no longer arises and any declarations based upon the Charter are no longer maintainable by Mr. Morrissey.

25. Mr. Morrissey pleaded that the Minister was responsible for the overcharging of interest on his loans and for the maintenance of a claim for that interest in the Debt proceedings. However, as it was pointed out by Mr. McBride on behalf of the State defendants, he did not seek any relief against the Minister. I accept the submissions of Mr. McBride on this point. Mr. Morrissey has already received full credit for the over payment of interest in the judgment entered against him on 5th October, 2015. He cannot recover twice for the same loss. Insofar as he seeks to raise an issue that the wrongdoing was more than the miscalculation of the interest due on foot of his loan agreements, it is clear that Finlay Geoghegan J. has dealt with the issue of any wrongful overcharging of interest and has not accepted the case advanced by Mr. Morrissey. If IBRC and subsequently the Special Liquidators of IBRC were not liable to Mr. Morrissey in the manner in which he claimed, it is inconceivable that the Minister, as the shareholder, could be liable in those circumstances.

26. Accordingly, the case remaining in these proceedings against the State defendants is no longer maintainable by the plaintiff and he no longer has standing to continue them. I grant the State defendants the relief sought in the Notice of Motion and I dismiss the proceedings.