

THE HIGH COURT

[2009 No. 9048 P]

BETWEEN

GREGORY MCCAMBRIDGE

PLAINTIFF

AND

ANGLO IRISH BANK CORPORATION LIMITED AND

MAINLAND VENTURERS CORPORATION

DEFENDANTS

JUDGMENT of Ms. Justice O'Regan delivered on the 7th day of June, 2016

Background

1. The within matter comes before the Court on foot of a notice of motion of 21st January, 2015, of the plaintiff wherein he is seeking various reliefs including:

- a. the lifting of the stay on the proceedings pursuant to s.6(2)(a) of the Irish Bank Resolution Corporation Act 2013 together with -
- b. an order joining a further party to the proceedings,
- c. an order permitting the plaintiff to amend his statement of claim and
- d. an order consolidating the within proceedings with allied debt collection proceedings.

2. The plaintiff issued a plenary summons on 7th October, 2009, seeking the rescission of a commitment agreement (dated 4th October, 2006) together with damages under various headings of claim. The plaintiff subsequently delivered a statement of claim of 4th November, 2009.

3. The proceedings concern a claim by the plaintiff as an investor against the Bank which invited and facilitated participation in a fund for the renovation of hotels in New York.

4. Allied proceedings were entered into the Commercial Court list on the application of the relevant plaintiff by order of 9th November, 2009, on the basis that such proceedings would act as pathfinder proceedings. In this regard, there were two affidavits of solicitor Thomas Norris on behalf of the plaintiffs filed, respectively dated 29th October, 2009 and 6th November, 2009.

Pathfinder Proceedings

5. At para. 20 of Mr. Norris's first affidavit he states:-

"The proceedings and related proceedings are identical such that all cases can be admitted into the Commercial Court list and one case can proceed to determination, which would bind the remaining plaintiffs and I confirm that I am instructed on behalf of the plaintiff herein and the plaintiffs in the related proceedings and confirm that they will each be bound by the findings in whichever proceedings proceeds to hearing."

6. At para. 24(a) of that affidavit Mr. Norris confirms that the affidavit was being sworn on behalf of twenty four plaintiffs. Mr. Norris liaised with and secured instructions from each of the individual plaintiffs.

7. In his second affidavit of 6th November, 2009, at para. 8, Mr. Norris confirms that the plaintiffs in the remaining proceedings have agreed to be bound by Mr. McCaughey's proceedings but goes on to state that this is conditional upon the said proceedings proceeding on a generic basis and the remaining plaintiffs will not be bound in the event that a claim is defeated on the basis of something that applies only to the plaintiff defeated. This caveat is explained because the defendants had raised an issue in respect of the residency of Mr. McCaughey (see para. 8).

8. During the course of the pathfinder proceedings one of the issues which arose was as to amending the pleadings to allow the plaintiff to plead that he held the status of "a consumer". Ultimately liberty was afforded to the plaintiff to plead that he was a consumer. However, he resolved not to do so as he did not wish to disclose information that would be required if he availed of an entitlement to such a plea. His counsel asserted to the Court at that time that such status could not bind the other plaintiffs.

9. In the events the pathfinder proceedings took three weeks to be heard and ultimately a judgment was delivered by Birmingham J. on 27th July, 2011.

10. Because of the commitment agreement, one of the documents signed by the plaintiff as part of the investment process, the Court found that liability could only attach to the Bank if there was an element of fraud involved, and the Court held that there was no such fraud. At para. 201 of his judgment, Birmingham J. held that there was no evidence of fraud and the plaintiff had also failed to establish the evidence and entitlement to succeed on any one of the non-fraud elements of the claim. The judge indicated that investor remorse did not provide a basis for a successful legal action. Earlier, at para. 62 of the judgment, the Court indicated that granting consumer status may not in truth be of enormous significance because of the best practice within bank business.

11. Insofar as the issue of zoning was concerned, the pathfinder plaintiff indicated that if he had known of the zoning status he would

not have invested. However, the Court found that "no reasonably prudent investor who found the investment otherwise attractive, is likely to have been dissuaded from investing by being told about the reality of the zoning issue."

12. The High Court order was appealed, and ultimately Hardiman J. gave a unanimous decision of the Supreme Court on 13th March, 2013, and at para. 58 of his judgment, Hardiman J. stated that the matter involved a case where the parties had ordered a relationship on the basis of detailed, precise and elaborate contractual provisions. Further, at para. 88, he held that the finding as to the plaintiff's state of mind (vis-à-vis zoning) was a finding of fact.

Plaintiff's position

13. The plaintiff in this application has sworn two affidavits respectively dated 16th December, 2014 and 12th March, 2015.

14. Although the plaintiff did not see fit to disclose to this Court the commitment agreement and other documents executed by him at the time of the investment, they were in fact disclosed by Mr. Kieran Wallace in defence of the plaintiff's claim. These documents comprised:-

- a. the commitment agreement of 4th October, 2006;
- b. an investor questionnaire, and
- c. a professorial investor declaration.

14A. Mr. Wallace's affidavits are respectively dated 18th February, 2015 and 8th April, 2015.

15. In dealing with the plaintiff's business, his status as a consumer and the nature of the argument he believes he can now make vis-à-vis zoning notwithstanding the pathfinder proceedings the following information is disclosed:-

- a. the plaintiff has been a private client of Anglo Irish Bank since 1999 and at all times Anglo purported to provide him with a bespoke service where it would source, package and sell a property and other funds (see para. 4 of the affidavit of the 16th December, 2014);
 - b. in para. 12 of his first affidavit he states that certain determinative findings were specific to Mr. McCaughey in the pathfinder proceedings and he can effectively distinguish himself in that he maintains that he was a consumer;
 - c. at para. 13 he suggests that the findings against Mr. McCaughey vis-à-vis the zoning status does not bind him;
 - d. he states at para. 15 that "I am retired the investments into geared property funds did not constitute a part of my business." [sic];
 - e. in his second affidavit, at para. 16, he states that he would not have entered into the investment had he known of the zoning issues;
 - f. in the plaintiff's investor declaration he states that he has a financial investment portfolio exceeding €500,000 and he has sufficient experience in the financial sector, or access to professional advisors with such experience, in order to adequately understand the nature of the transactions or services envisaged and he wishes to be treated as a professional client;
 - g. in the investor questionnaire, the plaintiff warrants that he is an "accredited investor" and that he owns not less than \$5m US dollars in investments;
 - h. at para. 6 of the commitment agreement, the plaintiff states that he understands that the information provided, including the investor questionnaire and the representations and warranties made by him, will be relied upon by Mainland and the partnership for the purpose of determining his eligibility to purchase interests.
16. The plaintiff has declined to amplify to the Court the nature of the business or businesses in which he was involved, to support the contention that he was a consumer insofar as the instant investment is involved.

Legal issues

17. Notwithstanding that several claims are brought within the notice of motion before the Court, it is accepted by both parties that, in advance of any additional relief being afforded to the plaintiff, the plaintiff must secure an order under s.6 of the Irish Bank Resolution Corporation Act 2013. Under s.6(2)(a) all proceedings then in existence against IBRC were immediately stayed.

18. In the case of *Quinn v. Irish Bank Resolution Corporation & Ors.* [2013] 1 I.R. 393, Ryan J. in the High Court reviewed the meaning and effect of s.6(2)(a) of the 2013 Act aforesaid. He came to the conclusion that the stay was not intended to be permanent and he made the following statement at para. 48 of his judgment:-

"It seems to me to be manifest that a fair, proper and constitutional interpretation and also a similar approach based on common law leads one to the inevitable conclusion that the stay in this case was intended to be subject to being lifted on application to this Court."

That judgment was delivered on the 15th March, 2013.

19. In a subsequent judgment of Laffoy J. delivered on the 15th August, 2013, in the High Court case of *Wright-Morris v. Irish Bank Resolution Corporation* [2013] IEHC 385, an application was made to the Court under s.6(2)(b) of the 2013 Act which precludes further proceedings against the Irish Bank Resolution Corporation without the consent of the court. Laffoy J. in her judgment likened the provision to s.222 of the Companies Act 1963, which governs the prosecution and commencement of proceedings in cases of a compulsory winding up. Section 222 of the 1963 Act aforesaid is a verbatim replication of s.231 of the Companies Act 1948 in the United Kingdom. In the absence of any Irish authority on s.222 of the 1963 Act, Laffoy J. looked at the authorities which governed s.231 of the United Kingdom 1948 Act to the effect that the discretion afforded to the court is to do what is right and fair in the circumstances (see para. 22 of the *Wright-Morris* judgment).

20. Notwithstanding that Laffoy J. was considering the implications of s.6(2)(b) of the 2013 Act, I am satisfied that the same principles apply to an application to have a stay lifted under s.6(2)(a) of the 2013 Act, namely that the court has a discretion to do what is right and fair in the circumstances.

21. At para. 23 of her judgment, Laffoy J. opines that in an appropriate case she believes that a court would refuse to give consent under s.6(2)(b) if it was satisfied that the cause of action against the Irish Bank Resolution Corporation was "clearly statute barred."

22. Although counsel for the plaintiff submits that it would only be in rare cases that the lifting of a stay might be refused, such as a case being clearly statute barred, it does occur to me that the comments of Laffoy J. arose in circumstances where an assertion had been made in resisting the lifting of a stay based upon the claim being statute barred. and this therefore was the context of reference to "clearly statute barred."

23. Furthermore, although it is contended for on behalf of the plaintiff that a mere assertion by the plaintiff that he was a consumer in 2006 is sufficient to lift the stay, this does not to me appear to accord with;

a. the entirety of the judgment of Laffoy J. given that in the *Wright-Morris* case the court did entertain, insofar as it could given the apparent lack of information available to it, a consideration of whether or not the assertion that the plaintiff's claim was statute-barred could be supported, and

b. the Court's discretion is as to what is right and fair in the circumstances.

24. Effectively, therefore, in order to determine what is "right and fair in the circumstances", the court must have regard to the nature of the claim being advanced by the plaintiff beyond mere assertion.

25. In the instant matter the plaintiff wishes to proceed on the basis that:-

a. he was a consumer, and

b. he wishes to raise the fact that he would not have proceeded with the investment had he known of the zoning status.

26. Insofar as the zoning status is concerned, it appears clear to me that the plaintiff will make the same arguments as were made in the pathfinder proceedings which he has already agreed to be bound by, save and insofar as the pathfinder proceedings were defeated on the basis of something that applied only to the pathfinder plaintiff. The within plaintiff has not disclosed any fact or detail which would suggest that the findings of Birmingham J. *vis-à-vis* zoning applied only to the pathfinder plaintiff.

27. The plaintiff makes the assertion that he is a consumer for the purposes of avoiding paras. J - N inclusive of the commitment agreement of the 4th October, 2006, and there is nothing in any of these paragraphs which affects the matters set out at para. 15 hereof.

28. In S.I. 27 of 1995, being the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, consumer is defined as "a natural person who is acting for purposes which are outside his business".

29. In the case of *Allied Irish Banks v. Higgins & Ors.* [2010] IEHC 219, a High Court judgment of Kelly J. delivered on the 3rd June, 2010, the defendants in that action asserted that they were consumers within the meaning of the Consumer Credit Act 1995 in attempting to resist an application for summary judgment against them in the total sum of in excess of six millions euros.

30. In considering the argument, Kelly J. referred to the case of *Benincasa v. Dental Kit* (case C-269/95) being a case of the European Court of Justice which in turn considered the concept of a consumer. The European Court of Justice indicated that, in determining whether a person has the capacity of a consumer, the concept must be strictly construed and went on to state:-

"Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer... The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity."

31. In his conclusion, Kelly J. determined that the defendants in that action acted as partners in a partnership which borrowed money from AIB, and stated that:-

"They did so with a view to investing in property and its development for profit. In so doing, they engaged in business and the Act had no application to them. The assertion by them to the effect that they were "consumers" which is contained in their affidavits is not sufficient to warrant this case being adjourned to plenary hearing. No arguable defence or triable issue has been identified by them on this topic..."

32. The plaintiff urges this Court to prefer the views of Barrett J. in the case of *Ulster Bank Ireland Ltd. v. Barry Healy* [2014] IEHC 96, a judgment delivered on the 28th February, 2014, where he found that the defendant in that action was a consumer as asserted, and he found that the sole issue arising was whether when he borrowed monies from Ulster Bank he was acting outside his business, trade and profession. Barrett J. indicated that he did not consider that a consumer who on one or more occasions places saved or borrowed monies in a particular form of investment, such as property, with a view to making a profit, necessarily becomes a person whose business, trade or profession is that of a professional investor and he went on to distinguish that case from the *Higgins* case, which he suggested was "quantitatively and appears qualitatively different from the level and form of speculation engaged in by Mr. Healy."

33. Insofar as Barrett J. differs in his approach from Kelly J. as to who might qualify as a consumer under the relevant legislation, I adopt the approach of Kelly J. who in turn has adopted the approach of the European Court of Justice. Both cases concerned an application on the part of a bank looking for summary judgment with the defendants in each case seeking to be classified as a consumer for the purposes of defending the action.

Conclusion

34. I am satisfied that the issue of zoning generally to all of the plaintiffs connected to the pathfinder proceedings has been fully, comprehensively and finally dealt with by the order of Birmingham J. which in turn has been upheld by the Supreme Court. There is no fact advanced to me to distinguish the within plaintiff. Accordingly, I do not believe it would be right and fair in the circumstances of the instant case for me to lift the stay imposed by the 2013 Act to enable the plaintiff to argue the zoning issue further.

35. Insofar as the plaintiff asserts that he is a consumer and therefore entitled to the protection of the Consumer Credit legislation so as to avoid paras. J - N inclusive of the commitment agreement, I am satisfied that:-

a. Birmingham J. in his decision found that the plaintiff in the pathfinder proceedings failed to establish the evidence and entitlement to succeed in any one of the non-fraud elements of the claim, which in turn included a claim in negligence, so that even if the plaintiff successfully argued that he was a consumer and thereby avoided the implications of paras. J - N inclusive of the commitment agreement nevertheless, as a finding of negligence on the part of the defendant has not been established, such asserted consumer status would not advance the position of the plaintiff and enable him to succeed in recovering damages as against the defendants.

b. Entirely independently of the matters referred to in the next proceeding paragraph, I am satisfied that the only basis put forward before this Court to suggest that the plaintiff is a consumer is his bald assertion to that effect. The plaintiff's counsel suggests that such a bald assertion is sufficient to obligate this Court to exercise its discretion and lift the stay. I believe that this argument is not supported by the *Wright-Morris* judgment where clearly the court did engage with and make an assessment of the respective arguments of the parties. Neither is it supported by the fact that a discretion to do what is right and fair is vested in the Court. Furthermore I am satisfied that, having regard to the *Allied Irish Bank v. Higgins* judgment, the within plaintiff is "clearly" not a consumer. He has not raised a statable argument or identified a triable issue on the topic of his alleged status as a consumer.

36. In these events, I believe that it is neither right nor fair for the Court to grant an order lifting the stay provided for by s.6(2)(a) of the 2013 Act.