



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 177

Record No. 2017/240

**Ryan P.
Finlay Geoghegan J.
Hogan J.**

BETWEEN/

VINCENT O'DONOGHUE

PLAINTIFF /

APPELLANT

- AND -

ALLIED IRISH BANKS PLC, THE MINISTER FOR FINANCE, GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of June 2017

1. In these proceedings the appellant, Mr. Vincent O'Donoghue, has sought an order restraining the Government from disposing of all or part of his shareholding in Allied Irish Banks plc ("AIB"). In his judgment in the High Court Gilligan J. made an order striking out the proceedings against all defendants pursuant to Ord. 19, r. 28 and the inherent jurisdiction of the Court. By its ruling this morning this Court has already dismissed Mr. O'Donoghue's appeals against this decision and the decision to refuse to grant any interlocutory relief restraining the sale of 25% of the Government's shareholding. The purpose of this *ex tempore* judgment is briefly to give the reasons for that conclusion.

2. The background to the State's acquisition of over 99% of the shareholding in AIB in the wake of the financial crisis of 2008 - 2010 is well known and need not be repeated here at any length. It is sufficient to say that pursuant to the provisions of the Credit Institutions (Financial Support) Act 2008 the State guaranteed the liabilities of a number of credit institutions, including AIB. Pursuant to the Credit Institutions (Stabilisation) Act 2010 the Government subsequently advanced some €21bn. to AIB in return for that shareholding. The object of this acquisition was to stave off the potential insolvency of AIB against the background of an acutely difficult trading environment. Since that time AIB shares have not traded openly and freely in major capital markets and, for this to occur, the Court has been informed that it is necessary that the State should sell off 25% of its shareholding. At all events and, indeed, for whatever reason, the Government has now decided in the last few weeks to sell off 25% of that shareholding. The initial public offering in respect of these shares is currently in train.

3. In essence Mr. O'Donoghue's case is that this sale is ill-judged and not in the interest of the Irish people. Specifically, he contends that such disposal is not in the interest of the common good and is thereby contrary to Article 6 of the Constitution. These concerns are expressed in paragraph 5 of his statement of claim dated 29th March 2017 which is in the following terms:

"The plaintiff's case is that...a decision by the second and third named defendants to dispose of part or all of the State's shareholding in [AIB] is unlawful on the grounds that it is contrary to the common good."

4. There are, nevertheless, many possible objections to the sustainability of the claims advanced by Mr. O'Donoghue in this litigation. One may immediately observe, however, that it has long been held that the State is a juristic person with "the capacity to hold property" - see *Comyn v. Attorney General* [1950] I.R. 142, 159-161, *per* Kingsmill Moore J.. One of the essential ingredients of the right to hold property is the right to dispose of it. Both Article 10(3) and Article 10(4) of the Constitution expressly confer a power of alienation in the case of natural resources such as lands, mines, minerals and waters. It is essentially implicit in the general scheme of the Constitution itself that a similar power to alienate and dispose of a property should exist in the case of other forms of State assets such as, in this instance, the ownership of shares.

5. The most fundamental objection, however, to this appeal is that these proceedings present a non justiciable political controversy in respect of which the courts have no jurisdiction. It may justly be said that the present case exhibits all the classic hallmarks of such a non justiciable controversy. First, there are no cognisable legal standards by which the decision of the Government to sell off this shareholding can be measured. Some may think that it is important that the State should endeavour to avail of benign market conditions such as currently exist in order to recover for the benefit of the taxpayer some element of the enormous investment made in AIB in the aftermath of the economic crash in 2008 - 2010. Others, like Mr. O'Donoghue, may think it desirable that the State should retain effective full ownership of the Bank for a variety of different reasons. Yet others may have different views again on the matter and consider, for example, that even more of the State's shareholding should now be sold.

6. The courts are, plainly, in no position to make a judgment in relation to such matters. The Court obviously lacks the skills and competence to make macro-economic judgments of this kind in relation to how State resources of this kind can best be utilised. But even if it did, it would not alter matters in the slightest, since as I said when delivering a judgment as a judge of the High Court in *MacDonncha v. The Minister for Education* [2013] IEHC 226:-

"this is because questions of the wisdom, efficacy and general fairness of these [macro economic] policies are committed exclusively to the democratic process. Article 5 of the Constitution proclaims the State to be a democracy and this means that questions of general economic policy of this nature are committed to the two branches of government which are

ultimately answerable to the People in the electoral process”.

7. Second, the entire text and structure of the Constitution suggests that this is a matter in which the courts have no role. I have already referred to the fact that State’s status as a juristic person under the Constitution necessarily implies the power to dispose of State assets. In addition, however, Article 34.1 of the Constitution confines the court to the administration of justice, *i.e.*, determining legal disputes known to the law according to fixed and ascertainable legal standards. If, as here, the case does not fall within these parameters of justiciability, then the answer must be that the Government is answerable for its decision only to Dáil Éireann in the first instance in the manner provided by Article 28.4.1 of the Constitution and, ultimately to the People in the electoral process in accordance with ordinary democratic norms.

Conclusions

8. The net result of this appeal is, ultimately, the same no matter which way it is approached. The present case as pleaded by Mr. O’Donoghue in his statement of claim discloses no cause of action known to the law for all the reasons I have endeavoured to state. Given that the only issue presented on this appeal is essentially a non-justiciable political controversy, the appeal itself is, accordingly, destined to fail. I would therefore dismiss the appeal from the decision of Gilligan J. to strike out the proceedings as against the State defendants pursuant to Ord. 19, r. 28 and the inherent jurisdiction of the High Court.

9. In respect of the action against AIB the position is, if anything, even clearer. No basis for any legal wrongdoing – whether general or particular – has been alleged against the Bank by Mr. O’Donoghue in his pleadings. The order of the High Court dismissing the claim against AIB pursuant to Ord. 19, r. 28 and the inherent jurisdiction of the Court must therefore be affirmed. It follows, accordingly, that there can be no question of granting any interlocutory injunction or other relief restraining the sale of the shares which Mr. O’Donoghue has claimed and the decision of the High Court refusing such relief must also be affirmed.