Neutral Citation [2013] IEHC 116

THE HIGH COURT

[2011 No. 4336 P.]

BETWEEN

CIARA QUINN, COLLETTE QUINN, BRENDA QUINN, AOIFE QUINN, PATRICIA QUINN, SEAN QUINN JUNIOR

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND KIERAN WALLACE

DEFENDANTS

AND

SEAN QUINN SENIOR, DARA O'REILLY AND LIAM McCAFFREY

THIRD PARTIES

Re. Notice of Motion dated the 14th February, 2013.

JUDGMENT of Mr. Justice Ryan delivered the 15th March, 2013

1. Introduction

This motion concerns the meaning and effect of s. 6(2)(a) of the Irish Bank Resolution Corporation Act, 2013. The legislation was passed with great urgency over the course of one night and it had the effect of putting IBRC into liquidation. The Act empowered the Minister for Finance to make a special liquidation order. Section 6 of the Act deals with some of the consequences of the procedure; subsection (2)(a) provides that on the making of the order "there shall be an immediate stay on all proceedings against IBRC" and paragraph (b) says that "no further actions or proceedings can be issued against IBRC without the consent of the Court".

The plaintiffs have litigation in being in which they are suing IBRC in proceedings that they instituted in 2011 and that were pending at the time when the legislation was passed and the special liquidation order was made.

The result of the action that was authorised by the Act was the liquidation of IBRC. This was a liquidation that was effected by statute and not by a court pursuant to Part VI of the Companies Act. In a winding up by the Court, Section 222 of the 1963 Companies Act provides that proceedings that are already in being or proceedings that are intended to be brought at the time of the liquidation can only be continued or instituted with leave of the court. Under S. 222, the same rule applies to existing proceedings and to intended proceedings that are not yet in existence when the order for winding up is made by the court.

The 2013 legislation contains some provisions concerning the liquidation of the bank that are adopted from the Companies Act with necessary alterations to fit the special statutory scheme. Other sections of the 1963 Act are excluded from applying, among them Section 222. Section 6(2) is analogous to that provision.

The question that arises here is what impact does S. 6(2)(a) have on the plaintiffs' litigation that was in existence at the time of the making of the special liquidation order. Obviously, one thing it does is to put a stay on those proceedings, but the real question is: what more does it do? Is it intended to terminate the proceedings? Is this an enactment by the Oireachtas that simply puts an end to all existing actions against IBRC?

The parties to this motion argue that the obvious answer is that it does not and cannot have that effect. In other words, the legislature does not have the power to declare that a proceeding that is already in existence before the court but has not yet been heard will no longer be an action to be heard by a court now or at any time in the future. They say that would obviously be an interference in the court process, it would prevent access to the courts for determination of rights or entitlements or claims, it would be a breach and a manifest breach of the separation of powers between legislature and judiciary and it would also offend against other basic principles of democracy as well as constitutional law. Such a construction put on the paragraph would also offend principles of equality and would be wholly irrational because of the difference of treatment of pending and intended litigation. The catalogue of infractions of rights and principles would be unrivalled in Irish legal and constitutional history.

The curious situation thus arises on the motion that there is no dispute between the parties as to what the result, that is, my decision, should be on the interpretation of section 6(2)(a). They are both in agreement that there is indeed a stay which was imposed on the making of the special liquidation order but they say that the legislation must be read as envisaging or at least permitting an application to this Court to lift the stay and let the case continue. They also agree that it is appropriate that the court should lift the stay. They argue that the stay is a temporary measure that was imposed under the Act and that it makes no sense to construe the provision in any other way.

The problem is that the section does not actually say what the parties contend for. It does not say that from the making of the special liquidation order, "no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose"- which is what s. 222 of the 1963 Act says. That does not mean that they are wrong but that one has to see whether it is a legitimate interpretation or construction to read the section in the way that both sides submit should be done. The first step is to ascertain the meaning of s. 6(2)(a), an exercise that some scholars refer to as interpretation. Then it has to be construed in accordance with principles of statutory interpretation and construction.

The accord between the parties on the issue to be decided presents some difficulty for a court. In a sense, the only *legitimus contradictor* is myself as the judge. It may be compared with a question of jurisdiction, which a court must resolve before deciding the issues raised by the contending parties, where they are in agreement that the matter is properly before the court and willing to submit to its order. In normal circumstances, consent of the disputants is sufficient to overcome procedural impediments. But a court may not even by agreement act contrary to law. That is the issue that arises in this motion. If I do not have legal capacity to

interfere with the stay that is admittedly in place, this application must be refused. If I do have jurisdiction, the defendant supports the lifting of the stay.

2. The Motion & Grounding Affidavit
In their Notice of Motion dated the 14th February, 2013, the plaintiff's seek the following relief:-

> "1. An order pursuant to the inherent jurisdiction of this Honourable Court, or otherwise, lifting the stay imposed on the above entitled proceedings pursuant to s. 62(a) of the Irish Bank Resolution Corporation Act 2013;
>
> 2. Such further and/or other orders and/or directions as to this Honourable Court deems appropriate;
>
> 3. Costs."

The grounding affidavit is sworn by the second plaintiff, Colette Quinn, in which the deponent sets out the history of the proceedings that began by Plenary Summons dated the 161h May, 2011. The history includes the determination of a preliminary issue as to the standing or entitlement of the plaintiff's to bring the proceedings, which was decided in their favour by order of this Court of the 8th March, 2012, (Charleton J.).

The deponent emphasises the importance of the proceedings to the plaintiff's and their families. Paragraph 28 summarises the basis of the claim made by the plaintiff's. They contend that Anglo Irish Bank advanced €2.35 billion to Quinn entitles for the purpose of funding margin calls arising out contracts for difference entered into on behalf of Sean Quinn Senior in respect of Anglo shares. The plaintiffs contend that such behaviour by the bank was unlawful as being in breach of the Companies Act 1963 and the Market Abuse Regulations.

It is scarcely necessary to say that I am not in any way concerned with the validity of these claims and neither am I concerned with whether the plaintiff's have established a base level claim such as a prima facie case because of the position adopted by the defendants. They agree with the plaintiffs that the court does indeed have jurisdiction to lift the stay and do not challenge the entitlement of the plaintiffs to be granted that relief so as to pursue their action.

Ms. Quinn complains that the bank wrongfully deprived the plaintiff's of their property and that they pursued the litigation in defence of their property and interests. Assuming that the stay imposed by s. 6(2)(a) is permanent, she says that it was unilaterally imposed by the Oireachtas and precludes the plaintiff's from continuing with their action. This is most unjust; their position is that the assets were unlawfully removed from them and the stay precludes them from seeking to recover their assets or other relief through the courts. She goes on to apply to have the stay on the main proceedings lifted, to enable them to continue.

She goes on to say that if this Court does not have the power the lift the stay, then the 2013 Act is "an impermissible infringement on the constitutional rights of the plaintiff's, most notably are our right of access to the courts, property rights, equality, and principles of natural and constitutional justice together with fair procedures. I further say and believe and have been so advised that the rights and entitlements of the plaintiff's pursuant to the European Convention on Human Rights, and the protocols thereto, would also be impermissibly infringed upon".

By letter to the 20th February, 2013, the defendants accepted that the plaintiffs "have an entitlement to pursue these proceedings and to have them determined by the court. On that basis our client does not object to your application to have the stay imposed on the proceedings by operation of s. 6(2)(a) lifted and, that being so, we do not intend to file affidavit evidence in respect of your client's application. At the hearing of the motion our client will submit that the court has an inherent jurisdiction to lift the stay ins. 6(2)(a) in relation to existing proceedings and that the section must be construed on the basis that the stay was not intended to be permanent".

The letter goes on to caution in respect of some of the averments contained in Ms. Quinn's affidavit which deposed to the purported merits of the case and referred to the conduct of other parties and a further paragraph deals with a discovery question. Neither of these matters is relevant to this application.

3. The Legislation
The Irish Bank Resolution Corporation Act 2013 is entitled "an Act to provide for the winding up of IBRC and to provide for connected matters" and it contains a series of recitals of which I quote the first and last of nine in total:-

> • Whereas it is necessary, in the public interest, to provide for the orderly winding up of the affairs of IBRC to help to address the continuing serious disturbance in the economy of the State;
>
> • And whereas in the achievement of the winding up of IBRC the common good may require permanent or temporary interference with the rights, including property rights, of persons.

Section 3 sets out the purposes of the Act in para. (a) to (j) and (b) is as follows: to provide for the winding up of IBRC in an orderly and efficient in the public interest.

Section 4 provides for the making of a Special Liquidation Order. The section empowers the Minister to make such an order in respect of IBRC and the winding commences on the making of the order.

Section 6 deals with the effects of the Special Liquidation Order. Section 6(2)(a) and (b) provide that with effect from the making of the Special Liquidation Order-

> "(a) there shall be an immediate stay on all proceedings against IBRC,
>
> (b) no further actions or proceedings can be issued against IBRC without the consent of the Court."

Section 6(5) provides that

"The making of the Special Liquidation Order in relation to IBRC shall, for the purposes of any enactment or rule of law or of any contract, deed or other agreement to which IBRC is a party, have the same effect as if the Special Liquidation Order were the making of a winding up order by the Court or the appointment of an official liquidator".

Section 10 deals with the application of the Companies Acts to IBRC. Subsection (2) excludes many of the sections in Part VI of the Companies Act 1963 relating to winding up of companies. These sections are predicated on the winding up being carried out by order of the court or under its supervision. Of particular relevance is the exclusion of s. 222 of the 1963 Act which is as follows:-

> "222. When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

This section and others between 220 and 223 are excluded by s. 10(2)(c) of the 2013 Act.

Section 10(2)(i) excludes s. 280(3) and (4) of the 1963 Act but leaves in place subsections (1) and (2) of s. 280, with necessary modifications, which concern the power to apply to court to have questions determined or powers exercised. These subsections are as follows:-

> "280-(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> -(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

4. Points in favour of literal interpretation or strict construction

It may be argued that a literal interpretation or strict construction of s.6(2)(a) should be adopted. First, the words are clear that there is an immediate stay on all proceedings against IBRC. Secondly, the long title of the Act, perhaps it is more accurate to say the last prefatory recital, envisages that "in the achievement of the winding up of IBRC the common good may require permanent or temporary interference with the rights, including property rights, of persons." Thirdly, the exclusion ofs.222 of the Companies Act, 1963 and its replacement by s.6(2)(a) and (b) and the contrast between (a) & (b) in respect of the consent of the Court. It must nevertheless be noticed that the most rigid adherence to the meaning of the eleven words of the provision does not support a permanent stay but rather leaves its duration unspecified.

5. The Approach to Interpreting and Construing S.6(2)(a)

The classic and familiar tests are undisputed and set out in the written submissions. The presumption of constitutionality operates to prefer a constitutional construction to one which would be unconstitutional and an interpretation featuring the validity of an Act is given in cases of doubt:

> "An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt."

East Donegal Cooperative Livestock Mart Limited v. Attorney General [1970] I.R. 317 at 341 per Walsh J.

If there are two or more reasonable constructions, one of which is constitutional and the other or others are unconstitutional, the former prevails: *McDonald v. Bord na gCon* (No.2) [1965] I.R. 217.

The plaintiff's submit that a court may depart from the strict literal interpretation of a section in circumstances where that would be necessary to avoid an absurd result or an anomalous result, citing the comments of Lord Millett in the case of R. (on the application of *Edison First Power Limited) v. Central Valuation and Another* [2003] U.K.H.L 20; 2003 4 All E.R. 209 at paras. 116-7 where he said:-

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it ..."

Section 5 of the Interpretation Act 2005, places the rule against absurdity on a statutory footing, requiring as it does that a "provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole" in construing a provision that is obscure or ambiguous or absurd or fails to reflect the plain intention of the legislature.

The court must therefore prefer a constitutional construction to one which would be unconstitutional or doubtful. As between reasonable constructions that are constitutional and unconstitutional, the former prevails. The court may interpret and construe but may not legislate, amend or re-write the Act. It should adopt a meaning that gives effect to the provision rather than one that is ineffective.

6. Submissions

The plaintiffs submit that there are two reasonable constructions of s. 6(2)(a). Construction 1 is that on a strict literal interpretation there is a stay of all proceedings in being against IBRC indefinitely. Construction 1 produces an inharmonious equivalent to absurd according to the Latin meaning of *absurdus*- result when it is contrasted with paragraph (b) that permits intended litigation to proceed with the consent of the court. This militates against construction 1. The result would also be anomalous and it is submitted that that is similarly objectionable. The provision if read as being absolute or as excluding the capacity of the High Court would offend against another presumption, namely, that which is against the ouster of court jurisdiction, unless there is clear language to prescribe that result. Similarly with the presumption of fairness, that also is offended by construction 1.

Construction No. 1 that the stay is permanent (indefinite is to be the term preferred by the submissions) is then examined with a view to assessing whether it is constitutional and it is found to offend a variety of different principles of Constitutional law as follows-

> (a) Separation of powers

(b) Private property rights

(c) Equality - discriminatory treatment in cases of difference of capacity, physical and moral, and of social function that may be made in accordance with article 40.1 require objective justification which is absent here: *Brennan v. Attorney General* [1983] I.L.R.M. 449 where at 480 Barrington J. said-

> "The classification must be for a legitimate legislative purpose ... it must be relevant to the purpose, and ... each class must be treated fairly."

(d) The right to litigate/access to the courts.

It is also submitted that construction 1 would constitute serious multiple breaches of the European Convention on Human Rights. The submissions draw attention to s. 2(1) of the ECHR Act 2003, which provides:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

In regard to the intention of the legislature, the plaintiffs argue that there is no reason to suppose that it was the intention of the legislature to deprive these plaintiffs and of course every other plaintiff in existing proceedings of their right to litigate; neither is it apparent from the Act that any such prohibition on litigation confined to existing litigation is a necessary measure to achieve the objects of the Act. It is true as the submission acknowledges that the recitals accompanying the title of Act say that "in the achievement of the winding up of IBRC the common good may require permanent to temporary interference with the rights, including property rights, of persons", but what is not clear is any basis for thinking that interfering on a permanent basis with the property right of existing litigants, while not doing so in respect of prospective litigants, is in any way a means of achieving the desired result.

Construction 2, it is said, represents a departure from a strict literal interpretation of s. s. 6(2)(a) but it is reasonable and is to be preferred in light of the above principles of statutory construction. It is that Section 6(2)(a) must be read with s. 6(2)(b) so as to ensure that s. 6 overall is construed in a harmonious manner and avoiding absurd outcomes or unfair or unjust anomalies. Thus, in circumstances where a person may apply to court seeking consent to issue proceedings against IBRC, it must be implied that another person who has already instituted proceedings prior to the enactment of the 2013 Act has a similar entitlement in respect of continuing their proceedings. There is nothing in the 2013 Act that expressly precludes the court from lifting the stay imposed by s. 6(2)(a). Therefore, by implication, the court has an inherent jurisdiction to lift the stay. Constructions 1 and 2 are reasonable and put the court in a position of making a choice between what would be an unacceptable and unconstitutional meaning of the provision and one that is constitutionally acceptable.

It is submitted that the legislature did not intend in the 2013 Act to prevent the courts from administering justice in cases already before it. The submissions propose that it would be reasonable to read into s. 6(2)(a) or to infer from it an inherent jurisdiction to lift the stay which would not amount to judicial legislating. This is consistent with the principle that the courts have an inherent jurisdiction to regulate their own procedures.

The first defendant helpfully summarised its submissions as follows:-

(a) A stay is by necessary implication capable of being removed;

(b) The reservation of s. 280 as modified enables application to be made to the court;

(c) Section 6(2)(b) expressly contemplates further actions or proceedings and is incompatible with a parliamentary intention to prohibit litigation against IBRC;

(d) The exclusion of s. 222 of the 1963 Act is not decisive when the right to seek court approval for commencing litigation is retained and in view of the meaning of stay.

(e) Similarly, the preservation of the entitlement of defendants in litigation brought by IBRC to continue with their counterclaims which would give rise to a set off - s. 6(1)- is also incompatible with an intention to prohibit litigation;

(f) The implied preservation of schedule 1 of the Bankruptcy Act as it applies to corporate winding up proceedings could be identified as carrying with it an implicit preservation of the right to have disputed claims adjudicated by the court.

7. Discussion

What does a literal interpretation mean? The statement in S. 6(2)(a) that there shall be an immediate stay on all proceedings against IBRC is not ambiguous, neither is it vague. The words are clear. The stay operates with immediate effect on the making of the order. In that respect the position is similar to the consequence of a court order of winding up. I accept the point that a stay is implicitly not final or permanent and capable of being lifted.

The question is how long the stay is to remain in place; the sentence does not say whether it is temporary or permanent or indefinite. "Immediate" does not assist the choice because it deals with the application of the stay, not its duration. It is not that the words are unclear but that the consequence is not specified. There is no basis in the text for declaring that the stay is permanent. The words do not say that. And assuming that the measure represents an interference with the property or other rights of persons, the preliminary recital referring to potential permanent or temporary impact does not resolve the question.

The distinction between paragraphs (a) and (b) of the subsection is undoubtedly puzzling. There may be a reason why the reference would be included in one paragraph and excluded from the other but it is not obvious. If the omission of specific mention of the function of the court in S.6(2)(a) is considered to be a deliberate withholding of the right to apply to have the stay lifted, that obviously has serious repercussions on the plaintiffs' position. It still does not establish the permanency of the stay but the fact that the standard mechanism of removal had been abrogated would tend to support that contention. It is of course possible that the omission was the result of error born of haste and urgency but that cannot lightly be inferred. One must begin with the assumption that all the provisions in the Act are the will of the Oireachtas. And it has to be said at the outset that it makes no sense to have a

distinction between existing proceedings and intended or future proceedings whereby a permanent stop is imposed on the first and the second is permitted.

My view of the meaning paragraph (a) of s.6(2) is that it is uncertain whether the stay is temporary or permanent or indefinite. There is nothing to indicate exclusion of the Court's jurisdiction. Although there is a contrast with the express reference in (b) to consent of the Court, it seems to me to be possible to conceive of possible explanations that might account for the omission from paragraph (a) but I do not base any conclusion on such speculations.

The canons of construction dictate a meaning of the provision that is consonant with Constitutional principles, which necessarily means that the stay is temporary and is capable of being lifted by application to this Court.

A different analysis of the provision is reflected in the plaintiffs' submissions in which it is stated that Construction 1 is the literal meaning, which is legally and constitutionally objectionable. If that is indeed the correct interpretation, I agree with the catalogue of infractions of rights that is cited in opposition to that reading.

I accept as correct the legal and constitutional principles set out in the parties' submissions. And it is clear that the long-established authorities dictate a Constitutionally sound and harmonious construction along the line proposed by both parties. The result is the same whichever route is followed.

If it was intended that the stay was to be permanent, such a measure would come with heavy legal baggage including, inter alia, interference with property rights, access to the courts, separation of powers, invidious discrimination and the other Constitutional issues that are listed in the submissions. No sensible draftsman or legislator would simply provide for the deprivation of rights in such case without providing any justifying context or circumstance or without establishing a basis of distinction between existing and future litigants.

It is impossible to conceive that the Oireachtas by this paragraph terminated the plaintiffs' proceedings in an instant and deprived them of the right to apply to court. Any such interpretation would involves extensive and substantial interference with Constitutional rights in modes that are discriminatory and unjustified and unnecessary in the circumstances. To say that every existing proceeding - but not any future action - against the bank, whatever its circumstances or however recently it had been instituted and whether good or bad or for one citizen or many, is forever prevented from proceeding and without access to a Court, would be an astonishing consequence achieved by a mere eleven words.

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.

In the result the plaintiffs succeed in this application.