

THE HIGH COURT

[2014 No. 2799 P.]

BETWEEN

CAROL MORRISSEY AND JOHN MORRISSEY

PLAINTIFF

AND

NATIONAL ASSET MANAGEMENT AGENCY LIMITED, CAPITA ASSET SERVICES (IRELAND) LIMITED, MINISTER FOR FINANCE,
IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 10th day of July, 2014

1. These are my reasons for refusing to admit this case to the Commercial List.

The Application

2. The first and second defendants applied to transfer this case to the Commercial List. The third, fourth and fifth defendants consented to the application. It was opposed by the plaintiffs.

Background

3. Mr. Morrissey is allegedly indebted to both the first named defendant (NAMA) and its subsidiary National Asset Loan Management (NALM). The indebtedness to NAMA is of the order of €4.7m and has arisen on foot of a facility concerning his private dwelling house (the PPR facility). It is common case that no demand has issued to Mr. Morrissey in respect of this alleged indebtedness. Consequently, there is no litigation in being in respect of it either.

4. His alleged indebtedness to NALM is much larger. It amounts to a sum in excess of €32,131,000 and arises, *inter alia*, from a series of loan facilities granted by the Irish Nationwide Building Society. These have been called the Investment Loan Facilities (ILF). It is common case that demand has issued in respect of these facilities but no proceedings are in being.

5. The ILF loans are secured over a series of properties situated for the most part in Rathmines, Rathgar and Ranelagh, Dublin. The PPR facility is secured by a mortgage over the private dwelling house of the plaintiffs located at 36 Palmerston Road, Rathmines.

6. It is alleged that the ILF facilities have been in default for what is described as a considerable period of time.

7. In January 2014, NALM issued a demand letter to Mr. Morrissey demanding full payment of the ILF facilities by 27th January, 2014. In the absence of payment, statutory receivers were appointed by NAMA over the secured investment properties. Upon such appointment, the statutory receivers took possession of the properties.

8. The appointment of the receivers brought about correspondence from the plaintiffs' solicitors and thereafter there was an exchange of letters but no accommodation was reached.

9. On 27th February, 2014, these proceedings commenced.

The Plenary Summons

10. The general endorsement of claim seeks the following reliefs:-

"1. An Order declaring that acts of the first named, second named and third named defendants, their servants and agents in the purported exercise of their respective statutory and non-statutory functions in respect of the second named plaintiff's properties including (but not limited to) the family home at 36 Palmerston Road, Dublin 6, including the failure to act fairly and reasonably in respect of the valuation and disposition of the said properties, (including the appointment of a receiver) have engaged in breaches of, and threaten further inferences (sic) in the exercise of by the plaintiffs of, the plaintiffs' respective constitutional rights and duties, including the following rights and duties:-

(i) Their right to inviolability of their dwelling, under Article 40, section 5 of the Constitution;

(ii) Their rights and duties as spouses, parents and educators of their children under Article 40, section 3, 41 and 42 of the Constitution;

(iii) Their right to property, under Article 40, section 3, and 43 of the Constitution;

(iv) Their right to martial (sic) autonomy, under Article 40, section 3, 41 and 42 of the Constitution;

(v) Their right to equality before the law, under Article 40, section 1 of the Constitution;

(vi) Their right to human dignity, under Article 40, section 1 and 3 of the Constitution;

(vii) Their right to access of the courts under Article 40, section 3 of the Constitution;

(viii) Their right to litigate under Article 40, section 3 and 43 of the Constitution.

2. An Order for damages (including aggravated and exemplary damages) against the defendants for:-

- (i) Breach of Constitutional Rights;
- (ii) Negligence;
- (iii) Negligent misrepresentation;
- (iv) Breach of Statutory Duty;
- (v) Breach of Section 3 of the European Convention on Human Rights Act 2003;
- (vi) Breach of Statutory Rights, under the Guardianship of Infants Act, 1964, as amended;
- (vii) Causing loss by unlawful means

by reason of the acts of the first named, second named and third named defendants, their servants and agents for which acts the fourth and fifth named defendants are directly and vicariously liable.

3. An Order restraining the first named and second named defendants, their servants and agents from conduct that breaches or threatens to interfere with the exercise by the plaintiffs of their said Constitutional Rights.

4. An Order declaring that the restrictions on liability for wrongdoing contained in section 17 of the National Asset Management Agency Act 2009, do not apply to claims by the plaintiffs in respect of the said breaches by the first named and second named defendants of the plaintiffs' Constitutional Rights.

5. An Order declaring that the restrictions on access to the courts and the right to litigate contained in section 182 of the National Asset Management Agency Act 2009 do not apply to the said claims in respect of the said breaches by the first named and second named defendants of the plaintiffs' Constitutional Rights.

6. An Order declaring that the restrictions and relief contained in section 192 of the National Asset Management Agency Act 2009 do not apply to the said claims for orders restraining the first named, second named and third named defendants from breaches of the plaintiffs' Constitutional Rights.

7. An Order declaring that the restrictions prescribed by section 189 of the National Asset Management Agency 2009 (sic) in respect of the entitlement to proceed with litigation based on a party's failure to comply within 30 days with an Order for Costs made at an earlier interlocutory stage do not apply to the said claims by the plaintiffs against the defendants.

8. An Order declaring that the restrictions on the effectiveness of a *lis pendens* prescribed by section 195 of the National Asset Management Agency Act 2009 have no application to a *lis pendens* in respect of legal proceedings seeking the protection of the Court from unconstitutional action by the State, its servants or agents, which said *lis pendens* the plaintiffs need to register in vindication of their Constitutional Rights.

9. If necessary, in the alternative:-

(a) An Order declaring that, insofar as section 17 of the National Asset Management Agency Act 2009 purports to deny the plaintiffs the entitlement to full vindication of their Constitutional Rights against breaches thereof by the first named and second named defendants in all cases to which the section applies, save where those breaches were other than in respect of or arising out of the performance or non-performance in good faith of any of the functions provided for in Parts 4, 5 and 6 of the said Act, or in respect of any decision made in good faith to perform or not to perform any of the functions provided for in Parts 8 and 9 thereof, the said section is invalid having regard to the provisions of the Constitution;

(b) An Order declaring that section 172 of the National Asset Management Agency Act 2009, is invalid having regard to the provisions of the Constitution;

(c) An Order declaring that the restrictions on access to the courts and the right to litigate contained in section 182 of the National Asset Management Agency Act 2009, insofar as they purport to restrict the scope of the exercise of the judicial power and to deny the plaintiffs the entitlement to vindication of their Constitutional Rights against breaches thereof by the defendants in all cases to which the said section applies, are invalid having regard to the provisions of the Constitution;

(d) An Order declaring that, insofar as section 189 places restrictions on the right of access to the courts of persons, including the plaintiffs, seeking to vindicate their Constitutional Rights, the said section is invalid having regard to the provisions of the Constitution;

(e) An Order declaring that the restrictions and relief contained in section 192 of the National Asset Management Agency Act 2009, insofar as they purport to restrict the scope of the exercise of the judicial power and to deny access to vindication of their Constitutional Rights through relief from breaches by the first named and second named defendants of the plaintiffs' Constitutional Rights save in accordance with the said restrictions, are invalid having regard to the provisions of the Constitution;

(f) An Order declaring that, insofar as the restrictions on the effectiveness of a *lis pendens* prescribed by section 195 of the National Asset Management Agency Act 2009 have application to a *lis pendens* in respect of legal proceedings seeking the protection of the court from unconstitutional action by the State, its servants or agents, the said section is invalid having regard to the provisions of the Constitution.

10. *The first named plaintiff's claim, in addition, is for an Order declaring that the acts of the first named, second named and third named defendants, their servants and agents, in purported exercise of their respective statutory and non-statutory functions, constitute breaches of, and threaten further interference in the exercise by her of, her right under Article 41, section 2 of the Constitution.*

11. *The second named plaintiff's claim, in addition, is for an Order declaring that the acts of the first named, second named and third named defendants, their servants and agents, in purported exercise of their respective statutory and non-statutory functions, constitute breaches of, and threaten further interference in the exercise by him of, his right to earn a livelihood, under Article 40, section 3 of the Constitution.*

12. *An Order that section 17, 171, 182, 189, 192 and 195 of the National Asset Management Agency Act 2009 are incompatible with the State's obligations under Article 6, 8, 13 and 14 of the European Convention on Human Rights and under Article 1 of the First Protocol thereof.*

13. *And the plaintiffs, if necessary, seek leave of this Honourable Court to apply for an Order under section 182(2) of the National Asset Management Agency Act 2009*

And the plaintiffs' further claim:-

14. *Such further or other declaratory order as to this Honourable Court shall seem meet and just.*

15. *Further and other reliefs.*

16. *Interest pursuant to section 22 of the Courts Act 1981, as amended.*

17. *Costs."*

Entry to the List

11. The application to transfer the litigation to the Commercial List was grounded upon an affidavit of Michael Broderick, a senior asset recovery manager with NAMA and a certificate from Alan O'Sullivan, solicitor and partner in the firm of Hayes, Solicitors for the plaintiffs.

12. Reliance was placed upon O. 63A, r. 1(a)(i) and/or r. 1(b) in support of the application.

13. Rule 1(a)(i) deals with proceedings in respect of any claim or counterclaim, not being a claim or counterclaim for damages for personal injuries arising from or relating to a business document, business contract or business dispute where the value of the claim or counterclaim is not less than €1m.

14. Rule 1(b) deals with proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List. By definition, a claim falling under r. 1(b) does not fall within any of the other claims identified in Order 63A, rule 1.

15. Entry to the Commercial List in all cases is a matter for the discretion of the judge in charge of the List. No applicant may enter the Commercial List as of right. The exercise of that judicial discretion has been the subject of a number of reported decisions some of which I will address presently.

16. Before doing so, however, I ought to refer to a number of preliminary objections which were made to me at the commencement of this application and upon which I ruled *ex tempore*.

Preliminary Objections

17. The first objection was by way of criticism of the certificate from the solicitor for the defendants moving the application. The criticism was based upon an alleged failure to comply with the rules of court in that it was said that the certificate failed to set out such facts relating to the proceedings as demonstrated the appropriateness of the action to be treated as commercial proceedings.

18. The certificate of a solicitor is a very important document in an application to transfer proceedings to the Commercial List. It is, from the point of view of the court, a warranty by an officer of the court that on consideration of the circumstances of the case it is one appropriate for transfer to the Commercial List. Sufficient facts relating to the proceedings must be set out in the certificate so as to demonstrate this.

19. Mr. O'Sullivan's certificate contains, *inter alia*, the following:-

"3. These proceedings contain, inter alia, various claims by the plaintiffs including a claim for damages arising from loan facilities in the amount of over €32,131,525.73 due and owing by the second named plaintiff to the first named defendant and a related security held by and/or on behalf of the first named defendant over seven commercial investment properties located at various addresses in Dublin 6 and Dublin 8. In this regard, I beg to refer to the grounding affidavit of Michael Broderick sworn on behalf of the first and second named defendants on 26th March, 2014, which sets out the background to this dispute.

4. In the premises I say and believe that the value of the dispute in these proceedings is at least €1,000,000 and, for this reason, I believe that the proceedings constitute 'commercial proceedings' within the meaning of Order 63A, rule 1(a)(i) of the Rules of the Superior Courts. Insofar as the plaintiffs contend that they are allegedly entitled to damages, which is denied by the first and second named defendants, the claim arises, inter alia, from business documents, contracts and a dispute where the underlying claim is at least €1,000,000 within the meaning of Order 63A, rule 1(a)(i).

5. Further, or in the alternative, I believe that the judge of the Commercial List may also consider it appropriate to admit these proceedings to the Commercial List pursuant to Order 63A, rule 1(b) of the Rules of the Superior Courts

having regard to the commercial and other aspect of these proceedings within the meaning of the said Rule."

20. This certificate contains an assertion that the proceedings contain claims by the plaintiffs, including a claim for damages, arising from loan facilities for a sum of in excess of €32m. Mr. O'Sullivan also refers to the sworn material in the grounding affidavit which sets out the background to the dispute. By implication he adopts what is contained in the affidavit in support of the assertion which he makes in the certificate. I was unable to discern a defect in that certificate such as to render the application defective. Having so concluded, I dismissed the first of the preliminary objections.

21. The second preliminary objection was based upon an alleged prejudice that would be caused to the plaintiffs if the substantive application were granted. It was argued that if the application to transfer was successful, the court would fix times for the delivery of pleadings. That is so. It was said that the effect of the transfer would be to force the plaintiffs to deliver a statement of claim in advance of the time fixed by the Rules of Court. It was said that the plaintiffs would be obliged to articulate what their claim is, narrow their options, and make strategic decisions which would foreclose and restrict their entitlements. The gravamen of this complaint was that because the time for delivery of a statement of claim had not yet expired, an obligation to do so which might be imposed by the court, should the application to transfer to the Commercial List be successful, would prejudice the plaintiffs.

22. This argument was based on a misunderstanding of the actual position. The third, fourth and fifth defendants entered an appearance to these proceedings on 4th March, 2014. The appearance included a demand for delivery of a statement of claim.

23. Under the provisions of O. 20, r. 3 of the Rules of the Superior Courts, a plaintiff is, if so requested, obliged to deliver a statement of claim within 21 days from the receipt of such notice. Although no such request was made by the first and second defendants either at the time of entering the appearance or within eight days thereafter as is permitted under O. 20, r. 3, such a request was made by the remaining defendants. Accordingly, the plaintiffs were already in breach of the provisions of O. 20, r. 3 by not delivering their statement of claim to those defendants by 25th March, 2014. It follows that any order which the court might make should the proceedings be transferred to the Commercial List by way of requiring delivery of a statement of claim would be in respect of a period in excess of the time permitted under the rules of court and in respect of which the plaintiffs were already in default. Accordingly, I rejected this preliminary objection since it was based on a false premise. No prejudice of the type alleged could be sustained.

24. The third preliminary objection had to do with an allegation that the affidavit grounding the application for transfer to the List contained material which was legally privileged because, it was said, it dealt with settlement negotiations between the parties. This contention was not accepted by the first and second defendants but counsel made it clear that he would not rely upon any of that material at that juncture and consequently that objection evaporated.

25. The final objection was to the effect that the substantive application failed *in limine* because Mrs. Morrissey never had any commercial dealings of any sort with the first or second defendants. Consequently, it was argued, this action could never constitute commercial proceedings within the meaning of the relevant rule. That argument might have force if Mrs. Morrissey was the sole plaintiff in the proceedings. But she is not. The plaintiffs have decided to bring the action jointly. Mr. Morrissey has undoubtedly had major commercial involvements which I have already outlined. Having decided to so constitute the action, it could not be said that this application had to fail *in limine* and ought to be struck out.

26. Having refused to accede to any of those preliminary objections, I now proceed to deal with the substantive application for transfer.

Substantive Objections

27. On an application to transfer to the Commercial List, it is up to the moving party to demonstrate an entitlement to the order sought. The moving party must satisfy the court that the case falls within the ambit of O. 63A, r. 1 and is suitable for the discretion of the judge to be exercised in favour of the applicant.

28. In the present case, the first and second defendants seek to do that by reference to the commercial arrangements between Mr. Morrissey and the first and second defendants. They say those arrangements have given rise to a dispute and both the value of those arrangements and the claim for damages make the case appropriate for the Commercial List.

29. The plaintiffs do not dispute that there is indeed a commercial background to the proceedings but they characterise the nature of the claims here as a "*full blooded constitutional action*". Their counsel said it was "*about as substantive a constitutional action as one could get in defence of constitutional rights*".

30. The essence of the plaintiffs' objection to the case being dealt with in the Commercial List is that the nature of their claim as identified in the plenary summons is such as to render it inappropriate for that list.

31. The first and second defendants allege that the institution of these proceedings was no more than a strategic response to the demand made on foot of the ILF facilities. That contention is not accepted by the plaintiffs.

Commercial Proceedings

32. Order 63A, rule 1 defines "*commercial proceedings*" as follows:-

"(a) proceedings in respect of any claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, arising from or relating to any one or more of the following:

(i) a business document, business contract or business dispute where the value of the claim or counterclaim is not less than €1,000,000;

(ii) the determination of any question of construction arising in respect of a business document or business contract where the value of the transaction the subject matter thereof is not less than €1,000,000;

(iii) the purchase or sale of commodities where the value of the claim or counterclaim is not less than €1,000,000;

(iv) the export or import of goods where the value of the claim or counterclaim is not less than €1,000,000;

(v) the carriage of goods by land, sea, air or pipeline where the value of the claim or counterclaim is not less than €1,000,000;

(vi) the exploitation of oil or gas reserves or any other natural resource where the value of the claim or counterclaim is not less than €1,000,000;

(vii) insurance or re-insurance where the value of the claim or counterclaim is not less than €1,000,000;

(viii) the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment) where the value of the claim or counterclaim is not less than €1,000,000;

(ix) the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities where the value of the claim or counterclaim is not less than €1,000,000;

(x) the construction of any vehicle, vessel or aircraft where the value of the claim or counterclaim is not less than €1,000,000;

(xi) business agency where the value of the claim or counterclaim is not less than €1,000,000;

(b) proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List;

(c) any application or proceedings under the Arbitration Acts 1954 to 1998 (other than an application in pursuance of section 5 of the Arbitration Act, 1980 to stay proceedings in respect of a matter referred to arbitration) where the value of the claim or any counterclaim is not less than €1,000,000;

(d) any proceedings instituted or any application or reference made or appeal lodged under the provisions of the Patents Act, 1992, not including an application under section 108(4) of that Act;

(e) any proceedings instituted, application made or appeal lodged under –

(i) the Trade Marks Act, 1996;

(ii) the Copyright and Related Rights Act, 2000;

(iii) the Industrial Designs Act, 2001;

(f) any proceedings instituted for relief in respect of passing off;

(g) any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body authorised by statute to make such decision or determination or give such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List;

(h) any proceedings by or against the Registrar (within the meaning of Article 1 of the Cape Town Convention) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (each as defined in section 3 of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005) or any regulations or procedures made thereunder."

33. In *Mulholland v. An Bord Pleanála* [2005] 3 I.R. 1, I said:-

"By defining 'commercial proceedings' as it did, the Superior Courts Rules Committee appeared to wish to give a wide measure of discretion to the judge in charge so as to enable the speedy resolution of commercial disputes using that term in a broad way. The committee did not attempt to tie the judge down to a technical or narrow view of what might be appropriate to be admitted to the list."

34. The definition of commercial proceedings goes far beyond the type of litigation that is usually catered for in the Commercial Courts in the adjoining jurisdictions. True it is that all of the types of business described in O. 63A, r. 1(a) and (c) are typical of the sort of cases dealt with in those courts. But intellectual property cases and public law cases of the type described in O. 63A, r. 1(g) are not found in those courts. Nonetheless, such cases can be admitted here in circumstances where the judge in charge of the list is satisfied that having regard to the commercial or any other aspect thereof, it is appropriate to do so.

35. So, it can be seen, that the Commercial List is not limited to adjudicating on matters of "commercial law" only. It is given jurisdiction to deal with other disputes which could be described under different headings such as, for example, planning law, environmental law and administrative law. To admit such cases, however, the judge in charge of the list has to be satisfied that, having regard to the commercial or any other aspect thereof, they are appropriate for entry into the Commercial List.

36. In the present case, the solicitor's certificate contends that the case falls within the provisions of O. 63A, r. 1(a)(i) or O. 63A, r. 1(b).

37. It is correct to say that this litigation has its roots in the multimillion Euro commercial arrangements made by Mr. Morrissey which I have already described. But the nature of the reliefs sought will call for very little consideration by the court of the details of those arrangements. In fact, there is a high probability that it will be admitted that such arrangements were made. The thrust of the case will seek to treat of the legality and efficacy of the remedies provided for in those arrangements when viewed in the light of constitutional rights and obligations and the provisions of the European Convention on Human Rights Act 2003.

38. In *P.J. Carroll & Company Limited v. Minister for Health and Children* [2005] 1 I.R. 294, Geoghegan J. made observations obiter which have a relevance here. That case involved an appeal concerning the admissibility of evidence at a trial in respect of facts which were admitted. No appeal had been taken against the admission of the case to the Commercial List in the first instance. Nonetheless, Geoghegan J. made observations which are clearly *obiter dicta* as follows:-

"In its essence it is not a commercial case. It is a constitutional action. I am not in anyway suggesting that every case which challenges the constitutionality of a statutory provision should be precluded from being entered into the commercial list. Each case must depend on its own facts. But I see a difference between a case which is fundamentally a commercial case but where they may be tagged on as a last resort relief a challenge to the constitutionality of a statutory provision on the one hand and an action which from the beginning is fundamentally a constitutional action. It may be appropriate to enter the former in the commercial list but caution should be exercised in admitting the latter."

39. Those observations of Geoghegan J. were cited to me in the *Mulholland* case. I rejected their applicability to the facts of that case but they are observations to which I ought to have regard.

40. It is interesting to note that, buoyed up by Geoghegan J's observations just quoted, the defendants in the *P.J. Carroll* case subsequently brought an application to transfer those proceedings out of the Commercial List. I refused that application. That decision was in turn appealed by the defendants to the Supreme Court. The appeal against my order was dismissed. In the course of dismissing the appeal, Geoghegan J. observed that the question appeared to come down to whether the rules in O. 63A were to be interpreted literally or in a purposive manner.

41. I am of opinion that the rules ought to be interpreted in a purposive manner. The purpose of the setting up of the Commercial Court was primarily to facilitate the just, efficient and speedy resolution of commercial disputes. I do not believe that this case can, even by giving a wide and purposive construction to the relevant rules of court, be regarded as a case which has sufficient commercial elements to be considered suitable for admission to the Commercial List. It is, to use the words of Geoghegan J., *"fundamentally a constitutional action"*. It is not, again to use his words, *"fundamentally a commercial case but where there (is) tagged on as a last resort relief a challenge to the constitutionality of a statutory provision"*. It is far from that.

42. The vast bulk of the reliefs sought in these proceedings are declaratory in nature. Such claims rest on constitutional rights identified in the general endorsement of claim. Some reliefs seek to have statutory provisions declared unconstitutional. Others seek to have the exercise of both statutory and non-statutory functions declared unconstitutional. Whilst there is a claim for damages, such claim rests, *inter alia*, in an allegation of breach of constitutional rights or rights under s. 3 of the European Convention on Human Rights Act 2003. In addition to all of this, it has to be borne in mind that the rights sought to be asserted by Mrs. Morrissey do not arise directly out of any of the commercial arrangements which I have already described in this judgment. She was not a party to them.

43. Thus, in refusing admission to the Commercial List, I took the view, applying the dictum of Geoghegan J. in the *P.J. Carroll* case which I have quoted, that this litigation is fundamentally a constitutional action.

44. For these reasons, I declined, in the exercise of my discretion, admission to the Commercial List.