



THE COURT OF APPEAL

UNAPPROVED

Record Number: 2014/871, 2014/872, 2014/873, 2014/874

High Court Record Number: 2012/116MCA

Haughton J.

Neutral Citation Number [2022] IECA 256

Binchy J.

Pilkington J.

**IN THE MATTER OF IRISH LIFE & PERMAMENT PLC AND IN THE MATTER
OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2020, AND IN THE
MATTER OF AN APPLICATION BY THE MINISTER FOR FINANCE FOR A
DIRECTION IN RELATION TO IRISH LIFE & PERMANENT PLC PURSUANT
TO SECTION 9 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010
AND ANCILLARY ORDERS**

BETWEEN/

**GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS,
SCOTCHSTONE CAPITAL FUND LIMITED, JOHN PAUL MCGANN, GEORGE
HAUG, TIBOR NEUGEBAUER, AND J. FRANK KEOHANE**

APPELLANTS

-AND-

THE MINISTER FOR FINANCE

RESPONDENT

-AND-

PERMANENT TSB PLC (FORMERLY IRISH LIFE AND PERMANENT PLC)

NOTICE PARTY

JUDGMENT of Mr. Justice Robert Haughton delivered on the 8th day of November, 2022

1. These are appeals from the judgment of Peart J. in the High Court whereby he refused to set aside, pursuant to s. 11 of the Credit Institutions (Stabilisation) Act, 2010 (as amended) (“the 2010 Act ”), a Direction Order made on 28 March, 2012 pursuant to s. 9 of the 2010 Act (“the March Direction Order”) and ancillary orders whereby Permanent TSB plc, formerly Irish Life and Permanent plc (“ILP ”), was directed to sell its life assurance business, Irish Life Limited and its subsidiaries (“Irish Life”), to the Minister for Finance (“the Minister”/respondent) for the sum of €1.3 billion, such sale to be completed not later than 30 June, 2012.
2. ILP is a wholly owned subsidiary of Irish Life & Permanent Group Holdings plc (“ILPGH ”). ILPGH is a public limited company in which the appellants are minority shareholders, and in which 99.2% of the shares are held by the Minister.
3. The substantive hearing in the High Court was based on affidavit evidence, without cross examination, and legal submissions, and took place over 9 days in June 2012. Legal submissions made by Piotr Skoczylas (“Mr. Skoczylas”) were adopted by the other applicants, including solicitors appearing on behalf of Scotchstone Capital Fund Limited, which was the only applicant to have legal representation. The respondent and notice party were separately represented by a solicitor and counsel.
4. Subsequent to delivery of the judgment on 28 June 2012 there was a costs hearing, and it was ordered that the applicants pay the respondent and notice party their costs of the proceedings,

including all reserved costs. Following further hearings in August 2012 in which the applicants sought stays, Peart J. ordered that the applications for stays be refused. The perfected order, which is the subject matter of this appeal, is dated 20 May, 2013. While the costs orders made by Peart J. are also the subject of this appeal, argument has yet to be heard on that issue.

5. For reasons given in this judgment, I agree with the trial judge that the appellants do not have *locus standi* under s.11 of the 2010 Act to seek to set aside or vary the March Direction Order, and I would dismiss these appeals.

6. The 2010 Act was promulgated at a time of unprecedented financial instability in the State, when the banks and other credit institutions were under threat and required exceptional measures including State financial support to preserve them and restore confidence in the banking sector, and the means by which support was to be given was by “direction orders”. Section 7 of the 2010 Act provides for the making of “proposed direction orders” by the Minister in relation to a “relevant institution”. Section 9 provides that the Minister should then apply *ex parte* to the High Court which, “if satisfied that the requirements of section 7 have been complied with and that the opinion of the Minister under that section was reasonable and not vitiated by any error of law” would make the direction order in the terms of the proposed direction order (or as varied by the court in limited circumstances). Section 11 of the 2010 Act then allowed for “the relevant institution in relation to which a direction order is made or a member of that institution” to apply to the High Court by motion on notice grounded on affidavit to set aside the order, and under ss. (4) the court could instead vary or amend the direction order in certain circumstances.

7. The s.9 *ex parte* application by the Minister for the March Direction Order was made pursuant to Originating Motion Paper on 28 March, 2012, and was duly granted by Kearns P

8. There had been two earlier direction orders. The first of these, dated 9 June, 2011 (“the June 2011 Direction Order”), addressed only to ILP, directed the sale by ILP of Irish Life. ILP attempted

to sell Irish Life by Initial Placement Offer (IPO), and later by private sale, but by the end of 2011 had failed to find a buyer at what was regarded as reasonable market value. That lack of success led to the Minister applying for the March Direction Order.

9. A second direction order was obtained on 26 July, 2011 (“the July 2011 Direction Order”), addressed to both ILP and its holding company ILPGH. This will be described in greater detail below, but in essence pursuant to the July 2011 Direction Order, the Minister on behalf of the State undertook phase 1 of the recapitalisation of ILP by providing capital of €2.3 billion in exchange for a 99.2% shareholding in ILPGH. The sale of Irish Life by ILP was phase 2, and its purpose was to provide further liquidity for ILP’s ongoing banking operation.

10. The two earlier direction orders are part of the overall background to the circumstances in which the Minister came to make an application for the March Direction Order. No application was ever made to set aside the June 2011 Direction Order. Application was made pursuant to s. 11 of the 2010 Act to have the July 2011 Direction Order set aside. That s.11 application was heard by O’Malley J. in the High Court in what I will refer to as “the main proceedings” and resulted in a preliminary reference to the Court of Justice of the European Union (“CJEU”) – her first judgment is reported at [2014] IEHC 418. The ruling of the CJEU on the reference delivered on 8 November 2016 [Case C-41/15] was not favourable to the applicants, and following further argument before her O’Malley J. in her second judgment [2017] IEHC 520 refused the application to set aside the July 2011 Direction Order. That decision was affirmed by this court (Hogan J., Irvine and Baker JJ. concurring), and the Supreme Court declined an application for leave for further appeal. Accordingly, this appeal is concerned only with the refusal by the High Court to set aside the March Direction Order.

Futility/mootness

11. It is at first blush surprising that this appeal proceeded. Irish Life (and its subsidiaries) has since been sold twice – first by ILP to the Minister/the State for €1.3 billion pursuant to the March Direction Order, which sale was completed on 29 June, 2012. Then on 19 February, 2013 the Minister

signed an agreement to resell Irish Life to Canada Life, for €1.3 billion, and later in 2013 that sale was completed following regulatory approval. Mr. Skoczylas and others attempted, unsuccessfully, to obtain interlocutory injunctive relief to prevent the resale in what I will call “the injunction proceedings”. That relief was initially refused in the High Court [2013] IEHC 299 (Laffoy J.) and an appeal to the Supreme Court was dismissed [2013] IESC 37 (Clarke J., *nem diss.*). This, it might be thought, rendered this appeal moot, because the sale of Irish Life to the Canada Life cannot be undone, but this is not so because of assurances given by the Minister to the Supreme Court in the course of the injunction proceedings. This requires some explanation.

12. Subsequent to the judgment of Peart J. refusing to set aside the March Direction Order, Mr. Skoczylas and others issued the injunction proceedings entitled *Dowling v Minister for Finance* 2013/5683P and seeking the interlocutory injunction restraining the Minister from completing the sale of Irish Life to Canada Life pending the determination of a number of other proceedings, including the present appeal. Mr. Skoczylas contended that the sale to the State, and by the State to Canada Life, were at a significant undervalue. The High Court in refusing an interlocutory injunction considered that if the plaintiffs were subsequently successful at trial they would be adequately compensated in damages for any consequential loss suffered by them. The Supreme Court affirmed that order. However, the judgment of Clarke J. shows that the court was concerned with the possibility that the plaintiffs would suffer irreparable harm in the event that the resale proceeded, and subsequently (if the plaintiffs won their action) that reversing that transaction might as a matter of law or practicality not be possible, and that the Minister might later be able to argue that the present s.11(1) proceedings were moot. The dilemma for the Supreme Court was that this might be a reason to grant an interlocutory injunction. This dilemma was resolved by the Minister giving an assurance that mootness would not be argued in any substantive related proceedings. Clarke J. explained:

“12.10. However, in assessing the extent to which it might be said that the appellants could suffer irreparable harm, it was necessary to have regard to the question of whether the Minister

could be ordered to pay full compensation. It must, of course, be recalled that what the appellants directly own is a shareholding in Holdings. That shareholding has a value which is dependant on the assets of the company. The appellants will never directly own Irish Life irrespective of the outcome of these or any of the other proceedings. Even if an injunction were granted and the appellants ultimately succeeded in a way which required the Minister to place Irish Life back into the ultimate beneficial ownership of Holdings, the only practical effect would be that the appellants would own shares in a company whose value included whatever its ownership of Irish Life might contribute but would also, almost certainly, have to suffer whatever diminution in the share value of Holdings might be attributable to a repayment of the monies paid by the Minister for Irish Life. The extent of any irreparable harm which the appellants might suffer is, therefore, to a material extent, affected by the question of whether full damages could be awarded. In the event that full damages were capable of being awarded, then it seems unlikely that there would be any significant effect on the value of the appellants' shareholding in Holdings for the court would be able to ensure that the Minister would be required to deal with Holdings in a way which compensated that company for any losses which could reasonably be said to be attributable to what would, in that eventuality, turn out to be a sale by the Minister of an asset which ought to have been returned to Holdings. In such eventuality while there would, in one sense, be irreparable harm, the weight to be attached to that harm would be relatively small for Holdings would be enabled to recover any losses arising and the value of any shareholding in Holdings would not be materially affected.

12.11. It was for that reason that the Court invited the Minister to indicate his position in relation to mootness at the relisted hearing. Counsel for the Minister obtained explicit instructions and informed the Court that the Minister would not argue that any of the

substantive related proceedings would become moot in the event that Irish Life had been sold by the time that such proceedings came to be finally determined. It followed that it will be open to this Court to consider, in any appeal which can properly be brought against that decision of Peart J., whether the 2012 Direction Order is valid even though Irish Life may have been sold by the time that any hearing relating to that appeal comes before the Court. It further followed that there is no procedural barrier, or other barrier based on mootness, which would prevent the appellants or Holdings from receiving full compensation for any consequences which could be said to flow from such invalidity even in the event that Irish Life is sold. It further followed that any questions which arise directly in these proceedings concerning the validity of the Minister's ownership of Irish Life or the Minister's entitlement to lawfully sell Irish Life, can remain alive notwithstanding the sale of Irish Life. If necessary, a claim for damages can be included in addition to the declaratory relief sought in these proceedings.

12.12. None of that will, of course, guarantee that it would be possible, either as a matter of law or on the facts, to reverse the sale of Irish Life to Canada Life. What it does mean is that there will be no procedural or other bar to the appellants being entitled to pursue a claim for full compensation in the event that they are able to establish that the Minister's sale of Irish Life to Canada Life was unlawful subject to the ordinary rules concerning the assessment of damages. In assessing the extent of any irreparable harm it is, therefore, for the reasons already analysed, necessary to have regard to the fact that the Minister will, should a valid case in that regard be made out, be obliged to pay appropriate damages and that the value of the shareholding of the appellants in Holdings will, thus, be proportionately increased. Furthermore, to the extent that the appellants establish any invalidity in the 2011 Direction Order which results in any adjustment in the shareholding structure of Holdings, it follows

that the participation by the appellants (and, indeed, any other original shareholders in Holdings) in any increased value in Holdings attributable to damages awarded against the Minister will be enhanced.”

13. This undertaking also resolved the Supreme Court’s concern that, if an injunction was granted and the Minister successfully defended the proceedings, the Minister would be the party suffering financial loss and the plaintiffs would not be in a position to compensate for that loss. The Supreme Court on that basis concluded that the least risk of injustice was met by not granting an injunction.

14. Accordingly, that judgment explains why the Minister has not pursued any defence or argument as to mootness or futility in this appeal. The Supreme Court, as we have seen, also indicated that if necessary, a claim for damages can be included in addition to the declaratory reliefs sought in the injunction proceedings.

15. The appellants have also brought proceedings by Petition issued pursuant to s.205 of the Companies Act, 1963, against ILPGH and named directors for “oppression” seeking various forms of relief, including compensation, by way of redress in respect of their allegations that the respondents have conducted the affairs of ILPGH in a manner oppressive to them and in disregard of their interests. In an appeal from another interlocutory judgment of the High Court (relating to an unsuccessful attempt by Mr. Skoczylas to restrain the termination of his directorship on ILPGH) *Hardiman J.* in the Supreme Court ([2013] IESC 25) took the opportunity to emphasise the power of the court in such proceedings to grant remedies/compensation:

“It appears to the Court, as it appears in relation to domestic law issues, that the jurisdiction which the Court enjoys under s.205 is broad enough to allow the Court to put in place any appropriate remedy for any breach of European Law which may be made out...”

Later he stated –

“...the Court believes that its powers under a s.205 application, if the petitioners are successful, are very wide and will enable it to take every possible step to compensate the

petitioners for the wrong which will have been done to them if they are successful with their petition.”

16. In light of the foregoing, I find it difficult to understand what benefit the appellants hope to derive from this appeal, and in the Notice of Appeal they have not identified any remedy which they claim would be appropriate should they succeed. At hearing Mr. Skoczylas was asked about this, and said that the appellants did seek an order setting aside the March Direction Order, while acknowledging “a number of complexities including the passage of time”. He also submitted that the court could amend the March Direction Order, although he said “I should not be pressed on suggesting how to amend the Direction Order”. He also pointed to a saving provision in s.11 which provides that -

“(5) An order under subsection (3) is effective, from the date of its making, to set aside the direction order without prejudice to the validity of anything previously done or taken to have been done, under the direction order.”

Thus, he argued that a “set aside” order would not necessarily involve any unravelling of the sale to the Minister or the onward sale to Canada Life, or “undoing” of the March Direction Order. That said, is hard to comprehend how this court could now grant an order under s.11 of the 2010 Act setting aside a Direction Order that has been fully implemented by completion of the sale of Irish Life to the Minister, and where the Minister, some 11 years ago now, resold Irish Life to Canada Life. In this regard it is worth emphasising that s.11 of the 2010 Act confers a statutory jurisdiction on the court which is limited to setting aside or varying the direction order; it does not confer a declaratory jurisdiction.

Locus standi and substantive issues

17. Leaving aside these considerations, the first issue which arises on this appeal is whether the appellants had *locus standi* to pursue an application to set aside under s.11 of the 2010 Act. The trial judge found they did not, but nevertheless went on to consider the substance of the applicants' case for setting aside the March Direction Order, and for the reasons given in his judgment rejected their arguments. The appellants argue that the decision of the trial judge on *locus standi* was determinative, and that he did not decide the substance of the application to set aside, and only expressed his views on it obiter. The Minister and notice party agree that the trial judge determined that the appellants lacked *locus standi* but contend that he went on to consider whether, if he was wrong in that conclusion, the appellants had established grounds upon which the Direction Order could be set aside, and that he concluded that they had not (albeit that they accept that the trial judge's rejection of the appellant's substantive arguments for setting aside the March Direction Order would not have precedential value).

18. Before this appeal was heard, this court was minded to hear argument only in relation to the *locus standi* issue, and issued a preliminary direction to that effect on 3 November, 2020. However, in response to objections from Mr. Skoczlyas the court issued a revised direction on 6 November, 2020 stating – In addition to the affidavit evidence that was before the High Court, Mr. Skoczlyas and Scotchstone Capital Fund Limited, sought to rely on a further affidavit sworn by Mr. Skoczlyas on 18th July, 2019 in which he sought to “address important relevant matters which have occurred after the date of the decision from which the appeal is brought, which was 28th June 2012”. Mr. Skoczlyas sought to rely on O. 86(a) r. 4(b) of the RSC which provides that –

“3. The Court now accepts that some of the substantive arguments of Mr. Skoczlyas seeks to advance overlap with or may have a bearing on his argument on the *locus standi* issue. The respondent and Notice Party also raise matters bearing on the substantive issues that could affect the *locus standi* issue. The Court has therefore come to the view that there is limited

benefit to a preliminary hearing on the *locus standi* issue, and has decided to hear all issues, and to rescind the earlier Direction.”

19. Accordingly, the court considered the parties’ written and oral legal submissions in relation to both the *locus standi* issue and the substantive issues, and heard oral submissions (by way of remote hearing) on 10 November, 2020 and 11 November, 2020, covering both *locus standi* and the substantive issue, including the materials and references in two “Speaking Submissions” in writing submitted by Mr. Skoczlyas, the first running to some thirty pages concerning *locus standi*, and the second relating to substantive issues running to some eighty pages, submitted by Mr. Skoczlyas on the eve of the hearing, and a further ‘speaking note’ which he submitted encapsulating his oral reply submission.

The recent affidavit

20. In addition to the affidavit evidence that was before the High Court, Mr. Skoczlyas and Scotchstone Capital Fund Limited, sought to rely on a further affidavit sworn by Mr. Skoczlyas on 18 July, 2019 in which he sought to “address important relevant matters which have occurred after the date of the decision from which the appeal is brought, which was 28th June 2012”. Mr. Skoczlyas sought to rely on O. 86(a) r. 4(b) of the RSC which provides that –

“... Further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.”

21. The Minister and notice party objected to the introduction of this affidavit, which was not the subject of any prior directions in this Court, and because it consisted of submissions not appropriate to an affidavit. Without prejudice to those contentions, a replying affidavit was sworn by Conor Ryan, Company Secretary of Permanent TSB plc (formerly Irish Life and Permanent plc) by way of response. At hearing I expressed the view of the court that it would consider Mr. Skoczlyas’ further

affidavit *de bene esse*, and Mr. Ryan's affidavit on the same basis, and would take them into account insofar as they were relevant, and I have sought to do that in preparing this judgment.

22. For the most part the material in Mr. Skoczylas' further affidavit relates to his contention that ILPGH and ILP were at all times viable and solvent companies, based on financial statements prepared, approved and adopted since the hearing in the High Court, and also relevant to his contention that the Minister bought Irish Life at an undervalue, and resold it within months with significant benefits for the State at the expense of minority shareholders of ILPGH (including the appellants). Mr. Skoczylas in his affidavit deploys this material to support his arguments for setting aside the March Direction Order, and a contention that it is incompatible with Article 15(1) and Article 16 of the Second Council Directive 77/91/EEC (the "Second Directive"). Mr. Skoczylas also deploys it in support of his contention that the resale by the Minister to Canada Life at €1.3BN was below its embedded value, and at the expense of ILPGH minority shareholders who were thereby deprived of a benefit of €135M profit generated by Irish Life in the first half of 2012, and a €40M dividend received by the Minister following the resale of Irish Life.

Appellants George Haug and J. Frank Keohane

23. It is appropriate therefore for this judgment to address in the first instance the issue of *locus standi*. I propose to set out some further background for that purpose, although much of this is also relevant to the substantive issues.

24. Before doing so it is necessary to mention two named appellants, George Haug, and J. Frank Keohane. It appears that Mr. Haug was part of a group that was adopting Mr. Skoczylas' position, but he is now deceased. The court was so informed by Mr. Skoczylas, as that was his understanding, but no evidence was formally put before the court. As there was no application by or on behalf of

Mr. Haug or his estate to reconstitute the proceedings or the appeal brought by him, it was appropriate that the appeal in his name be struck out and the court made that order.

25. In relation to Mr. Keohane it appeared to the court that he had been informed by email of the date fixed for hearing of the appeal. He did not make any separate written submissions, and did not appear at the hearing. In a related appeal in which Mr. Keohane was also named as an appellant, and which this court heard on 12 November, 2020, it emerged from email exchanges with the Court of Appeal Office that Mr. Keohane was no longer pursuing that appeal and did not wish to incur costs. Mr. Skoczlyas confirmed that he had not had recent contact with Mr. Keohane. In the circumstances, and given that Mr. Keohane did not appear to pursue his appeal, the court decided to strike out his appeal.

Further Background

26. ILPGH came into being in January 2010 pursuant to a Scheme of Arrangement effected pursuant to s. 201 of the Companies Act, 1963, and sanctioned by the High Court by order made on 11 January, 2010. ILPGH was the owner of ILP, a bank which has been renamed and operates in this jurisdiction as Permanent TSB plc. At the relevant time ILP was the owner of the Irish Life Group (“Irish Life”) which included Irish Life Assurance plc and Irish Life Investment Managers Limited.

27. The appellants are all shareholders in ILPGH. There are currently approximately 130,000 shareholders, who in aggregate hold 0.2% of the shares in ILPGH, the balance of 99.2% of the shares being held by the Minister in circumstances described below. Mr. Skoczlyas became a shareholder of ILPGH in March 2011, holding 12,650 shares in the company as then constituted. Scotchstone Capital Fund Limited became a shareholder in ILPGH in September 2010, holding 523,407 shares. These numbers of ILPGH shares refer to shares before consolidation and re-nominalisation (1 for

100) of the ordinary shares in 2015. In his affidavit sworn on 18th July, 2019 Mr. Skoczlyas describes himself at para. 8 as a –

“...low-income entrepreneur who is trying to start up a business before the Minister forced the July 2011 *Ex Parte* Direction Order, by means of which the Minister forcibly increased his stake in ILPGH from 0.002% to 99.2%, which drastically encroached on the Applicants/Appellants’ rights, including the property rights associated with their investment in ILPGH. Scotchstone is a tiny start-up investment company that I set up in 2010 and of which I am Director. Scotchstone’s investors have always been only me and parents (of whom my father is now deceased). I am Scotchstone’s main investor. Effectively, the money invested by Scotchstone was my money, which I earned from the previous 15 years of my professional life as an investment banker, strategy consultant and financial professional. ... Scotchstone is a private collective investment scheme recognised and supervised by the Malta Financial Services Authority and audited and advised by a Big Four accounting firm.”

28. After the economic and banking crisis in 2008, ILP along with other Irish banks became increasingly reliant upon State and EU financial support. By late 2010 it was apparent that there was a serious threat to the financial stability of the State, in significant part due to the State’s commitments to the banks, and ‘blanket’ guarantees given in 2008. The State’s guarantees in respect of ILP amounted to approximately €26BN.

29. In November 2010 in “the Programme of Support” the Irish State entered into binding legal commitments with the European Commission, the European Central Bank and the International Monetary Fund (together the “External Partners”), including a commitment to recapitalise viable Irish Banks. As part of that programme the Central Bank of Ireland committed itself to carry out a Prudential Capital Assessment Review (“PCAR”), and a Prudential Liquidity Assessment Review

(“PLAR”) and to determine the capital needs of the banks on the basis of the results. The PCAR and PLAR results were published on 31 March, 2011.

30. The State was then legally committed to ensure recapitalisation in line with the reviews by 31 July, 2011.

31. The Governor of the Central Bank directed ILP to raise regulatory capital in the sum of €4BN. That direction was binding on ILP.

32. The State decided to recapitalise ILP by way of a subscription by the Minister for ordinary shares in the sum of €2.3BN in ILPGH, contingent capital in the sum of €0.4BN, and a “standby” investment of €1.1BN. The price to be paid per share was €0.06453, a discount of 10% to the middle market price on 23 June, 2011. The calculation of the number of shares required to be issued in return for the €2.3BN resulted in the acquisition by the Minister of 99.2% of ILP. That recapitalisation was achieved through the July Direction Order made in 2011.

33. It was agreed between the State and the External Partners that the balance of the €4BN would be achieved through the sale of Irish Life. It is also apparent that the External Partners required the State to finalise the recapitalisation of ILP by the 30 June, 2012.

34. The Credit Institution (Stabilisation) Act, 2010 was enacted as part of the response to the serious disturbance in the economy of the State. The recitals refer *inter alia* to the need for measures “to address a unique and unprecedented economic crisis which has led to difficult economic circumstances and severe disruption to the economy” and to “continuing serious threat to the stability of certain credit institutions in the State, and to the financial system generally” and to the necessity, in the public interest “to maintain the stability of those credit institutions and the financial system in the State”. They highlight the financial support already provided to credit institutions to help them

to meet their regulatory and financial obligations and the fact that the “urgent reorganisation of certain credit institutions is of systemic importance to the State”. The 2010 Act, other than the certain specified provisions not relevant to these proceedings, was stated in s. 69 to have effect only until 31 December, 2012. This time limit was extended, but as extended lapsed on 31 December, 2014. The 2010 Act was amended by the Central Bank and Credit Institutions (Resolution) Act, 2011.

35. The purposes of the 2010 Act are set out in s. 4 and will be set out more fully later in this judgment. They include addressing “the serious and continuing disruption to the economy and the financial systems”, “the reorganisation of credit institutions in the State to achieve the financial stabilisation of those credit institutions and their restructuring”, to address “the compelling need... to facilitate the availability of credit in the economy of the State”, “to protect the State’s interest in respect of the guarantees given by the State under the Act of 2008 to support the steps taken by the Government in that regard” and to restore confidence in the banking sector.

36. Part 2 of the 2010 Act sets out the procedure by which the Minister can seek a “direction order” in respect of a “relevant institution”. Both ILP and ILPGH are a “relevant institution” as defined in s. 2(1) of the Act.

37. The procedure leading to the making of a direction order commences with the consideration by the Minister of whether he should make a Proposed Direction Order. Under s. 7(2) the Minister may make a Proposed Direction Order in relation to a relevant institution where, having consulted with the Governor of the Central Bank (the “Governor”), the Minister is of opinion that making such an order by the Court in the terms of the Proposed Direction Order is necessary to secure the achievement of a purpose of the Act specified in the proposed Direction Order. Under s. 7(1)(e) a Proposed Direction Order may propose –

“(e) disposing, on specified terms and conditions, of a specified asset or liability or a specified part of the relevant institution’s undertaking.”

It is not in dispute that the March Direction Order fell within s. 7(1)(e) of the 2010 Act.

38. Section 7(4) of the 2010 Act provides that before making a Proposed Direction Order, the Minister must notify the relevant institution in writing, and the relevant institution then has 48 hours (or a shorter time by agreement with the Minister) to make submissions, which the Minister must consider. Correspondence relied upon by the Minister and notice party as demonstrating compliance with that requirement was exhibited to the grounding affidavit of Michael Torpey sworn on behalf of the Minister on 27 March 2012 for the purposes of seeking approval of the proposed March Direction Order.

39. Section 9(1) of the 2010 Act provides that –

“As soon as may be after completion in relation to a proposed direction order of the procedures required by *section 7*, the Minister shall apply *ex parte* to the Court for an order (in this Act called a “direction order”) in the terms of the relevant proposed direction order.”

40. At this point it is convenient to refer to certain findings of fact made by O’Malley J. in her first judgment in *Dowling v Minister for Finance* [2014] IEHC 418 at para. 41, in the context of making her preliminary reference to the CJEU. These are findings of fact which were left undisturbed by this court in the appeal brought against the ultimate judgment of O’Malley J., and reported at [2018] IECA 300. The relevant findings are: -

“41.2 ...

7. The State was legally committed to ensure recapitalisation in line with the reviews by the 31st July, 2011.

8. The Governor of the Central Bank then directed ILP to raise regulatory capital in the sum of €4BN. The direction was binding on ILP and was not the subject of any legal challenge. The direction was made by the Central Bank in its capacity of independent regulator.
9. On the balance of probabilities, the required capital could not have been raised from private investors.
10. On the balance of probabilities, the required capital could not have been raised from existing shareholders.
11. On the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the bank, whether by reason of a run on the bank by depositors, revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities.
12. The failure of ILP would, as a matter of probability, have resulted in a complete loss of value to the shareholders.
13. The failure of ILP would, as a matter of probability, have had extreme, adverse consequences for the Irish State, whether by reason of a run on the bank and subsequent calls on the State guarantee of up to c. €26BN, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme of Support for non-compliance with its terms, sanctions imposed under the treaty, or a combination of some or all of these possibilities

14. The adverse consequences for the State would, as a matter of probability, have worsened the threat to the financial stability of other Member States and of the European Union.
15. The decision by the State to invest in the recapitalisation was made in fulfilment of its legal obligations and in the interests of the State's financial system, the citizens of the State and the citizens of the European Union.
16. The State decided to recapitalise ILP by way of a subscription by the Minister for Finance for ordinary shares in the sum of €2.3 billion, contingent capital in the sum of €0.4 billion, and a "standby" investment of €1.1 billion. The price to be paid per share was €0.06453, a discount of 10% to the middle market price on the 23rd June, 2011. The calculation of the number of shares required to be issued in return for the €2.3 billion resulted in the acquisition by the Minister of 99.2% of the company.
17. The share price on that date was not the result of a false market. The share price had been falling in any event over the previous number of years, and failed dramatically on publication of the PLAR/PCAR results. As a matter of probability, this was because the market doubted the ability of the bank to achieve the required recapitalisation in a way that would be attractive to investors.
18. *Part of the plan for the recapitalisation of the bank involved the sale of its asset Irish Life. This asset belonged to ILP, and not to the shareholders of ILPGHGP. Its value could not, accordingly, be attributed to those shareholders any more than the liabilities of ILP could have been attributed to them.*

19. *To attribute the value of Irish Life to the shareholders would be to make an unlawful return of capital to the shareholders.*
20. The paid in share capital of the company was not counted as part of the recapitalisation and has not been taken out of the company by the Minister.
21. The Liability Management Exercise resulted in a significant loss to the subordinated debt holders and contributed significantly to the recapitalisation.
22. The European Commission gave approval under State Aid rules for the recapitalisation of ILP by means of the State investment in the same manner, at the same price and to the same extent as that ultimately carried out on foot of the direction order made by the High Court.
23. The Irish Takeover Panel granted a waiver of Rule 9 for the purposes of the State investment on the basis of the same proposal. This did not involve any breach of the Takeover Directive.
24. The Minister's proposal was supported, albeit reluctantly, by the Board of ILP. The Board considered that the company had no other option available to it in terms of achieving the required recapitalisation. An EGM was called with a view to passing the necessary resolutions.
25. The State's proposal was not accepted by the shareholders voting at the EGM on the 20th July, who wished to explore other potential avenues for the raising of the required capital. The Board was instructed to seek an extension of time for the recapitalisation.

26. Neither the Minister for Finance nor the Governor of the Central Bank was minded to seek such an extension. Having regard to the source of the deadline, an extension would have required the consent of the External Partners and the members of the Council.
27. The Minister decided to make a Proposed Direction Order pursuant to the provisions of the Credit Institutions (Stabilisation) Act, 2010.
28. He informed the Governor of the Central Bank of his intentions and complied with the procedural requirements of the Act in so doing.
29. He informed the Board of ILP of his intentions and complied with the procedural requirements of the Act in so doing.
30. The Governor communicated his views, which were supportive of the proposed direction order as being likely to achieve the statutory purposes of the Act.
31. The Chairman of the Board referred the Minister to the letter he had written after the EGM, outlining the views of the dissenting shareholders.
32. The application for a direction order was made and granted, in accordance with the procedure prescribed by the Act, on the 26th July.
33. There was no want of candour and no breach of duty to the Court on the part of the Minister or his legal representative in the making of the application.
34. One result of the order was (as it would have been under the proposal put the EGM) that the Minister obtained 99.2% of the issued shares of ILPGH. It was therefore

necessary to remove the company's shares from the official lists in Ireland and the United Kingdom. This did not involve any breach of the MiFID Directive.

35. The Credit Institutions (Stabilisation) Act, 2010 permits the action taken by the Minister. The Direction Order cannot be set aside or varied unless the Court finds that his opinion that it was necessary was unreasonable or vitiated by legal error.”

I have italicised the findings of O'Malley J. at 18 and 19 above as these are most relevant to the present appeal.

41. Having made these findings, O'Malley J. referred the following questions to the CJEU: -

“Having regard to:

- (i) the [Second Directive],
 - (ii) Directive [2001/24]¹;
 - (iii) the obligations of the Irish State and that the provisions of the [TFEU Treaty] and in particular Articles 49, 65, 107, 120 and Title VIII of Part III thereof;
 - (iv) the obligations of the Irish State under the EU/IMF Programme of Support;
 - (v) The terms of the Council Implementing Decision 2011/17, made pursuant to [Regulation No. 407/2010].
- (1) Does the Second Directive preclude in all circumstances, including the circumstances of this case, the making of a Direction Order pursuant to Section 9 of the 2010 Act, on

¹ Directive 2001/24 on the winding up and reorganisation of credit institutions (the CIWUD Directive).

foot of the opinion of the Minister that it is necessary, where such an order has the effect of increasing a company's capital without the consent of the general meeting; allotting new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's Memorandum and Articles of Association without the consent of the general meeting?

- (2) Was the Direction Order made by High Court pursuant to Section 9 of the 2010 Act in relation to ILPGH and ILP in breach of European Union Law?"

The CJEU ruled on these questions on 8 November, 2016 in Case C-41/15, *Dowling v Minister for Finance*. At para. 43 it ruled that: -

“The two questions referred, which can be examined together, must be understood as meaning that the referring court is seeking, in essence to ascertain whether Article 8(1), together with Articles 25 and 29 of the Second Directive, must be interpreted as precluding a measure, such as the Direction Order at issue in the main proceedings, adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union, the effect of that measure being to increase the share capital of a public liability company, without the approval of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive right to subscribe.”

The CJEU answered the questions in the negative. The court noted, at paragraph 50: -

“The protection conferred by the Second Directive on the shareholders and creditors of a public limited company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.”

Accordingly the CJEU found that the Second Directive did not preclude –

“an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see, by analogy, judgment of 19 July, 2016, *Kotnik & Ors* C-526/14 EU: C: 2016;570, paragraphs 88 to 90).”

The court found, at para. 54 that –

“Although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by those amendments (see, to that effect, judgment of 19 July, 2016, *Kotnik & Ors* C-526/14 EU: C: 2016;570, paragraph 91)”

The court then concluded at para. 55: -

“In the light of the foregoing, the answer to the questions referred is that Article 8(1) and Articles 25 and 29 of the Second Directive must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where

there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied a pre-emptive right to subscribe.”

42. Following the CJEU’s ruling, and a resumed hearing in the High Court, O’Malley J. dismissed the challenge to the validity of the July Direction Order – her second judgment is reported at [2017] IEHC 520. In a third judgment delivered by O’Malley J. in the main proceedings on 1 December, 2017 she held that the applicants were not required to obtain leave to appeal under the 2010 Act, and held in the alternative that if she was wrong and leave was required, leave would be granted on two grounds identified in that judgment.

43. Thereafter Mr. Skoczlyas and the other applicants appealed to the Court of Appeal, and in October 2018 this court (Hogan J., reported at [2018] IECA 300) dismissed the appeal and upheld the judgment of O’Malley J.

44. It should be mentioned at this point that the Minister and notice party both contend that it is impermissible in the present appeal for Mr. Skoczlyas, both on the further affidavit which he sought to have admitted and in his submissions, to yet again seek to reargue points which have been determined in the proceedings heard by O’Malley J. and this court in relation to the July Direction Order. By way of example they point to the appellant’s submission that ILPGH and ILP were financially stable in 2011 and 2012, yet O’Malley J. in her second judgment of 31 July, 2017 in dealing with the argument with Mr. Skoczlyas that the Bank was at all times solvent, viable and operating normally, held as follows at para. 71: -

“The concentration by the applicants on the technical definition of solvency involves disregarding the reality of the Bank’s situation and the exposure of the State to the risk created by that situation. The Bank was, presumably, paying its debts as they fell due. However, the evidence adduced by the application for the Direction/Order, set out in paragraphs 29.1 to 29.22 of the first judgment, was in my view sufficient to ground the finding that a failure to recapitalise would on the balance of probabilities have led to a failure to the Bank.”

They also point to the judgment of Hogan J. in this court in which he addressed the appellant’s argument concerning the alleged viability of the Bank prior to recapitalisation, observing, at para. 159 –

“... The plain fact of the matter was that the bank was failing and without this State investment it would – as O’Malley J. expressly found in her first judgment - in all probability had collapsed within days, leading in that situation to a total loss of shareholder value.”

45. The full conclusions of the Court of Appeal are summarised by Hogan J. at paras. 168 – 181 of his judgment, but it is appropriate in this context to refer to his first two conclusions: -

“169. First, this Court cannot look behind the judgment of the Court of Justice in *Dowling* insofar as it was concluded that the making of the Direction Order was essentially outside the scope of the Second Company Law Directive, so that the Direction Order could not be held unlawful on that account. Irrespective of what might have been said earlier in *Pafitis* or the other Greek Bank cases dating from this pre-Euro period, the Court of Justice has now given an authoritative and final determination on this issue of EU law in the present case which is averse to the contentions of the appellants. As it is that decision which binds this Court, it follows that the appellant’s endeavours in this appeal to re-open or to re-interpret the decision of the Court of Justice must fail.

170. Second, as the appellants' challenge in the present appeal centred on the *manner* in which the recapitalisation was effected by the provisions of the 2010 Act and the Direction Order made thereunder, it follows that the proportionality and reasonableness of these measures is in essence governed by domestic law rather than by EU law. I would regard that the power to set aside a Direction Order on grounds of reasonableness or error of law contained in s. 11 of the 2010 Act in effect provides in statutory form for judicial review of an administrative decision such as the High Court ordinarily enjoys in standard Order 84 proceedings."

46. A substantive issue raised prominently by the appellants on the present appeal was the alleged incompatibility of the March Direction Order with the Second Directive. As that issue was not raised in the High Court it was contended that it should not be entertained before this court, and that new evidence and arguments related to that issue contained in Mr. Skoczlyas' further affidavit should not be considered. Both the Minister and the notice party objected to the attempt to make new arguments and, as we have seen, the attempt to rely on new evidence which was not before the High Court.

47. The main proceedings heard by O'Malley J. related to the July 2011 Direction Order. As I have said, the June 2011 Direction Order, which was also made and approved under the 2010 Act, and which was not the subject of any challenge, directed certain preliminary steps to be taken in relation to the disposal of Irish Life by (i) an IPO, or (ii) by private sale. In September 2011 ILP decided to suspend the IPO preparatory process primarily in order to focus effort on a potential private sale on which significant progress had been made by then. A bidding process was commenced, leading to five bids eventually being received. However on 25 November, 2011 the private sale process was terminated following a decision taken by the highest bidder to withdraw its bid. The Minister considered that the two remaining lower bids were unacceptable "on various grounds but primarily on the basis of the lower price being offered".

48. Thereafter, as the affidavit evidence shows, the External Partners were notified, which led to a discussion between the Secretary of the Minister's Department, the CEO of the NTMA and the Governor of the Central Bank on the 2 December, 2011 about alternative options to achieve the completion of the recapitalisation of ILP. On the 5 December, 2011 the Minister's Department received a communication from the External Partners which indicated a wish to discuss the alternative plans for completing this recapitalisation at the forthcoming quarterly mission of the External Partners in January 2012. During that meeting on the 10 January, 2012 the External Partners were fully briefed about the private sale process and the decision which had been taken to suspend it. Possible alternative ways forward were discussed. The trial judge then sets out at paras. 28 – 32 of his judgment his findings as to the factual the circumstances that led to the making of the March Direction Order, and the fixing of the price at €1.3 billion Euro: -

“28. The Minister considered a number of ways forward but decided that the sale of Irish Life to the Minister was the only viable option then remaining to the State in order to meet the obligation to have the recapitalisation of ILP completed by 30th June 2012 in order to meet its regulatory requirements.

29. On the 12th January 2012 the External Partners indicated that the State should finalise the recapitalisation of ILP by the 30th June 2012 and agreed also that this would be best effected by a private sale of Irish Life to the Minister. Thereafter, solicitors for the Minister and solicitors for ILP met on the 24th January 2012 to discuss the steps necessary for such a sale within this specified time frame, and efforts towards that end were accelerated to meet the deadline. Mr. Torpey described some of the necessary steps required to be taken at para. 28 of his affidavit sworn on the 30th April 2012 in order to be in a position to bring an application for a Direction Order to the High Court. The Government approved the proposal at its Cabinet meeting on the 6th March, 2012, leading to the preparation of legal documents to support the

Minister's application *ex parte* to the High Court on the 28th March 2012. On the 21st March 2012 the Minister wrote to the Governor of the Central Bank outlining the sequence of events described above, and setting out in some detail his opinion that a Direction Order was necessary. He sought the Governor's views of the proposed Direction Order. The Governor by letter dated 22nd March 2012 expressed his agreement with what was being proposed. These letters will be referred to later as they are relevant to the applicants' submission that they are insufficient for the purpose of fulfilling the Minister's obligation under Section 7 to consult with the Governor as to the necessity for a Direction Order, and that therefore there has not been compliance with Section 7 of the Act of 2010.

30. Mr. Torpey has referred to the commitment made by the State to the External Partners in the Memorandum of Understanding dated 10th February 2012 that the Minister would purchase Irish Life, and that the recapitalisation of ILP would be completed following the suspension of the private sale of Irish Life by means of the proceeds of sale of Irish Life to the Minister. He has averred also that a sale of Irish Life to the Minister is beneficial also to Irish Life since it achieves a separation of that business from ILP's banking business, thereby limiting potential contagion and may result in a raising of its credit rating with Standard & Poors (S&P), as explained by him in an earlier affidavit. He fears also that if the sale is not completed S&P may revisit its rating and revise it downwards to take account of possible contagion, and that this would be detrimental to the Irish Life business. This is the view with which the applicants disagree.

31. He states also that if the sale is not completed by the 30th June, 2012 the State and ILP could suffer other adverse consequences as it would represent a breach of the State's commitment to the External Partners leading to a decision to discontinue funding to the State, thereby reducing funding available to the State and leading to a delay in the return of the State

to the financial markets, having in turn a knock-on effect on the ability of the State to service its debts. He believes it would cause damage to the State's international reputation, and cause the State to be in breach of its obligations under EU law and expose the State to a risk of penalties under Article 260 of the Treaty for the Functioning of the European Union. He fears also that the Central Bank may suspend ILP's banking business to revoke its licence if ILP breaches its capital requirements, and further that ILP and its management could be exposed to financial and other administrative sanctions under the Central Bank Act, 1942, as amended.

32. An affidavit has also been sworn by Ciaran Long, who is company secretary of ILP. He repeats much of what has been deposed by Mr. Torpey, and emphasises the urgency attached to the determination of the applicants' present application so that the recapitalisation of ILP in accordance with the commitments given in that regard. He avers the terms under which the sale of Irish Life to the Minister would occur are likely to be less onerous than ILP would have to accept from a trade purchaser, and states that the price being paid by the Minister is higher than the highest bid received during the bidding process for a private sale. The Minister's price was considered by ILP to be fair and reasonable and full value. He makes other points too, but there is no need to set them out in detail at this stage. But he has averred that the March Direction Order does not in any way dilute or otherwise weaken the position of shareholders in ILPGH, and that once the Order is implemented, ILP will simply be exchanging one asset for another, namely shares for cash, at a price greater than a trade purchaser was prepared to pay and which ILP's financial advisors have advised is a fair and reasonable price, and on terms less onerous to ILP. The applicants do not agree, and have adduced evidence to support their view that the sale of Irish Life to the Minister would cause him to suffer a detriment."

Section 11(1) of the 2010 Act

49. At this point it is helpful to set out s.11(1) of the 2010 Act, which provides:-

“(1) The relevant institution in relation to which a direction order is made or a member of that institution may apply to the Court by motion on notice grounded on affidavit, not later than 14² days after the publication, in accordance with subsection (1) of and S.9(A), of a direction order, for the setting aside of the direction order.”

Emphasis is added to the words that fall to be construed in this appeal on the issue of *locus standi*.

50. It has always been the Minister’s contention that ILP, which owned Irish Life prior to the making of the March Direction Order, is the only “relevant institution” for the purpose of s.11(1) of the 2010 Act, since no other institution or other entity is directed to do or refrain from doing anything under the terms of the March Direction Order. This is in contrast to the July 2011 Direction Order by which both ILP and ILPGH were subject to certain directions intended to enable the Minister to invest up to €3.8 billion in connection with the required recapitalisation of ILP.

51. It is not disputed that the sole member of ILP is ILPGH. By virtue of the recapitalisation under the July 2011 Direction Order, the Minister became, by virtue of his purchase for €2.3 Billion, the owner of some 36 billion shares in ILPGH, and holder of 99.2% of the issued share capital in ILPGH. The balance of shares in ILPGH is held by some 130,000 shareholders, including the appellants. Critically, none of the appellants is a member of ILP. They are, as the trial judge observed, “*simply shareholders in ILPGH*”. The Minister and notice party have therefore contended that on a plain or literal reading of s.11(1), as amended, the appellants were not entitled to apply to set aside the March Direction Order. However, the appellants argued in the High Court, as they do in this Court, that they

² As originally promulgated this time limit was “5 working days after the making of a direction order”. It was amended to 14 days from the date of publication of the s.9 direction order by s.110(5) of the Central Bank and Credit Institutions (Resolution) Act, 2011.

have *locus standi* on the basis that as shareholders in ILPGH their property rights and interests are adversely affected by the sale of Irish Life by the Minister to himself at what they contend is a gross undervalue, and in circumstances where the Minister acknowledged that it was his intention to re-sell ILP at some time in the future, as he has indeed done. They contend in particular that the March Direction Order and the opinion of the Minister that led to the proposed Direction Order lack reasonableness and proportionality because there is no provision for claw back by ILP in the event that the Minister re-sells at a profit.

52. The appellants therefore contended in the High Court, and again in this Court, that s.11(1) should be given a broad interpretation to allow them *locus standi* because the intention behind the section was that persons or entities who might be directly or adversely affected by the making of a Direction Order should have an opportunity to be heard, and they contend that they are materially affected by the sale of Irish Life at undervalue.

53. Before the High Court and before this Court the appellants have sought to rely heavily on the judgment of Feeney J. who delivered a preliminary ruling on the question of *locus standi* in the main proceedings in which they applied to set aside the July 2011 Direction Order. The judgment of Feeney J. is reported at [2012] IEHC 89, and will be discussed more fully later in this judgment. In essence he determined that the word “member”, which is not defined in the 2010 Act, should be given a broad and purposive interpretation such that it encompasses those persons who are not registered as members but who hold the beneficial interest in shares, and where their shareholding is held by nominees or trustees.

54. In developing this argument in the High Court the applicants also referred to the judgment of Hardiman J. in *Adam v Minister for Justice* [2001] IR 53 for their argument that the intention of the Oireachtas was that any party who may be affected by a Direction Order should be able to seek to set

it aside. *Adam* was a case where leave to seek judicial review had been granted *ex parte* pursuant to O. 84 RSC, and where the respondent brought an application to set aside the order even though O. 84 made no provision for such an application by an affected respondent. Hardiman J. stated at p. 77 –

“In my view, any order made *ex parte* must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without its having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent.”

55. The appellants in the High Court also relied particularly on a recital in the 2010 Act which states –

“And whereas the common good requires permanent or temporary interference with the rights, including property rights, of persons who may be affected by the performance of those functions.” [Emphasis added]

Accordingly, the appellants’ key submission in the High Court was that as shareholders they held existing property rights at the time of the March Direction Order which were or might be affected by that order and accordingly on a broad interpretation of s.11 they were persons who had *locus standi*.

56. The appellants in the High Court also referred to s. 53 of the 2010 Act. That section provides –

“53. The provisions of this Act, and any order made under this Act have effect notwithstanding anything in –

- (a) the Companies Acts, the Building Societies Act, 1989, the Credit Union Act, 1987 or any other enactment,
- (b) any other rule of law or equity,
- (c) any code of practice made under an enactment,
- (d) the existing rules of any regulated market or the rules of any other market on which the shares of a relevant institution may be traded from time to time,
- (e) the memorandum of association and articles of association of a relevant institution, or
- (f) any agreement to which such an institution or any of its subsidiaries is a party, is bound by, or has an interest in,

except to any extent to which this Act expressly provides otherwise.”

It was submitted that the Enterprise Securities Market Rules (ESM) Rules of the Irish Stock Exchange require that where an asset representing 75% or more of a listed company is to be sold, approval by members at a general meeting is required. The appellants submitted in the High Court that they were affected persons because, by achieving the sale of Irish Life by means of a direction order, the Minister had, by virtue of s. 53 been able to avoid the need to hold a general meeting of ILPGH for the purpose of approving the sale to himself to what they alleged was undervalue. This provision of the ESM Rules and the appellant’s argument will be discussed in greater detail later in this judgment.

57. The appellants also urged the High Court to look at the 2010 Act as a whole when construing the phrases “the relevant institution in relation to which a direction order is made” and “a member of that institution” in s. 11(1). They pointed to the fact that in different parts of the statute the legislature

refers to “a relevant institution”, or “the relevant institution” inter-changeably, and that ILPGH comes within the definition of “a relevant institution” given the definition contained in s. 2 of the 2010 Act which includes –

“(a) a body -

(i)...

(ii) that is, or was on the date on which this Act came into operation, a bank licenced under *section 9* of the Central Bank Act, 1971”, and

...

“(f) a holding company of a person or body referred to in any of paragraphs (a) to (d)”.

58. The appellants further argued that “the relevant institution in relation to which the Direction Order is made” should not be limited, in the case of the March Direction Order, to the institution to which it was directed, namely ILP, and that it should include ILPGH since it was the sole member of ILP which owned the asset being sold. It was argued that in reality it was ILPGH that was disposing of a valuable asset. In support of that argument, which is again relied upon before this court, the appellants refer to the Scheme of Arrangement creating ILPGH, to replace ILP as the Group’s holding company listed on stock exchanges at an EGM of ILP held on 15th December, 2019, and to the Prospectus issued for that purpose in November 2009. They rely *inter alia* on the following extracts from that Prospectus: -

“IL&P Group Holdings will have the same capital structure, board and management team as IL&P and there will be no changes to corporate governance and investor protection measures.”

“Under the Scheme, on the Effective Date, the existing issued share capital of IL&P (other than seven Retained Shares) shall be reduced by cancelling and extinguishing all existing shares. The Retained Shares being retained since IL&P, as a public company, is required under the Act to have a minimum of seven shareholders at all times. Immediately and contingent upon the cancellation of the Existing Shares taking effect, IL&P will apply the whole of the reserve arising in its book of account as a result of the cancellation in allotting and paying up in full and at par such number of new IL&P shares as shall be equal to the number of existing Shares cancelled (the New IL&P Shares). The New IL&P Shares so created will be issued to IL&P Group Holdings. The New IL&P shares shall carry the same rights and be subject to the same restrictions as the Existing Shares. IL&P Group Holdings will therefore beneficially own the entire issued share capital of IL&P. In consideration for the cancellation of the Existing Shareholders (other than Restricted Shareholders) will receive in respect of any Existing Shares held as at the Scheme Record Time: for each existing Share cancelled, one IL&P Group Holdings Share.”

“Effects of the Scheme

Overall effect: ... IL&P Group Holdings will become the holding company of IL&P and will, in turn, be owned by the Existing Shareholders in the same proportions in which they held the Existing Shares immediately prior to implementation of the Scheme.

Financial Effect:

The financial interests of Existing Shareholders (other than Restricted Shareholders) in the profits, net assets and dividends of the Group will not be affected by the Scheme. No changes are contemplated in the trading operations of the Group as a consequence of the Scheme.”

59. The pre-existing group structure was considered by the Board of ILP at the time of the banking and financial crisis emerging by the end of 2008, and considered to be disadvantageous to the group. The Scheme of Arrangement would see ILPGH becoming the parent of the Group with the ILP shares being cancelled and being replaced by new ILP shares which would issue to ILPGH, which would then become the beneficial owner of the entire issued capital of ILP. The appellants relied in argument in particular on the statement in the prospectus as to Financial Effect, and the assurance that in terms of profits, net assets and dividends existing shareholders would not be affected by the scheme. It was argued that this was a guarantee that the major asset of the Group, namely Irish Life, would not be disposed of without shareholder approval, and that, given that the Minister was by virtue of the March Direction Order seeking to effect a sale of Irish Life to himself at (alleged) undervalue, that both companies (ILPGH and ILP) should be treated as inseparable from an investor protection perspective, and that the applicants/appellants should be considered to be members of “the relevant institution” for the purposes of s.11(1).

60. The appellants argued that the denial of *locus standi* was based on the Minister’s arbitrary assignment of ILP as that the only “relevant institution” for the purposes of the Proposed Direction Order, and the *ex parte* application seeking approval under s. 9 of the 2010 Act. If this arbitrary choice by the Minister determined *locus standi* then it breached the fundamental principle of *nemo iudex in causa sua*. It meant that the State/the Minister was determining who could challenge the March Direction Order, notwithstanding that the State/Minister had involved both ILP and ILPGH as “relevant institutions” for the purposes of the challenge to the July Direction Order in relation to recapitalisation of the ILPGH Group, and notwithstanding that the March Direction Order followed on and was fundamentally related to the same recapitalisation scheme.

Judgment of the High Court in relation to *locus standi*

61. The trial judge rejected all of the appellants’ arguments. He differentiated the July Direction Order where “there was no doubt that both ILP and ILPGH are each one of the “relevant institution[s]”, since each was the subject of certain directions contained therein (para. 48). The issue to be decided by Feeney J. was whether the applicants in that case, who held their shares through nominees and were not themselves registered as members, who were nevertheless to be included within the meaning of “member of that institution”. Peart J. stated –

“49. ... It is important that the applicants appreciate that Feeney J. did not decide that persons other than ‘*members of that institution*’ [i.e. the institution in respect of which a Direction Order has been made] were entitled to apply to set aside the Direction Order. He simply decided that persons who held shares in the relevant institution in dematerialised form and through nominees, and as such held the ultimate beneficial interest in those shares, were persons to be regarded nevertheless as members of the relevant institution to which the Direction Order relates, even though their actual names do not appear in the company’s register of members.”

62. He rejected the argument that ILPGH came within the definition of “a relevant institution” having regard to the definition in s. 2 of the 2010 Act based on the fact that different parts of the 2010 Act refer to “a relevant institution” or “the relevant institution” inter-changeably. In rejecting the argument Peart J. stated –

“53. ... The use of the words “that institution” [in section 11(1)] serves to confine its application to only the relevant institution to which the Direction Order relates. The words “that institution” in the section cannot on any permissible basis of interpretation be given the same meaning as “a relevant institution” without completely altering the clear meaning of the section, and altering the clear intention of the Oireachtas. This court cannot by a purposive or

expensive interpretation in effect change the statutory provision from that which the words clearly indicate.”

63. He considered that the passage relied upon by the appellants from the judgment of Hardiman J. in *Adam* did not assist them, because what was stated therein had to be read in the context in which it was written, namely O. 84 R.S.C. which itself provided no mechanism for an application to be brought to set aside a leave application order applied for *ex parte* and therefore without notice to any party which might be affected. In those circumstances, the High Court had an inherent jurisdiction to set aside an *ex parte* order granting leave, where the rules were silent but –

“54. ... In the present case, however, the statute itself made such a provision, and clearly delineates the classes of persons who may seek to set aside a direction order obtained *ex parte*. If it had not done so, and a party claiming to be affected thereby sought to have it set aside, such a party may have been able to argue successfully for an inherent jurisdiction in the High Court to do so, or perhaps could have moved to set aside an *ex parte* order under the Rules of the Superior Courts.”

He refrained from expressing a view as to whether that argument would have been successful on the sole basis that the appellants were merely shareholders of the company to which the Direction Order related, as opposed to being the affected company itself.

64. The trial judge accepted the argument of the Minister and notice party that one of the consequences which flows from the principle of separate legal personality is the rule which precludes shareholders from recovering in respect of losses or wrongs done to the company. He observed –

“55. ... It is submitted by them that if in the present case ILPGH (the sole member) is affected by the Direction Order made in respect of ILP, then it is ILPGH which is the entity to seek to

set that order aside, but not its individual shareholders. The difficulty for the present applicants is that it is the Minister who controls ILPGH being the holder of 99.8% [*sic*] of the shares in ILPGH following the purchase of 36 billion shares therein in exchange for an investment of €2.8 billion following the July Direction Order.”

He therefore preferred the Minister’s argument that by claiming to have *locus standi* the appellants were attempting to prevent the sale of an asset – Irish Life – owned by another company (ILP) in which they owned no shares whatsoever. He accepted that the appellants could not reasonably argue that the sale of such an asset of a different company could amount to an expropriation of their own property as shareholders of ILGPH, stating “the asset in question does not even belong to the company in which they are shareholders.” (para. 56).

65. The trial judge also accepted an argument that the wording in s. 11(1) should be seen as an exception to the well-established principle that it is the company itself that must seek redress for wrongs done to the company, not its shareholders since, absent its provisions, the shareholders themselves would have no such entitlement. As it was an exception to a general rule, the court should not extend the scope of the exception, since its scope was clearly defined from the unambiguous wording of the section. He accepted the argument that if the Oireachtas had intended, where shares were held in an affected company by a corporate member, that the shareholders of that corporate member could also apply to set aside, it could and would have made that position clear by so providing (para. 58). The trial judge refers, with apparent approval, to the Minister/notice party’s reliance on the fact that in other sections of the 2010 Act the Oireachtas had made specific reference to “*a relevant institution, any of its subsidiaries, its holding company ...*”, for example in s. 61. The absence of these words from s. 11, it was argued, was not accidental, and the Oireachtas had intended to limit the class of members to those who were members of the particular relevant institution in relation to which the Direction Order was made, in the present case ILP. Peart J. observed –

“60. Indeed one could envisage a further situation which the shares in the relevant institution are held as in this case by a limited company, whose shares in turn are held by another limited company, whose shareholders are natural persons. If the present applicants are correct, it is conceivable that one or more of those natural persons might argue that by virtue of the chain of connection to the relevant institution he/they ought to be entitled to apply to set aside on the basis that in some ultimate way they are persons who may be affected by the Direction Order. Equally, as is said by Mr. Gallagher for the Notice Party, if the phrase ‘that relevant institution’ or ‘the relevant institution’ were to be so broadly defined as contended for by the applicants, it is conceivable that a subsidiary or member of a subsidiary might also claim to have *locus standi* to make an application to set aside. He submitted that such could never have been the intention of the Oireachtas, particularly given the urgent nature of the measures which might often have to be taken by the Minister in relation to Direction Orders. Hence the limitation to a very particular and clearly defined class of persons who may make such an application.”

66. It is apparent from para. 69 – 77 of his judgment that the trial judge accepted these arguments.

It is appropriate to quote two key paragraphs: -

“69. I am satisfied that the intention of the Oireachtas can be gleaned from the ordinary and plain meaning of the words used by the Oireachtas in enacting Section 11. The words used are clear and easily understood. Those who may seek to set aside a Direction Order are confined to either the relevant institution in relation to which the order has been made (in this case clearly ILP since ILPGH is not directed to do anything or refrain from doing anything), or a member of that institution (in this case the sole shareholder of ILP). None of the applicants is a shareholder of ILP. Its only shareholder is ILPGH. ILPGH is therefore the

entity which may make such an application (apart of course from ILP itself should it have wished to do so).

70. I considered carefully the various submissions made by the applicants for a more expansive interpretation of ‘member’ to see if their claim that as shareholders of ILPGH they are persons who may be affected personally by the March Direction Order. But I accept the submissions made by both the Minister and the Notice Party that for this court to so conclude would not only do violence to the clear wording of the section, and a right in something to the section which the Oireachtas has not intended, but would also ignore the very long standing principle of company law which finds its root in *Foss v Harbottle* [1843] 2 Hare 461 that where a wrong has been done to a company the correct plaintiff is the company, not the individual shareholder. In the present case, if an asset of ILP is unfairly or unlawfully expropriated at undervalue, and is unfairly and unreasonably deprived of an opportunity to benefit from any re-sale of Irish Life at any later stage it is ILP which suffers the loss. Under traditional and well-established principles any remedy that may be available is one to be pursued in the name of ILP. Exceptionally, Section 11(1) provides that its shareholders may also do so in relation to a satisfied application. But the section goes no further than that in making an exception to the normal rule.”

67. The trial judge rejected the argument that the recital to the 2010 Act relied upon by the appellants justified a widening of the class of persons who might seek to set aside a Direction Order to persons “affected by the order”, and he considered that the judgment of Feeney J. in the main proceedings related to the July Direction Order must be read in the context of the issue before him, which was whether the term “member” was confined to its meaning in s. 31 of the Companies Act, 1963 so as to exclude shareholders whose shares were held through nominees, but who were beneficial owners of the shares. He also rejected the submission that the phrase “the relevant

institution in relation to which a Direction Order relates” should not be confined to ILP simply because the Minister chose not to name ILPGH in the proposed Direction Order. While accepting that in a number of documents ILPGH is referred to as being the party disposing of Irish Life, he considered that this could not be determinative of the issue of *locus standi*. He proceeded, in para. 73 –

“... Neither in my view can the fact that Section 53 of the Act of 2010 has the effect that the ESM rules are over-ridden. That section does not prevent ILPGH itself from applying to set aside the Direction Order if a majority of the members of ILPGH decided that it should do so, or perhaps if the Board decided it should do so. I appreciate that the present applicants by now hold a very small minority of the shares and therefore could not themselves achieve such a resolution in the face of the majority opposition. However, that is one of the characteristics of company law and the rights of individual shareholders, and perhaps exemplifies one of the disadvantages of investing in an unlimited liability company. A shareholder does not always have control over the decisions taken, but must be taken as accepting this disadvantage when deciding to buy shares. That risk is inherent in the nature of a share.”

68. Peart J. posed the question “... If the application for a direction order was required by the Act to be on notice, rather than *ex parte* with the right to apply to set aside, which parties would, by reference to the intention of the Oireachtas in this Act, be required to be on notice of the application so that they could exercise their right to be heard?” (para. 74). He answered it thus: -

“75. I think it is fair to say that the Minister would have been required to put ILP on notice of the application, and to put ILPGH on notice of the application being the owner and only ‘*member of that [relevant] institution*’ referred to in s. 11. There could not in my view have been any requirement, if the application was not *ex parte*, to put each of the 130,000 private

shareholders of ILPGH on notice, in addition to ILPGH itself. Once ILPGH was on notice I considered that the Court would have been satisfied that all necessary parties were on notice of the application. Once ILPGH would have been put on notice of such an application, it would have been up to that company, and not the Minister, to decide whether or not at which to call an EGM so that its individual shareholders could be consulted and could vote on whether or not ILPGH wished to oppose the application. In such a situation, ILPGH could as a protective measure lodge an application to set aside within time, and then seek shareholder approval if it wished to do so. This conclusion is consistent also with the accepted principle of company law to which reference has been made whereby any right of action for a wrong done to a company must be remedied at the suit of the company and not any individual shareholder.”

The trial judge then concluded: -

“76. The opportunity to apply to set aside an *ex parte* order of this kind is provided in my view to allow persons to apply to have the order set aside, who, if the application was required to be brought on notice would have been entitled to be heard. That is a fulfilment of the important requirement of fair procedures by which a party affected by the order may be heard, and this Court should not see any need to extend beyond that the class of persons who may apply to set aside. The party in relation to which the Direction Order is made is clearly ILP and it may apply to set it aside. As a further precaution, the section allows the owners of ILP to apply, just as, if the application was required to be on notice, ILP would have to have been on notice. But in my view that is where the obligation for fairness ends as far as the Minister is concerned. I believe that such an approach is helpful in determining the scope of the parties who may claim an entitlement to apply to set aside a Direction Order, and in these circumstances I am satisfied that the applicants do not have *locus standi*.”

69. The trial judge then proceeded to consider the nature of the application under s.11, and to address the merits of the challenge, and this is covered in paras. 78 – 186 of his judgment. In summary, he concludes that the appellants failed to satisfy him – (a) that there was any non-compliance with the requirements of s. 7; (b) that there were any vitiating errors of law; (c) that the opinion of the Minister (on the basis of the materials before him when deciding to make a Proposed Direction Order that the sale of Irish Life to himself under such order in the terms proposed was a method of doing so which was reasonably expedient and/or advantageous in order to fulfil the mandatory requirement to fulfil the mandatory requirement to complete the recapitalisation of ILP by the 30th June, 2012) was not an opinion reasonably open to him on those materials and information, or that it flew in the face of plain reason and common sense or was not an opinion that any Minister acting reasonably would have made.”

70. In the High Court the appellants had prepared submissions and grounding affidavits on the basis that they would be arguing that the Act of 2010, and the March Direction Order, were in breach of a number of Articles of the Constitution of Ireland. Peart J. ruled at the commencement of the hearing and in line with a case management ruling made by the President of the High Court (Kelly P.), that that was not an issue which was before the court on the present application to set aside the March Direction Order. He notes at para. 172 of his judgment that the appellants accepted that the issue did not arise on that application. For the same reasons it does not arise in relation to the present appeal.

71. The trial judge also briefly addresses issues raised by the appellants under EU Treaties and EU law, stating –

“175. Similarly, issues as to whether the Act of 2010 breaches EU Treaties and laws made thereunder are not before this Court on this application, and I do not propose to address them further.

176. It has been argued also that the Direction Order and the Act are in breach of Article 17 of the Charter of Fundamental Rights of the European Union. However, I am satisfied that there is no merit in such an argument for the very simple reason that the Charter does not apply where the Act is not implementing European law. The Direction Order is not an implementation of European law. The fact that the obligation to recapitalise ILP is a requirement of the External Partners including the European Commission, and the fact that under an Implementing Decision relating to Ireland the recapitalisation requirement is required, does not mean that the rights under the Charter are engaged. It is true that executive and judicial authorities in Member States are obliged to apply the Charter when they are applying EU Regulations or decisions or implementing EU Directives, but the Minister in proposing a Direction Order is acting directly under the Act of 2010, which is not an act which is implementing EU law as such. I do not propose to address that issue further.”

72. The trial judge also rejected an argument that the March Direction Order was an unlawful restriction on the free movement of capital and therefore in breach of Article 63.1 of the TFEU, and that it applied because there was a cross-border investment in shares within the EU which constituted a movement of capital, and it was an interference with their abrogation of rights associated with such transaction. Peart J. held –

“181. It seems to me that the arguments being advanced under this heading had been borrowed from the applicant’s challenge to the July 2011 Direction Order, so to speak, as in that case what is under challenge, as far as I have been informed, is the process by which the Minister became the owner of 99.2% of ILPGH, ... That action had of course the effect of greatly reducing the value of the existing shareholders’ shares. The arguments being advanced seem more appropriate to that scenario, as opposed to one, such as the present case, where the Direction Order merely directs the sale of an asset belonging to ILP at a price which

equates to and even exceeds the price being offered by the highest bidder during the private sale process.”

73. The trial judge accepted the Minister’s and notice party’s submissions that even if there was some scope to argue Article 63, there were compelling public policy considerations which could justify the March Direction Order, and Article 65.1 provided that the provisions of Article 63 should be without prejudice to a number of matters, including “*the right of Member States ... to take measures which are justified on grounds of public policy or of public security*”. He also accepted the submission that the March Direction Order did not represent an unlawful restriction on the movement of capital, and that there was no discrimination on grounds of nationality since all shareholders were treated equally. He also accepted the submission by the notice party that it could not be said that by taking certain action which is required to be taken by the State in order to comply with the Implementing Decisions of the Council the Minister would in summary be acting in breach of the Treaty, and the provisions on the free movement of capital. In para. 185 Peart J. stated –

“185. ... Even if there is some question to be raised as to whether the acquisition by the Minister of Irish Life for value may in some indirect way constitute a restriction on the movement of capital by effecting a downward value on the applicant’s shares thereby depriving them of funds, it seems almost unanswerable that such action can be justified by the unique, unprecedented and grave economic and financial catastrophe which this country is enduring, and in respect of which this Direction Order is at least part, albeit a small part, of a strategy being adopted by the State to assist recovery.”

74. The trial judge also rejected arguments made on behalf of the appellants of a lack of candour on the part of the Minister on the making of the *ex parte* application.

75. In his conclusion the trial judge states –

“For all these reasons, I refuse the present application to set aside the Direction Order made by the President of the High Court on the 28th March, 2012.”

76. It will be apparent from this that most of the judgment of Peart J. addresses the substantive issues. While the trial judge does not, after deciding that the applicants did not have *locus standi*, formally introduce the balance of his judgment in relation to the merits with words such as “Lest I am wrong in relation to this finding, I will now address the merits of the application ...”, he did proceed to address the substantive arguments in what I would regard as a comprehensive manner, and the wording at the end of his judgment does indicate that he rejected the application to set aside not simply on the grounds of a lack of *locus standi*, but also on a failure on the part of the applicants to satisfy him that there was any substantive ground to set aside. Were it necessary to decide this point I would tend to the view that Peart J. did consider and determine the substantive issues against the appellants, in addition to finding that they lacked *locus standi*.

Grounds of Appeal and appellants’ submissions on *locus standi*

77. The appellants’ notice of appeal runs to sixty-four grounds, of which grounds 1 – 19 inclusive and 46 relate to the *locus standi* issue. In addition there is a schedule posing some thirty questions for reference to the CJEU under Article 267, the first three of which relate to the issue of *locus standi*. The written submissions of Mr. Skoczylas related to *locus standi* appear at para. 4.1.1 – 4.1.23 inclusive, and were supplemented in his oral submissions, including his reply submissions (and further speaking note) all of which were adopted by the other appellants. Some of these grounds/submissions are overlapping, but are summarised in what follows.

78. As before the High Court, fundamentally the appellants contend that the trial judge erred in law in treating ILP as the “only relevant institution” for the purposes of s.11(1), and therefore determining that ILPGH was the only “member of that institution” for the purposes of the section.

79. Mr. Skoczylas contended that the manner in which the proposed direction order for the sale of Irish Life by ILP to the Minister was framed, practically ILP and its sole member ILPGH were the only legal persons able to make an application to set aside under s.11 because both of them were under the control of the Minister. In effect therefore neither ILPGH nor ILP could or would oppose the March Direction Order.

80. It was contended that the denial of *locus standi* was therefore based on the Minister's arbitrary assignment of ILP as the only "relevant institution" for the purposes of section 11. Mr. Skoczylas contended that this violated the court sanctioned Scheme of Arrangement effected pursuant to s.201 of the Companies Act 1963, and sanctioned by the High Court (Clarke J.) on 11 January, 2010. That Scheme of Arrangement was approved by an EGM of ILP on 15 December, 2009, and the order approving it notes the undertaking given by counsel for the "New ILP [ILPGH]" to be bound by the Scheme. Further Mr. Skoczylas relied on the assurances, quoted earlier, in the Prospectus issued in November 2009 in respect of the Scheme of Arrangement.

81. It was contended that this Prospectus was governed by the Prospectus Directive 2003/71/CC (as revised by Directive 2010/73/EU), pre-amble 27 of which states that "investors shall be protected by ensuring publication of reliable information".

Mr. Skoczylas therefore contended that the Scheme of Arrangement as approved by the High Court was a legally binding agreement between ILP and its shareholders, which bound ILPGH, where the ILP shareholders became the ILPGH shareholders. In his written submission Mr. Skoczylas submitted that this agreement was "copper fastened by Article 42 of Directive 2001/34/EC that provides that :-

"The legal position of the company must be in conformity with the laws and Regulations to which it is subject, as regards both its formation and its operation under its statutes".

82. Mr. Skoczylas also relied on Article 5 of the Directive which provides:-

“Member States shall ensure that... (b) that issuers of securities admitted to such formal listing... are subject to the obligations provided for by this Directive.”

He therefore argued that the High Court *locus standi* ruling was wrong in law in disregarding and/or abrogating Articles 5 and 42 of Directive 2001/34/EC, by making it “practically impossible” for the appellants to challenge the *ex parte* order of Kearns P. approving the March Direction Order, and that that ruling was in breach of EU law.

83. He further argued that such denial of *locus standi* was – (a) A breach of fair procedures and a breach of Article 6 of the European Convention on Human Rights (ECHR), and (b) the right to *audi alterim partem*, and (c) in breach of Article 47 of the Charter of the Fundamental Rights of the European Union in precluding the appellants from having access to the court, or to an effective remedy in respect of breach of their rights, including minimum rights guaranteed by EU law. The appellants therefore contended that the trial judge erred in law in failing to recognise that the 2010 Act must be interpreted as far as possible in conformity with the constitutional guarantee of fair procedures, and that the High Court should have implied into the statutory decision-making process an obligation to respect fair procedures, and that the exclusion of such a right would have required clear words in the legislation.

84. The appellants pleaded that the trial judge erred in law by failing *per incuriam* to follow and apply key relevant aspects of the judgment of Feeney J. in which he found the applicants did have *locus standi* in respect of the July 2011 Direction Order. The judgment of Feeney J. will be considered more fully later in this judgment, but in summary he considered that on a literal approach the word “member” did not have a clear and obvious meaning, and was capable of alternative literal meanings. Accordingly, in construing it Feeney J. was guided by the approach identified by the Supreme Court

in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101 and other cases indicating that the court was required to ascertain the intention of the Oireachtas from the language and text of the legislation. He was also guided by s.5(1) of the Interpretation Act, 2005 which requires that where a provision of any Act is “obscure or ambiguous, or ..on a literal interpretationwould fail to reflect the plain intention of - ...the Oireachtas” that provision shall be given a construction that reflects the plain intention of the Oireachtas “where that can be ascertained from the Act as a whole” – and he also relied on s.7 of the Interpretation Act, 2005 which allows the court in such circumstances to consider the long title of an Act. Having considered the Act and the context of s.11(1) he stated:

“The cumulative effect of the unique and extraordinary statutory measures contained in the 2010 Act, the fact that those measures include the entitlement to interfere with property rights without compensation and that such interference can take place without any consultation and as a result of an *ex parte* application together with an absolute five day limitation period to apply under s. 11 requires that on a purposive approach to the entire of the 2010 Act that the word "member" must be construed in a broad manner and not in the restrictive manner contended for by the Minister. The Minister's suggested construction of the word "member" would require that persons owning the beneficial interest in the shares of a company affected by a s. 9 order both within and outside Ireland would have to take the time consuming and independent step to be entered in the register of shareholders prior to making an application under s. 11 or seek to oblige or compel the nominee to make an application. For that construction to be valid such restriction would have to be expressed with absolute clarity. To have such restriction would potentially defeat the purpose and intent of the Oireachtas in providing for a review in s. 11 of the 2010 Act.”

85. It was contended that, for the reasons given by Feeney J., s. 11 should be given a broad construction, and that “member” should be construed to include the appellants, and/or that “relevant institution” should be construed to include ILPGH.

86. In further support of the appellants’ contention as to the meaning of “relevant institution” in s.11, it was pleaded that ILP could not have been the only “relevant institution” for the purposes of the March Direction Order because ILP could not, absent a direction order, have sold Irish Life without an approval of ILPGH as required by the ESM Rules. Mr. Skoczylas argued that such a transaction by ILP without approval at an EGM of ILPGH would have been an act *ultra vires* ILP and a violation of the minimum rights of ILPGH shareholders protected by EU law, and submitted that the Minister had, by virtue of s.53 of the 2010 Act, impermissibly sought to avoid the need to hold an EGM of ILPGH.

In further support of this the appellants relied on “multiple official statements by the Central Bank of Ireland, the Minister himself as well as ILPGH” (Ground 6) to the effect that it was indeed ILPGH that had been disposing of Irish Life.

87. The appellants further pleaded that the trial judge erred in failing to presume that the procedures that were challenged under the 2010 Act were to be conducted in accordance with constitutional justice which included the right of access for affected parties, including the appellants.

In support of this the appellants pleaded that the trial judge failed to recognise that the discretion afforded to the Minister in making the proposed March Direction Order was very broad, and the scope of possible review of that discretion very narrow, and that the Minister’s decision was one that effected the minimum rights of ILPGH members, including rights protected by EU law.

88. The appellants next contended that the trial judge erred in law by misapplying the rule in *Foss v. Harbottle*, and argued that they came within exceptions to the rule identified by Courtney in *Law of Private Companies* (2nd Edn.) [2002] Tottel Publishing at para. [19.107], where the authors state:-

“Traditionally, the textbooks say there are four exceptions to the rule in *Foss v. Harbottle*. To this has been added a less settled exception. The five supposed exceptions are said to be: (a) where an *ultra vires* or illegal act is perpetrated. (b) where more than a bare majority is required to ratify the “wrong” complained of. (c) where the members’ personal rights are infringed. (d) where a fraud has been perpetrated upon a minority by those in control. (e) where the justice of the case requires a minority to be permitted to institute proceedings.”

89. The appellants submitted that on the facts and evidence the exceptions at (a), (c), (d) and (e) applied. As to (a) and (c), it was submitted that the Minister, who was in control of ILPGH and all its subsidiaries, committed illegal acts by means of the March Direction Order, which benefited the Minister/State at the expense of the minority shareholders, while infringing the minorities’ personal rights as shareholders, which are protected by EU law – in particular the right to have ILPGH hold an EGM to approve a sale of Irish Life.

90. As to (d), it was asserted that the Minister perpetrated “fraud” on the minority shareholders. Mr. Skoczylas relied on the meaning of “fraud” per Courtney (*op. cit.* at para. [19.121]) as not necessarily involving dishonesty or criminality, but involving some moral turpitude.

In developing the submission based on fraud, Mr. Skoczylas further refers to Courtney at para. [19.115] onwards as follows:-

“19.115 This was the clearest and most exceptional case where the rule in *Foss v. Harbottle* will not apply and has even been identified as the only true exception to the rule. Accordingly,

notwithstanding the rule, a minority of the company's shareholders may take a derivative action on behalf of the company where the majority in control of the company perpetrate a fraud on the minority...

19.117 The case law which has built up around this exception typically involves the expropriation or appropriation, to use two expressions found in other textbooks, of corporate property by a majority who are in a controlling position.

19.118 One of the leading cases on the fraud on a minority exception is *Menier v. Hooper's Telegraph Works Ltd* [(1874) 9Ch App 350]:

“The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minorities. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. ... The majority had put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the court can do it, given to them.”

91. Courtney refers in paras. [19.088] to the seminal case *Prudential Assurance v. Newman Industries Limited (No.2)* [1982] 1Ch 204, at 210 where the Court of Appeal stated five propositions in relation to the rule in *Foss v Harbottle*, the fifth of which stated the following in relation to the fraud exception:

“(5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In that case the rule is relaxed in favour

of the agreed minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance would never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

Courtney at para.19.127 also cites Knox J. in *Smith v. Croft (No.3)* [1987] BCLC 355, at p.389 that

"...the whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the company, is rooted in a procedural expedient, and adopted to prevent a wrong going without redress".

92. Mr. Skoczylas therefore argued that by the March Direction Order the Minister was appropriating properties of ILP at an undervalue and thereby benefitting at the expense of the minority shareholders in ILPGH, such that the appellants are entitled to take a derivative action, and entitled to access to the court to set aside the March direction order. This argument appears to be made both to support a broad interpretation of s.11(1) and also to support a stand-alone right to pursue the application to set aside.

93. Mr. Skoczylas submitted that the first phase of recapitalisation of ILP – by means of the July Direction Order – was “forcibly tunnelled through ILPGH, even though ILPGH had never been required to raise any capital because it was not a credit institution, and thus not subject to the March 2011 PCAR/PLAR Bank stress tests”. He submitted that appropriation of Irish Life with the embedded value of, he alleged, €1.8BN, was unnecessary for ILP recapitalisation, and was effected for what the Minister himself admitted were “commercial benefits”. Mr. Skoczylas contended that Irish Life was quickly “flipped” within some seven months and twenty days to recoup the €1.3BN along with “significant commercial benefits. at the expense of the minority shareholders”. Mr. Skoczylas submitted that ILPGH shareholders including the appellants participated in a “burden –

sharing to the extent of 99.2% of their stake in ILPGH in respect of the first phase of the recapitalisation, and that it was a manifest error in law that the same shareholders did not have *locus standi* to challenge “a forcible disposal of the most valuable asset of ILPGH as part of the second phase of the recapitalisation of ILP driven by the same PCAR/PLAR.” (paras. 4.1.21 – 4.1.23 of Mr. Skoczylas’ written submissions).

For similar reasons Mr. Skoczylas also relied upon exception (e) to the rule in *Foss v. Harbottle*, arguing that the justice of the case required the appellants in this case, part of the minority, to be permitted to pursue the application to set aside.

94. At Ground 15 and in Mr. Skoczylas’ speaking submission the appellants raised a new argument, asserting that there was “implied agency relationship” between ILPGH and ILP, such that ILPGH should not be treated as an entity with separate legal personality from ILP for the purposes of the March Direction Order and for the purposes of s.11. It was contended that ILPGH and ILP were part of the “same financial conglomerate” under EU law, and that “the facts, context and justice of the case required that the principles of a single economic entity should have been applied”. The end point of this argument is that the appellants, as members of ILPGH, should be treated as members of ILP for the purposes of s.11(1).

95. In Ground 17 the appellants contended that because issues of EU law arose in the case, the courts were required to take a more liberal approach to the issue of *locus standi*, so that a person’s rights were not unduly hampered or frustrated, and that the section and/or rules on *locus standi* should be interpreted in a way which avoided making it “virtually impossible” or excessively difficult” for the appellants to challenge measures alleged to be incompatible with European law.

96. In his written submissions Mr. Skoczylas went further arguing in para. 4.1.11 that the trial judge in his ruling “... patently breached the fundamental legal principle elucidated in the CJEU seminal ruling in *Unibet, C- 432/05,2007 I-02271*”. In that decision the CJEU ruled :-

“42. ...While it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, *inter alia*, [...]. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Unión de Pequeños Agricultores v Council*, paragraph 41).

43. In that regard, the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, *inter alia*, [...]).”

Mr. Skoczylas argued that Community law was engaged because approval of the sale of Irish Life, which constituted more than 75% of the assets of ILP required that ILPGH hold an EGM.

97. As mentioned earlier in this judgment, shortly before the hearing of this appeal Mr. Skoczylas introduced two “Speaking Submissions”; one of which is an eighty-page document setting out extracts from authorities and related materials. The document on page 1 explains :-

“Given the relatively extremely short time offered by the Court of Appeal for oral submissions, this Book will serve as a basis [for] Piotr Skoczylas’ oral submissions (excluding costs) in order to make the submissions as efficient as possible”.

This document refers primarily to authorities and materials related to the substance of the appeal against the refusal to set aside. The other thirty page “Speaking Submission” relates primarily to *locus standi*. Mr. Skoczylas also made oral submissions by way of reply, and accompanied these with a further nine page speaking note, the first three pages of which were directed at the issue of *locus standi*.

98. I do not propose here to summarise the helpful submissions, both written and oral, made by counsel on behalf of the Minister and the notice party as it is more convenient to refer to these as appropriate in the next part of this judgment when discussing the grounds of appeal.

Discussion and decision

99. At the outset it is important to make some observations about the relationship between the July 2011 Direction Order and the March Direction Order. Common to both (and also the June 2011 Direction Order) is that they are measures initiated by the Minister under the 2010 Act to provide financial support for or stabilise the financial position of ILP, and they have a common source in the Programme of Support and the Council Implementing Decisions, and were agreed in principle by the Minister with the External Partners.

100. But there are many differences. The July 2011 Direction Order is directed at the State recapitalising ILP to the tune of €2.7 billion through a mechanism of the Minister subscribing for shares in ILPGH, and it was, necessarily, directed to both ILP and ILPGH.

101. In contrast, the March Direction Order is later in time (albeit that the June 2011 Direction Order initially directed the sale of Irish Life on the open market), is directed only at ILP, and concerns the sale of an ILP asset, Irish Life, with the objective of increasing liquidity in its own funds, rather than recapitalisation *per se*. It is significantly less radical than the July 2011 Direction Order, being

directed at conversion of an ILP asset to cash, and the potential for the (alleged) diminution in value of the appellants' shareholdings in ILPGH is of a lower order of magnitude.

102. Secondly, the challenge in the main proceedings to the July Direction Order under the 2010 Act is now at an end. As we have seen, O'Malley J. in [2014] IEHC 418 made certain findings in relation to the July 2012 Direction Order, and made a reference to the CJEU for a preliminary ruling, and the CJEU on 8 November, 2016 ruled that Article 8(1) and Articles 25 and 29 of the Second Council Directive 77/91/EEC did not preclude a Direction Order *such as the Direction Order at issue in the main proceedings* (i.e. the July 2011 Direction Order). O'Malley J. following a further hearing then dismissed the s.11(1) application to set aside the July 2011 Direction Order in [2017] IEHC 520. That decision was affirmed by this court (Hogan J., [2018] IECA 300, Irvine and Baker JJ. concurring), and in its decision reported at [2019] IESCDET 55, the Supreme Court declined leave to appeal. The July 2011 Direction Order is therefore lawfully approved under the 2010 Act and cannot be the subject of any further challenge.

103. The limited relationship between the challenges to the July 2011 Direction Order and the March Direction Order was noted by Clarke J. in the course of the appeal of refusal to grant an injunction, [2013] IESC 37:

“11.11 To put it at its most neutral, it is far from clear as to whether it could be established, as a matter of law and fact, that the existence of the 2011 Direction Order with its consequent effect on the shareholding in [ILPGH], had any real effect on the validity of the 2012 Direction Order or the outcome of any possible challenge to that order.”

The differences between the direction orders has been acknowledged by the Minister. Mr. Torpey in his affidavit sworn on 12 April, 2012 in these proceedings at para.15 states:

“I am advised and believe that the factual and legal issues which may arise in the course of the proceedings in respect of the applications to set aside each Direction Order are distinct and that they should be dealt with separately.”

As Mr. Skoczylas points out, Counsel for the Minister and for the notice party both acknowledged in the High Court that the present challenge is different and separate from the challenge to the July 2011 Direction Order.

104. The foregoing does not mean that the pronouncements and reasoning of O’Malley J., the CJEU and Hogan J. in respect of the July 2011 Direction Order may not be of assistance to a determination in respect of the March Direction Order challenge. It seems to me that they may be persuasive, if not binding, on discrete issues common to both direction orders. Moreover, certain background findings of fact made by O’Malley J. apply equally to the background to these proceedings, and are not the subject of any serious dispute; in particular amongst her findings for the purposes of the preliminary reference the following are relevant to the *locus standi* issue under consideration:

“2. The State’s guarantees in respect of ILP amounted to c.€26 billion.”

“18. Part of the plan for the recapitalisation of the bank involved the sale of its asset Irish Life. This asset belonged to ILP, and not to the shareholders of ILPGH. It’s value could not, accordingly, be attributed to those shareholders anymore than the liabilities of ILP could have been attributed to them.

19. To attribute the value of Irish Life to the shareholders would be to make an unlawful return of capital to the shareholders.”

105. For present purposes I accept that the fact that the applicants were found by Feeney J. to have *locus standi* to challenge the July 2011 Direction Order does not predetermine the issue of *locus standi* in respect of the March Direction Order. But equally, it is not open to Mr. Skoczylas to argue, as he attempts to do at para.2.6 of his written submission, that the issue of *locus standi* is in some way

res judicata or that the State parties are in some way estopped from arguing that the appellants lack standing.

Interpretation of s.11(1)

106. Central to the issue of *locus standi* is the interpretation of s.11(1), which limits the entitlement to make an application under s.11 of the 2010 Act to set aside or vary a direction order approved by the High Court at an *ex parte* hearing. It will be recalled that the subsection, as amended, states:

“(1) The relevant institution in relation to which a direction order is made or a member of that institution may apply to the Court by motion on notice grounded on affidavit, not later than 14 days after the publication, in accordance with subsection (1) of and S.9(A), of a direction order, for the setting aside of the direction order.” [Emphasis added]

“**relevant institution**” is defined in s.2 as follows:

“(a) a body -

- (i) that has its registered office in the State,
- (ii) that is, or was on the date on which this Act came into operation, a bank licenced under *section 9* of the Central Bank Act, 1971”, and
- (iii) to which financial support has been given or is to be given by the Minister,

...

(b) a body that has its chief office in the State and is, or was on the date on which this Act came into operation, a building society within the meaning of the Building Societies Act 1989,

(c)³...

(d) a person or body prescribed under section 3,⁴

(e) a subsidiary of a person or body referred to in any of *paragraphs (a) to (d)*, and

(f) a holding company of a person or body referred to in any of *paragraphs (a) to (d)*;"

“Member”

“Member” is not defined in s.11 or elsewhere in the 2010 Act. ILPGH was the only member of ILP registered as such in the CRO under the Companies Act, 1963 at the date of the March Direction Order, the making of the *ex parte* order, and at time of the application by the appellants under s.11(1) to set aside the March Direction Order.

Reasoning of Feeney J

107. As indicated earlier Mr. Skoczylas urged this court to follow the reasoning of Feeney J. in his judgment determining that the applicants had *locus standi* to challenge the July 2011 Direction Order, reported at [2012] IEHC 89, to come to a broad interpretation of “member” that would include members of ILPGH. It is appropriate to look at that judgment in more detail, because the Minister and notice party sought to distinguish it on the basis that it concerned the July 2011 Direction Order which was directed to both ILP and ILPGH. They argued that the plain and ordinary meaning of s.11(1) was that it did not extend to the appellants in this instance, a meaning that they contended was consistent with the wording of s.11(1) and other provisions of the 2010 Act.

108. The background to the dispute before Feeney J. was that Mr. Skoczylas and Scotchstone Capital Fund Limited purchased their shares in ILPGH in March 2011 through Saxo Bank, and they were

³ Paragraph (c) included Credit Unions in the definition, but was deleted by s.110 and Part 5, First Schedule to the Central Bank and Credit Institutions (Resolution) Act, 2011.

⁴ Section 3 empowered the Minister to make regulations to prescribe a person or body corporate for the purposes of paragraph (d), be it a body registered or having its principal place of business in the State, or “in the case of an individual, his or her ordinary residence is in the State” provided “the Minister is of the opinion that it is necessary or desirable for the purposed of this Act that the person be so prescribed”. No relevant regulation was made, and accordingly the appellants could not rely on or bring themselves within paragraph (d).

held in Mr. Skoczylas' trading account at Saxo Bank. The name under which those shares was registered in the registrar of members of ILPGH was VIDACOS Nominees Ltd., which was the nominee through which Saxo Bank held shares in ILPGH. This remained the position at the time of the making of the July 2011 Direction Order, and as of 3 August, 2011 when Mr. Skoczylas brought his application under s.11(1) of the 2010 Act to set aside that Direction Order. Subsequently, on 29 September, 2011, Mr. Skoczylas completed the transfer of ILPGH shares of which he was beneficial owner and an ordinary share certificate in his name was registered on that day. However the Minister claimed that Mr. Skoczylas was not a member during the period up to and including 3 August, 2011, and that as a result he lacked the necessary standing or entitlement to bring a s.11(1) application to set aside. That contention was based upon a claim that a member for the purposes of s.11(1) of Act must be a member within the meaning of s.31 of the Companies Act 1963, and that since Mr. Skoczylas was not in the Registrar of Members at the relevant time they were not members for the purposes of s.11(1).

109. Feeney J. noted that there was no definition of the term “member” in the 2010 Act, and members neither defined in the interpretation section nor in s.11 of the 2010 Act. Mr. Skoczylas argued before him, as he does again on this appeal, that the 2010 Act comprised a series “of extraordinary statutory measures” and “must be regarded as *sui generis*”. He therefore argued for a purposive construction. He also contended that since “member” is not defined in the 2010 Act there is no legal or other reason to unduly restrict the definition of the word “member” to the definition set out in the Companies Act 1963, and that the definition should and must have regard to the prevailing market practice, including the fact that shareholders hold shares through brokers or nominees and that, since it is the beneficial owners of the shares whose rights are being affected by the s.9 Order, those are the persons who are understood to be members within s.11(1) of the 2010 Act. He further contended that the correct meaning of member in s.11(1) is that a member is a person or entity affected by a direction order – the person whose economic rights are altered by the Direction Order.

110. Feeney J. rejected the Minister’s contention that “member” should be narrowly interpreted in accordance with s.31 of the Companies Act, 1963 i.e. a person registered in the CRO as a member, and determined that a purposive approach to the 2010 Act should be adopted in order to ascertain the intention of the Oireachtas from the whole of the Act, and this led him to adopt “a broad construction of “member” being one which recognises the entitlement of holders of beneficial interests in shares to exercise rights under s.11” (para. 36).

111. As the appellants place significant reliance on the reasoning of Feeney J. it is appropriate at this stage to refer to the pathway to this conclusion. At para. 21 he states:

“21. The purpose and object of statutory interpretation is for the Court to identify the true meaning of the legislation. In carrying out that task, the Court must identify as a first step whether the word or words under consideration have a clear or obvious meaning thereby enabling the Court to apply a literal interpretation. The plain meaning rule can be adopted where the Court is satisfied that there is only one meaning and where an objective and an informed interpretation of the word or words under consideration raise no real doubt as to the true legal meaning of the enactment. In this case, the word "member" is not defined and is used in different ways within the legislation and covers a number of different institutions. This arises from the definition of relevant institution in s. 2 of the Act. The text of the Act is and must be the primary indication of the intention of the Oireachtas in enacting legislation. Where a word is not defined within an Act and where it is used in different circumstances, a situation can arise where the Court must look at the context of the Act as a whole. This is particularly so in this case given the scope and breadth of the Act and its stringent terms. In this case, the Court is satisfied that it can be said that the word "member" as used in s. 11 does not on an objective and informed interpretation have only one meaning or an obvious meaning. That being the case where there are alternative literal meanings capable of being applied to the word "member", the Court is placed in a situation where it must exercise an objective

judgment as to the meaning and the starting point for that is to place the word in issue within the context of the Act as a whole.”

112. Having referred to the principles of construction of legislation, the objective of identifying the intention of the legislature, and the judgments of Fennelly J. in *Crilly v. T & J Farrington Ltd.* [2001] 3 IR 251, and Denham J. in *Howard v. Commissioners of Public Works* [1994] 1 IR 101, Feeney J. then stated: -

“22... In circumstances where the literal approach is not capable by itself of resolving all doubts as to the interpretation and meaning of a statute, there is now a statutory provision to guide the Court in interpreting and applying legislation. The Interpretation Act 2005 is an Act "respecting the interpretation and application of Acts and of Statutory Instruments". Part 2 of that Act deals with miscellaneous rules. The literal approach is recognised within the provisions of s. 5 of the Interpretation Act 2005. That section deals with circumstances where a literal approach does not conclusively determine an interpretative problem. Section 5 of the Interpretation Act 2005 provides in the relevant parts:-

(1) In construing a provision of any Act ... -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation ... would fail to reflect the plain intention of

—

(i) ... the Oireachtas,

... the 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.

23. The first step in interpreting and applying legislation is to endeavour, by following the literal approach, to identify the intended meaning of a word or words used in a statute. The

fundamental object of interpretation being to give effect to the intention of legislation, it follows that the primary and pre-eminent indicator of such intention is the text itself. It is when consideration of the word or words in legislation proves either obscure or ambiguous that it becomes necessary to go beyond the literal or textualist approach.

The literal approach requires that the primary indication of the legislature's intention is to be gleaned from the word or words of an Act. The word or words to be construed must be given their ordinary and natural meaning and having given the word or words such meaning, it is then necessary to ascertain if the provision under consideration is plain and unambiguous."

113. In rejecting the Minister's contention in relation to s.31 of the Companies Act 1963, Feeney J. stated:

"24... Whilst a word may have an ordinary or dictionary meaning, the same word can have a technical or legal meaning where it has been used in a particular statutory code dealing with a particular area. In those circumstances the use of that word in legislation is to be assigned its technical or legal meaning as opposed to its ordinary meaning unless the context requires otherwise. Section 11(1) of the 2010 Act uses the word "member" to cover not only companies incorporated under the Companies Act 1963 but also to cover other entities including licensed banks, credit unions, building societies and even extending to a person or body prescribed under s. 3 of the Act. The word "member" in s. 11(1) is used in circumstances where it clearly has more than one meaning. There is no definition of member in the Act. Where "member" also refers to entities and persons other than a company incorporated under the Companies Act 1963, a court cannot approach the word "member" as if it is a legal term defined by Company Act legislation. The fact that the word "member" has a legal meaning within the Companies Act 1963 does not render its meaning in s. 11(1) plain or unambiguous where "member" in the Act of 2010 embraces members coming from entities or persons other than

a company. The Act provides that a person or entity can be a member of different bodies and if member as used in relation to one of the bodies is to be solely interpreted by reference to its meaning in other legislation covering such body, then for such meaning to be clear and unambiguous it would be necessary for the Act to state so and for the word to be so defined.”

114. Feeney J. rejected the further contention that the provisions of the Companies Act 1963 were *in pari materia* or forming part of the same statutory context as the 2010 Act. He stated:-

“25... The 2010 Act, due to its unique, unprecedented and stringent provisions, is to be properly regarded as *sui generis*. The 2010 Act deals with many matters outside of company law and its declared purpose includes matters which are stated as being necessary to address a unique and unprecedented economic crisis and to deal with circumstances where the common good requires permanent or temporary interference with the rights including property rights of persons who may be affected by the performance of the Act. It is the unique and unprecedented nature and scope of the 2010 Act which leads this Court to the conclusion that no assistance can be gained by interpreting the word “member” by reference to any other legislation. ...

26. The Court is satisfied that the word “member” as used in s. 11(1) of the 2010 Act does not on an objective interpretation have only one potential meaning nor does it have an obvious meaning. Where, as in this case, there are alternative literal meanings capable of being applied to the word “member” it can be properly said that the word “member” as used in s.11(1) is ambiguous.”

115. Feeney J. therefore considered that the provisions of s.5 of the Interpretation Act 2005 came into effect, and that objectively the plain intention of the entire of the 2010 Act needed to be considered, and a purposive interpretation adopted, being the one that best promoted the purpose of the legislative enactment. He noted, at para. 30:-

“30... As pointed out by Edwards J. in *Monahan v. Legal Aid Board* [2009] 3 I.R. 458 (at p.483 and 484):

“Section 7 of the Interpretation Act 2005 provides that, in cases where s. 5 of the Act of 2005 applies, the courts may ‘make use of all matters that accompany and are set out in’ the text of the legislation. This authorises the court to consider the long title of an Act in interpreting specific statutory provisions contained in that Act, in accordance with the practice of the courts prior to the enactment of the Interpretation Act 2005.”

In para. 31 Feeney J. referred extensively to the long title to the 2010 Act which he considered “...identifies the context of the legislation and provides the rationale for the Act’s unique, unprecedented and far-reaching provisions”. He stated:-

“... Direction orders can, and do as in this case, have the effect of interfering with the rights, including property rights, of persons affected by the direction order. Section 9 direction orders have far-reaching consequences and encroach upon valuable property and contract rights. The scheme in the Act is such that a party affected by a direction order will be unaware of such order until it is made. Section 11(1) provides the only means by which an affected party can seek to challenge a direction order and... It is clear that s.9 orders can and are intended to affect the interests of others. Those persons are entitled to be dealt with in a manner consistent with the principles of natural justice. Those persons are given, under the scheme of the Act, an entitlement to apply to set aside a direction order....

32. ... The purpose and intent of s.11 was to provide a statutory basis for the constitutional requirement that a person or entity affected by a direction order has an entitlement to have a direction order reviewed by the Court. Section 11(1) of the 2010 Act provides an absolute time limit and it is only by availing of that section that a party

affected by a direction order can apply to court. Section 63(3) of the 2010 Act provides:

“(3) A person is not entitled to apply for the judicial review of a decision referred to in subsection (1) if he or she was entitled to apply to have the relevant order of the Court set aside but did not do so.”

116. Feeney J. therefore concluded that:-

“33. When a company is the subject of a s. 9 order the persons affected are not limited to persons who are members for the purpose of the Companies Act 1963 but also extend to persons who are the beneficial owners of shares in a company the subject of the s. 9 order. The intention of the Oireachtas, as gleaned from the interaction between s. 9 and s.11 of the Act of 2010 and with due recognition being paid to the recitals in the Act and the whole of the Act leads to the conclusion that the plain intention of the Oireachtas was to authorise interference with property rights and to provide that a remedy was available under s. 11 to those whose property rights may be affected to apply to the Court. Those persons are the ultimate owners of the shares and not just members as defined in s. 31 of the Companies Act 1963.”

117. Feeney J. was satisfied that for the construction contended for by the Minister to be valid, such restriction would have to be expressed with absolute clarity in the legislation – otherwise such restriction would potentially defeat the purpose and intent of the Oireachtas in providing for the review in s.11. He also rejected the Minister’s contention that the construction contended for by Mr. Skoczlyas would lead to uncertainty. One of the two reasons given for rejecting this uncertainty argument is expressed in para. 37 by Feeney J. as follows:

“... Secondly, if a person or company makes an application under [s.11(1)], as a person affected by the direction order and therefore a member, that person or company would have to establish that his or its economic rights were affected by the s.9 order. A finite and certain number of parties seeking to challenge the s.9 direction order is known within [the time

allowed for a s.11 application] and to succeed in an application under s.11, a party would have to establish that such party was effected by the s. 9 order.”

118. I do not disagree with the reasoning that led Feeney J. to these conclusions, but it must be remembered that this was in the context of the challenge by the applicants to the July 2011 Direction Order. The issue of interpretation that he had to determine was whether each applicant was a “member” of ILPGH. It is the case that the word “member” is not defined in the 2010 Act. I do accept that where the issue was whether the right to beneficial ownership carried with it the right to bring a s.11(1) challenge, the word “member” (and hence the phrase “member of that institution”) was not clear or unambiguous. This required the court to identify the intention of the legislature by reference to the language used in the legislation. To this extent I do not accept the Minister’s contention that the plain and ordinary meaning of “member”, as it is used in s.11(1), is in all instances so clear that the court need go no further.

119. It is also clear that under s.5 of the Interpretation Act, 2005 where the provision is obscure or ambiguous, or on a literal interpretation would fail to reflect the plain intention of the Oireachtas, the court should construe it to reflect the plain intention of the Oireachtas where that can be ascertained from the Act as a whole. I accept as correct the reasoning of Feeney J. in respect of the July 2011 Direction Order that led him to reject the argument that “member” should be narrowly construed in accordance with s.31 of the Companies Act, 1963, and I agree that he was entitled to adopt a purposive approach and consider the Act as a whole, including the long title.

120. I also agree with his critical observation, after conducting the exercise of ascertaining the legislative intention, that the persons affected by a s.9 direction order are not just persons actually registered as members in the CRO, but include persons who are *beneficial owners* of shares in the company. This was because the July 2011 Direction Order might interfere with their property rights, and Feeney J. reasoned that the Oireachtas intended that *beneficial owners* of shares should have an entitlement to challenge the direction order.

121. However, therein lies the first difficulty for the appellants in the present appeal. The March Direction Order was only directed at ILP. The entirety of the beneficial interest in ILP was held by ILPGH which was the sole legal “member” of ILP, both legally and beneficially. On no interpretation could it be said that the appellants were “members” of ILP ; they were only “members” of ILPGH, whether registered as the owners of shares, or as beneficial owners holding their shares through nominees or trustees.

122. Neither can it be said that the appellants had any beneficial interest in the shareholding of ILPGH in ILP. It is a fundamental principle of company law that a shareholder has no right to ownership of any of the company property. Hogan J. in the appeal to this court of the main proceedings cited with approval (at para.164) Attorney General v Jameson [1904] 2 I.R. 644 at p.671, where Kenny J. stated:

“No shareholder has a right to any specific portion of the company’s property, and, save by and to the extent of his voting power at a general meeting of the company, cannot curtail the free and proper disposition of it.”

See also Keane on Company Law Fifth Edition (2016):

“[17.01] Where a company has a share capital, each of the members owns at least one share of that capital and is consequently a shareholder of the company. This does not mean that he or she is the owner of any part of the company’s assets or that he or she owns the jointly with his or her fellow shareholders.”

This is because, as recognised by the Supreme Court in O’Neill v Ryan (No.3) [1990] ILRM 140, shares constitute a mere right of participation in the company on the terms set out in the Articles of Association so that, while the value of shares might be reduced by virtue of losses suffered by the company, the right of participation would not be affected. It is of course the case that a shareholder has a right to share in a company’s profits, but only on the basis of contractual terms set out in the

Articles of Association, and this applies likewise to the right to share in capital e.g. on a voluntary liquidation. The appellants do not have any interest in any asset of ILPGH.

123. *A fortiori* the appellants never had any *beneficial interest* in ILP, or the assets of ILP, including its subsidiaries or their assets. I agree with O'Malley J's finding in relation to Irish Life that "This asset belongs to ILP, and not to the shareholders of ILPGH."

In his judgment on the appeal in the main proceedings Hogan J. proceeded:

"165. This point was also well expressed by Courtney, *Law of Private Companies* (Dublin, 2016) at 447:

"Where the company holds property, it holds it in its own right and its shareholders have no right to or interest in its assets."

166. It follows that Irish Life was an asset of ILP (or, perhaps, more strictly, ILP General Holdings plc). Critically, however, it did *not* belong to the shareholders and nor can it be said that ILP in its various corporate structures held Irish Life on some form of trust for those shareholders. The net result of this is that it cannot be said that Irish Life was owned in some way – directly or indirectly – by the shareholders. Nor does it follow that through this sale of Irish Life the shareholders can be said to have contributed an asset towards the company's liabilities, so that to that extent they had burden-shared already."

I respectfully adopt with those findings and conclusions.

124. It follows, for reasons further elaborated below, that in my view *in the context of the present dispute* there is no relevant obscurity or ambiguity in the word "member", or its use in the phrase "a member of that institution", in s.11(1) and "member" cannot apply to the appellants as they had no legal or beneficial interest in ILP or its assets.

125. Just as fundamentally, in my view it is not a single word that falls to be construed in the present case. Indeed as Feeney J. observed the court looks to ascertain “...the intended meaning of a word or words in a statute.”

In relation to the March Direction Order the question is not limited to the word “member”, or that word taken in isolation, or even just the words “relevant institution”. Rather it is the meaning of the wider phrase that I have highlighted in s.11(1) –

“The relevant institution in relation to which a direction order is made or a member of that institution...”,

- taken as a whole.

126. As Feeney J. stated, “The first step in interpreting and applying legislation is to endeavour, by following the literal approach, to identify the intended meaning of a word or words used in a statute.” In addressing the plain and ordinary meaning of this phrase - the literal approach - it is necessary to look at all of the words in s.11(1) and their relative positions. For instance, it would not be appropriate to look at the words “The relevant institution” without the following qualifying words “in relation to which a direction order is made”.

127. A proposed direction order is first promulgated under s.7, and then the procedure in s.9 must be followed. By the time s.11(1) is invoked there is a direction order in place, made by order granted *ex parte* by the High Court under s.9. Section 11(1) is plainly only concerned with *the* direction order that has been made – an application under s.11(1) cannot concern any other direction order. This is also underscored by the closing words “...for the setting aside of *the* direction order” – again the use of definite article identifies the particular direction order already made by the court.

128. Equally “that institution” can only refer back to “the relevant institution in relation to which a direction order is made”. The use of the word “that” in this demonstrative manner makes it plain that the legislature is referring to the institution in relation to which the direction order is made – here ILP – and none other. It cannot, in its plain and ordinary meaning, refer to any other institution. In his

submission the Minister argues that “relevant institution” for the purposes of s.11(1) can only refer to the institution to which a direction order is directed, and I agree.

129. Mr. Skoczylas relied on the definition of “relevant institution” in s.2 of the 2010 Act at (f) as including a holding company. However s.11(1) commences with the phrase “*The* relevant institution in relation to which a direction order is made...”. It uses the definite article, by reference to the direction order already made, and repeats this in the closing phrase “...for the setting aside of *the* direction order”. In the context of s.11(1) it cannot include another company. The plain and order meaning of this phrase is clear: it refers to *the* relevant institution *to which directions are given* in the direction order.

130. It is important here to emphasise my conclusion that the plain and order meaning of the phrase under construction is clear and unambiguous, and plainly demonstrates that the intention of the Oireachtas was to allow only a body/company/institution the subject of a direction order made by the High Court *ex parte* under s.9, or a member of that institution, a statutory right to apply to set aside, or seek variation in certain limited circumstances, of that direction order. I find that the phrase under consideration is not amenable to any literal meaning other than that which I have identified. The question of absurdity, or utilising the approach permitted by s.5 of the Interpretation Act, 2005 to resolve an ambiguity, does not, in my view arise. Accordingly, it is not appropriate for the court to adopt a purposive approach, or look to the long title or other provisions of the 2010 Act, as an aid to interpretation.

Purposive approach

131. In any event, in my view a purposive approach to interpreting s.11(1) does not assist the appellants. Feeney J. at para. 31 of his judgment relies on the long title to the 2010 Act, and finds support for his conclusion in the fact that direction orders can have the effect of interfering with “the rights, including property rights, of persons affected by the direction order.” In that case the beneficial

shareholding of Mr. Skoczylas and other shareholders in ILPGH was undoubtedly affected by the July 2011 Direction Order, which had the effect of diluting their shareholdings in ILPGH, and further deprived them of the opportunity to debate and decide this at a general meeting.

132. By contrast, in respect of the March Direction Order only ILPGH held a property right in ILP that was, potentially, affected. In referring to “property rights” Feeney J. was clearly referring to the property right that Mr. Skoczylas and others as holders of shares, or the beneficial interest in shares, in ILPGH. In referring to “rights”, Feeney J. clearly had in mind the range of legal rights that a shareholder has under company law *qua* a shareholder e.g. the right to insist that in certain circumstances a general meeting of members be held to approve a measure proposed by the board of the company. These are the “affected” rights of a shareholder which Feeney J. held “also extend to persons who are the beneficial owners of shares in a company the subject of the s.9 order” (para.33).

However these are not “affects” that apply to the March Direction Order – the appellants’ shareholdings in ILPGH are not “affected” by that order. “The relevant institution” to whom the March Direction Order was directed was ILP, and it was directed to sell its asset, Irish Life, to the Minister. The March Direction Order did not direct ILPGH to do anything, nor was ILPGH required, expressly or by implication, to do or refrain from doing anything.

133. In further support of the contention that this was the intention of the legislature (apparent from a purposive approach to the 2010 Act as a whole), counsel for the Minister referred to the wording adopted in s.61 of the 2010 Act. Section 61 is a provision that addresses the legal effect of a direction order on certain “relevant agreements” between the “relevant institution” and third parties.

134. In further support of the contention that this was the intention of the legislature (apparent from a purposive approach to the 2010 Act as a whole), counsel for the Minister referred to the wording adopted in s.61 of the 2010 Act. Section 61 is a provision that addresses the legal effect of a direction order on certain “relevant agreements” between the “relevant institution” and third parties.

Section 61(1) states:

“61. (1) In this section “relevant agreement” means an agreement under which the relevant institution in relation to which an order under this Act is made or any of its subsidiaries, its holding company and any subsidiary of its holding company enjoys any right or interest or is subject to any obligation or liability (regardless of whether such an agreement is governed by the law of the State or another place).”

Similar references to subsidiaries and holding companies appear in subsections (2) and (3) of s.61, which in essence provide that certain legal consequences e.g. obligations, liabilities, rights or the loss or rights, as listed in ss.(4), that would arise for the “relevant institution” under the “relevant agreement”, no longer arise by reason of the direction order. Thus the “relevant institution”, and its subsidiaries or holding company, are relieved of obligations or liabilities to third parties that would otherwise arise by reason of the direction order, for example the triggering of default on a loan and the obligation to return collateral.

135. Counsel for the Minister submitted that the express separate references to “subsidiary” and “holding company” in s.61 demonstrate an intention on the part of the Oireachtas to limit the term “relevant institution” in s.11 to the body/company to whom a direction order is directed, and not to extend it to any subsidiary or holding company.

136. There is some force to this submission. Although the adoption of such wording in s.61 does not give rise to an implication that “relevant institution” in s.11 excludes a holding company, it is clear that the drafters of the 2010 Act were live to the possibility that they could have adopted similar wording, thereby expressly extending the right to make a s.11 application to the body the subject of directions and “any of its subsidiaries, its holding company and any subsidiary of its holding company”, and to “members” of a subsidiary or a holding company.

It seems to me that the omission from s.11(1) of any reference to a subsidiary or holding company supports the construction contended for in the minutes.

137. It is easy to see why this should be so, and why more generally the legislature chose not to extend the right to bring a s.11(1) application beyond the relevant institution the subject of directions and its immediate members. If it extended to holding companies and subsidiaries, and their members, there would be an ever-increasing circle of potential applicants seeking to set aside a direction order. This could result in a large number of applicants, and inevitably prolongation of the court process in circumstances where invariably time would be of the essence.

138. Section 4 of the 2010 Act, as amended, sets out its purposes, and these include –

“(f) to address the compelling need –

- (i) to facilitate the availability of credit in the economy of the State,
- (ii) to protect the State’s interest in respect of the guarantees given by the State under the Act of 2008 and to support the steps by the Government in that regard,
- (iii) to protect the interests of taxpayers,
- (iv) to restore confidence in the banking sector and to under pin Government support measures in relation to that sector, and
- (v) to align the activities of the relevant institutions and the duties and responsibilities of their officers and employees with the public interest and the other purposes of the Act,

(g) to preserve or restore the financial position of a relevant institution,

(h) to empower the Court to impose reorganisation measures through orders made in reliance on the CIWUD Directive.”

139. It follows that if s.11(1) was to be as broadly construed as Mr. Skoczylas suggests, this would tend to defeat the urgency associated with the adoption and implementation of the emergency financial measures required for the stabilisation and preservation/restoration of the credit institutions

and contained in a direction order. This urgency was recognised by the Oireachtas in the five day time limit – later extended by the 2011 Act to 14 days from publication of the direction order – for bringing a s.11(1) challenge.

140. Accordingly even if a broad or purposive approach to interpretation of s.11(1) were to be adopted it would still not lead me to a conclusion that the subsection should be construed to afford the appellants *locus standi*.

Arbitrary selection of ILP for March Direction Order

141. Mr. Skoczylas argues that the denial of *locus standi* is based on the Minister’s “arbitrary assignment of ILP as the only “relevant institution” for the purposes of the proceedings, and that this arbitrary choice should not be determinative, and contrasts the March Direction Order with the first phase of recapitalisation where the July 2011 Direction Order involved directions to both ILP and ILPGH.

142. I see no force in this argument. In my view it was necessary, given the corporate structure that faced the Minister, for the July 2011 Direction O to involve both companies in order to effect the State’s injection of €2.3 billion capital into ILP in exchange for shares in the holding company. It was equally logical, when directing the sale of Irish Life, to involve only ILP in the proposed direction orders – this applies both to the June 2011 Direction Order (which the appellants did not challenge), and the March Direction Order – because ILP alone was the owner of the asset.

ESM Rules

143. A key submission made by Mr. Skoczylas was that EU law was engaged and that the court should interpret s.11(1) consistently with EU law in order to give the appellants *locus standi* as affected members of ILPGH. He submitted that “relevant institution” was not confined to ILP but should be interpreted to include ILPGH on the basis that, absent a direction order, the sale by ILP of Irish Life could only have been undertaken after approval by an EGM of ILPGH. He referred the

court to the Enterprise Securities Market (ESM) Rules⁵ adopted by the Irish Stock Exchange as requiring a general meeting of ILPGH to approve such a sale. Rule 15 states:

“Any disposal by an ESM company which, when aggregated with any other disposal(s) over the previous twelve months, exceeds 75% in any of the class tests, is deemed to be a disposal resulting in a fundamental change of business and must be conditional on the consent of its shareholders being given in general meeting.”

144. Mr. Skoczylas relied on averments in the grounding affidavit sworn by Mr. Torpey on behalf of the Minister on 30 April, 2012 to ground the *ex parte* application under s.9 of the 2010 Act, at para. 32:

“...It is my belief and I am so advised that the Irish Life Sale might well exceed the 75% threshold of one or more of these class tests and, therefore, would ordinarily need to be conditional on the consent of the ILPGH shareholders being given in general meeting of ILPGH and a shareholder circular being published in relation thereto. However, as noted above, ILPGH is a “relevant institution” and I am advised and believe that the provisions of Section 53(d) of the Act referred to above are applicable to ILPGH. As a result, if the [March] Direction Order is granted by the Court, I am advised and believe that the provisions of the Direction Order will have effect notwithstanding anything in the ESM Rules. Accordingly, if the Court grants the Direction Order, it is the intention of the ILP Group to complete the Irish Life Sale in reliance on s.53 without seeking the consent of the ILPGH shareholders in

⁵ The ESM Rules were enshrined in EU Law by Article 14.4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (“MiFID”) which provides: “Member States shall require that investment firms or market operators operating as MTF [i.e., multilateral trading facility] establish and maintain transparent rules, based on objective criteria, governing access to its facility”. This was transposed by Regulation 41 of the EC (Markets in Financial Instruments) Regulations 2007 (S.I.60 of 2007) and resulted in the adoption of the ESM Rules by the Irish Stock Exchange.

a general meeting of ILPGH or a shareholder circular being published in relation thereto, even if such consent would otherwise be required pursuant to ESM Rules.”

145. Section 53 of the 2010 Act provides –

“53. The provisions of this Act, and any order made under the Act, have effect notwithstanding anything in –

- (a) the Companies Acts, the Building Society Act 1989, the Credit Union Act 1997 or any other enactment,
- (b) any other rule of law or equity,
- (c) any code of practice made under an enactment,
- (d) the listing rules of any regulated market or the rules of any other market on which the shares of a relevant institution may be traded from time to time,
- (e) the memorandum or association and articles of association of a relevant institution, or
- (f) any agreement to which such an institution or any of its subsidiaries is a party, is bound by, or has an interest in,

except to any extent to which this Act expressly provides otherwise.”

146. Accordingly, Mr. Skoczylas submitted that the proposed March Direction Order, and the s.9 approval application, proceeded on the basis of an express acknowledgment by the Minister that, but for s.53 of the 2010 Act, a general meeting of ILPGH (listed on the ISE) would have been required under ESM Rules to approve the sale of Irish Life to the Minister, notwithstanding that the sale was by ILP (which was no longer a listed company) and not by ILPGH.

147. In further support of his submission Mr. Skoczylas also referred to s.5A of the 2010 Act. This was inserted by s.110(5) of the Central Bank and Credit Institutions Act, 2011, and with its heading reads:

“Minister and Bank to have regard to European Union law.

5A.-In performing a function under this Act, the Minister and the [Central] Bank shall have regard to the laws of the European Union (including those governing state aid) and any relevant guidance issued by the Commission of the European Union.”

148. Mr. Skoczylas argued that instead of directing ILP to sell Irish Life the Minister could have chosen a form of direction order that directed ILPGH as holding company in turn to direct ILP to sell Irish Life to the Minister, which would undoubtedly have given the appellants *locus standi* to bring a s.11(1) application. In his reply submission Mr. Skoczylas argued that –

“It is not true that the only possible interpretation of the 2010 Act is that the Appellants don’t have *locus standi* – the Minister had to observe EU law as per the newly inserted subsection 5A in accordance with the 2011 Act.

...In this case there was no general meeting approving the decisions in question. Such an EGM was abrogated pursuant to s.53 of the 2010 Act, which was inconsistent with s.5A of the 2010 Act, which required compliance with EU law.”

149. He also submitted that the breach of Rule 15 of the ESM meant the Minister was in breach of Articles 5 and 42 of Directive 2001/34/EC, implemented in Irish law by the European Communities (Admissions to Listing and Miscellaneous Provisions) Regulations 2001 (S.I. No. 286 of 2007). This was not an argument that he made in the High Court.

I propose to address this notwithstanding that it was raised, at least in this form, for the first time before this court.

150. The first problem with Mr. Skoczylas’ submission is that, as submitted by Counsel for the Minister, the provisions of Directive 2001/34/EC apply only to “official listings”, and therefore do not apply to the ESM Rules at all. If they did apply to ESM, regulations 5 and 42 do not give Rule 15 any particular status. Regulation 5 simply provides that member states shall ensure that securities may not be admitted to official listings on any stock exchange –

“...unless the conditions laid down by this Directive are satisfied”

and that –

“...issuers of securities admitted to such official listing...are subject to the obligations provided for by this Directive.”

Regulation 42 provides:

“The legal position of the company must be in conformity with the law and Regulations to which it is subject, as regards both its formation and its operation under its statutes.”

Regulations 5 and 42 therefore do not, as Mr. Skoczylas contends, “enshrine” Rule 15, and they did not prevent the provisions of the 2010 Act from overcoming the requirements of the ESM Rules that might otherwise apply.

151. Secondly, Regulations 5 and 42 do not in their terms restrict the availability of s.53 of 2010 Act. Section 53(d) cannot be ignored. It, along with the “switch off” provisions in s.61 mentioned earlier, is a central feature of the 2010 Act that allowed necessary measures to be taken to address the “unprecedented economic crisis” and “continuing serious threat to the stability of certain credit institutions in the State” referred to in the long title. The legal effect of s.53(d) is quite clear: it means that if the March Direction Order is made the general meeting that might otherwise be required by the ESM Rules, which are “listing rules of any regulated market” is not required. It means that the March Direction Order takes effect notwithstanding anything in the ESM Rules (if they apply). However, it does not prevent ILP or ILPGH bringing a s.11(1) application.

152. Mr. Skoczylas makes a related submission that “The ESM Rules were enshrined in EU law by Art 14.4 of Directive 2004/39/EC (“MiFID”), implemented in Irish law by Regulation 41 of the EC (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007).” Regulation 41 provides:

“Member States shall require that investment firms or market operators operating in MTF establish and maintain transparent rules, based on objective criteria, governing access to its facility. These should comply with the conditions established in Article 42(3).”

Article 42(3) MiFID in turn concerns access to the regulated market and provides for the qualifications that persons should have in order to be admitted as members/participants. Thus Article 14.4 addresses only rules of access. ESM Rule 15 is not a rule of access, and I accept the Minister's submission that it has nothing to do with Article 14.4. Even if it did, that would not prevent the Minister from relying on s.53(d) of the 2010 Act.

153. Moreover, s.53(d) enjoys a presumption of constitutionality. The appellants cannot challenge the constitutionality of the s.53, or other provisions of the 2010 Act, in the present proceedings. That was the ruling of Kearns P., followed by Peart J. when the present application was heard. While the appellants have issued a separate constitutional challenge, the presumption of constitutionality remains while those proceedings are pending.

154. It is not therefore open to Mr. Skoczylas to argue that s.53, or reliance on it by the Minister, is inconsistent with s.5A. I also note that the Minister's only obligation under s.5A is "to have regard to the law of the EU". It is quite clear from Mr. Torpey's averments that the Minister was live to and did have regard to the ESM Rules when proposing the March Direction Order.

155. The suggestion that the Minister might have made a different direction, addressed to ILPGH and directing it in turn to direct ILP to sell Irish Life, is in truth a substantive argument. It is unpersuasive as an argument for granting the appellants *locus standi*. In any event Peart J., with whom O'Malley J. agreed ([2014] IEHC 418, at para.38.41 of her first judgment), found that there was no onus on the Minister to show that the proposed direction order was the only method of achieving the statutory purpose. O'Malley J. added –

“38.41....However, it is desirable that the evidence grounding the application should demonstrate that the order sought is the most reasonably practicable method in all the circumstances of the case. The court will of course be conscious that such applications may be made in circumstances of urgency, where the time available will not permit of exhaustive analysis. In such situations the court will have due regard to the role and responsibilities of

the Minister as already described. It will also have regard to the fact the Minister will have had access to expert advice in forming his opinion.”

156. On the appeal to this court from the ultimate refusal of O’Malley J. to set aside the July 2011 Direction Order, Hogan J. [2018] IECA 300 found that the test to be applied was in substance the proportionality test articulated in *Heaney v Ireland* [1994] 3 I.R. 593. There Costello J. found that where a constitutionally protected right is restricted by legislation – or, as Hogan J. states, an administrative decision such as the July 2011 Direction Order – the restrictions must:

“(a) be rationally connected to the objective and not be arbitrary, unfair or based on rational considerations;

(b) impair the right as little as possible; and

(c) be such that their effects on rights are proportionate to the objective.”

Hogan J. then emphasises that the second limb does not mean literally what it says, quoting from and Mac Lachlin J. in *RJR-MacDonald Inc. v Canada (Attorney General)* [1995] 3 S.C.R. 199, at para.160

–

“...The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must afford some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor the objective to infringement...On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.”

Hogan J. also quoted from Murray C.J. in *Meadows* [2010] 2 I.R. 710, at p.723 where he said –

“In having regard to the degree of discretion a wide margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objective.”

From these authorities Hogan J. concluded:

“145. It is clear from these comments that some flexibility must necessarily be allowed to decision makers, not least in cases of this kind where the decision in question had large scale macro-economic implications and where it was required to be taken urgently and against the background of an acute emergency.”

157. At risk of delving into the substantive issues, the question may be asked of Mr. Skoczylas ‘s suggestion of an alternative direction order requiring ILPGH to direct ILP to sell Irish Life, ‘Why chose such a circuitous method of achieving the same end’? It would self-evidently be more complex and intrusive. Apart from that, clearly from the Minister’s perspective it would have been undesirable because it would have enabled all or many members of ILPGH to make applications under s.11(1), something that could have been anticipated at that point given that applications were pending seeking to have the July 2011 Direction Order set aside. It is probable that that in turn would have led to delay in High Court while s.11 applications were processed, and ILP had a deadline of 30 June, 2012 for completing the sale of Irish Life.

158. Under the 2010 Act the Minister had, while observing the principle of proportionality as enunciated by Hogan J., a discretion or margin of appreciation to chose the form of proposed direction order that he considered would, if implemented, achieve the desired result being within one or more of the purposes of the 2010 Act he Minister was entitled to limit it to a direction involving only ILP as owner of the asset even if one of the intended consequences was that the appellants would not be within the class of persons entitled to bring s.11(1) applications.

159. The fact that the Minister made such a choice does not mean that the Minister breached EU law, or, as Mr. Skoczylas suggests, the principle *nemo iudex in causa sua*. The proposed direction order was still one that had to be approved by the High Court under s.9 of the 2010 Act, which required that the High Court be satisfied that the requirements of s.7 were complied with, and that the opinion of the Minister was reasonable and was not vitiated by any error of law. To state the obvious,

the s.9 decision was the decision of the High Court, not of the Minister, and incidentally as a decision of the court was not one to which s.5A of the Act applied. Even then the direction order could be the subject of challenge by the “relevant institution”, ILP or its sole member ILPGH, under s.11(1), although as Peart J. correctly observes that was unlikely to happen.

160. Mr. Skoczylas appears to deploy his ESM Rules argument to contend that s.11(1) *must* be given a broad interpretation under EU law to allow the appellants *locus standi* and give them effective protection under Community law. This follows CJEU rulings that a domestic court must favour the interpretation of national transposing legislation which is most consistent with the result sought by a directive in order to achieve an outcome compatible with the directive/EU law – see *Marleasing SA v. La Comercial Internacional de Alimentation SA* C-106/89 [1990] ECR I-4135.

161. However this argument cannot prevail where, as I have found, the interpretation of s.11(1) is clear and unambiguous. It is only where the legislative intention behind a domestic provision that implements EU law is unclear and admits of more than one meaning that the court of the Member State is bound under EU law to adopt the purposive interpretation that best implements the EU directive or regulation. Where the ordinary meaning of the domestic provision is, on the application of domestic rules of interpretation, clear and unambiguous, it is not open to the court to interpret the provision *contra legem*.

162. This is so even if the interpretation by the national court produces a result contrary to that envisaged by the EU directive or regulation. In *Pupino* (Case C-105/030) ECR I-05285, at para.47 the ECJ stated:

“The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as a basis for an interpretation of national law *contra legem*. That principle does, however, require that,

where necessary, the national court consider the whole of the national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.”

163. McKechnie J. reviewed and restated the *contra legem* principle in his recent judgment in *Minister for Justice and Equality v. Vilkas* [2018] IESC 69 (nem diss.) and concluded:

“79. It is clear from the above that the principle of conforming interpretation cannot be used to lead to an interpretation of national law *contra legem*. This concept of ‘*contra legem*’ is frequently used in EU law. The Latin phrase means ‘against the law’. Often the case law of the CJEU will simply refer to the prohibition on a *contra legem* interpretation without elaborating on what precisely this means. However, the meaning of the concept is somewhat intuitive although generally well understood at a surface level: it is that a court cannot adopt an interpretation which goes against the express wording of a provision. Put differently where it is not reasonably possible to construe a national measure in conformity with its EU counterpart, to do so would be against the law. If a conflict of that scale exists, a court must give preference to its domestic provisions.”

164. The High Court and this court are bound by statute, and a barrier exists that separates permissible judicial interpretation from impermissible judicial legislation. Where, as I have found, the interpretation of s.11(1) is clear and unambiguous it is not open to the court to adopt a strained interpretation that is *contra legem*.

Official statements/Scheme of Arrangement/Prospectus

165. Mr. Skoczylas relies on “multiple official statements by the Central Bank of Ireland, the Minister himself as well as ILPGH” (Ground 6) to the effect that it was indeed ILPGH that had been disposing of Irish Life. However, the trial judge rightly rejected the argument that this meant that ILP and ILPGH were inseparable, and should be treated as one from an investor protection point of view. The statements relied on, and any linkage in directorships between the two companies, quite

simply do not alter the legal position, which was that at all material times ILP owned Irish Life, and ILPGH was a separate legal person and had no legal or beneficial interest in any asset of ILP. This is not one of the circumstances in which the court can pierce the corporate veil where to do so would be in direct conflict with the plain and ordinary meaning of s.11(1).

166. Moreover Mr. Skoczylas' reliance on part of paragraph 66 of the European Court of Human Rights decision in *Agrotexim v Greece* 330 Eur. Ct. H. R. 3 (series 3) (1995) is misplaced. The context of that decision was a referral to that Court by the European Commission on Human Rights of a dispute in which shareholders/creditors of a Greek company, Fix Brewery, which had gone into liquidation, wished to pursue proceedings in the E.C.H.R. for inter alia breach of their property rights under Article 1 of Protocol 1 of the Convention by reason of the actions of the Municipality of Athens, claiming that the value of their shareholding was diminished. The ECHR disagreed with the Commission's opinion that shareholders could directly complain of violation of their rights under Article 1 of Protocol 1. The full text of paragraph 66 reads:

“66. Concerned to reduce such risks and difficulties the Court considers that the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators. The Supreme Courts of certain member States of the Council of Europe have taken the same line. This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice (*Barcelona Traction, Light and Power Company Limited*, judgment of 5 February 1970, Reports of judgments, advisory opinions and orders 1970, pp. 39 and 41, paras. 56-58 and 66).”

It will be apparent from this that the court was considering the right to apply under the Convention to the Strasbourg institutions – not any right of shareholders or creditors to take action under domestic law. Indeed the Court in para. 65 recognises that –

“...It may be assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that is prejudicial to "their" company.”

167. Equally I fail to see how Mr. Skoczylas can rely on assurances in the Scheme of Arrangement and Prospectus issued in November 2009 for the ILP EGM on 15 December, 2009, and the subsequent High Court order sanctioning that Scheme under s.201 of the Companies Act, 1963, to argue for *locus standi* under s.11(1) of the 2010 Act. This, as the trial judge found, cannot be determinative of the correct interpretation of the subsection. The Scheme of Arrangement established ILPGH to replace ILP as the group’s holding company. The assurances have been set out earlier in this judgment, but included that the shareholders in ILPGH would have the same rights and be subject to the same restrictions as their then existing shares in ILP, and that their financial interests in the profits and dividends of the group would not be affected by the Scheme. If these assurances have been breached by virtue of the March Direction Order – and I make no judgment on that - then it is for those appellants who claim their rights as shareholders have been adversely affected to seek appropriate redress in the s.205 proceedings, or in the injunction proceedings where the Supreme Court has made it clear the claim can be amended to include a claim for compensation, or any other manner open to them. This cannot be a ground for granting *locus standi* to the appellants to bring a s.11(1) challenge to a direction order where the subsection limits the persons eligible to bring such a challenge and on the correct interpretation of the subsection the appellants do not qualify.

EU principles and *Unibet*

168. Mr. Skoczylas in his submissions on *locus standi* argued that as the State is implementing EU law a denial of locus standi would breach certain general principles of EU law, including the right to

property, the principle of proportionality and the right to an effective remedy. He refers to the Opinion of the Advocate General dated 22 June 2016 in the Reference in the main proceedings, where it was stated (ECLI:EU:C:2016:473):

“91...by the Direction Order [both the July 2011 and the March 2012 Ex Parte Direction Orders], Ireland was giving effect to the condition for financial assistance to recapitalise its banks, as laid down in Article 3(5)(a) and (7)(g) of the Implementing Decision. In that regard, as stated in recital 11 of the Implementing Decision, ‘the operations which the Union financial assistance helps to finance must be compatible with Union policies and comply with the law of the Union’. That includes not only positive rights which individuals derive directly under EU law, but also the general principles of EU law, including the fundamental rights which Member States must observe when implementing EU law. Those general principles comprise not only the right to property enshrined in Article 17 of the Charter, but also the principle of proportionality. Specifically the latter principle requires the Member States to employ means which, while enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation.

92. It is for the High Court, when reviewing the Direction Order pursuant to section 11 of the Act, to consider whether the principles mentioned in the preceding point have been observed and, in particular, whether the Direction Order constitutes the measure least detrimental to the objectives and the principles laid down by the Second Directive.”

That the reason for the 2011 Direction Order was Council Implementing Decision 2011/77 was also accepted in the judgment of the CJEU (C-41/15 of 8 November, 2016) - see paragraphs 46 and 47.

169. Mr. Skoczylas pointed out, correctly, that in his grounding affidavit Mr. Torpey accepted that the sale of Irish Life was part of the recapitalisation of ILP required by the Council Implementing Decisions, and that the application under s.9 for a direction order was to enable the sale to the Minister

and the use of the proceeds of sale for the purpose of further recapitalising ILP. He therefore contended that denial of locus standi would mean that this could not be challenged, and that in “contriving” this situation the Minister was breaching shareholder rights, and the appellants were being denied an effective remedy.

170. As far as property rights are concerned, the 2011 July Direction Order – which was the only measure addressed by the Advocate General and the CJEU in the preliminary reference – engaged the rights of the appellants as shareholders in ILPGH. However, for reasons that I have elucidated earlier I do not accept the submission that the appellants enjoyed any property rights in ILP that were capable of being breached by the sale of Irish Life pursuant to the March Direction Order; their only property right was to a shareholding in ILPGH. In this respect the March Direction Order cannot be compared with the 2011 July Direction Order.

171. As to the principle of proportionality, it is of note that this is not discussed by the CJEU in its judgment on the reference. It considered that the 2011 July Direction Order was “an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of [ILP], which failure, in the opinion of the referring court, would threaten the stability of the European Union”, and the court decided that the protection of the Second Directive for shareholders did not extend to such a national measure adopted “...in a situation where there is serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.” (paragraph 50).

172. That being said, in the appeal of the main proceedings before this court, Hogan J. accepted that the guiding test to be applied to an administrative decision such as a direction order under the 2010 Act was “in substance the proportionality test articulated in *Heaney v. Ireland* [1994] 3 I.R. 593” – see paragraph 140. But the principle of proportionality in this context relates to the scope of review and test of reasonableness to be applied by the High Court when undertaking its substantive

consideration of a direction order. It does not seem to me to be relevant to consideration of the issue of *locus standi*, or to assist the appellants in their argument that, notwithstanding the plain meaning of s.11(1) 2010 Act, they should be granted standing.

173. Mr. Skoczlyas argued that the refusal of *locus standi* breaches the Community law principle of effective protection, as elucidated by the CJEU in *Unibet*, C-432/05, 2007 I-02271. He argued that “...your hands are bound. You have to allow judicial oversight of decisions, administrative decisions of the State”.

174. *Unibet* was a preliminary reference from the Swedish District Court as to whether a relevant legislative provision, which made promotion or participation in a lottery organised abroad liable to the imposition of a fine and imprisonment if the promotion was targeted to residents in Sweden, was compatible with Community law and whether, where appropriate, that provision must be disapplied. The background was that the Swedish State had taken a number of measures, including obtaining injunctions and commencing criminal proceedings, against media who had agreed to provide Unibet with advertising space, prompting Unibet to sue the Swedish State seeking a declaration that it had the right under Article 49 EC to promote its gaming and betting services in Sweden, and was not prevented from doing so by the domestic prohibition.

175. The court summarised the first question asked as follows: -

“36. By its first question, the [Swedish Court] asks, in essence, whether the principle of effective judicial protection of an individual’s rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other legal remedies permit the question of compatibility to be determined as a preliminary issue.”

The court noted at the outset that the principle of effective judicial protection was a general principle of the Community law stemming from the constitutional traditions common to the Member States, which was enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (para. 37). It stated that –

“Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual’s rights under Community law...”

176. The court reiterated the role of domestic legal systems:

“39. It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law...”

Having noted that the EC Treaty made it possible in a number of instances for private persons to bring direct action, the court stated that “... it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law.” The court then proceeded –

“41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community Law (see, to that effect, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraph 16; and *Factortame and Others*, paragraphs 19 to 23)”.

177. There then follows two paragraphs which form the basis of Mr. Skoczlyas’ submission:

“42. Thus, while it is, in principle, for national law to determine an individuals standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, *inter alia*, joined Cases C-87/90 to C-89/90 *Verholen & Ors* [1991] ECR I-3757, paragraph 24, and *Safalero*, paragraph 50) It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Unión de Pequeños Agricultores v Council*, paragraph 41).

43. In that regard, the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by community law (principle of effectiveness) (see, *inter alia*, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).”

178. There are significant difficulties for the appellants in relying in isolation on these two paragraphs of the judgment in *Unibet*. In its reasoning the CJEU noted that while Swedish law did not provide for a free-standing action to challenge the validity of the national provision under Community law it nevertheless permitted individuals to obtain examination of compatibility in proceedings before the ordinary courts or administrative courts by way of a preliminary issue, and the local court was required to disapply the contested provision if it considered that it conflicted with Community rule. It noted that the detailed procedural rules governing actions brought under Swedish law for safeguarding an individual’s rights under Community law were no less favourable than the rules governing actions for safeguarding an individual’s rights under national provisions. Also noting that it would be necessary to establish that a national procedural provision rendered the application

of Community law “impossible or excessively difficult”, the court found that Swedish law did not prevent a person, such as Unibet, from disputing the compatibility of the national legislation with Community law and that there were various indirect legal remedies for that purpose. Thus Unibet could obtain an examination of compatibility in the context of a claim for damages before the ordinary courts, and such a claim had been brought and found by the Swedish court to be admissible. It was also found that Unibet could have sought judicial review, and that in such proceedings Unibet could seek a declaration of incompatibility. The court also noted that if administrative action or criminal proceedings were brought against Unibet it would have the opportunity in such proceedings to dispute the compatibility of the relevant national provisions with Community law.

179. This led the CJEU to answer the first question as follows: -

“65. Accordingly, the answer to the first question must be that the principle of effective judicial protection of an individual’s rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Article 49 EC, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish.”

180. This clearly does not support Mr. Skoczylas’ argument. Firstly, Article 34.3.1 of the Constitution vests the High Court “with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”, and it is therefore possible for an individual to bring a free-standing action challenging the validity of domestic legislation under the Constitution, or on the basis that it is incompatible with Community law. The appellants have in fact mounted a constitutional challenge to the 2010 Act, and s. 53 in particular.

181. Secondly, the appellants have brought proceedings under s. 205 of the Companies Act, 1963 alleging oppression by ILPGH, and within those proceedings it is open to the court to identify and

determine an issue as to the validity or otherwise of the March Direction Order, and if the applicants are successful it may will be open to the court to fashion an appropriate remedy.

182. Thirdly, in the injunction proceedings, the appellants have raised an issue as to the legality of the sale by ILP of Irish Life to the Minister under the March Direction Order, and whether that breached European Union law. Although the appellants failed to obtain an interlocutory injunction, the Supreme Court has made it clear that it would be open to the appellants to seek to amend their pleadings in order to claim damages for (alleged) diminution in the value of their shareholdings in ILPGH. For the purposes of such a claim it would be open to the High Court in those proceedings to determine as an issue the legality of the March Direction Order.

183. This demonstrates that Irish law respects the appellants' right to effective judicial protection, and that it provides for detailed procedural rules for safeguarding their rights as shareholders in ILPGH that are no less favourable than those governing similar domestic actions. Mr. Skoczlyas emphasises in his argument that national procedural rules "must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (paragraph 43, CJEU)". However the facility with which an action can be brought by Plenary Summons challenging the constitutionality of a provision of Irish legislation such as s.53 of the 2010 Act, or seeking a declaration of incompatibility with Community law, is in itself a complete answer to his argument. Further it is useful to recall what Clarke J. had to say on the effective remedy that is required by EU law, and in particular the appellants right to seek compensatory damages. In his judgment in the injunction proceedings he stated: [2013] IESC 37:

"13.4 In addition, for the reasons already analysed, it is necessary for this Court to consider whether such an eventuality might be said to deprive the appellants of an effective remedy as required by European Union law. However, it seems clear that a consideration of whether there is an effective remedy must be seen in the light of the jurisprudence of the ECJ which requires a balancing exercise to be engaged in in circumstances where the Court has to make

a decision at an interlocutory stage when the ultimate result of the proceedings is not clear. If the Court were considering this matter after it had been established that the Minister could not lawfully sell Irish Life then it might very well be the case that a failure to put in place measures which prevented the sale of Irish Life would deprive the appellants of an effective remedy.

13.5 However, that is not the situation with which the Court was confronted. The Court was required to consider where the balance of justice lay in circumstances where it is necessary to recognise that granting the appellants the order which they seek also runs the risk of significant irreparable harm to the Minister and the national finances which the appellants acknowledge they will be unable to compensate. In those circumstances, it did not seem to this Court that a decision to decline to grant an interlocutory injunction could amount to a deprivation of an effective remedy. *That conclusion was, in the Court's view, reinforced by the fact that, for the reasons already analysed, the Court is satisfied that, as a matter of Irish law, the appellants, if they succeed, will be entitled to full compensation so that there should not, in reality, be any material difference in the value of their shareholding in Holdings as a result of a successful conclusion to these proceedings than there would have been had Irish Life remained in the ownership of Holdings itself.*"

184. It is also important to note that in paragraph 42 of *Unibet* the CJEU affirms the principle that it is for national law to determine an individual's standing and legal interest in bringing proceedings. It was therefore open to the Oireachtas to limit in s. 11(1) of the 2010 Act the opportunity for challenging a direction order, which is a creature of statute, to "the relevant institution" to whom the direction order is directed, or "members of that institution".

185. In that Mr. Skoczylas also argues that declining the appellants *locus standi* under s. 11(1) breaches their right to a remedy under the European Convention on Human Rights, it is well established that any such contention only falls to be decided after a determination on constitutionality.

The principle was summarised by Murray CJ. in *Carmody v Minister for Justice, Equality and Law Reform and Ors.* [2010] 1 IR 635, at p. 650 where he stated: -

“... When a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility with such Act or some of its provisions with the State’s obligations under the Convention, the issue of constitutionality must first be decided.”

It follows that it is not open to Mr. Skoczylas to pursue such an argument in the present appeal.

Foss v. Harbottle exceptions

186. I turn next to Mr. Skoczylas’ arguments based on exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461. The plaintiffs in that case were shareholders in a joint-stock company, and in that capacity sought to bring proceedings against certain directors, and the solicitor and architect of the company, charging the defendants with concerting and effecting various fraudulent and illegal transactions whereby it was alleged the property of the company was misapplied, alienated and wasted. The Vice-Chancellor, Sir James Wigram held that there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of, and that therefore the plaintiffs could not maintain the proceedings. He stated, at p.490:-

““It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative”.

The rule in *Foss v. Harbottle* has two limbs. The first, which is relevant to the present discussion, is that where a company has been wronged, the company not its shareholders, is the proper person to

institute proceedings. The second is that an individual shareholder, or shareholders, may not bring proceedings to overturn a decision of the company where that decision is one which a majority of the members may confirm. Courtney in *The Law of Private Companies* (Second Edition, Tottel, 2002) explains the reason for the rule:-

“[19.084] The rationalisation of the rule in *Foss v. Harbottle* on the basis of the company’s separate legal personality, as seen in the judgment of the English Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2)* and the Supreme Court’s endorsement thereof in *O’Neill v. Ryan*, is indicative of a ‘back to basics’ approach. Notwithstanding that CA 1963, s. 205 has driven a horse and four through the rule, the Supreme Court’s recent endorsement of the rule has ensured its immediate survival in Irish Company law.”

187. In *O’Neill v. Thomas Ryan, Ryanair Ltd & others* [1993] ILRM 557 the plaintiff claimed that alleged conduct of the last four defendants, Aer Lingus plc, David Kennedy, GPA Group Ltd. and Transport Analysis Inc., caused damage to a Ryan Air Limited, and thereby to the plaintiff, by reducing the value of his shareholding in the second defendant. The plaintiff (who was a former CEO of Ryan Air Ltd.) claimed for damages for breach of contract and wrongful dismissal and also for alleged breaches of Articles 85 and 86 of the Treaty establishing the EEC, resulting from the adoption by Aer Lingus plc of anti-competitive practices and policies, which infringed the rules of competition and abused a dominant position. The last four defendants brought a motion to dismiss the action against them on the ground that the claim disclosed no reasonable cause of action, and submitted that the rule in *Foss v. Harbottle* applied.

188. Lynch J. in the High Court agreed. He rejected the contention that the rule in *Foss v. Harbottle* did not apply to a cause of action based on breach of the Treaty competition rules, causing damage to

the company in which the plaintiff was a shareholder. In his judgment, reported at [1990] I.L.R.M. 140, p.148 Lynch J. states:-

“It is therefore clear that I must give effect to Articles 85 and 86 of the Treaty but it is also well settled that effect must be given by the national courts in like circumstances and subject to like limitations as would be applied by the national courts to an analogous cause of action in national law, it being clearly understood however that no limit which would wholly or substantially negative the enforcement of Articles 85 and 86 in Irish law could be applied.... The rule in *Foss v. Harbottle* does not wholly or substantially negative the effectiveness or enforceability of Articles 85 and 86 in Irish law. Breaches of those Articles can be challenged by the company which is the victim of the breaches. The rule merely prohibits persons who are not directly affected by the breaches from maintaining an action which is more properly to be maintained, if at all, by the company in which such persons are shareholders. The desirability of avoiding a multiplicity of actions perhaps in many cases contrary to the will of the directors and/or the majority of shareholders is obviously a major factor in the thinking underlying the rule in *Foss v. Harbottle* and demonstrates the sound sense of that thinking.”

189. Mr. Ryan, as in the present appeal, also presented a petition under s.205 of the Companies Act 1963. By the time the Supreme Court heard the appeal, the s.205 proceedings had been settled, one of the terms being that the plaintiff's shares in Ryan Air were purchased by some of the respondents to the petition, and accordingly the plaintiff was no longer a shareholder. The plaintiff nevertheless submitted that he came within one of the exceptions to the rule in *Foss v. Harbottle*, and alternatively that he had rights under directly applicable provisions of community law which must entitle him to a remedy under national law.

190. Blayney J. (Finlay CJ, Egan and Denham JJ concurring) held that the plaintiff's claim fell entirely outside the rule in *Foss v. Harbottle* and any exception to it. He stated:-

“The exceptions made to the rule, which allow minority shareholders to bring a derivative or representative action, are made in order to ensure that a majority in control of the company should not be able with impunity to act illegally or oppressively or in such a way as to commit a fraud on the minority. But where a derivative or representative action is permitted as an exception to the rule, the action is brought in respect of damage to the company. Instead of the company itself bringing the action in respect of such damage, the exceptions permit one or more minority shareholders to bring it. But the action is always brought in respect of damage to the company.

The plaintiff’s claim here is not in respect of damage to the company. It does not purport to be a representative or derivative action. It is a claim in respect of alleged damage to his shareholding in the company. Because of this it is totally different from the type of claim with which the rule is concerned. It cannot be an exception to the rule because it is not a claim in respect of damage to property.”

191. Both Blayney J. and O’Flaherty J. (Finlay CJ and Egan J concurring) endorsed the rule in *Foss v. Harbottle*, quoting from the decision of the English Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2)* [1982] Ch 204, at 224, where it was stated:-

“A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is a consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes

of the company by the exercise of his voting rights in general meetings. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the articles of association.”

192. More recently the rule in *Foss v. Harbottle* was endorsed by the Supreme Court in *Madden v. Anglo Irish Corporation Plc v. William Lacey* [2005] 1 ILRM 294. Denham J. (nem diss.) held that no relevant distinction may be drawn in law between a public and private company established for a joint venture, so as to exclude the latter company from relevant principles of company law. She held that the principle rooted in *Foss v. Harbottle*, that where a wrong has been done to a company the correct plaintiff is the company, applies to both public and private companies. She proceeded:-

“... Considering the statement of claim it is clear that the action taken by the appellant is a reflection of the loss suffered by the company. This is seen starkly in paragraph 9 of the statement of claim where the appellant pleaded that by reason of the aforesaid paragraphs the plaintiff as a substantial shareholder in and creditor of the company has suffered loss and damage. It is thus a reflective claim and as such the appellant is not entitled to sue, it is for the company to sue. Consequently I would dismiss this aspect of the appeal also.”

193. At the level of principle it seems to me that the rule in *Foss v. Harbottle* has no application to the present proceedings because they do not constitute a claim to recover loss or damage alleged to have been suffered by ILP or ILPGH, or likely to be suffered by ILP arising from approval of the March Direction Order. Equally they do not constitute a claim of diminution in the value of ILPGH’s shareholding in ILP if the March Direction Order is approved. What they do concern is an entirely statute made right, limited by the wording used in s.11(1), to seek to have a direction order set aside or varied. Furthermore, in seeking to avail of s.11(1), the appellants are seeking to prevent a direction

order which they perceive would damage/diminish the value of their shareholdings in ILPGH; in other words they are motivated by self-interest, not by damage to ILPGH or ILP.

194. To the extent that the rule in *Foss v. Harbottle* is engaged, I agree with the Minister's submissions that s.11(1) may be regarded as generating a limited exception to the rule that a shareholder generally cannot sue on behalf of the company of which they are a member. Indeed at para. 4.1.14 of his written submissions Mr. Skoczylas appears to accept that "s.11 of the 2010 Act is a statutory exception to the *Foss v. Harbottle* rule." Its effect is to allow members of "the relevant institution" an opportunity to challenge direction orders made in respect of the institutions of which they are members. Absent the reference to "member" in s.11(1), a member of a relevant institution would not be entitled to take proceedings in respect of direction orders aimed at the company concerned. This right in members, created by s.11(1), is an exception to the general rule, and I agree with the submission that this is a further reason for adopting a narrow construction of the phrase "the relevant institution in relation to which a direction order is made or a member of that institution...".

195. To the extent that rule in *Foss v. Harbottle* may have any application, Mr. Skoczylas relies on exceptions identified by Mr. Courtney, *Op.Cit.* at para. [19.107] where it is stated:-

"...the five supposed exceptions are said to be:

- (a) Where an *ultra vires* or illegal act is perpetrated.
- (b) Where more than a bare majority is required to ratify the "wrong" complained of.
- (c) Where the members personal rights are infringed.
- (d) Where a fraud has been perpetrated upon a minority by those in control.
- (e) Where the justice of the case requires a minority to be permitted to institute proceedings."

Mr. Skoczylas relies on (a), (c), (d) and (e).

196. As to (a), Mr. Skoczylas has never identified how he alleges that the sale by ILP of Irish Life was *ultra vires*. It was also not clear from his submissions as to how he alleges that such a proposed sale would be illegal, but so far as I am able to glean from his submissions generally this is a reference to the use of the direction order process, and the limiting of the March Direction Order to ILP, in order to avoid a general meeting as required by the ESM rules. I have addressed this earlier in this judgment, and I don't propose to repeat my conclusions save to state that s.53 of the 2010 Act clearly provides that any order made under the Act has effect notwithstanding anything *inter alia* in “(d) the listing rules of any regulated market or the rules of any other market on which the shares of a relevant institution may be traded from time to time.”

197. Mr. Skoczylas also relies on exception (c), which arises where members' personal rights are infringed. However the appellants are not shareholders in ILP, and have no personal rights, such as the right to vote at general meetings, in that company.

Regarding exception (d), Mr. Skoczylas alleges that “the Minister perpetrated ‘fraud’ on minorities” (para. 4.1.16 of his written submission). He urges on the court the meaning of “fraud” adopted by Courtney *Op.Cit.* at [19.0121]:-

“There exists many general judicial statements of what a majority of shareholders is not permitted to do: They may not ‘appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate’ or may not ‘put something into their pockets at the expense of the minority’. The ordinary meaning of the word ‘*fraud*’ has little application to the concept of ‘fraud’ on the minority. Rather, as *Keane* has said [Keane, *Company Law* (3rd Edn., 2000) at para. 26.15], “fraud” in this context does not necessarily involve any element of dishonesty, let alone criminality”. This has been endorsed by the Supreme Court in *Balkenbank v. Taher* [19th January 1995, Unreported). Fraud on a

minority has been found to exist in a number of diverse situations, including varying degrees of moral turpitude.”

Under this exception a minority of company shareholders may take a derivative action on behalf of the company where the majority in control of the company perpetrate a fraud on the minority.

198. I would reject this submission. Firstly, as already explained, s.11(1) is a statutory provision which does not sit easily with the principle in *Foss v. Harbottle*, or the common law exceptions that allow a derivative action. Secondly, the company to which the March Direction Order is directed is ILP in which the appellants do not hold any shares. Thirdly, Courtney in *Op.Cit.* at [19.116] identifies that “this exception can only provide relief to the company concerned: it is not intended to provide the minority shareholders with relief.”

Courtney further states:-

“[19.117] The case law which has been built up around this exception typically involves the *expropriation* or *appropriation*, to use two expressions found in other text books, of corporate property by a majority who are in a controlling position.”

199. Thus the exception is not one that can be availed of by minority shareholders seeking relief on their own account as opposed to seeking relief on behalf of the company of which they are a member.

200. Moreover it cannot be said that the company of which the appellants are a member, ILPGH, is involved in any expropriation or appropriation of property owned by it.

201. Furthermore, if the effect of the March Direction Order is to direct a sale of Irish Life at an undervalue, that is a loss suffered by ILP, not a loss of its shareholders ILPGH or members of that holding company. I agree with the following observation of the trial judge at para. 70:-

“In the present case, if an asset of ILP is unfairly or unlawfully expropriated at undervalue, and is unfairly and unreasonably deprived of an opportunity or re-sale of Irish Life at any later

stage it is ILP which suffers the loss. Under traditional and well-established principles any remedy that may be available is one to be pursued in the name of ILP. Exceptionally, s.11(1) provides that its shareholder may also do so in relation to set aside application. But the section goes no further than that in making an exception to the normal rule.”

202. Finally, insofar as the appellants assert that they have, or will, suffer loss, in terms of diminution of the value of their shareholding, by reason of the fact that ILPGH did not oppose or object to the proposed Direction Order, or itself bring a s.11(1) application to set aside, that is a claim that can be addressed and determined, and if appropriate compensation awarded, within the injunction proceedings (if appropriately amended to include a claim to damages) and/or the s.205 petition proceedings brought by the appellants. In other words, even if they could demonstrate fraud, in the sense identified by Courtney and Keane, the appellants are not left without a remedy under domestic law if they can show that they have suffered loss/damage or oppression by reason of the acts or inaction of ILPGH.

Second Directive

203. Mr. Skoczylas in his various submissions makes numerous references to shareholder rights under the Second Council Directive (77/91/EEC) which was adopted to coordinate safeguards for the protection of the interests of shareholders in public limited companies. In the substantive claim in the main proceedings Mr. Skoczylas and his co-applicants argued that the July 2011 Direction Order breached Articles 8(1) (shares are not to be issued at a price lower than their nominal value or, if none, their accountable par), Article 25 (increases in capital in general should be decided at a general meeting of shareholders), and Article 29 (that, in essence, in the event of an increase in share capital the shares must be offered on a pre-emptive basis to the existing shareholders). This was the subject of the preliminary reference by O’Malley J., and the ruling of the CJEU was that these Articles did not preclude a measure such as the July 2011 Direction Order “where there is a serious disturbance

of the economy and financial system of a Member State threatening the financial stability of the European Union”. O’Malley J. followed this with a dismissal of the main proceedings, which order was later affirmed by this court.

204. It will be apparent from the subject matter of Articles 8, 25 and 29 that they relate to share issues and capital increases, and were therefore of possible relevance to the validity of the July 2011 Direction Order, although there was considerable dispute before this court as to whether EU law/the Second Directive was ‘engaged’ at all as the 2010 Act was not a measure implementing an EU directive or regulation. Hogan J. was of the view that it was not ‘engaged’, although this appears to have been *obiter*.⁶ It is not, however, necessary to decide that point in these proceedings.

205. What can be said is that the March Direction Order is not concerned with share issues or increases in share capital, and in my view it is clear that Articles 8, 25 and 29 are not ‘engaged’ in this appeal.

206. Mr. Skoczylas also made submissions based on Articles 15(1)(c) and 16 of the Second Directive. Article 15 concerns distributions to shareholders and sub-article (1)(c) provides that the amount of a distribution to shareholders “may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with law or the statutes.” Article 16 provides that any distribution contrary to Article 15 must be returned to the company by the shareholder who received it.

⁶ In the appeal in the main proceedings Hogan J. stated –

“104. At the same time EU law, broadly speaking, deferred to national law as to the *manner* in which the recapitalisation was to be achieved. The 2010 Act was an autochthonous item of legislation enacted by the Oireachtas. Since, moreover, the appellants’ main complaints centred on the *manner* in which the recapitalisation was effected by the provisions of the 2010 Act and the direction order, I consider that the issues which fall to be determined on this appeal are substantially governed by domestic law.

105. As it happens, nothing really greatly turns on whether domestic or EU law provides [sic] governs this aspect of the application because the essential challenge in this case is to the proportionality of the direction order....”

These points were not raised in pleadings, or in the High Court, and Mr. Skoczylas' submissions in relation to them were based on evidence that was not before the High Court – and based on “expert evidence” that he sought to introduce in his supplemental affidavit sworn on 18 July, 2019. Furthermore in my view they do not have any bearing on the *locus standi* issue. For all these reasons it is not necessary to address arguments made by Mr. Skoczylas based on Article 15 or 16, or the Second Directive more generally.

207. In any event I have addressed in some detail (and rejected) the EU law arguments for *locus standi* that were entertained, based firstly on ESM Rule 15 (whether having its origin in EU Directive 2001/34/EC, or in MiFID, or in neither), requiring a general meeting of ILPGH, and secondly on the Community law general principle of effective remedy as expounded by the CJEU in *Unibet*. In so doing I have borne in mind at all times that the March Direction Order was carried through as part of the recapitalisation required by the Council Implementing Decisions, which were decisions made pursuant to Council (EC) No.407/2010, and therefore binding on the State under EU law (such that breach would expose the State to a risk of penalties pursuant to Article 260 of TFEU).

Reference

208. Mr. Skoczylas asks the court to make a preliminary reference to the CJEU under Article 267 on the issue of *locus standi* “if we have any doubt about the matter.” However, as I have made plain, the correct interpretation of s.11(1) is that the appellants do not have *locus standi*, and this is clear and unambiguous; to find otherwise would be to interpret s.11(1) *contra legem*, which is something that even a purposive interpretation in conformity with Community law would not require. I am of the view therefore that a preliminary reference is not warranted and is not required to determine this appeal.

Conclusion

209. I would therefore affirm the decision of the trial judge that the appellants do not have locus standi under s.11(1) to seek to set aside the March Direction Order. In light of this it is not necessary or appropriate to consider or determine the substantive arguments raised by the appellants and I would dismiss the appeals.

210. The court has yet to hear argument in relation to the appeal from the order of Peart J. awarding costs in the High Court to the Minister and the notice party against the applicants, and a short hearing should be arranged for that purpose. If after considering this judgment this remains a live issue application should be made to the Court of Appeal office within 21 days from the electronic delivery of this judgment and a short hearing will be arranged for that purpose.

176. As has become usual where judgment is delivered electronically, I will indicate the order that I would propose to make in relation to the costs of these appeals. As the Minister and the notice party were “entirely successful” in these appeals within the meaning of that term in s.169(1) of the Legal Services Regulation Act, 2015 they are entitled to their costs of the appeals, such costs to include all reserved costs, and such costs to be adjudicated by a legal costs adjudicator in default of agreement. In the event that any party wishes to contend for some other order as to costs of the appeals that party should so notify the Court of Appeal office within 21 days from the date of electronic delivery of this judgment and a short hearing will be arranged.

Binchy and Pilkington JJ. have indicated their agreement with this judgment that orders that are proposed.

