

# THE HIGH COURT

[2020 No. 4217 P]

**THE PRESIDENT  
MCDONALD J.  
HYLAND J.**

**BETWEEN**

**SENATOR IVANA BACIK, SENATOR VICTOR BOYHAN, SENATOR GERARD  
CRAUGHWELL, SENATOR ANNIE HOEY, SENATOR SHARON KEOGAN,  
SENATOR MICHAEL MCDOWELL, SENATOR REBECCA MOYNIHAN,  
SENATOR RONAN MULLEN, SENATOR MARIE SHERLOCK  
AND SENATOR MARK WALL**

**PLAINTIFFS**

**AND**

**AN TAOISEACH, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**Judgment of the Divisional Court delivered on 29<sup>th</sup> June 2020**

## **The issue before the court**

1. While a number of constitutional issues arise for consideration in these proceedings, the most fundamental issue before the court relates to whether Seanad Éireann may sit as a House of the Oireachtas notwithstanding the fact that, at the date the proceedings were brought and heard, the complement of Senators was composed solely of those recently elected under Article 18.4 and did not include the eleven Senators to be nominated under Article 18.3 by the incoming Taoiseach (who had yet to be appointed, on the nomination of Dáil Éireann, under Article 13.1).

2. It should be noted that, after completion of the hearing on 25<sup>th</sup> June 2020, Micheál Martin was elected Taoiseach of the 33<sup>rd</sup> Dáil on 27<sup>th</sup> June 2020 and, on the same day, he appointed eleven senators to Seanad Éireann. The question of whether the Seanad can sit as a House of the Oireachtas in the absence of the nominated senators is accordingly no longer a

live one as of the date of delivery of this judgment. Nonetheless, the issues which were so fully debated before us in the course of the hearing on 24<sup>th</sup> and 25<sup>th</sup> June 2020 could arise again and might affect one or more of the plaintiffs in the same way in future. Moreover, it is undoubtedly a question of exceptional public importance. Accordingly, notwithstanding the events of 27<sup>th</sup> June 2020, we have decided to determine the issues raised.

### **How the issue arose**

3. The issues arose against the backdrop of the general election which took place on 8<sup>th</sup> February 2020 for Dáil Éireann and the consequent general election for the Seanad which commenced on 30<sup>th</sup> March 2020. In the latter election, forty-nine senators were elected to the Seanad. That did not complete the complement of sixty senators contemplated by Article 18 of the Constitution. The remaining eleven senators were not nominated until 27<sup>th</sup> June 2020 following the election of Micheál Martin as Taoiseach on the same date.

4. During the interregnum between the election on 8<sup>th</sup> February 2020 and the election of Micheál Martin on 27<sup>th</sup> June 2020, the outgoing Taoiseach continued to perform the duties of that office in accordance with Article 28.11 of the Constitution. However, as explained in more detail below, a continuing Taoiseach, performing duties under Article 28.11, does not have the power under Article 18.3 to nominate the eleven nominated senators. That power resides solely in a newly elected Taoiseach.

### **Relevant facts**

5. Under Article 18.8 of the Constitution a general election for Seanad Éireann is required to take place not later than 90 days after a dissolution of Dáil Éireann. For that reason, a general election to the Seanad was occasioned by the dissolution of Dáil Éireann by proclamation of the President dated 14<sup>th</sup> January 2020. The same proclamation also summoned the newly-

elected Dáil to meet on 20<sup>th</sup> February 2020. Following the President's proclamation, a general election to Dáil Éireann took place on 8<sup>th</sup> February 2020.

6. The polling day for the general election to the Seanad was duly fixed for 30<sup>th</sup> March 2020. In the intervening period up to 29<sup>th</sup> March 2020 those persons who were members of Seanad Éireann immediately prior to the dissolution of the Dáil, continued to hold office in accordance with the provisions of Article 18.9 (which expressly provides for the continuance in office of outgoing senators until "*the day before the polling day of the general election for Seanad Éireann*").

7. Because the members of the Seanad continued to hold office up to 29<sup>th</sup> March 2020, and because the incoming Dáil could sit and vote, despite the fact that no new Taoiseach had been elected, legislation could be enacted in the normal way up to 29<sup>th</sup> March 2020. However, from that date, the outgoing senators no longer held office and could not therefore participate in the legislative process. As a consequence, no further legislation could be enacted as Article 20 stipulates a role for both Houses of the Oireachtas in the enactment of legislation.

8. In the course of the general election for the Seanad, each of the plaintiffs was elected a member of Seanad Éireann. However, the first meeting of the Seanad after the general election has not yet taken place. Under Article 18.8, the first meeting of the Seanad is to take place on a day to be fixed by the President on the advice of the Taoiseach. Article 18.8 provides as follows:

*"A general election for Seanad Éireann shall take place not later than ninety days after a dissolution of Dáil Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach".*

9. Article 18.1 prescribes the composition of the Seanad and provides as follows:

“1. *Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members*”.

10. As noted above, in accordance with Article 28.11, the Taoiseach in office at the date of dissolution of the Dáil on 14<sup>th</sup> January 2020 continues to carry out the duties of Taoiseach and to hold office until his or her successor has been elected by the Dáil. Article 28.11 of the Constitution makes this clear, providing as follows:

“1. *If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed.*

2. *The members of the Government in office at the date of a dissolution of Dáil Éireann shall continue to hold office until their successors shall have been appointed.*”

11. Although the Taoiseach in place prior to the election of 8<sup>th</sup> February 2020 continued to act in accordance with Article 28.11, he did not have power to nominate those members of the Seanad who, in accordance with Article 18.3, are required to be nominated, with their prior consent, by the Taoiseach. The language of Article 18.3 makes this clear. It requires that the nomination is to be made by the incoming Taoiseach:

“3. *The nominated members of Seanad Éireann shall be nominated, with their prior consent, by the Taoiseach who is appointed next after the re-assembly of Dáil Éireann following the dissolution thereof which occasions the nomination of the said members*” (emphasis added).

12. Notwithstanding that no Taoiseach had yet been elected by Dáil Éireann (with the consequence that no appointments had yet taken place of the eleven members to be nominated by that Taoiseach to the Seanad) the plaintiffs took the view that, nonetheless, the remaining

forty nine members of the Seanad elected in the Seanad general election could meet and legislate and that, accordingly, the Oireachtas was not debarred from functioning as a legislature.

### **The correspondence that took place prior to the proceedings**

13. The plaintiffs believe that, under Article 18.8, the continuing Taoiseach had the necessary power and competence to advise the President to fix a date for the first meeting of the Seanad. In advance of the commencement of these proceedings, the plaintiffs made that case to the Taoiseach, in a letter dated 5<sup>th</sup> June, 2020, in which they intimated that they intended to seek declaratory relief from this court unless *“it is clarified that you share our understanding on this issue and consider yourself constitutionally free to advise the President to fix a day for the first meeting of the newly elected Seanad in early course”*.

14. The view expressed by the plaintiffs in the letter of 5<sup>th</sup> June 2020 was contested by the Taoiseach in his response of 10<sup>th</sup> June 2020. In that letter, the Taoiseach drew attention to the provisions of Article 18.1 and suggested that, until a newly elected Taoiseach nominates eleven members to the Seanad, it is not properly composed in accordance with Article 18.1 and that until the Seanad is fully composed in accordance with the provisions of that Article, the Oireachtas itself is not fully composed in accordance with Article 15.1.2 of the Constitution and does not have the requisite power to legislate. For completeness, it should be noted that Article 15.1.2 provides as follows:

“2. *The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann”*.

15. Notwithstanding the view set out in his letter of 10<sup>th</sup> June 2020, the Taoiseach suggested that, if the plaintiffs made a submission in more detail setting out the legal basis for their

position, he would ask the Attorney General to consider the submission and to advise further on the issue. In the concluding paragraph of his letter, the Taoiseach stated that he agreed that the issue raised by the plaintiffs is an important point of law *“that needs to be clarified due to the fact that necessary legislation may need to be enacted in the coming weeks”*.

16. Thereafter, on 11<sup>th</sup> June 2020, the plaintiffs wrote to the Taoiseach setting out the basis for their position in more detail. In the letter, the plaintiffs maintained that there was no constitutional prohibition on or impediment to the current Taoiseach advising the President to fix a day for the first sitting of the Seanad in advance of the appointment of the remaining eleven senators to be nominated by the incoming Taoiseach. In making that case, they relied on a number of factors including the Irish language version of Article 18.1 (addressed in more detail below). They also relied on the fact that, in contrast to Article 18.3 (which specifically states that the appointment of the eleven nominees to the Seanad by the Taoiseach can only be done at the behest of the newly appointed Taoiseach to be elected by the Dáil), Article 18.8, dealing with the fixing of the date of the first Seanad meeting, contains no such restrictions. The correspondence concluded with a letter from the Taoiseach dated 13<sup>th</sup> June 2020 in which he stated:

*“I am advised that none of the points that you make alter the fundamental underlying principle stated in Article 18.1 of the Constitution. As there is no Taoiseach elected by the 33<sup>rd</sup> Dáil, the 11 nominated members of the new Seanad cannot be nominated. Therefore, I am not in the position of being able to advise the President of the day to be fixed for the first meeting of the Seanad pursuant to Article 18.8 of the Constitution”*.

### **The proceedings subsequently commenced by the plaintiffs**

17. The plaintiffs were unhappy with the response received from the Taoiseach on 13<sup>th</sup> June 2020. These proceedings were commenced by them by plenary summons issued on 15<sup>th</sup> June

2020. On the following day an *ex parte* application was made by counsel for the plaintiffs to Kelly P. for an early hearing date. To allow for the exchange of pleadings and legal submissions, the matter was listed for hearing before the High Court on Wednesday and Thursday 24<sup>th</sup> and 25<sup>th</sup> June 2020. The parties agreed that the case could be heard and determined without evidence and by reference to the provisions of the Constitution and the relevant legal principles.

**The claim made by the plaintiffs in the proceedings**

18. In their statement of claim, the plaintiffs set out that they were each elected to the Seanad in the recent general election and they maintain that they hold office as members of the Seanad. They contend that the forty-nine elected members of the Seanad are constitutionally capable of meeting and legislating notwithstanding the fact that, at the time the proceedings had been brought, the eleven members to be nominated by the incoming Taoiseach had yet to be appointed. While they accept that a continuing Taoiseach, carrying out duties under Article 28.11, does not have the power to nominate the eleven senators to be appointed under Article 18.3, they claim that the Houses of the Oireachtas are not debarred from functioning as a legislature as a consequence of the “*delay*” which occurred in the Dáil’s nomination of a Taoiseach.

19. The plaintiffs make the case that, in contrast to the Dáil (which was dissolved in accordance with Article 13. 2 prior to the general election which took place in February 2020), the Seanad continues in existence notwithstanding any delay in the appointment of its elected members or nominated members.

20. The plaintiffs expressed concern about the imminent lapse of certain provisions of the Offences against the State (Amendment) Act 1998 (“*the 1998 Act*”) which, if they are to remain in force, must be renewed by resolutions of the Dáil and Seanad not later than 29<sup>th</sup> June

2020. They also expressed concern that, unless meetings of the Seanad take place, delegated legislation in the form of ministerial regulations and statutory instruments will be incapable of scrutiny by the elected members of the Seanad.

**21.** Although the plaintiffs, in their statement of claim sought a series of declarations, for the reasons discussed further below, they confined themselves at the hearing to the declarations sought at paragraphs 4 and 5 of the plenary summons:

- (4) that the nomination of eleven members of Seanad Éireann by a Taoiseach appointed next after the re-assembly of Dáil Éireann following the dissolution thereof is not a constitutional pre-requisite to the sitting, meeting and/or functioning of the Seanad;
- (5) that the nomination of eleven members of the Seanad by a Taoiseach appointed next after the re-assembly of Dáil Éireann following the dissolution thereof is not a constitutional pre-requisite to the passing of legislation by the two Houses of the Oireachtas.

### **The defence of the defendants**

**22.** The main points in the defence delivered on behalf of the defendants are as follows:

- (a) As of the date of delivery of the defence, the defendants deny that the plaintiffs held office as Senators. This plea is expressly made in circumstances where the President, on the advice of the Taoiseach, had not yet fixed a date for the first meeting of the Seanad in accordance with Article 18.8. The defendants make the case that the plaintiffs would not hold office until the first sitting of the Seanad composed in accordance with Article 18.1;
- (b) The defendants contend that the Seanad had not yet been fully composed as required by Article 18.1 and that it cannot be fully composed until the Taoiseach



next appointed after the dissolution of the Dáil on 14<sup>th</sup> January 2020, has nominated eleven members to the Seanad in accordance with Article 18.3;

- (c) The case is made in the defence that, in deciding that he was not in a position to advise the President to fix a day for the first meeting of the Seanad (having regard to the fact that eleven of the 60 members who composed the Seanad could yet be nominated) the Taoiseach's "*exercise of discretion was in accordance with Article 18 of the Constitution*".
- (d) In para. 12 of the defence, the proposition is advanced that it is not that the terms of the Constitution prevent a Taoiseach (continuing to carry out his duties under the terms of Article 28.11.1) from advising the President to fix a date for the first meeting of the Seanad or that there is a constitutional prohibition on his doing so; rather it is the "*absence of a reasonable certainty regarding the appointment of a new Taoiseach and a fully composed Seanad which informs the First Named Defendant's approach when exercising his discretion to advise the President*". The defendants therefore accept that a Taoiseach continuing under Article 28.11.1 could, in theory, advise the President to fix a date for the first meeting of the Seanad but they argue that the Taoiseach was entitled to refuse to do so in circumstances where the Seanad has not been fully composed and there is no certainty as to when its composition will be complete.
- (e) The case is thereafter made in paras. 16-18 of the defence that the Oireachtas cannot enact primary legislation without a fully composed Seanad. The defendants contend that the Seanad is not properly composed and is not capable of meeting and transacting business until all sixty members have either been elected or nominated.

- (f) The defendants maintain that it would be contrary to Article 18 to suggest that a subset of forty nine of the sixty members of the Seanad could convene and do business before the Seanad is properly composed. By analogy, they contend that it would be equally contrary to Article 18 if the eleven Taoiseach's nominees convened and proceeded to do business. The defendants maintain that the Seanad must be fully constitutionally composed in accordance with the express provisions of Article 18.1 before it may conduct business. Once fully composed, the number of sitting members may vary by casual vacancy from time to time due to deaths and retirements, but it must be constitutionally composed at the outset in accordance with Article 18.1 before having the ability to sit and exercise its legislative functions.
- (g) With regard to the case made by the plaintiffs that the Seanad remains in existence and is not dissolved (in the same way as the Dáil) the defendants draw attention to the way in which the Constitution mandates that the Seanad will have no members on the polling day of a general election for the Seanad. This follows from the provisions of Article 18.9. The defendants contend that, by extension, there is no Seanad in existence on the date of the general election for the Seanad and that the Seanad is not perpetually capable of meeting and legislating.
- (h) In para. 21 of the defence, the defendants also seek to maintain that, through custom and practice and/or the Standing Orders of the Seanad, the first meeting of a new Seanad will not occur until the Seanad is fully composed of "*elected*" and "*nominated*" members.

**The reply of the plaintiffs to the defendants' defence**

23. In their reply, the plaintiffs asserted that they hold office as members of the Seanad and as members of the Oireachtas by virtue of certificates of election issued by the three returning officers for the vocational panels, the University of Dublin panel, and the National University of Ireland panel issued between 30<sup>th</sup> March, 2020 and 3<sup>rd</sup> April, 2020 as provided for in law enacted under Article 18.10 (which provides that elections of the elected members shall be regulated by law). They also rejected any suggestion that their status as senators is dependent on any Standing Orders adopted by the Seanad prior to their election.

24. The plaintiffs reiterated their case that the Seanad "*as a constitutional institution*" is not dissolved by the holding of the general election and that, upon the conclusion of the general election for the Seanad (the elected membership of the Seanad having been appropriately certified by the returning officers), it then rested with the Taoiseach for the time being to advise the President to reconvene the Seanad by fixing a day for its first sitting and thereby to ensure continuance of a functioning Oireachtas for the purposes of Article 15. In this context, it should be noted that Article 15.2 provides that the sole and exclusive power of making laws is vested in the Oireachtas which, by virtue of Article 15.1.2 comprises the President and two Houses namely Dáil Éireann and Seanad Éireann.

25. With regard to the reliance by the defendants on the custom and practice of the Seanad, the plaintiffs maintained that neither the custom and practice of the Seanad nor Standing Orders adopted from time to time can properly determine or affect the constitutional status of the plaintiffs or influence the interpretation of the Constitution or constitute an aid to the interpretation of the Constitution.

### **Submissions of the Parties**

26. Before summarising the parties' submissions, it should be noted that there was some narrowing of the issues between the parties during the hearing. As outlined above, the plaintiffs, at the end of the oral hearing, confined the relief sought by them to the declarations summarised in para. 21 above being a declaration that the nomination of eleven members of Seanad Éireann is not a constitutional prerequisite to the sitting, meeting and/or functioning of Seanad Éireann and a declaration that the nomination of eleven members of Seanad Éireann is not a constitutional prerequisite to the passing of legislation by the two Houses of the Oireachtas.

27. This was largely because the defendants accepted in their defence that a continuing Taoiseach was not debarred, as such, from exercising the power under Article 18.8 to advise the President to fix a date for the first meeting of the Seanad. Instead, they made the case that a continuing Taoiseach was entitled, as a matter of discretion, to do so. The narrowing of the issues was also facilitated by the position taken by the plaintiffs at paragraph 3 of their reply to the defence, where they indicated that they did not assert a contest in respect of the Taoiseach's exercise of such discretion, except that they had proceeded on the basis that the exercise of the Taoiseach's discretion regarding his powers under Article 18.8 was informed by the principal consideration that, as continuing Taoiseach, he could not nominate the eleven members and was therefore not able to advise the President of the day to be fixed for the first meeting of the Seanad. Because of this narrowing of the issues in the case, we think it unnecessary to focus in any detail on submissions made by either side in respect of the question of the discretion.

### **The submissions of the plaintiffs**

28. In their very helpful oral and written submissions, the plaintiffs maintain that the appointment of the Taoiseach's eleven nominees to the Seanad is not a pre-requisite to the first sitting of the Seanad. For this purpose, the plaintiffs place significant reliance on the way in

which Article 18.8 envisages that the timing of the advice by the Taoiseach to the President to fix a date for the first meeting of the Seanad is referable solely to the general election of the elected members of the Seanad. In making this argument, the plaintiffs maintain that they principally rely on a literal interpretation of Article 18.8. It is only in the event that the court is against them on the literal meaning of Article 18.8 for which they contend, that they rely, as a secondary argument, on a harmonious interpretation of Article 18.8 read in conjunction with the other sections of Article 18 and also in conjunction with Articles 5, 6, 15 and 16. They rely for that purpose on the observations of Henchy J. in *Tormey v. Ireland* [1985] I.R. 289 at pp. 295-296.

**29.** Before addressing the literal meaning of Article 18.8, counsel for the plaintiffs, in his oral argument, spent some time addressing what he characterised as a *volte face* on the part of the defendants. He strongly argued that the approach taken by the defendants in their defence as summarised in para. 22 (c) and (d) above was inconsistent with the case made by the Taoiseach in the correspondence addressed in paras. 14-16 above. He submitted that the correspondence suggested that the Taoiseach had indicated that, as a Taoiseach continuing in office solely under Article 28.11, he was prohibited by the Constitution from exercising the power available under Article 18.8 to advise the President to fix a date for the first meeting of the Seanad. In contrast, the defence expressly pleads that the Taoiseach has a discretion to exercise the power available under Article 18.8. Counsel argued that it was highly significant that it had been acknowledged in the defence that a Taoiseach, carrying out the duties of that office under Article 28.11, had a discretion to exercise the powers arising under Article 18.8 to advise the President to fix a date for the first meeting of the Seanad. He characterised this as “*one of the most important statements in the case*” and he submitted that the inevitable consequence is that Article 18.8 is triggered. Thus, he suggested that if the discretion were exercised and a date fixed for the first meeting of the incoming Seanad, any meeting of the

Seanad on that date would necessarily constitute a meeting of the Seanad for all purposes of the Constitution, even if the only members of the Seanad at that moment were the 49 elected senators.

**30.** In support of the literal meaning of Article 18.8 for which they contend, the plaintiffs draw attention, in particular, to the use of the words “*the first meeting of Seanad Éireann after the general election*” in Article 18.8. They argue that, if the Constitution had intended that the first meeting could not take place until after the appointment by the incoming Taoiseach of eleven nominees under Article 18.3, Article 18.8 would have used words such as “*the first meeting of Seanad Éireann after the composition thereof*”.

**31.** They also argue that their position is strengthened by the Irish language version of Article 18.8 which states:

*“Ní foláir olltoghchán do Sheanad Éireann a bheith ann lá nach déanaí ná nócha lá d’éis lánscoir do Dháil Éireann, agus ní foláir do Sheanad Éireann teacht le chéile ar chéad-tionól tar éis an olltoghcháin lá a chinnfidh an tUachtarán chuig ar chomhairle an Taoisigh”.*

**32.** It is important to keep in mind in this context that, under Article 25.5.4, the Irish language text of the Constitution has primacy in the event of conflict between the Irish and English language versions of the text.

**33.** The plaintiffs refer to the work by Professor Micheál Ó Cearúil, the author of “Bunreacht Na hÉireann: a study of the Irish text” which Hardiman J. described in *Roche v. Roche* [2010] 2 I.R. 321 as an extremely useful work of scholarship of the highest order. The study was written for the All Party Oireachtas Committee on the Constitution published in 1999. In that text, Ó Cearúil observes that the Irish language version of the words “*and the first meeting of Seanad Éireann a general election shall take place*” (from the English language text of Article 18.8) appear in the authoritative Irish text in the following form ‘*agus ní foláir*

*do Seanad Éireann teacht le chéile ar chéad-tionól tar éis an olltoghtháin*’ which Ó Cearúil translates as ‘*Seanad Éireann must come together for (its) first assembly after the general election*’. The plaintiffs emphasise the use of the word “*must*” and they argue that the Irish language version of Article 18.8 mandates the holding of the Seanad’s first meeting after the Seanad’s general election.

**34.** The plaintiffs argue that neither the Irish text nor the English text predicate the holding of the first meeting on the appointment of eleven senators on the nomination of the Taoiseach. They accordingly argue that there is no constitutional impediment to the President being advised to fix a date for the first sitting of the Seanad. They contend that this is consistent with a plain reading of Article 18.8.

**35.** With regard to Article 18.1, the plaintiffs draw a parallel between its provisions and those of Article 16.2.1 dealing with the Dáil. Article 16.2.1 states that:

*“Dáil Éireann shall be composed of members who represent constituencies determined by law.”*

**36.** According to the plaintiffs, both Article 18.1 and Article 16.2.1 describe the membership of each house of the Oireachtas. In the case of the Dáil, Article 16.2.1 does so by reference to geographic areas described as constituencies determined by law; in the case of the Seanad, Article 18.1 does so by reference to two categories of members, composed respectively of forty-nine elected members and eleven nominated members.

**37.** The plaintiffs argue that the principal purpose of Article 18.1 is to delineate and describe two distinct categories of senators. They submit that, when Article 18.1 is construed in conjunction with Article 16.2.1 (dealing with the composition of the Dáil), it does not mandate or prescribe a minimum numerical membership of the Seanad; rather it prescribes a numerical maximum on each of the two categories of member. They argue that, if Article 18.1 had been intended to set a minimum number of members, it would have been framed in the

same language as Article 16.2.2 (which states that the total number of members of the Dáil shall not be fixed at less than one member for each 30,000 of the population). Had that been the intention, Article 18.1 would have been framed as: “*the number of members of Seanad Éireann shall be sixty*”. In support of this position, the plaintiffs suggest that it is significant that the word “*number*” is not used in Article 18.1.

**38.** The plaintiffs also seek to rely on the Irish language text of Article 18.1 which states:

*“Seasca comhalta líon Sheanad Éireann, .i. aon duine dhéag a ainmneofar agus naonúr is daichead a thoghfar”.*

**39.** According to Ó Cearúil the words “*of whom*” used in the English language text of Article 18.1 are expressed, in the authoritative Irish language version by the abbreviation “.i.” which is the Irish language equivalent of “*i.e.*” (that is). The plaintiffs submit that this “*subtle difference*” supports the contention that the words “*composed of*” refer to categories rather than number of members of the Seanad.

**40.** In support of their submissions on this issue, the plaintiffs suggested that there is no difference, in substance, between a situation where the eleven Taoiseach’s nominees have yet to be appointed and cases where (a) there are one or more casual vacancies in the membership of the Seanad; or (b) where an elected or nominated member dies before the first sitting of the Seanad; or (c) where a member of the Seanad, subsequent to his or her election discovers that he or she is disqualified (as occurred in Australia in the circumstances discussed in *Re Canavan* [2017] HCA 45); or (d) where a Taoiseach appoints fewer than eleven nominated members under Article 18.3; or (e) where a Taoiseach fails or refuses to appoint any nominated members; or (f) where fewer than six senators are elected on the university panels in circumstances where the number of nominated candidates on one or both of the panels is fewer than the number of vacancies as envisaged by s. 18 (4) of the Seanad Electoral (University Members) Act 1937 (“*the 1937 Act*”).



**41.** In his oral submissions, counsel for the plaintiffs argued that Article 18.1 does not provide that all sixty senators are required to be present on day one. In certain circumstances, the Constitution envisages that a Seanad may subsist with 49 members. Where a Taoiseach has not yet been elected by the Dáil (and so the continuing Taoiseach acting under Article 29.11 is unable to nominate the eleven nominated members under Article 18.3), it is necessary to give Article 18.8 a sensible meaning as referring to the 49 elected senators. Had it been intended that a meeting of the Seanad could not take place until the eleven nominated members had been appointed, Article 18.8 would have expressly so provided.

**42.** The plaintiffs accept that the Taoiseach, acting under Article 28.11, cannot appoint the eleven nominated members of the Seanad and that such nominations cannot take place until a new Taoiseach is appointed under Article 13.1 on the nomination of Dáil Éireann. However, they argue that Article 18.8 envisages and accommodates the possibility of a time-lag between the election of the elected senators and the nomination of the nominated senators. They submit that it is not a requirement of the Constitution that the election of the elected members and the nomination of the nominated members must occur simultaneously. They argue that, since Article 18.8 envisages that the Seanad will sit after the election of its elected members, it can “*by implication*” sit before the nomination of the nominated members, if necessary.

**43.** In support of their contention that a Taoiseach continuing to carry out the duties of that office under Article 28.11 can advise the President to fix a date for the first meeting of the Seanad, notwithstanding the lack of any nominated members, the plaintiffs draw attention to the changes made to the original text of the Constitution by the Second Amendment of the Constitution Act, 1941 (which, in accordance with what was then Article 51 of the Constitution made a significant number of omnibus amendments to the text of the Constitution by means of an Act of the Oireachtas). These included amendments to Article 18.3 dealing with the nomination of senators. In its original form, Article 18.3 used the words “*nominated by the*

*Taoiseach with their prior consent*". These words were deleted by the Second Amendment and replaced with the words now found in Article 18.3:

*"... nominated, with their prior consent, by the Taoiseach who is appointed next after the re-assembly of Dáil Éireann following the dissolution thereof ..."*.

**44.** The plaintiffs stress that, despite having made this amendment to Article 18.3, the Oireachtas chose not to amend Article 18.8 in any respect and did not confine the power to advise the President to fix the day for the first sitting of the Seanad to a Taoiseach newly-appointed under Article 13.1.1.

**45.** The plaintiffs, in both their written and oral submissions, place significant emphasis on the democratic nature of the State enshrined in Articles 5 and 6 of the Constitution which they say necessitates the existence of a functioning parliament. They say that the Constitution should be interpreted to the extent possible in a manner which fulfils the important objective of Article 5. In particular, they argue that Article 18 should be interpreted in a manner which gives effect to, rather than frustrates, the democratic nature of the State and they rely on the Latin maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be void). Thus, they say that the Constitution ought to be interpreted in such a way as to allow the Houses of the Oireachtas to sit and to legislate in the common good. In contrast, the plaintiffs maintain that the interpretation advanced by the defendants leads to a paralysis of the political system and renders the principal organ of representative government inoperative and incapable of responding to emergencies.

**46.** The plaintiffs also invoke Article 15, specifically Articles 15.1 and 15.2 which clearly contemplate that there will be two Houses of the Oireachtas. They also highlight that, under Article 15.2, the function of the Oireachtas is to be the sole organ of State empowered to make laws. They argue that Article 18 must be read in conjunction with Articles 5, 6, 15 and 16 and that, when read literally and in context, the Constitutional order requires the convening of a

Seanad and the fixing of a day for its first meeting. Otherwise, there would be no legislature in existence capable of exercising the function of law making under Article 15.2.

47. In support of this argument the plaintiffs also refer, in their written submissions, to Article 24 which makes express provision for an accelerated legislative process where legislation is urgent and immediately necessary for the preservation of public peace and security or is required by reason of a public emergency. Under Article 24, the consideration of the necessary legislation by the Seanad can be significantly curtailed. The plaintiffs argue that the mechanics of Article 24 cannot be reconciled with the defendants' analysis of Article 18. The argument made in the written submissions was developed further by counsel for the plaintiffs in his reply to the Attorney General's submissions. He strongly argued that the Constitution envisages that, in times of public emergency, the Article 24 machinery should be capable of being operated and that this was plainly envisaged by the framers of the Constitution. Counsel maintained that there is a Taoiseach and a Government in place (under Article 28.11) who would be capable of initiating the Article 24 process. Yet, if the position taken by the defendants were correct that there is currently no Oireachtas in place, it would have the consequence that there would be no ability to implement Article 24 if required. He suggested that the stance taken by the defendants was unsupportable and that it cannot have been the intention of the people, when enacting the Constitution, to bring about such a situation even where the Government in place under Article 28.11 has decided that it is necessary to enact legislation to address a public emergency. He characterised the defendants' approach as not only giving rise to legislative deadlock but also creating a situation where the Government would be unable to do what might be necessary for the safety of the people. In his oral argument, counsel for the plaintiffs also cited Article 17 which requires that the Appropriations Act must be enacted every year and he asked rhetorically how, if the defendants' interpretation of the Constitution is correct, that Constitutional imperative could be discharged. In similar

vein, he asked the court to consider what might have happened if the Covid-19 crisis had only emerged after the general election for the Seanad (say on 4<sup>th</sup> April 2020). If the defendants' position is correct, he said that the Oireachtas would, in such circumstances, have been unable to pass the necessary emergency legislation to enable the State to respond to the crisis.

**48.** In the course of his oral submissions, counsel for the plaintiffs also referred, by way of example, to the exceptional steps taken by the Oireachtas, at a time of grave national emergency during the Second World War, to ensure that, even if the holding of a general election was interrupted by war time events, there would still be a continuing legislature in being capable of discharging its functions under Article 15.2. He referred, in this context, to the General Elections (Emergency Provisions) Act 1943 which provided for the holding of a general election for Dáil Éireann in advance of any dissolution of the Dáil. Given the ongoing Covid-19 pandemic, he argued that *“this is the reality of the needs of a constitutional democracy in time of emergency”*.

**49.** The plaintiffs also made the case (described in more detail below) that, in contrast to the Dáil, the Seanad is not dissolved and that it therefore continued in being notwithstanding the intervening Seanad general election. The plaintiffs have also, in both their written and oral argument reiterated the objection raised in their reply to the defence to the effect that neither custom and practice nor the Standing Orders of the Seanad can be relied upon as an aid to the interpretation of the Constitution.

**50.** Counsel for the plaintiff concluded his oral submissions to the court by stressing that the Constitution envisages orderly government without any legislative hiatus and that this was of very great importance in present circumstances given the ongoing Covid-19 pandemic. He argued that, if such a hiatus was envisaged by the draftsman of the Constitution, it would have been expressly provided for in the text of the Constitution. He submitted that Article 18.8 provides for *“the opposite to a hiatus”*.

### **The Submissions of the Defendants**

**51.** In their equally helpful submissions, the defendants argue, based on Article 18.1, that the Seanad must be fully constitutionally composed in accordance with the express provisions of that Article before it may conduct business, including the ability to exercise its legislative functions.

**52.** In respect of the fixing of the day for the first meeting of the Seanad, the defendants argue that the Taoiseach has a discretion as to when to advise the President to fix a date and that discretion is validly exercised where there has been no reasonable certainty regarding the nomination of a new Taoiseach by the 33<sup>rd</sup> Dáil and where the 26<sup>th</sup> Seanad cannot be constitutionally composed until a “new” Taoiseach has been nominated by the 33<sup>rd</sup> Dáil.

**53.** In respect of the composition of the Seanad, the defendants contend that until the nominees are appointed, a significant constituency of the membership is absent and thus the Seanad is not fully composed as required by Article 18.1 and cannot therefore discharge its constitutional role. Article 18.1 does not admit of an interpretation allowing the Seanad to be composed of one section of membership absent the other. Both limbs of membership are expressly provided for in Article 18.1. The Seanad is not the Seanad, as constitutionally understood, without one of its two constituent parts. If one part of the two constituent parts is removed, one is no longer left with the Seanad as constitutionally understood but rather with a different body not the body envisaged by the clear and unambiguous wording of Article 18.1. There is no ambiguity or uncertainty in the wording of Article 18.1.

**54.** In oral argument, the Attorney General on behalf of the defendants, maintained that the case turns on the interpretation of Article 18.8. He asserted that should the first meeting of Seanad Éireann take place without the nominated members, that would have to be explicitly stated. He reiterated that the reference to Seanad Éireann in Article 18.8 means Seanad Éireann

as defined in Article 18.1, thus requiring the eleven nominated senators. The defendants accept that this can only be done by a new Taoiseach under Article 18.3.

**55.** Submissions were made as to the proper construction of Article 18.1 with particular emphasis being placed on the words “*of whom*” and the mandatory words “*shall be composed of*”. Reliance was placed on that part of the decision in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556 that refers to words denoting numbers admitting of no debate and the passage in *People v. O’Shea* [1982] I.R. 384 at p. 397 where the Chief Justice said that words, where the meaning is plain and unambiguous, must be given their literal meaning. Given the reliance by the plaintiffs on Article 5 of the Constitution and the democratic nature of the State, it was observed that part of a democratic state is giving effect to the words that the Oireachtas use and that the people have used in the Constitution in Article 18.1.

**56.** The defendants contend that because the Taoiseach’s discretion has been validly exercised, there is no contradiction between Article 18.1 and Article 18.8 and neither is Article 18.1 being afforded a primacy. They argue such an interpretation is not irreconcilable with the State’s democratic character described at Article 5, which must be read in the context of the more specific and clear rules in Articles 18.1, 18.3 and 18.8. Moreover, the rule in Article 18.1 is not undemocratic, contrary to the approach of the plaintiffs. The democratic nature of the State is affirmed by adhering to the rule in Article 18.1, and the eleven nominated senators are just as much part of the membership of the Seanad as the forty-nine elected members. The fact that the missing members are unelected nominees of the incoming Taoiseach does not lessen their status as full members.

**57.** According to the defendants, the literal and text-based approach to the Constitution in this regard is an appropriate method of constitutional interpretation given the clear words used, including words denoting numbers. The express wording concerning the nominated members must not be overlooked and certainly the wording cannot be rendered subservient to an extra-

constitutional political impasse in the Dáil in respect of the nomination of a new Taoiseach. Dáil Éireann has enjoyed the ability to nominate a new Taoiseach since 20<sup>th</sup> February 2020. The inability of the Dáil to do so is a political matter for its members. Further, the constitutional composition of the Seanad has a meaning that the Court ought to give full effect to. In this respect the defendants rely upon the same Latin maxim as the plaintiffs, *ut res magis valeat quam pereat* (albeit to a different end.) The defendants argue that, were a power to legislate vested in the Seanad absent the nomination of the eleven members, that would, in view of its gravity, be found “in lights” and not “hidden away” in the dark corners of the Constitution.

**58.** The defendants comment on the views expressed on this issue in *Kelly: The Irish Constitution*, 5<sup>th</sup> ed., Bloomsbury Professional, 2018, (identified below) and although agreeing with the conclusion, take issue with the description of the issue before this court as presenting a “constitutional lacuna”. They stress that the constitutional architecture can function without issue precisely in the manner envisaged by the wording of the Constitution i.e. the completion of the constitution of the Seanad can be achieved by the nomination of a Taoiseach by the 33<sup>rd</sup> Dáil and the issue of the partial composition of the Seanad is a political rather than a legal lacuna. The defendants also place reliance upon the conclusions in an article entitled “*Legal and Constitutional Issues arising from the 2020 General Election*”, Hogan & Hogan, Social Science Research Network Publication ID3587047 (considered below).

**59.** The defendants firmly controvert the plaintiffs’ argument that a partially composed Seanad can legislate. They note the Dáil can continue to sit primarily to achieve the fundamentally important constitutional function of any incoming Dáil, namely to nominate a new Taoiseach for appointment by the President but argue that the Oireachtas may not enact primary legislation without a fully composed Seanad. They rely on *The State (Byrne) v. Frawley* [1978] 1 I.R. 326 in support of this argument. They note that without the nominated members, not only would the number required to command a majority in the Seanad be reduced

from 31 to 25 but the input from the nominated members (coming as they do from a different constituency) would be lost.

**60.** The defendants further observe that decisions made by bodies improperly constituted are liable to be quashed by the courts, relying in this respect on *Hegarty v Governor of Limerick Prison* [1998] 1 I.R. 412 and *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1.

**61.** In respect of the plaintiffs' argument that the Seanad frequently meets with an attendance of less than its full membership and that its quorum could be met through elected members only, the defendants note that the 2017 Standing Orders provide that the quorum for the sitting of the Seanad is either 6 or 12 depending on the circumstances. They refer to Article 15.11.3 which provides that the number of members necessary to constitute a meeting of either House shall be determined by its standing orders. But the defendants argue that there is no legal relationship between the composition of the Seanad on the one hand and the quorum on the other, with the former relating to establishment and the latter relating to the post-establishment functioning of the body. They make the case that where a body has not been composed in accordance with law, it does not exist and matters of quorum or daily functioning are not engaged. They argue that Article 15.11.3 makes provisions for the quorum and not the composition of either House. The defendants accept that in the event of conflict between the Standing Orders and the Constitution, the latter will prevail.

**62.** With regard to the argument that the composition of the Seanad is not questioned where there are casual vacancies caused by deaths or resignations resulting in a drop in membership to less than 60, the defendants make reference to the means of filling these vacancies identified at Articles 18.10.2 and 18.10.3 and note that those mechanisms indicate the constitutional composition of the Seanad is 60 members at the outset with casual vacancies being filled during the term. According to the defendants, it does not follow that, because the Seanad may operate



subsequent to its composition and establishment with a number less than 60, it may initially be composed of just forty-nine members.

**63.** Turning to the issue of the Taoiseach's discretion in respect of Article 18.8, the defendants maintain that, although the plaintiffs have not directly sought a mandatory Order directing the Taoiseach to advise the President to fix a day for the first meeting of the new Seanad, that is, in substance if not in form, the relief sought. The defendants accept that there may be a role for Court review of the exercise of the Taoiseach's discretion in an extreme situation i.e. if the discretion were to be abused in bad faith, but that is not a matter arising in these proceedings. The defendants draw attention to other provisions of the Constitution under which the President is to act in a particular way on the advice of the Taoiseach (Articles 13.1.3 and 13.2.1). They note a similar formula is used when the advice of the Government is involved (Articles 13.9 and 13.11). The defendants accept that the power under Article 18.8 to advise the President to fix a first sitting of the Seanad can be exercised by either a continuing Taoiseach or a newly appointed Taoiseach.

**64.** In oral submissions, it was stressed that in respect of the advice to be given to the President by the Taoiseach, having regard to Article 13.9, which identifies the formal role of the President, the President has no discretion in respect of the date but fixes it on the advice of the Taoiseach. In respect of the Taoiseach's advice, the defendants characterise that as a discretionary decision or power. When exercising it, certain considerations will be political ones in relation to the date of the first meeting of the Seanad, whereas others will be legal ones. In this case, when considering whether to advise the President to fix a date, the Taoiseach must have regard to whether the first meeting could constitutionally take place and constitutionally transact any business. That includes considering whether the Seanad has been properly composed in accordance with Article 18.1 or at least in the case of a continuing Taoiseach,

whether the Taoiseach can have reasonable certainty that it will be properly composed by the date to be fixed.

**65.** Insofar as Article 18.8 is concerned, it is submitted that the reference to Seanad Éireann must be composed in accordance with the composition rule i.e. Article 18.1, unless the Constitution specifies where it may be necessary to depart from the composition of the body. The defendants observed that there is nothing absurd in saying that the choice of the people is that the Oireachtas shall not be able to fully kick start after a general election of the Dáil until the Seanad is properly composed, even if that means a delay. It is not a lacuna that the new Taoiseach must appoint the eleven senators. The Court cannot disregard the plain language of Article 18.1 to maximise the effect of Article 18.8 and to argue that this is possible is an absurd argument.

**66.** The defendants note that their interpretation of Article 18.8 is supported by both the English and Irish language versions of the text, with the Irish language version being translated by the leading commentator, Ó Cearúil as being “*(the Seanad) must come together for (its) first assembly after the general election*” and O’Donaill offering “*it shall be necessary*”, neither of which change the meaning of Article 18.8.

**67.** In respect of whether the plaintiffs “hold office”, the defendants agree that the plaintiffs are elected members of the Seanad and they query whether there is, in substance, a distinction between a candidate duly elected and holding office. They suggest that the issue may be one of nomenclature and that the issue does not need to be resolved in these proceedings.

### **Academic Commentary**

**68.** The Court has been referred to various academic textbooks and articles addressing the issues arising in these proceedings. At paragraph 4.4.06 of “*Kelly: The Irish Constitution*”, reference is made to the difficulty arising where the outgoing Seanad has been dissolved by the

holding of a general election, but a Taoiseach is not appointed and so the Taoiseach's appointees have not been chosen. The authors observe as follows:

*“Should the general election for the Dáil take place and no Taoiseach be appointed, there is essentially a vacuum of legislative power; the previous Seanad cannot then be reassembled, and a new Seanad cannot meet and legislate until a Taoiseach is appointed and makes his or her nominations .... Though this point will not be clear until it has been considered by the courts, it would seem to be a constitutional lacuna that could in certain circumstances be highly problematic”.*

**69.** That same issue was very recently addressed in the Hogan & Hogan article (referred to above), where one of the questions addressed is whether the Seanad can function in the absence of its full complement of members. They conclude that, on balance, the President can only fix the date for the first meeting of the new Seanad once that body is fully constituted; that the Seanad cannot be fully constituted until the eleven members are nominated; and that therefore the Oireachtas cannot legislate until the eleven members of the Seanad have been nominated.

**70.** Tillman has also considered the ability of the Seanad to legislate in the absence of the nominated members (Irish Law Times, 2020 38(7) 94, *“COVID-19 Can the Oireachtas legislate during the pandemic?”*). He suggests, inter alia, that were the forty-nine members absent, then, even if there was a quorum made up of nominated members, this would be a matter of genuine constitutional concern as such a Seanad would lack democratic bona fides. However, where the Seanad lacks only its nominated members, he suggests *“... that should be a matter of little or no consequence to a democratic state”*.

**71.** Finally, in a newspaper article, *“Oireachtas can pass laws in public interest without Taoiseach Seanad nominees”*, Irish Times, 26<sup>th</sup> March 2020, Doyle and Hickey suggest an interpretation of the relevant constitutional provisions that would allow the Oireachtas to legislate in the public interest, summarising the argument as follows:

*In other words, the Constitution takes great care (a) to specify that the new Seanad cannot be convened until the forty-nine elected members have been chosen and (b) to prevent the outgoing Taoiseach from nominating the eleven Senators. Here then is the key point that these conscientious constitutional actors might consider: the existence of these direct and explicit limitations on the Taoiseach's powers counts against the existence of an indirect and implicit limitation on the Taoiseach's power to convene the first meeting of the Seanad. If the Seanad can be convened before the Taoiseach's nominees are in place, then the Oireachtas is fully constituted and legislation can be enacted".*

### **Discussion and analysis**

72. The issues raised in the course of the written and oral submissions of the parties require careful consideration and analysis. The task of the court is made more difficult in circumstances where the provisions of Article 18 have never previously been addressed in any detail by a court. Before attempting to address the issues, it is important to identify the principles applicable to the interpretation of the Constitution.

### **Applicable principles of interpretation**

73. The court was referred to a number of decisions of the Supreme Court in relation to the interpretation of the Constitution including *Curtin* (cited above) and *Tormey v Ireland* (cited above). *Curtin* is a relatively recent authority. In that case, at p.p. 609-612, the Supreme Court considered, in some detail, the criteria governing the correct approach to the interpretation of the Constitution. At p. 609, Murray C.J. (who gave the judgment of the seven member court) acknowledged that different "*interpretative elements are emphasised in individual judgments according to the particular context in which questions arise and the particular types of*

*interpretative problem*". Nonetheless, Murray C.J. emphasised that one must start the process of interpretation by looking at the words used in the Constitution and giving them their literal meaning. Thus, at p. 609, he observed:

*"Words denoting numbers, places or identified persons admit of no debate"*.

74. At p. 610, Murray C.J. said that a correct balance has to be struck between the effect to be given to the literal meaning of particular words and the need to have regard to the terms of the Constitution as a whole. He described the following observations of O'Higgins C.J. (speaking for the majority of the Supreme Court in *The People v. O'Shea*) as authoritative:

*"The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself. The Constitution brought into existence a new State, subject to its own particular and unique basic law, but absorbing into its jurisprudence such laws as were then in force to the extent to which these conformed with that basic law."*

75. Murray C.J. then referred to his own judgment in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at p. 679 where, having cited the passage quoted above, from the judgment of O'Higgins C.J. in *O'Shea*, he said:

*"It is axiomatic that the point of departure in the interpretation of a legal instrument, be it a constitution or otherwise, is the text of that instrument, albeit having regard to the nature of the instrument and in the context of the instrument as a whole."*

76. In *Curtin*, at p. 610, Murray C.J. also referred to the observations of Henchy J. (who gave a dissenting judgment in *The People v. O'Shea*) at p. 426 (in a passage later cited with approval by Keane C.J. in the *The People (Director of Public Prosecutions) v. M. S.* [2003] 1 I.R. 606 at p.619):

*“Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that ‘the letter killeth, but the spirit giveth life’. No single constitutional provision ... may be isolated and construed with undeviating literalness.”*

77. These observations of Henchy J. in *O'Shea* are also consistent with the approach taken by him in *Tormey v. Ireland* where, at pp. 295-296 he suggested that: *“The rule of literal interpretation, which is generally applied in the absence of ambiguity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of a provision are open in light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to the other. Thus, where there are two provisions in apparent conflict with one another, there should be*

*adopted, if possible, an interpretation which will give due weight and harmonious effect to both provisions*” (emphasis added). In that case, as the words highlighted in the passage quoted make clear, the Supreme Court was required to reconcile two provisions of the Constitution (namely Articles 34.3.1 and 34.3.4) which, on an individual literal interpretation gave rise to an apparent conflict. It was therefore necessary to depart from a purely literal approach and, instead, to seek a harmonious interpretation.

78. Having cited the observations of O’Higgins C.J. and Henchy J. in *The People v. O’Shea*, Murray C.J., in *Curtin*, continued as follows at p.p. 610-611 in a passage which is clearly binding on this court:

*“The result can be expressed as follows. Where words are found to be plain and unambiguous, the courts must apply them in their literal sense. Where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution. The historical context of particular language may, in certain cases, be helpful, as explained by O’Higgins C.J. in the passage quoted above. Geoghegan J, when considering the meaning of the term ‘primary education’ in Article 42.4 of the Constitution in his judgment in *Sinnott v Minister for Education* [2001] 2 I.R. 545, said, at page 718, that it was ‘important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it’. Hardiman J, at page 688, thought that it was ‘beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution.’*

*This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances. O’Higgins C.J. in *The State (Healy) –v- Donoghue* [1976] I.R. 325*

*observed at p. 347 that ‘... rights given by the Constitution must be considered in accordance with the concepts of prudence justice and charity which may gradually change and develop as society changes and develops and which falls to be interpreted from time to time in accordance with prevailing ideas’. Again in Sinnott v Minister for Education [2001] 2 I.R. 545, Murray J. stated ‘Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been suggested, that it can be divorced from its historical context’.*

*Hardiman J. at p. 688 referred to general theories of interpretation in the following terms:*

*‘Tensions are said to exist between the methods of construction summarised in the use of adjectives such as ‘historical’, ‘harmonious’ and ‘purposive’. In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction’.*

*Thus, the natural and usually the logical starting point, in every case, will be the words used...”.*

**79.** Murray C.J. then examined the provisions of the Constitution in issue in that case (which was concerned with alleged misbehaviour on the part of a judge) and noted that Article 35.4.1 did not define the word misbehaviour or state whether it related to the performance of judicial duties or might be of a general kind. He also noted that Article 35.4.1 prescribed no procedures to be followed by the Houses of the Oireachtas to deal with allegations of misbehaviour as against a judge. He concluded that, in such circumstances, it was reasonable



to consider whether there was any history or background to the enactment of the Constitution capable of elucidating what was in the contemplation of the framers.

**80.** The following principles flow from the approach taken in *Curtin* and from the case-law cited by Murray C.J. in that case:

- (a) The starting point is to carefully consider the words used in a constitutional provision with a view to identifying their meaning.
- (b) While not specifically addressed in *Curtin*, it may also be necessary to consider the meaning of the words in the Irish language version of the text which, in accordance with Article 25.4 of the Constitution, takes priority in the event of any conflict with the English language version.
- (c) Where the words used are clear and unambiguous, they are to be construed in their literal sense. Thus, for example, words denoting numbers, places or identified persons admit of no debate.
- (d) The words used in the provision in issue cannot be construed in isolation. They must be construed in the context of the Constitution as a whole.
- (e) If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency. In this context, while Murray C.J. in *Curtin* did not expressly say that the harmonious interpretation favoured by Henchy J. in *O'Shea* should be applied, he did not dissent from the observations of Henchy J. to that effect in the passage quoted by him. It is interesting to observe that, although *Tormey* was cited by counsel in *Curtin*, the judgment of the court does not refer to it. Having regard to the emphasis placed by the Supreme Court in *Curtin* on the principle that the words of the constitutional provision in issue

should be the first port of call, it seems to us that the harmonious approach will only be taken in cases of apparent inconsistency. It will not be necessary to go beyond a literal interpretation of a constitutional provision unless such an interpretation gives rise to an apparent conflict with some other provision of the Constitution.

- (f) In cases of doubt, ambiguity, inconsistency or silence, it is legitimate to have regard to factors such as the historical context. Although the issue did not arise in *Curtin*, this would appear to include, for example, a relevant amendment to the Constitution, something which was considered, for example, in *M v. Minister for Justice* [2018] 1 I.R. 417 at pp. 486-487.

### **The meaning and significance of the provisions in issue**

**81.** Having regard to the approach taken in *Curtin*, the starting point in seeking to interpret the provisions in issue is to consider the words used. In this case, the plaintiffs suggest that the Irish language version is helpful in identifying the meaning of some of the provisions in question. It will therefore be necessary to consider the Irish language text of those provisions. Having initially determined the meaning of the provision from the words used, it will next be necessary to consider the provision in the context of the Constitution as a whole.

**82.** In the event of ambiguity, it may be necessary to go further and to consider the wider context. In addition, as cases such as *Tormey* show, in the event of apparent conflict with other provisions of the Constitution, it may be necessary to seek a harmonious interpretation which allows any such apparent conflict to be resolved. However, in this case, for the reasons discussed below, it was not necessary to resort to a harmonious interpretation. On the contrary, a consideration of the provisions of the Constitution addressing Seanad Éireann and its place within the legislative system established by the Constitution demonstrates that there is no

conflict between those provisions such as to engage the harmonious approach to constitutional interpretation.

**83.** In the first place, it is essential to consider the provisions of Article 18 and, in addressing the meaning of Article 18, it seems to us that the natural and obvious starting point is Article 18.1.

### **The meaning and effect of Article 18.1**

**84.** As the Attorney General observed in his oral submissions, Article 18.1 comprises (in the English language version) no more than 22 words. The Irish language version is even more concise containing no more than 17 words. The language used is simple and straightforward, namely: *“Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine will be elected members”*. In our view, those words, considered on their own, and without reference to their Constitutional context, are clear and unambiguous. They are expressed in the imperative *“shall”*. The words tell us what Seanad Éireann is composed of. It is hardly necessary to consult a dictionary to understand what the words *“composed of”* mean. They are words used in everyday speech. Thus, for example, it might be observed that the light spectrum is composed of seven colours or all matter is composed of atoms. The words *“composed of”* are frequently used to describe the constituent parts of something. It is therefore unsurprising that the word *“compose”* is defined, for example, in the Shorter Oxford Dictionary, 6<sup>th</sup> ed., 2007, Vol. 1, at p. 473 as *“Constitute, make up, be the constituents or material of”*.

**85.** Thus, Article 18.1 tells us, in the first instance, that the Seanad is made up of sixty members. It then goes further. Having told us that it is made up of sixty members, Article 18.1 then tells us, using the linking words *“of whom”*, what those members will be made up of - namely eleven nominated members and forty-nine elected members. There is no ambiguity

about any of that. We also bear in mind what the Supreme Court said in *Curtin*, that words denoting numbers admit of no debate.

**86.** We are therefore of opinion that, read on its own, Article 18.1 clearly and unambiguously means that the institution or organ of State, Seanad Éireann, created by the Constitution must be comprised of sixty members, eleven of whom are nominated and forty-nine of whom are elected. It seems to us to follow that, in the absence of some indication to the contrary, references elsewhere in the Constitution to the Seanad are to be interpreted in the same way. Having told us in Article 18.1 what the Seanad is composed of, it would be odd if other references to the Seanad in the Constitution were to be given any different meaning (again in the absence of some indication to the contrary). That said, before any final view can be formed of the meaning of Article 18.1, it is necessary to consider its meaning in the context of the other sections of Article 18. Furthermore, in accordance with the observations of O’Higgins C.J. in *O’Shea* (as re-iterated by the Supreme Court in *Curtin*), we will also consider Article 18 in the wider context of those provisions of the Constitution which address the legislative function (of which Article 18 forms a component part).

**87.** Before addressing Article 18 more generally, it is necessary, next, to consider the plaintiffs’ suggestion that Article 18.1 does no more than to “*delineate and describe two categories of senators who are markedly distinct*” and their reliance on the Irish text in support of that proposition. There is no doubt that Article 18.1 refers to two categories of senator. However, it is not correct, in our view, to suggest that all Article 18.1 does is to describe the two categories. On the contrary, it goes much further and tells us that these are the two categories of which the Seanad is composed. This seems to us to be a fundamental statement describing the composition of the Seanad. Thus, the Seanad is not made up solely of elected senators or solely of nominated senators. It is made up of both. Subject to what we say below about the other sections of Article 18, it must follow that the Seanad will not be “*composed*”

as required by Article 18.1 (bearing in mind the use of the imperative “*shall*”) unless both nominated and elected senators have been appointed.

**88.** The court sees nothing in the Irish text to alter this position. As noted above, the plaintiffs in their written submissions sought to rely, to some extent, on the Irish text and, in particular, on the way the Irish text substitutes the abbreviation “.i.” for the words “*of whom*”. Ó Cearúil explains that “.i.” equates to the abbreviation “*i.e.*” (that is) as used in English. However, the use of that abbreviation (which the plaintiffs very fairly acknowledge to be a subtle difference) does not conflict with or undermine the meaning derived from the English text. Whether one looks at the English or Irish version, the result seems to us to be the same. In either case, the meaning is clear. The Seanad is made up of sixty members of whom eleven are nominated members and forty-nine are elected members.

**89.** Although not pursued in their written or oral submissions, the plaintiffs, in their letter to the Taoiseach of 11<sup>th</sup> June 2020 also relied on another aspect of the Irish text namely the use of the word “*líon*”. The Irish text of Article 18.1 commences with the words “*Seasca comhalta líon Sheanad Éireann ...*”. In their letter, the plaintiffs highlighted that the word “*líon*”, in this context, is translated as “*complement*”. They made the point that the Irish language statement that sixty members is the complement of the Seanad reads less prescriptively than the English language statement that the Seanad “*shall be composed of sixty members*”. At first sight, that may appear to be a plausible suggestion to make. However, on closer analysis we do not believe that the use the word “*líon*” can be read, to any appreciable extent, less prescriptively than the English language version. It is still clear that the intention in Article 18.1 is that the Seanad will comprise sixty members, broken into eleven nominated members and forty-nine elected members. To paraphrase Murray C.J. in *Curtin*, there is no scope for debate about that. If anything, the use of the word “*líon*” or complement reinforces this view. “*Complement*” is defined in the Shorter Oxford English Dictionary, *op. cit.*, at p. 471 as “*the quantity or amount*

*that completes or fills, the full number required to man a ship, fill a conveyance etc*". That the number required to constitute the Seanad is sixty (made up of the eleven nominated members and forty-nine elected members) is reinforced by a consideration of Articles 18.3 and 18.4 (addressed below). Consistent with Article 18.1 those sections clearly envisage and require that both nominated and elected members will be appointed.

**90.** It might also be observed that the nominated members play a distinct role to that of the elected members, with *Kelly: The Irish Constitution* observing "*...even if, as often happens, the Government does not control a majority of the 43 panel members, nor of the six university members, any Government deficit is capable of being made up by way of the 11 members whom it lies with the incoming Taoiseach to nominate. Accordingly, a Government reverse in the Seanad is exceedingly rare*" (paragraph 4.4.03).

**91.** Having addressed the meaning of Article 18.1 by reference to its individual terms, it is now necessary to consider the other sections of Article 18.

### **Other provisions of Article 18**

**92.** Article 18.2 deals with eligibility for office as a senator and it is clear from its terms that it applies to both nominated and elected senators.

**93.** Article 18.3 deals specifically with nominated senators and specifies their mode of appointment. It makes clear that the nominated members of the Seanad are to be nominated by the Taoiseach. But, as a consequence of the Second Amendment to the Constitution made in 1941, this can only be done by a Taoiseach newly elected by the Dáil under Article 13.1 following its re-assembly after a Dáil general election. Article 18.3 is examined in more detail below in the context of Article 18.8. It is sufficient to note, at this point, that there is nothing in its terms which conflicts with the meaning of Article 18.1 set out above. On the contrary, Article 18.3 requires the incoming Taoiseach to nominate the nominated members. There is no

discretion given to the incoming Taoiseach to decline to nominate such members or to decide to nominate less than eleven members. This reinforces the conclusion that, for the Seanad to be composed, the nominated members must be in place.

**94.** The relevant provisions dealing with the election of the elected members of the Seanad are to be found in Article 18.4 to Article 18.7. These provisions deal solely with the elected members and, in the view of the court, there is nothing in them which, in any way, conflicts with the meaning of Article 18.1 as set out above. Just as Article 18.3 envisages that the incoming Taoiseach will nominate the eleven nominated members, Article 18.4 envisages, with a view to completing the required complement of sixty members that the remaining forty-nine members will be elected, three by the National University of Ireland, three by the University of Dublin and forty-three from panels of candidates constituted in the manner provided for in Article 18.7.

**95.** Article 18.8 was the subject of sustained argument by counsel for the plaintiffs. For that reason, it is addressed separately below. In short, we have concluded that the plaintiffs' arguments in relation to the interpretation of Article 18.8 must be rejected. Instead, we have formed the view that, when Article 18.8 speaks of "*the first meeting of Seanad Éireann after the general election*", it clearly has in mind a meeting of the Seanad composed in accordance with Article 18.1 and therefore comprising both the elected and the nominated members.

**96.** In support of their argument that, in contradistinction to the Dáil, the Seanad is never dissolved (and therefore does not cease to exist as an institution or organ of State), the plaintiffs placed some emphasis on Article 18.9. This argument is addressed separately in paras. 135 to 142 below. Article 18.9 provides that, unless a member of the Seanad has died, resigned or become disqualified, the member will continue to hold office until the day before the polling day of the Seanad general election. For this reason, the outgoing Seanad, in March 2020, was able to function in conjunction with the newly elected Dáil in order to pass a suite of legislation

dealing with the emergency created by the ongoing Covid-19 pandemic. We do not believe, however, that Article 18.9 throws any additional light on the meaning of Article 18.1. It seems to us that, when it refers to Seanad Éireann, it must be read as referring to the Seanad as composed under Article 18.1. We can see no basis to suggest that it can be read in any other way.

**97.** In support of their position, the plaintiffs have sought to rely on Article 18.10.2 and Article 18.10.3 under which casual vacancies in the number of nominated members can be filled by nomination of the Taoiseach and casual vacancies in the number of elected members are to be filled in the manner prescribed by law. The plaintiffs suggest that these provisions show that the Seanad can function without its full complement of members. For similar reasons, they also refer to Article 15.11.3 which authorises each House of the Oireachtas to fix, by means of standing orders, a quorum necessary to constitute a meeting. In our view, the answer to this argument is to be found in the Hogan & Hogan paper referred to above where they say at page 27: *“Narrow though the distinction in practice may in some instances be, there is nonetheless a difference between the failure to comply with a constitutional obligation in the first instance and the happening of **subsequent** events (such as death or resignation) which created a series of casual vacancies on the other”* (emphasis in original).

**98.** We respectfully agree. Article 18.1 prescribes the complement of members necessary to constitute the Seanad. Having done so, it was then necessary to consider what should be done in the event that a vacancy subsequently arose in order to ensure that the Seanad, as a crucially important organ of the State, would, in such event, continue to have its full complement of members. Article 18.10 is a necessary provision for that purpose. Similarly, to ensure the smooth running of the Seanad, it was necessary to provide, in Article 15.11.3, that the Seanad could fix its own quorum. However, both of those provisions pre-suppose that the Seanad has a fixed number of members. There would be no need to provide for the filling of



casual vacancies or the fixing of a quorum if that were not so. Accordingly, the provisions on which the plaintiffs seek to rely seem to us to reinforce the meaning of Article 18.1 explained above rather than to undermine it. In our view, the reference to the Seanad in Article 18.10 is a reference to the organ of State containing the sixty members prescribed by Article 18.1.

**99.** Before concluding our review of Article 18, we should briefly address the plaintiffs' submission (summarised in para. 40 above) where the plaintiffs posit a series of hypothetical situations which they suggest support the construction of Article 18 for which they contend. In our view, these simply do not arise on the facts. If any such situation were ever to arise, it would be necessary to address it at that time. Having regard to *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 at p.p. 186-187, we do not believe that it is either necessary or appropriate to consider such hypothetical situations in this judgment.

### **Article 18.8**

**100.** The plaintiffs' case to the effect that Seanad Éireann, and therefore the Oireachtas, is at present validly composed with forty-nine senators, is based on Article 18.8, read together with Article 18.3. As identified above, the English language version of Article 18.8 provides that "*A general election for Seanad Éireann shall take place not later than ninety days after a dissolution of Dáil Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach*".

**101.** The Irish language version reads as follows: *Ní foláir olltoghchán do Sheanad Éireann a bheith ann lá nach déanaí ná nócha lá d'éis lánscoir do Dháil Éireann, agus ní foláir do Sheanad Éireann teacht le chéile ar chéad-tionól tar éis an olltoghcháin lá a chinneadh an tUachtarán chuige ar chomhairle an Taoisigh.*

**102.** In short, the plaintiffs make two distinct arguments in respect of Article 18.8, both of which they say flow from the natural and ordinary meaning of the words and do not require

recourse to principles of harmonious interpretation with other provisions of the Constitution given the clarity of the wording of Article 18.8 (read with Article 18.3). However, they make a subsidiary argument that, to the extent it is necessary to look beyond those Articles, the remainder of Article 18, and Articles 5, 6, 15, 16 and 24 of the Constitution support their interpretation. At a later point in this judgment, we consider these provisions because each of them appear to us to form part of the same constitutional context as Article 18. They are all concerned with the democratic institutions of the State and the legislative function and there is an interrelationship between them and Article 18. For that reason, we believe that, in accordance with the guidance given by O’Higgins C.J. in *People v. O’Shea* (and endorsed by the Supreme Court in *Curtin*), it is appropriate to consider them. However, we have concluded that there is no inconsistency between the literal meaning of these provisions and thus see no scope to apply a harmonious interpretation.

**103.** The plaintiffs’ first argument is that given (a) the reference to the first meeting taking place “after the general election”, and (b) the absence of any reference to the nominated members in Article 18.8, the Taoiseach can exercise his or her power to advise the President once the elected members of the Seanad are in place when the advice is given. (It is common case that although the Taoiseach is stated to be “advising” the President of the appropriate day, in fact pursuant to Article 13.9, the President must fix the date as advised and has no discretion of his or her own in this regard).

**104.** Second, the plaintiffs assert that any Taoiseach, whether a continuing Taoiseach or a newly elected Taoiseach, may advise the President to fix a date for the first meeting of Seanad Éireann under Article 18.8. This is accepted by the defendants. Article 18.8 contains no requirement that only a newly elected Taoiseach may do so, unlike the position under Article 18.3 whereby the power to nominate the eleven members may only be exercised by a newly elected Taoiseach. The plaintiffs point to the fact that Article 18.3 originally contained no

wording limiting the power of appointment to a new Taoiseach, with that restriction being introduced following the second amendment of the Constitution in 1941. They emphasise that no equivalent amendment was introduced to prevent a continuing Taoiseach from advising the President of the day of the first meeting of Seanad Éireann, thus denoting an implicit acceptance of that power being exercised without members having been nominated.

**105.** These arguments, although related, are distinct. Before addressing them, it is useful to consider what appears to be the overall purpose of Article 18.8, being the setting of temporal limits for the holding of the general election and the convening of the first meeting of Seanad Éireann. This approach is supported by the fact that there is no separation, by way of a subsection, or even a full stop, between the mechanism for fixing the date for the holding of the election and the mechanism for fixing the date for the first meeting. Temporal limits of this kind are also set for Dáil Éireann. Article 16.3.2 provides that a general election for members of Dáil Éireann shall take place not later than thirty days after a dissolution of Dáil Éireann. Article 16.4.2 provides that Dáil Éireann shall meet within thirty days from polling day. Thus, the dissolution of Dáil Éireann sets the clock ticking for both the Dáil and Seanad elections. Equally, the election in each House triggers the first meeting of both Houses, though the date for the meeting of the Dáil is prescribed, whereas there is a discretion given to the Taoiseach in respect of the fixing of the date for the first meeting of the Seanad. In fact, it may well be that the reason a set time was not fixed for the first meeting of Seanad Éireann, unlike the first meeting of Dáil Éireann, was precisely because members are selected through both election and nomination and therefore the process of constituting the Seanad is potentially more complex and time-sensitive than that of the Dáil.

**Absence of reference to the nominated members in Article 18.1**

**106.** We turn now to the plaintiffs' argument that the wording of Article 18.8 suggests that the Taoiseach can advise the President of the day for the first meeting as soon as the general election has taken place and members have been elected, irrespective of whether nominated members have been selected. Although there is no reference in Article 18.8 to members being elected, counsel for the plaintiff confirmed that, on their construction, those words must be implied. Thus, on the plaintiffs' case, it is not merely the holding of the general election but also the election of the members that triggers the entitlement to advise the President. It is certainly necessary and accepted by all sides that the general election should be completed prior to the fixing of the day for the first meeting; the question is whether that is sufficient in the absence of nominated members.

**107.** It should be observed at this point that neither side appear to contend that advising the President of the day is a separate and distinct step to the holding of the first meeting of Seanad Éireann, or that the President could be advised by the Taoiseach even if the meeting could not go ahead due to the absence of the nominated members. The plaintiffs approach the matter on the basis that once the Taoiseach's advice is given, it inexorably sets in train a series of events culminating in the Seanad being entitled to meet and transact business, including legislating. The defendants say there is a discretion to be exercised by the Taoiseach in respect of the advice to be given to the President, but it must be reasonably exercised. Therefore, no advice will be given to the President by the Taoiseach unless there is a reasonable certainty that, on the day fixed, both the elected and nominated members will be in place.

**108.** It is certainly the case that there is no explicit reference to the nominated members being in place prior to the Taoiseach advising the President, whereas it must be assumed that the elected members are in place given that the advice is given **after** the general election. Nonetheless, the lack of an express identification of the necessity for elected members prior to advice being given undermines somewhat the plaintiffs' insistence on the significance of the

absence of any mention of the nominated members. In fact, neither category of members is identified in Article 18.8, thus supporting the approach that its purpose is to describe the chronology of events leading to the first meeting rather than altering the composition of the Seanad.

**109.** But a much greater problem for the plaintiffs' argument is the specific reference in the latter part of Article 18.8 to the first meeting as being a meeting of "Seanad Éireann". Article 15.1.2 provides that the Oireachtas includes a Senate, to be called Seanad Éireann. Seanad Éireann is described with particularity in Article 18.1. It is referred to on 65 occasions in the body of the English version of the Constitution. On each occasion where the Constitution bestows upon the Seanad a power or a function, that power or function is bestowed upon the body whose composition and thus its identity, is as described at Article 18.1. We have concluded that Article 18.1 means that the Seanad must be composed of sixty members, forty-nine elected and eleven nominated. It does not have a variable meaning depending upon the context in which it appears.

**110.** Despite the clarity of the description of Seanad Éireann, the plaintiffs make an audacious argument that seeks, in substance, to reformulate the body that may be described as Seanad Éireann. They argue for a body that has both a significantly lower number of senators (being forty-nine instead of sixty) and, even more significantly, is missing an entire category of membership. They say in their written submissions that their case is not that the Seanad should continue to subsist without its nominated members but that there may be a "time-lag" between the election of the elected senators and nomination of the nominated senators (paragraph 8.8). Despite this apparent concession, in fact on their argument it would be constitutionally permissible for such a body to carry out the functions presently ascribed to Seanad Éireann as defined by Article 18.1 for the entire life of the Dáil (presently capped at five years).

**111.** For the plaintiffs to persuade this Court that, in fact, Seanad Éireann may have a different composition to that described at Article 18.1, they would have to point to language in Article 18.8 that unequivocally displaces the wording of Article 18.1, ideally language that would explain in what circumstances the “alternative” definition of the Seanad applied and the relationship between such a body and that described in Article 18.1. However, far from being able to point to such wording, the plaintiffs point only to the reference to the first meeting taking place after the general election and the absence of an explicit reference to nominated members. But it is impossible to avoid the implications of the identification of the first meeting as being one of “Seanad Éireann” i.e. as defined in Article 18.1.

**112.** To conclude that the Seanad Éireann referred to at Article 18.8 is one and the same as that identified at Article 18.1 does not require the invocation of the doctrine of harmonious interpretation. Rather, it is simply necessary to read Article 18.8 in accordance with the basic principle of construction to the effect that, when a body is defined in one part of a legal document, it is that definition that describes the body whenever it is referred to throughout the document. Read in this way, the meaning of Article 18.8 becomes very clear. It requires the first meeting of Seanad Éireann (being a body composed of sixty members, eleven nominated and forty-nine elected) after the general election to take place on a day fixed by the President as advised by the Taoiseach. The Taoiseach’s function of advising the President therefore applies only to a meeting of Seanad Éireann properly composed and not to any other grouping of people.

**113.** Understood correctly, it is clear why there is no explicit reference to the nominated members or indeed the elected members in Article 18.8. The reference to “Seanad Éireann” makes it clear that both categories of members are required to be in place before the first meeting, since the Seanad requires the presences of both categories. There is therefore no need to specify that they must be in place prior to the advice being given by the Taoiseach to the

President. Accordingly, contrary to the plaintiffs' arguments, the absence of a reference to nominated members is not significant.

**114.** By arguing for the first meeting to be convened in the absence of the nominated members, the plaintiffs are effectively arguing for an implicit amendment to Article 18.1, which would significantly vary its composition by dropping out nominated members altogether. In our view, this would require explicit language given the clarity of Article 18.1. No such language exists. An amendment by implication would require convincing evidence of the intention of the drafters in this respect. The arguments presented by the plaintiffs in support of their construction, identified above, fall very far short of this.

**115.** Nor does the Irish language version of Article 18.8 alter our conclusions in this regard. As identified above, Ó Cearúil notes that the Irish language version of the words "*and the first meeting of Seanad Éireann after the general election shall take place*" appear in the Irish text as "*agus ní foláir do Sheanad Éireann teacht le chéile ar chéad-tionól tar éis an olltoghcháin*" which Ó Cearúil translates as "*Seanad Éireann must come together for (its) first assembly after the general election*". Thus, in both the Irish and English versions, it is mandatory that the meeting must take place on a day to be fixed by the President on the advice of the Taoiseach. The method of fixing the date must be complied with. But there is no suggestion that the obligation in that regard is intended to impact upon the composition of the Seanad.

#### **Relevance of the reference to "after the general election"**

**116.** These conclusions are themselves enough to dispose of this argument. However, it should be observed that even if there was no explicit reference to "Seanad Éireann" in Article 18.8, the mere reference to the general election does not necessarily carry with it an implication that the nominated members are displaced and only elected members are required for the convening of the first meeting. The reference to "*after the general election*" is explicable by a

consideration of the entirety of Article 18.8. The relationship between the dissolution of Dáil Éireann and the timing of a general election for the Seanad is specified in the first line; the date for the calling of the general election having been identified, the paragraph goes on to explain what happens after that same general election i.e. the holding of the first meeting and the scheme for fixing the date of that meeting. In other words, there is no reason to suppose that the second reference to the general election is intended to exclude the nominated members; rather the reference is there to explain the train of events post the holding of that general election, the necessity for which has been identified in the first line of the Article. This interpretation is consistent with the purpose of Article 18.8 above, i.e. to identify the time line for calling a general election and for the convening of the first meeting.

**117.** In summary, the plaintiffs' argument ignores the clear wording of Article 18.8. The meeting being convened is not a first meeting of the elected members of Seanad Éireann but rather a first meeting of Seanad Éireann itself. Seanad Éireann does not exist unless it is constituted as required by Article 18.1. Article 18.1 requires both elected and nominated members. The plaintiffs' argument in this respect must therefore fail.

### **Relevance of restriction in Article 18.3 on the continuing Taoiseach nominating members**

**118.** In one sense, that conclusion also disposes of the plaintiffs' second argument since if, as concluded above, nominated members are required for the first meeting, then in the absence of the nominated members the Taoiseach should not advise the President to fix a date, even if he or she otherwise has the power to do so. But the plaintiffs have undoubtedly raised an interesting point, being (on their argument) that where a power is given, it must be capable of being used. In other words, they say that because Article 18.8 permits the continuing Taoiseach to advise the President on the fixing of a date, the Taoiseach must be entitled to advise the President even where only the elected members are in place.



**119.** It is certainly true that, on the defendants' construction of Article 18, a continuing Taoiseach will not be in a position to exercise his or her functions under Article 18.8 because the nominated members, by definition, will not be in place in the absence of a newly elected Taoiseach. But in other circumstances, where a newly elected Taoiseach is in place, he or she can exercise the power under Article 18.8; and there is therefore no question of the power in Article 18.8 being redundant in all circumstances.

**120.** Further, the nature of a continuing Taoiseach's power under the Constitution is relevant in this respect. Article 28.11.1 enables him or her to continue carrying on his or her duties until their successor has been appointed. But there is no prohibition under Article 28.11.1 on the continuing Taoiseach having a discretionary power that cannot be exercised in certain circumstances because of the operation of other Articles of the Constitution. In this case, the restriction on exercising his or her powers under Article 18.8 arises from the intent of Article 18.3 i.e. that a (highly political) power to appoint nominees should not be exercised by an outgoing Taoiseach. Thus, the preclusion of the continuing Taoiseach from exercising his or her powers to advise the President of a day for the first meeting under Article 18.8 arises legitimately from the operation of another provision of the Constitution.

**121.** The plaintiffs focus on the decision taken, at the time of the Second Amendment, not to amend Article 18.8 to reflect Article 18.3 i.e. to restrict a continuing Taoiseach from advising the President of the day for the first meeting of the Seanad. Although it might have been neater to take that approach, in fact there was no requirement to do so in circumstances (as identified above) where the combined effect of Article 18.1, Article 18.3 and the specific use of the term "Seanad Éireann" in Article 18.8 mean that it is clear that a continuing Taoiseach is not in a position to advise the President of a day for the first meeting of Seanad Éireann. Those provisions effectively constrain the continuing Taoiseach without the need for an explicit amendment of Article 18.8.

**122.** Although considerable emphasis was placed by the plaintiffs on the amendment in 1941 of Article 18.3 as supporting their interpretation, it might also be observed that in certain respects the amendment is deeply unhelpful to them. In its amended form, Article 18.3 emphasises the importance of the nominated members and their role in the Seanad by permitting only a newly appointed Taoiseach to appoint them. It would be curious indeed if, on the one hand, the amendment enhanced the position of the nominated members by making it clear that only the newly appointed Taoiseach could appoint them but, on the other hand, justified an interpretation of the Constitution that dispensed with their presence altogether, including when the Seanad is carrying out its critical functions under Article 20 in respect of the passing of legislation.

**123.** The plaintiffs further criticise the defendants' interpretation on the basis that it is unlikely that the drafters of the Constitution intended to set up a situation where the Seanad could not be composed, meaning that the legislative functions of the Oireachtas could not be exercised, with all the undesirable consequences that would entail. But it is just as plausible that the drafters were intent on ensuring that an Oireachtas that could not agree on the election of a Taoiseach should not be able to legislate until such election. In other words, it may have been considered desirable that the combined operation of Article 18.3 and Article 18.8 operate as a brake on the establishment of Seanad Éireann (and by definition on the adoption of legislation) until a new Taoiseach is in place.

**124.** As with the plaintiffs' previous argument, because their interpretation of Articles 18.3 and 18.8 in this respect would, if accepted, negate the clear wording of Article 18.1, very compelling reasons for that interpretation are required. For the reasons set out above, the lack of an amendment to Article 18.8 in the same terms as the amendment made to Article 18.3 and the impossibility of a continuing Taoiseach exercising the power in Article 18.8 are insufficient

to persuade this Court that Article 18.8, read with Article 18.3, means that the Seanad can be composed with only elected members.

**125.** While the forty-nine senators recently elected may, understandably, be concerned to meet and transact the business of the Seanad at the earliest opportunity, a meeting of the House without the nominated members first having been appointed would in our view attract the principle discussed by Henchy J. in *State (Byrne) v. Frawley* [1978] I.R. 326 at p. 344. In that case, the Supreme Court rejected an argument that a jury from which women and non-rate payers had been unconstitutionally excluded was still valid because no one who was unqualified had actually served on the jury. Henchy J. observed (in language which seems to us to be equally applicable here):

*“The proposition that juries drawn from the remaining 20% were valid because no ineligible persons served on them, I find no more supportable than a proposition that an election would be valid when 80% of those who should have had an opportunity of voting were barred from the polls. The essential spuriousness of such an election would not be overcome by an assertion that no ineligible persons voted”.*

### **Other provisions of the Constitution**

**126.** For the reasons discussed above, we have come to the conclusion that the references to Seanad Éireann in Article 18 are intended to refer to the Seanad composed of all sixty members comprising both the eleven nominated members and the forty-nine elected members as provided for in Article 18.1. We are furthermore of the view that a consideration of Article 18, as a whole, supports the meaning given to Article 18.1 as explained above. However, the plaintiffs argue that if the literal interpretation of Article 18 that they advance is not accepted, then their interpretation is supported by a harmonious interpretation of the Constitution and in particular by Articles 5, 6, 15 and 16 (see submission at page 78 Day 1). As noted previously,

we think it is legitimate to consider these Articles as part of the relevant constitutional context of which Article 18 itself forms a part. However, we see no basis on which to apply a harmonious interpretation.

**127.** First, in respect of Article 16, the plaintiffs contend that, when one reads Article 18.1 in conjunction with Article 16.2.1 dealing with Dáil Éireann, both Articles simply describe the membership of each House. Article 16.2.1 provides that the Dáil “*shall be composed of members who represent constituencies determined by law*”. That argument seems to us to seriously understate the importance of both Articles. In our view, Article 16.2.1 is a critically important provision in the context of the democratic nature of the State since it not only describes what the Dáil is composed of but also specifies the nature of the Dáil as a House of Representatives. The members of the Dáil are representatives of individual constituencies (which are explained in more detail in the provisions which follow). Article 18.1 fulfils a similar role in describing the composition and nature of the Seanad as an upper House. Far from supporting the position advanced by the plaintiffs, it seems to us that a consideration of Article 16.2.1 alongside Article 18.1, underscores the function of both provisions and supports the conclusion that Article 18.1 should be given the meaning outlined above.

**128.** The plaintiffs also submit that Article 18 must be read in conjunction with Articles 5, 6, and 15. In summary, they argue that, given the democratic nature of the State, the sole power vested in the Oireachtas to make laws, the critical importance of that function, and the need to legislate, it cannot have been the intention of the Constitution that the State could be left without a legislature capable of legislating and they vigorously contend that the contrary position taken by the defendants is unsupportable. It is therefore necessary to consider the relevant provisions of those Articles.

**129.** Article 5 proclaims that Ireland is a sovereign, independent democratic State. Read on its own, that statement, although of very significant constitutional significance, does not tell us

anything about the nature of the democracy created by the Constitution. To find out more, one needs to consider the more detailed provisions of the Constitution which follow.

**130.** In overall constitutional terms, Article 6 is a crucially important provision, in that it makes clear that all powers of government (whether legislative, executive or judicial) are derived from the people. But Article 6.2 clarifies that “*These powers are exercisable only by or on the authority of the organs of State established by this Constitution*”. It is therefore necessary to look elsewhere in the Constitution to identify the organs of State concerned, their functions and the powers and duties conferred on them. Article 6 is the link between the nature of the State proclaimed in Article 5 and the detailed machinery subsequently prescribed to put flesh on the concept of the democratic State.

**131.** In so far as the legislative function is concerned (and the organs of State created for that purpose) Article 15 is a key provision. Article 15.1.1 provides for the Oireachtas as the National Parliament. Article 15.1.2 makes clear that the Oireachtas consists of the President and two Houses namely a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann. Neither of the latter terms are otherwise defined in Article 15 and it is therefore necessary to refer to Articles 16 and 18, respectively, in order to understand more about the organs established by the Constitution to act with the President in discharging the legislative function provided for in Articles 6 and 15. Crucially, it is necessary to refer to Articles 16 and 18 in order to understand how those Houses are composed or constituted. It seems to us to be clear that, when Article 15.1.2 refers to Seanad Éireann, it has in mind Seanad Éireann composed in accordance with Article 18.1. In our view, that is an inescapable conclusion. Thus, while Article 15.2 goes on to confer on the Oireachtas (comprising the President, the Dáil and the Seanad) the critically important power to make laws for the State (expressly entrusted to them on a sole and exclusive basis), that conferral of power, in so far as the Seanad is concerned, is a conferral on the organ composed in accordance with Article 18.1.

**132.** Further, the Constitution prescribes the nature of the democracy which the people chose to put in place when they enacted and adopted the Constitution. The people chose a bicameral Parliament with an upper House comprised not just of elected members (elected in the very particular way provided for in Article 18.4 to Article 18.7) but also of nominated members to be nominated solely by a Taoiseach who is appointed by the re-assembled Dáil following a Dáil general election. In our view, that is an integral element of the constitutional architecture of the form of democracy chosen by the people when they enacted the Constitution and it cannot now be ignored notwithstanding the difficulty that arose in the election of an incoming Taoiseach by the Dáil. To wholly exclude the nominated members from the Seanad would ignore the explicit requirement of the Constitution in that regard. For those reasons, we do not accept that the reliance placed by the plaintiffs on the democratic nature of the State, ultimately assists their argument.

**133.** As noted above, in his oral argument, counsel for the plaintiffs also sought to suggest that a consideration of Article 24 will demonstrate that the interpretation of Article 18 advanced by the defendants must be wrong. Under Article 24, provision is made for an accelerated legislative process in times of public emergency. Counsel argued that this machinery must be available to the State so that the Oireachtas, for the protection of the people, will be able to respond to moments of great crisis. He argued that the interpretation of Article 18 advanced by the defendants meant that there would be no functioning Oireachtas capable of implementing the Article 24 machinery and that it is therefore necessary to adopt a harmonious interpretation to allow Article 18 and Article 24 to be construed in harmony. We reject that argument. As the Attorney General made clear in his response, the constitutional machinery itself provides the solution – namely the nomination of a new Taoiseach by the Dáil. If an emergency arose of sufficient gravity to trigger the potential application of the Article 24 machinery, it is unthinkable that the elected representatives of the people in Dáil Éireann would not be able to

set aside their differences and take the necessary action to nominate a Taoiseach for appointment by the President.

**134.** In conclusion, we consider there is no inconsistency between any of the provisions of the Constitution discussed above. Each of these inter-related elements of the Constitution appear to us to be clearly expressed. Their literal meaning is clear. In these circumstances, we see no scope for the application of a harmonious interpretation. On the contrary, each of the relevant provisions seem to us, by reference to their express language and literal meaning, to work together consistently so that there is no need to adopt an approach that seeks to give them some other “harmonious” meaning.

#### **Absence of dissolution provision in respect of the Seanad**

**135.** The plaintiffs also make an argument that, in contrast to the Dáil, the Seanad is not dissolved but remains in continuous existence. They point to Article 16.3.2 which, in the case of the Dáil, expressly envisages that there will be a period of up to 30 days following its dissolution when the Dáil will no longer subsist. They contrast this with the position under Article 18.9, whereby members of the Seanad continue to hold office until the day before the polling day for the Seanad general election. This means that the outgoing Seanad can continue to sit and function even after the Dáil has been dissolved and even, for a time, after the new Dáil has re-assembled. They assert that Article 18.9 is a constitutional expression of intent that the continuing existence of membership of Seanad Éireann should be maintained as far as possible having regard to the necessity of a transitional period during a Seanad election. In the speaking note provided to the Court at the oral hearing, the point is made that the defendants’ approach means that the State is without a functioning parliament, and that this cannot be correct having regard to the mandate in Article 5, 6 and 15.1.2. and because it renders the Oireachtas inoperative and incapable of responding to unexpected crises. In support of this

position, the plaintiffs rely, by analogy, on the Supreme Court decision in *Loftus v. Attorney General* [1979] I.R. 221.

**136.** It is important to understand the limits of this argument. First, at the oral hearing the plaintiffs made it clear that they do not make the case that the Seanad is entitled to carry out its functions, including enacting legislation, in the absence of its elected members once its members cease to hold office under Article 18.9. It was specifically accepted that the Taoiseach cannot advise the President of the date for the first meeting until after the completion of the Seanad election i.e. after members are elected.

**137.** Second, the plaintiffs are incorrect in asserting that the only period during which the Oireachtas cannot function is the period during which the Dáil is dissolved. In those circumstances, their argument must be reduced to one suggesting that any interpretation of Article 18 that prevents the Seanad from exercising its legislative functions at any point in time after the Seanad election must be avoided. As we have already concluded above, the clear words of Article 18 cannot be distorted to achieve an end where legislation may be passed prior to a Taoiseach being elected. For that reason, we do not believe the plaintiffs' reliance upon the lack of a dissolution provision in respect of the Seanad assists them.

**138.** Article 18.9 makes it clear that the plaintiffs are incorrect in asserting that the only period during which the Oireachtas cannot function is the period during which the Dáil is dissolved. The necessary implication of providing that every member of the Seanad continues "*to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination*" is that, from the polling day until the first meeting of Seanad Éireann, the Seanad cannot legislate. There is therefore a gap in the functioning of the Oireachtas (a) after the Dáil is dissolved and before the first sitting of the Dáil after polling day and (b) from the day of the Seanad election until the first meeting of the Seanad.



**139.** Here, the Dáil was dissolved on 14<sup>th</sup> January 2020 and the first sitting of the Dáil took place on 20<sup>th</sup> February 2020, after the general election on 8<sup>th</sup> February 2020. During the entirety of that time, the Seanad could sit though of course no new legislation could be passed because the Dáil was dissolved. Then, up until 29<sup>th</sup> March 2020, the day before polling for the Seanad elections, both Houses were sitting and legislation could be and was passed. From 30<sup>th</sup> March 2020, because of the operation of Article 18.9, existing Seanad members no longer held office and therefore the Seanad could not sit. Post 3<sup>rd</sup> April 2020, forty-nine members of Seanad Éireann were deemed elected but the eleven members had not been nominated so the continuing Taoiseach could not reasonably have advised the President of the date to be fixed for the first meeting.

**140.** This chronology makes it clear that the Constitution clearly provides for distinct periods of time where the Seanad cannot sit as well as providing for when the Dáil cannot sit. Moreover, the Constitution does not provide any time limits by which the Taoiseach has to advise the President of the date of the first meeting of Seanad Éireann; there is no time within which a Taoiseach must be appointed; and there is no limit to the amount of time a Taoiseach and the other members of Government shall carry on their duties until their successors have been appointed. The Constitution therefore envisages periods of time during which a “caretaker” government is in place and during which no legislation can be passed. This is undoubtedly undesirable for many reasons: but it is not inconsistent with the Constitution. Contrary to the plaintiffs’ argument, the Constitution envisages periods of time during which the Seanad cannot carry out its legislative functions. Therefore, the absence of a dissolution provision does not signify continuity of the Seanad from polling day of the general election, or from the election of the members. We conclude that there is nothing in the constitutional architecture of either the Dáil or Seanad suggesting that Article 18 requires to be interpreted to permit the Seanad to carry out its functions in the absence of the nominated members.

**141.** Nor does the decision of *Loftus* assist the plaintiffs. In that case, the Supreme Court held that it was implicit in the Constitution that the office of Chairman of the Dáil continues even after a dissolution of the Dáil. The Court reached that conclusion in circumstances where the Chairman is an integral part of the Presidential Commission created under Article 14 which acts in the event of the absence or incapacity of the President. In that case, O’Higgins C.J. said at p. 244 that the provisions of Article 14 envisage the continuance of the office of Chairman. He said that: “*Otherwise, the Article would have been worded differently and would have made special provision for such an eventuality in which [the office] had ceased to exist*”. Because of that constitutional meaning, a similar meaning was to be given to the reference to the Chairman of Dáil Éireann in legislation, where he made up part of a statutory appeal board, even though the Dáil was dissolved at the time the appeal board sat. But in that case, the reason the Chairman was treated as remaining the Chair of the Dáil, despite its dissolution, was because of the terms of Article 14 which go to great lengths to make clear that, whenever the President is not available to carry out his or her constitutional functions, there will always be a Presidential Commission available to act in the absence, for any reason, of the President. But in this case, the terms of Article 18 explicitly provide for the opposite: that as soon as a general election of the Seanad takes, the members no longer hold office.

**142.** Finally, a point was raised as to whether members elected in the Seanad election hold office prior to the first meeting of the Seanad. We find it unnecessary to answer that question as its determination is not relevant to the matters before us.

### **Conclusions**

**143.** For the reasons earlier stated we are satisfied that Article 18.1 clearly and unambiguously means that the institution or organ of State, Seanad Éireann, created by the Constitution, must be comprised of sixty members, eleven of whom are nominated and forty-

nine of whom are elected. This arises both from the wording of Article 18.1 itself, the other provisions of Article 18 and a consideration of Articles 5, 6, and 15.

**144.** It follows that we reject the plaintiffs' contention, primarily based on a construction of Article 18.8, that the Seanad is permitted to sit before the Taoiseach has nominated the 11 members provided for in Article 18.1.

**145.** In coming to this conclusion, we considered Article 18.8 in the context of the relevant provisions of the Constitution which address Seanad Éireann and its place within the legislative system established by the Constitution. Having done so, we are satisfied that the purpose of Article 18.8 is to set temporal limits for the holding of the general election and the convening of the first meeting of Seanad Éireann. We do not consider significant the absence of a reference to nominated members in Article 18.8. Neither elected nor nominated members are identified in Article 18.8. On the other hand, we consider the reference to the first meeting being of "Seanad Eireann" very significant. Nothing in Article 18.8 suggests that the reference to Seanad Eireann was intended to refer to a group of people different to those identified in Article 18.1, being forty-nine elected members and eleven nominated members. The absence of an explicit reference to nominated members in the wording of Article 18.8 is not, in our view, significant where a meeting of Seanad Eireann must include them.

**146.** Neither do we consider it relevant that Article 18.8 was not amended to explicitly restrict a continuing Taoiseach from advising the President of the day for the first meeting of the Seanad, even though an amendment was made to Article 18.3 in 1941 restricting a continuing Taoiseach from nominating the eleven members to the Seanad. There was no requirement to do so where the combined effect of Article 18.1 and the explicit reference to Seanad Eireann in 18.8 make it clear that the first meeting cannot take place without the nominated members.

**147.** In circumstances where our analysis of Articles 18.1 and Article 18.8 did not identify any conflict between those provisions, it was not necessary for the Court to resort to what is commonly described as a harmonious approach to constitutional interpretation.

**148.** Turning to other Articles of the Constitution relied upon by the parties in their submissions, we are satisfied that a consideration of Article 16.2.1 (in respect of the composition of the Dáil) when considered alongside Article 18.1, supports the conclusion that Article 18.1 should be given the meaning outlined above.

**149.** Insofar the democratic nature of the State identified by Article 5 is concerned, the people chose a bicameral Parliament with an upper House comprised not just of elected members (elected in the very particular way provided for in Article 18.4 to Article 18.7) but also of nominated members to be nominated solely by an incoming Taoiseach. That is, in our view, an integral element of the constitutional architecture of the form of democracy chosen by the people when they enacted the Constitution. Article 6 makes it clear that the powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. This means the Seanad must be as established by the Constitution, i.e. Article 18.1.

**150.** Finally, the Court rejects the plaintiffs' submission that because the Seanad is not dissolved, it should be in a position to legislate at all times, save where explicitly precluded from so doing. Article 18.9 makes it clear that the members of the Seanad cease to hold office prior to an election for the Seanad. Furthermore, the constitutional scheme clearly envisages that there will be periods when the Seanad cannot sit and during which periods legislation cannot be passed by the Oireachtas. The fact that the members of the Seanad cease holding office before a general election rather than the Constitution providing for a dissolution of the Seanad does not alter that position.

**151.** Whilst the plaintiffs have sought to characterise what has occurred since the 29<sup>th</sup> March 2020, when the members of the 25<sup>th</sup> Seanad ceased to hold office, as a constitutional *lacuna*, and that is how it is described in the current edition of *Kelly*, we do not believe that it is accurate to so describe it. In our view the *lacuna* is simply the product of the form of democracy adopted in the Constitution which proceeds on the basis that the organs of State to whom powers are conferred by the Constitution will act to give effect to them. Thus, in so far as the election of the Taoiseach is concerned, Article 13.1 assumes that the Dáil will nominate a Taoiseach for appointment by the President. The Constitution places no time limit on the Dáil for this purpose. Nor does the Constitution place any temporal limit on the operation of Article 28.11 pending the appointment of a new Taoiseach. The Constitution clearly proceeds on the basis that the elected representatives of the people will act rationally and responsibly and that they will wish to give effect to the vitally important legislative function entrusted to them under the Constitution and to ensure that, from their number, a Government is put in place. The Constitution leaves that process to the elected representatives.

**152.** In our view, the Attorney General was correct in characterising the problem engendered by the delay in nominating an incoming Taoiseach not as relating to constitutional interpretation but rather concerned with the absence of political consensus within the Dáil.

**153.** The Court acknowledges as genuine and sincere the plaintiffs' concerns that without a functioning Seanad it would be impossible to enact emergency legislation that might at any time be required and that the arrival of the Covid-19 pandemic served to highlight the significance of risk to which the State might be exposed. While we understand why the plaintiffs have raised this issue, we do not believe that considerations of that kind can be allowed to influence the interpretation of the Constitution. As the Supreme Court judgment in *Curtin* stresses, we are bound to interpret the Constitution by reference to its terms. We see

nothing in the terms of the Constitution which would permit the convening of a partially constituted Seanad comprising only the forty-nine elected senators.

**154.** Further, as already observed in this decision, had it been necessary in the period since the Seanad general election was concluded to enact emergency legislation to protect the public, it seems to us inconceivable that the elected representatives of the people would not have acted urgently to overcome the political stalemate and elect a Taoiseach so as to allow the Oireachtas to function and carry out its legislative functions. Recent events in reaction to the Covid-19 crisis, demonstrate that, when necessary, the elected representatives of the people have been able to overcome their differences and to enact emergency legislation including legislation that was passed without a vote. There is no reason to suppose that the election of a Taoiseach would not proceed if that was what was required to pass legislation necessary to protect the public.

**155.** Finally, we make no finding in relation to the issue raised by the Defendants concerning the scope of the role of the court in reviewing the discretion of a continuing Taoiseach to advise the President, under Article 18.8, to fix a date for the first meeting of the Seanad. In light of the way in which the arguments unfolded on both sides, the issue in relation to the role of the court fell away and it is neither necessary nor appropriate that we should express a view on that issue.

**156.** In summary, for all the reasons advanced in this judgment, we are of the view that the first meeting of the Seanad may only lawfully take place when all sixty members identified in Article 18.1, elected and nominated, are in place.