THE HIGH COURT

[2024] IEHC 288

[Record No. 2013/2708P and 2013/2709P]

IN THE MATTER OF THE CREDIT INSTITUTIONS (STABLISATION) ACT 2010 AND IN THE MATTER OF THE DIRECTION ORDER MADE ON 26 JULY 2011 PURSUANT TO THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 AND IN THE MATTER OF THE DIRECTION ORDER MADE ON 28 MARCH 2012 PURSUANT TO THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010

BETWEEN

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

PLAINTIFFS

AND

IRELAND AND THE ATTORNEY GENERAL AND THE MINISTER FOR FINANCE

DEFENDANTS

DECISION of Ms Justice Bolger delivered on the 13th day of May 2024

1. This is the plaintiffs' claims for 26 separate declaratory reliefs pertaining to the constitutionality and the consistency with EU law of the Credit Institutions (Stabilisation) Act 2010 (herein after referred to as "the Act"), an Article 267 reference, if necessary, to the Court of Justice of the European Union and damages.

2. The Act was enacted on 21 December 2010, it was amended in 2011 by the Central Bank and Credit Institutions (Resolution) Act 2011 and most of the provisions of the Act, including those impugned in the within proceedings, ceased to have any effect as of 31 December 2014. This challenge is to the provisions of the Act prior to the 2011 amendments.

3. The third, fifth and sixth plaintiffs appeared personally, with the fifth and sixth plaintiffs supporting the written and oral submissions made by the third plaintiff, Mr. Skoczylas. The first and

second plaintiffs had previously settled their differences with the State, the eighth plaintiff is deceased and the seventh and ninth plaintiffs did not appear.

4. For the reasons set out below, I refuse the reliefs sought.

5. I deal firstly with Mr. Skoczylas' application to represent the fourth plaintiff company. I then set out the Act and the impugned sections thereof. I summarise the background and previous litigation in which some of the plaintiffs were previously involved and I then address the consistency of the impugned sections of the Act with EU law and with the Constitution.

Application by Mr. Skoczylas to represent the company

6. This hearing commenced before me on 20 June 2023, having been called on for three days the previous Thursday, 15 June. At the outset, Mr. Skoczylas sought to make an oral application to represent the fourth plaintiff company whose solicitors had been allowed to come off record by Roberts J. in a reserved written decision delivered on 7 June 2023, almost two weeks before this hearing commenced. Mr. Skoczylas is an experienced lay litigant and, as he highlighted to the court, has been commended by other courts on the quality of his paperwork. He sought to justify his failure to bring an application by notice of motion grounded on an affidavit by what he claimed was his entitlement to make the application orally and the court's inherent jurisdiction to deal with it. He did not explain his failure to file an application in that usual way since the decision of Roberts J. on 7 June, other than in referring to what he said were the exceptional circumstances of the case and that the facts on which he relied were *"self-evident"*. The State did not object to the absence of a formal application grounded on affidavit, but that in itself does not render the application properly before the court or excuse its absence.

7. Mr. Skoczylas relied on the decision of the Supreme Court in *AIB v. Aqua Fresh Fish Ltd* [2018] IESC 49 and asserted that the exceptional circumstances that Finlay Geoghegan J. had referred to therein, permitted him to represent the company. He expressed concern that the company would be prejudiced by a possible argument that he was not affected because the money he invested had been invested via the company. No such case had been made in the respondent's Defence or written submissions that were filed prior to the commencement of the hearing. In any event, the prejudice Mr. Skoczylas seemed to be concerned about was potential prejudice to him rather than to the company.

8. Prior to the application by the company's former solicitors to come off record, the same solicitors had been allowed to come off record in other related proceedings by the Court of Appeal on 25 May 2023. At the call over on 15 June 2023 in respect of this case, Mr. Skoczylas confirmed that this case was ready to proceed. By then he had known for some time that the company's solicitors had been permitted to come off record in both these and in other related proceedings. Therefore, any urgency to his application to represent the company was his own making and cannot justify his failure to bring the application properly before the court or constitute a valid reason why he should be permitted to represent the company.

9. Mr. Skoczylas put forward a position in correspondence of 2 September 2020, which he chose to open to the court, in which he had previously proposed a settlement of these proceedings if the State made certain financial payments to him, which he urged on the State on the basis, *inter alia*, that the State would not be able to obtain costs from him. That is a relevant factor in determining whether Mr. Skoczylas should be permitted to represent the company.

10. It is only in truly exceptional circumstances that an individual may represent a company (*AIB v. Aqua Fresh*), a position endorsed by the Court of Appeal in *Scotchstone v. Ireland & anor* [2023] IECA 129, at para. 82 of their decision in relation to Mr. Skoczylas' application to compel the company's then solicitors to stay on record on the grounds that Mr. Skoczylas had been unable to procure alternative legal representation for the company. This case does not come within the necessary exceptional circumstances in which an application by a person with no right of audience before the court to represent a company might be allowed. In addition, there is no clear (as versus hypothetical) evidence of prejudice that the company will suffer absent not being represented by Mr. Skoczylas.

11. I therefore refuse this application.

The Act

12. The Act was enacted by the Oireachtas on 21 December 2010 at a time when the State and the Eurozone was going through an unprecedented severe financial crisis, the extent of which is recorded in the recitals to the Act all of which merit quotation in full:

> "WHEREAS THERE IS A SERIOUS DISTURBANCE IN THE ECONOMY OF THE STATE;

AND WHEREAS MEASURES ARE NECESSARY TO ADDRESS A UNIQUE AND UNPRECEDENTED ECONOMIC CRISIS WHICH HAS LED TO DIFFICULT ECONOMIC CIRCUMSTANCES AND SEVERE DISRUPTION TO THE ECONOMY;

AND WHEREAS THERE IS A CONTINUING SERIOUS THREAT TO THE STABILITY OF CERTAIN CREDIT INSTITUTIONS IN THE STATE, AND TO THE FINANCIAL SYSTEM GENERALLY;

AND WHEREAS IT IS NECESSARY, IN THE PUBLIC INTEREST, TO MAINTAIN THE STABILITY OF THOSE CREDIT INSTITUTIONS AND THE FINANCIAL SYSTEM IN THE STATE;

AND WHEREAS IT IS NECESSARY, IN THE INTERESTS OF THE COMMON GOOD, TO CONTINUE THE PROCESS OF REORGANISATION, PRESERVATION AND RESTORATION OF THE FINANCIAL POSITION OF ANGLO IRISH BANK CORPORATION LIMITED BEGUN WITH THE ANGLO IRISH BANK CORPORATION ACT 2009 ;

AND WHEREAS THE FUNCTIONS AND POWERS CONFERRED BY THIS ACT ARE NECESSARY TO SECURE FINANCIAL STABILITY AND TO EFFECT A REORGANISATION OF CERTAIN CREDIT INSTITUTIONS;

AND WHEREAS IT IS NECESSARY TO AMEND THE EUROPEAN COMMUNITIES (REORGANISATION AND WINDING-UP OF CREDIT INSTITUTIONS) REGULATIONS 2004 (S.I. NO. 198 OF 2004) TO IMPLEMENT DIRECTIVE 2001/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 4 APRIL 2001 1 TO PRESERVE OR RESTORE THE FINANCIAL POSITION OF CERTAIN CREDIT INSTITUTIONS;

AND WHEREAS THE CONSIDERABLE FINANCIAL SUPPORT PROVIDED BY THE STATE TO CERTAIN CREDIT INSTITUTIONS HAS HELPED THOSE INSTITUTIONS TO MEET THEIR FINANCIAL AND REGULATORY OBLIGATIONS;

AND WHEREAS THE STATE WISHES TO PROVIDE FOR THE PERFORMANCE OF THE FUNCTIONS CONFERRED BY THIS ACT IN ORDER TO ACHIEVE THE FINANCIAL STABILISATION OF THOSE CREDIT INSTITUTIONS AND THEIR RESTRUCTURING (CONSISTENTLY WITH THE STATE AID RULES OF THE EUROPEAN UNION) IN THE CONTEXT OF THE NATIONAL RECOVERY PLAN 2011—2014 AND THE EUROPEAN UNION/INTERNATIONAL MONETARY FUND PROGRAMME OF FINANCIAL SUPPORT FOR IRELAND;

AND WHEREAS THE COMMON GOOD REQUIRES PERMANENT OR TEMPORARY INTERFERENCE WITH THE RIGHTS, INCLUDING PROPERTY RIGHTS, OF PERSONS WHO MAY BE AFFECTED BY THE PERFORMANCE OF THOSE FUNCTIONS;

AND WHEREAS THE URGENT REORGANISATION OF CERTAIN CREDIT INSTITUTIONS IS OF SYSTEMIC IMPORTANCE TO THE STATE;

AND WHEREAS IT IS NECESSARY TO MAINTAIN PUBLIC CONFIDENCE IN, AND ENHANCE, THE PROTECTION OF DEPOSITS IN CREDIT INSTITUTIONS GENERALLY;

AND WHEREAS IT IS DESIRABLE TO PROMOTE AND FACILITATE INVESTMENT BY PERSONS OTHER THAN THE STATE IN CREDIT INSTITUTIONS TO REDUCE THEIR RELIANCE UPON STATE SUPPORT;

AND WHEREAS BECAUSE CERTAIN CREDIT INSTITUTIONS IN THE STATE ARE PARTIES TO CONTRACTS AND OTHER ARRANGEMENTS GOVERNED BY THE LAW OF A STATE OTHER THAN THE STATE:"

13. Section 4 sets out the purposes of the Act as follows:

> "*(a) to address the serious and continuing disruption to the economy and the financial system and the continuing serious threat to the stability of certain credit institutions in the State and the financial system generally,*
> *(b) to implement the reorganisation of credit institutions in the State to achieve the financial stabilisation of those credit institutions and their restructuring (consistently with the state aid rules of the European Union) in the context of the National*

Recovery Plan 2011 - 2014 and the European Union/International Monetary Fund Programme of Financial Support for Ireland.
(c) to continue the process of reorganisation, preservation and restoration of the financial position of Anglo Irish Bank Corporation Limited begun with the Anglo Irish Bank Corporation Act 2009,
(d) to continue the process of preservation and restoration of the financial position of building societies through the issue of special investment shares under section 18 (1A) of the Building Societies Act 1989,
(e) to protect the interests of depositors in credit institutions,
(f) to address the compelling need—
(i) to facilitate the availability of credit in the economy of the State,
(ii) to protect the State's interest in respect of the guarantees given by the State under the Act of 2008 and to support the steps taken by the Government in that regard,
(iii) to protect the interests of taxpayers,
(iv) to restore confidence in the banking sector and to underpin Government support measures in relation to that sector, and
(v) to align the activities of the relevant institutions and the duties and responsibilities of their officers and employees with the public interest and the other purposes of this Act,

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

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

14. Section 7 of the Act allowed the Minister to make a "*proposed direction order"* if they were of the opinion that making a direction order in the terms proposed was necessary to meet a purpose of the Act as set out in s. 4 and after the Minister had taken certain steps including consultation with the Governor of the Central Bank. Section 9 allowed the court to make a direction order on an *ex parte* basis once the court was satisfied that the opinion of the Minister, that the direction order is necessary, was neither unreasonable nor vitiated by error of law. Matters were only made public after the direction order was made and thereafter s. 11 allowed an application to be made within 5 working days to set the order aside. If the direction order was made by the High Court, potentially wide ranging and radical effects could then follow.

15. The plaintiffs challenge the following sections of the Act as inconsistent with EU law and as contrary to the Constitution:

"7.— (1) Subject to subsections (2) and (4), the Minister may make a proposed direction order proposing that a relevant institution be directed to take (within a specified period) or refrain from taking (during a specified period) any action, including, in particular, and without limiting the generality of the foregoing, any one or more of the following:
(a) notwithstanding any statutory or contractual pre-emption rights, the listing rules of a regulated market or the rules of any other market on which the shares of the relevant institution may be traded from time to time, issuing shares to the Minister or to another person nominated by the Minister on terms and conditions that the Minister specifies in the proposed direction order at a consideration that the Minister sets;
(b) applying for the de-listing of the relevant institution's shares, or the suspension of their listing, on a regulated market, or to change the listing of the relevant institution's shares from a regulated market to another multi-lateral trading facility;

(c) increasing the authorised share capital (including by the creation of new classes of shares) of the relevant institution to permit it to issue shares to the Minister or to any other person nominated by the Minister;
(d) making a specified alteration to the relevant institution's memorandum of association and articles of association (including, without prejudice to the generality of the foregoing, the alteration of the rights of shareholders or any class of shareholders);
(e) disposing, on specified terms and conditions, of a specified asset or liability or a specified part of the relevant institution's undertaking…

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

(2) The Court, when hearing an ex parte application under subsection (1), shall, if satisfied that the requirements of section 7 have been complied with and that the opinion of the Minister under that section was reasonable and was not vitiated by any error of law, make a direction order in the terms of the proposed direction order (or those terms as varied after consideration of any submission referred to in section 7(4)(c)).

(3) If in a proposed direction order the Minister has declared the intention of preserving or restoring the financial position of a credit institution, and the Court is satisfied that the Minister made the proposed direction order or part of it with that intention, the Court shall declare in the relevant direction order that the direction order or the relevant part of it is a reorganisation measure for the purposes of the CIWUD Directive.

(4) A report prepared by the Bank (whether or not prepared specifically for the purpose of the application) in relation to matters within the Governor's or the Bank's responsibilities, including the financial position of the relevant institution, is admissible in evidence at the hearing of the application.

(5) The Court may make a direction order in terms varied or amended from those in the proposed direction order only if the Court is satisfied that— (a) there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7(2) was unreasonable or vitiated by an error of law, (b) it would be appropriate to do so, having regard to any report referred to in subsection (4), and (c) to do so is necessary for the purpose specified in the proposed direction order or any other purpose of this Act.

(6) The Court may give a direction, as it thinks appropriate, in relation to the publication of a direction order. (7) Subject to subsection (8), a direction order has effect— (a) if an application is made under section 11, in accordance with that section, and 16[2010.] [No. 36.] Pt.2 S.9 Credit Institutions (Stabilisation) Act 2010. (b) if no such application is made, 5 working days after the making of the order.

(8) The Court shall order that a direction order or a term of a direction order has effect immediately where the Court is satisfied that the purpose of the order or term is—

(a) to ensure the immediate and effective issuance of additional share capital in the relevant institution concerned by issuing shares to the Minister or his or her nominee—

(i) to prevent or remedy an imminent breach of the regulatory capital requirements applicable to the relevant institution, or

(ii) to enable the relevant institution immediately to meet regulatory capital targets set by the Bank,

(b) to address an imminent threat to the financial stability of the relevant institution concerned, or

(c) to address an imminent threat to the stability of the financial system in the State.

(9) The Court may order in a direction order that action taken by a relevant institution in accordance with section 8 shall be taken to have been taken in compliance with the direction order…

11.—(1) The relevant institution in relation to which a direction order is made or a member of that institution may apply to the Court by motion on notice grounded on affidavit, not later than 5 working days after the making of a direction order, for the setting aside of the direction order.

(2) The Court shall give such priority to an application under subsection (1) as is necessary in the circumstances and may give such directions with regard to the hearing of the application as it considers appropriate in the circumstances.

(3) On an application under subsection (1), the Court shall set aside the direction order only if it is of the opinion that there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7(2) was unreasonable or vitiated by an error of law.

(4) The Court may, instead of setting aside the direction order, make an order varying or amending that order in the manner it considers appropriate if the Court is satisfied that— Application to vary direction order. Application to set aside direction order. 17Pt.2 S.11 [No. 36.] [2010.] Credit Institutions (Stabilisation) Act 2010.

(a) there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7(2) was unreasonable or vitiated by an error of law,

(b) it would be appropriate to do so, having regard to any report referred to in section 9(4), and

(c) to do so is necessary to secure the achievement of the purpose specified in the direction order or any other purpose of this Act.

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

(6) An order under subsection (4) has effect, from the date of its making, to vary or amend the direction order without prejudice to the validity of anything previously done or taken to have been done under the direction order…

46.—(1) No enactment or rule of law, no provision of a relevant institution's memorandum of association or articles of association, no agreement and no rule or other instrument shall be taken to require the members or directors of a relevant institution to approve by resolution (whether an ordinary, special or other resolution) the taking of any action—

(a) by the relevant institution,

(b) by the directors of the relevant institution, or

(c) where the relevant institution is under special management, by the special manager, which that institution is directed to take by the Minister under this Act or by order of the Court under this Act or which is required to be taken in order to make effective any order made or direction given by the Minister or the Court under this Act.

(2) Any resolution passed by the members of a relevant institution the effect of which would otherwise be to prevent the taking of any action by—

(a) the relevant institution,

(b) the directors of the relevant institution, or

(c) where the relevant institution is under special management, the special manager,

which that institution is required to take by an order under this Act, or which is necessary to make effective any such order, or any requirement of the Minister under this Act, is of no effect…

47.—(1) There may be included in an order under this Act a provision that all the powers, or any specified power, exercisable by the members of the relevant institution concerned in a general meeting under, as the case may be, the Companies Acts, the Building Societies Act 1989 or the Credit Union Act 1997, any other enactment, the relevant institution's memorandum of association or articles of association, any agreement or any rule or other instrument, shall instead be exercised by the Minister. Such an exercise shall be taken for all purposes to have been that of the members.

(2) Where an order under this Act makes provision in accordance with subsection (1), any provision of the enactments or instruments referred to in that subsection which—

(a) enables or requires any matter to be done or to be decided by a relevant institution in general meeting, or

(b) requires any matter to be decided by a resolution of that institution,

shall be taken to be satisfied by a decision of the Minister notified in writing to that institution…

48(2) The duty imposed by subsection (1)— (a) is owed by the directors to the Minister on behalf of the State, and (b) takes priority over any other duty of the directors to the extent of any inconsistency.

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

(a) the Companies Acts, the Building Societies Act 1989, the Credit Union Act 1997 or any other enactment,

(b) any other rule of law or equity,

(c) any code of practice made under an enactment,

(d) the listing rules of any regulated market or the rules of any other market on which the shares of a relevant institution may be traded from time to time,

(e) the memorandum of association and articles of association of a relevant institution, or

(f) any agreement to which such an institution or any of its subsidiaries is a party, is bound by, or has an interest in,

except to any extent to which this Act expressly provides otherwise…

63.—(1) Leave shall not be granted for judicial review of any decision under this Act unless—

(a) either—

(i) the application for leave to seek judicial review is made to the Court within 14 days after the decision is notified to the person concerned, or that person otherwise becomes aware of the decision, or

(ii) the Court is satisfied that—

(I) there are substantial reasons why the application was not made within that period, and

(II) it is just, in all the circumstances, to grant leave, having regard to the interests of other affected persons and the public interest,

and

(b) the Court is satisfied that the application raises a substantial issue for that Court's determination.

(2) The Court may make such order on the hearing of the judicial review as it thinks fit, including an order remitting the matter back to the Minister with such directions as the Court thinks appropriate or necessary.

(3) A person is not entitled to apply for the judicial review of a decision referred to in subsection (1) if he or she was entitled to apply to have the relevant order of the Court set aside but did not do so. 52[2010.] [No. 36.] Pt.7 S.63 Credit Institutions (Stabilisation) Act 2010.

(4) A person is not entitled to apply for the judicial review of a decision referred to in subsection (1) if he or she applied to have the relevant order of the Court set aside and that application was refused by the Court…

64.—(1) The determination of the Court of an application for leave to apply for judicial review, or an application for judicial review, is final and no appeal lies from the decision of the Court to the Supreme Court in either case, except with the leave of the Court.

(2) A direction order, special management order, subordinated liabilities order or transfer order, and an order varying such an order or setting it aside, is final and no appeal lies from the order of the Court to the Supreme Court except with the leave of the Court.

(3) The Court shall grant leave under subsection (1) or (2) only if the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(4) On an appeal from a determination of the Court in respect of an application referred to in subsection (1), or an appeal from an order referred to in subsection (2), the Supreme Court—

(a) has jurisdiction to determine only the point of law certified by the Court under subsection (3), as the case may be (and to make only such order in the proceedings as follows from that determination), and

(b) shall, in determining the appeal, act as expeditiously as possible consistent with the administration of justice.

(5) This section does not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."

Background and previous litigation

16. The plaintiffs were all shareholders in Irish Life & Permanent Group Holdings plc ("ILPGH"). In July 2011 the Minister for Finance decided, pursuant to the Act, to recapitalise ILPGH in the approximate amount of €4bn, to dilute its share capital and to require Irish Life Assurance to be sold, which the Minister then purchased in March 2012. Two direction orders were made in order to implement these decisions, the first made on 26 July 2011 ("the July Direction Order") allowed the

share capital to be issued to the Minister and the dilution of the existing shareholders. The sale of Irish Life was achieved by way of a second Direction Order of 28 March 2012 ("the March Direction Order").

17. Some of the plaintiffs took proceedings to challenge those Direction Orders pursuant to section 9. They failed in both applications but for different reasons. They were permitted to challenge the July Direction Order, but their application was ultimately rejected. They were prevented from challenging the March Direction Order due to what the court found was their lack of *locus standi*.

18. In her first judgment on the challenge to the July Direction Order ([2014] IEHC 418), O'Malley J. made the following findings of fact at para. 41.2, which were subsequently upheld by the Court of Appeal, and which are, therefore, binding on this Court:

> *"1. From 2008 onwards, ILP along with other Irish banks became increasingly reliant upon State and EU financial support. As time went by and the financial turmoil of those years did not resolve, the efforts of the Irish government to support the banks did not succeed in convincing the markets of either the banks' viability or the State's capacity to continue supporting them.*
>
> *2. By late 2010 it was apparent that there was a serious threat to the financial stability of the State, in significant part due to the State's commitments to the banks.*
>
> *3. The State's guarantees in respect of ILP amounted to c. €26 billion.*
>
> *4. In entering into the Programme of Support in November 2010, the Irish State entered into binding legal commitments to the European Commission, the European Central Bank and the International Monetary Fund, including a commitment to recapitalise viable Irish banks.*
>
> *5. As part of the Programme, the Central Bank of Ireland committed itself to carry out a Prudential Capital Assessment Review and a Prudential Liquidity Review and to determine the capital needs of the banks on the basis of the results.*
>
> *6. The PCAR and PLAR results were published on the 31st March, 2011.*

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

8. The Governor of the Central Bank then directed ILP to raise regulatory capital in the sum of €4 billion. This direction was binding on ILP and was not the subject of any legal challenge. The direction was made by the Central Bank in its capacity of independent regulator.

9. On the balance of probabilities, the required capital could not have been raised from private investors.

10. On the balance of probabilities, the required capital could not have been raised from existing shareholders.

11. On the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the bank, whether by reason of a run on the bank by depositors, revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities.

12. The failure of ILP would, as a matter of probability, have resulted in a complete loss of value to the shareholders.

13. The failure of ILP would, as a matter of probability, have had extreme, adverse consequences for the Irish State, whether by reason of a run on the bank and subsequent calls on the State guarantee of up to c. €26 billion, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme of Support for non-compliance with its terms, sanctions imposed under the Treaty, or a combination of some or all of these possibilities.

14. The adverse consequences for the State would, as a matter of probability, have worsened the threat to the financial stability of other Member States and of the European Union.

15. The decision by the State to invest in the recapitalisation was made in fulfilment of its legal obligations and in the interests of the State's financial system, the citizens of the State and the citizens of the European Union.

16. The State decided to recapitalise ILP by way of a subscription by the Minister for Finance for ordinary shares in the sum of €2.3 billion, contingent capital in the sum of €0.4 billion, and a "standby" investment of €1.1 billion. The price to be paid per share was €0.06453, a discount of 10% to the middle market price on the 23rd June, 2011. The calculation of the number of shares required to be issued in return for the €2.3 billion resulted in the acquisition by the Minister of 99.2% of the company.

17. The share price on that date was not the result of a false market. The share price had been falling in any event over the previous number of years, and fell dramatically on publication of the PLAR/PCAR results. As a matter of probability, this was because the market doubted the ability of the bank to achieve the required recapitalisation in a way that would be attractive to investors.

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

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

20. The paid in share capital of the company was not counted as part of the recapitalisation and has not been taken out of the company by the Minister.

21. The Liability Management Exercise resulted in a significant loss to the subordinated debt holders and contributed significantly to the recapitalisation.

22. The European Commission gave approval under State aid rules for the recapitalisation of ILP by means of the State investment in the same manner, at the same price and to the same extent as that ultimately carried out on foot of the direction order made by the High Court.

23. The Irish Takeover Panel granted a waiver of Rule 9 for the purposes of the State investment on the basis of the same proposal. This did not involve any breach of the Takeover Directive.

24. The Minister's proposal was supported, albeit reluctantly, by the board of ILP. The board considered that the company had no other option available to it in terms of achieving the required recapitalisation. An EGM was called with a view to passing the necessary resolutions.

25. The State's proposal was not accepted by the shareholders voting at the EGM on the 20th July, who wished to explore other potential avenues for the raising of the required capital. The Board was instructed to seek an extension of time for the recapitalisation.

26. Neither the Minister for Finance nor the Governor of the Central Bank was minded to seek such an extension. Having regard to the source of the deadline, an extension would have required the consent of the External Partners and the members of the Council.

27. The Minister decided to make a Proposed Direction Order pursuant to the provisions of the Credit Institutions (Stabilisation) Act, 2010.

28. He informed the Governor of the Central Bank of his intentions and complied with the procedural requirements of the Act in so doing.

29. He informed the Board of ILP of his intentions and complied with the procedural requirements of the Act in so doing.

30. The Governor communicated his views, which were supportive of the proposed direction order as being likely to achieve the statutory purposes of the Act.

31. The chairman of the board referred the Minister to the letter he had written after the EGM, outlining the views of the dissenting shareholders.

32. The application for a direction order was made and granted, in accordance with the procedure prescribed by the Act, on the 26th July.

33. There was no want of candour and no breach of duty to the Court on the part of the Minister or his legal representative in the making of the application.

34. One result of the order was (as it would have been under the proposal put to the EGM) that the Minister obtained 99.2% of the issued shares of ILPGH. It was therefore necessary

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

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

19. O'Malley J. referred the following questions to the CJEU (it was the ECJ at the time of the decision but I refer to it in this judgment as the CJEU):-

"1. Does the Second Directive preclude in all circumstances, including the circumstances of this case, [she included the above quoted factual findings in her reference] *the making of a Direction Order pursuant to Section 9 of the 2010 Act, on foot of the opinion of the Minister that it is necessary, where such an Order has the effect of increasing a company's capital without the consent of the general meeting; allocating new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's Memorandum and Articles of Association without the consent of the general meeting?*

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

In their decision in *Dowling v. Minister for Finance,* Case C-41/15, ECLI:EU:C:2016:836, the CJEU found there was no such breach. That decision was applied by the High Court (O'Malley J.) when the matter was returned to it; *Dowling v. Minister for Finance* [2017] IEHC 520 ("the High Court judgment"). The plaintiffs appealed to the Court of Appeal ([2018] IECA 300) where Hogan J. held that the test required by Article 40.3.2 concerning the vindication of the applicant's property rights required that any departure from the principle of market compensation would have to be subject to the principle of strict scrutiny and proportionality. He held that *"the guiding test in cases of this kind where administrative decisions materially impact on constitutional rights is in substance the proportionality test articulated in Heaney v. Ireland [1994] 3 I.R. 593."* In other words, where a constitutionally protected right is restricted by legislation or an administrative decision, the restrictions must (a) be rationally connected to the objective and not be arbitrary, unfair or based

on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportionate to the objective. On the application of that test, the appeal was dismissed by the Court of Appeal. The Supreme Court refused leave to appeal on the grounds that the threshold for leave had not been met (*Dowling v. Minister for Finance* [2019] IESCDET 55).

20. Proceedings to challenge the March Direction Order (effecting the sale of Irish Life) were also unsuccessful in the High Court on the basis that the plaintiffs, as shareholders in ILPGH, did not have *locus standi* to challenge the decision of ILP, a different company albeit one whose entire share capital was owned by ILPGH, to sell Irish Life. This was upheld by the Court of Appeal in *Dowling & Ors v. Minister for Finance* [2022] IECA 256. It was acknowledged by the Court of Appeal in *Scotchstone* ([2022] IECA 23) that the CJEU wrongly took the view that O'Malley J. had decided in her first judgment that the Direction Order was the only means of recapitalisation, but that the Court found (at para. 328 of its decision) that the measure was taken "*in circumstances where there was a threat to the financial stability of the State and the financial stability of the EU".* That finding was *"crucial to and underlies"* the decision of the CJEU (para. 328).

21. Mr. Skoczylas subsequently instituted *Kobler* proceedings claiming that the Irish courts had misapplied European law, which were dismissed as unstatable by Sanfey J. in April 2020. That decision was appealed to the Court of Appeal and was dismissed on 31 January 2022. Mr. Skoczylas then made a *Greendale* application to the Court of Appeal to set aside their decision on the basis that it was incorrect, which was rejected by the Court of Appeal on 5 December 2022. Mr. Skoczylas and the company also made an application to the European Court of Human Rights on 9 August 2019 claiming a violation of Article 1, Protocol 1 and Article 6 of the Convention, both of which claims were dismissed by the court as manifestly ill-founded in a decision of September 2021.

22. Even though there have been multiple proceedings brought by these plaintiffs arising from actions taken under the Act, it is clear that the issue of the constitutionality of the Act was left over to this Court, as confirmed by Hogan J. in *Dowling* [2018] IECA 300 at para. 4*:*

> *"Separate proceedings challenging the constitutionality of the Credit Institutions (Stabilisation) Act 2010 ("the 2010 Act") have yet to be determined by the High Court. This issue of constitutional validity does not, of course, form any part of this appeal and naturally I express no view on that question."*

Presentation of the plaintiffs' submissions

23. Mr. Skoczylas filed extensive lengthy pleadings and written submissions which he supported by way of oral submissions which were adopted by the fifth and sixth plaintiffs. The Statement of Claim ran to some 68 pages including a "Schedule 1: Selected Particulars and a Schedule 2: Questions for possible reference to the European Court of Justice". The written submissions ran to 37 pages and included an appendix of 40 pages which included extracts from financial statements, the affidavits filed in the previous litigation challenging the Direction Orders, a valuation report prepared on the ILPGH shares, submissions made by the plaintiffs pursuant to s. 7(4)(b) during the Direction Orders proceedings asserting that the company was solvent and setting out alternative structures and referred to resolutions that had been voted by the company's EGM after the board had rejected the Minister's recapitalisation proposal. The plaintiffs also furnished this Court with a timeline of events in relation to the Direction Orders, and the subsequent litigation before the High Court, the CJEU and the Court of Appeal.

24. I draw attention to what the plaintiffs chose to submit to this Court in order to highlight how much of their challenges in these proceedings focused on the application of the Act in the Minster's previous two applications for Direction Orders in March 2011 and July 2012. The legality of those orders are not before this Court as they have already been conclusively determined upon by orders of the High Court and the Court of Appeal. I cannot, and will not, revisit the applications made for the Direction Orders or review how the statutory provisions impugned in this application were applied in those earlier applications, other than insofar as the decisions of the High Court, CJEU, the Court of Appeal, the Supreme Court and the European Court of Human Rights are relevant to and binding on the issues to be determined by this Court.

Discussion

25. I will assess the Act's compatibility, firstly, with EU law, including Article 63 and the principle of proportionality, and then with the Constitution and its provisions on delegated legislation, property rights, access to the courts and fair procedures.

1. **EU Law**

26. The plaintiffs submit that by empowering the Minister to override existing enactments protecting shareholder rights, the Act is incompatible with Article 63 of the TFEU and the free movement of capital and that the Act should apply a strict proportionality test in respect of the breach of their rights under EU law, which means that the less detrimental method of recapitalisation

that was available should have been availed of. They dispute that the CJEU have already determined the compatibility of the Act with EU law as they argue that the decision of the CJEU was only in relation to the Second Company Law Directive and was based on the presumption of constitutionality of the Act. They say that the 5 working-day limit to set aside an *ex parte* direction order under s. 11 of the Act is incompatible with Articles 6.1 and 14 of the ECHR by hindering an ability to effectively vindicate the rights of affected persons and *de facto* discriminating against non-residents (from outside Ireland), as it was more difficult for them to apply within 5 days. The State asserts that the consistency of the Act with EU law has already been determined by the CJEU, the ECHR, the Court of Appeal and the Supreme Court.

1.1 Presumption of Constitutionality

27. I do not accept the plaintiffs' contention that the CJEU proceeded on the basis of presuming the constitutionality of the Act or could have done so. The task of the CJEU is to interpret European law, which interpretation is then binding on the Member State and is applied by the national court. The CJEU is concerned with the supremacy and the interpretation of European law and any presumption that national legislation accords with a national constitution is barely of interest to the CJEU and would not, could not, and did not form part of its jurisdiction or binding decision.

1.2 Article 63 of the TFEU

28. As discussed above, the High Court referred questions of law to the CJEU during its consideration of the plaintiffs' challenge to the March Direction Order. The plaintiff asserts that the decision of the CJEU only found the Direction Order to be consistent with the Second Company Law Directive and that it did not consider the free movement of capital provisions of Article 63, a fundamental freedom of European law and one of the cornerstones on which the system of European law is based. The plaintiffs contend that that allows them to challenge the consistency of the Act with Article 63 in these proceedings. Their case seems to view the referral to and decision of the CJEU, in which many of the plaintiffs were directly involved, as a single and discrete issue of compatibility of the Directions Order with a specified Directive. That ignores two fundamental matters. Firstly, the task of the CJEU, as the plaintiff submitted in detail to this Court by reference to many of its decisions, is to interpret European law and it is then a matter for the national court to apply that binding European law to the national law and to the case. That task is not performed in a vacuum. The CJEU does not discharge its significant functions by reference to a single directive and certainly does not do so by ignoring the cornerstones of the European legal system, one of which is the free movement of capital incorporated into the TFEU by Article 63. That first principle position

is not altered or diluted by the fact that the decision of the CJEU does not make specific mention of Article 63. The principle of the free movement of capital recognised in Article 63 permeates European law. It is naive for the plaintiff, an experienced lay litigant and apparently a European qualified lawyer, to suggest that this principle was somehow ignored, forgotten or excluded by the CJEU. This conclusion is supported by the decision of the Supreme Court ([2019] IESC DET 55) refusing the plaintiff's application for leave to appeal the decision of the Court of Appeal, at para. 43, where the court stated, *"in accordance with established case law each decision of the Court of Justice speaks for itself, but like any body of law, must be seen as part of the corpus."*

29. The second point ignored by the plaintiffs' case on Article 63 is that while the questions referred by O'Malley J. do refer to the Second Company Law Directive, they also refer in more general terms to EU law, particularly in her third question which asked the CJEU whether the Direction Order was *"in breach of European Union Law"*. Posing that question was consistent with the plaintiffs' own submission, summarised by O'Malley J. at para. 37 of her decision ([2014] IEHC 418), that the Direction Order was incompatible with European law, in particular, contrary to the Second Company Law Directive and (my emphasis) to the provision of the TFEU *"in relation to the free movement of capital (because it constitutes a disincentive to investment in shares)"*.

30. A further general reference to EU law was made by Hogan J. in the Court of Appeal as early as paragraph 1 of his judgment where he referred to the CJEU having found that the State's actions did not contravene EU law. Ultimately, part of the reason he refused the plaintiffs' appeal was because the Court of Appeal was bound by the decision of the European court, a conclusion that can be seen, for example, at paras. 128 and 129 of his decision.

31. Finally, a proper reading of the decision of the CJEU demonstrates the broad scope of its decision which cannot be read as a narrow and limited application of the Second Company Law Directive alone, isolated from the wider system of European law and from the fundamental principle of free movement of capital contained in Article 63. Perhaps the best example of the court's concerns with issues beyond any isolated application of the Second Company Law Directive, on the wider issues relating to the financial stability of the European Union (a concern repeatedly highlighted in its judgment), is seen at para. 54 where the court, in distinguishing *Pafitis & ors* (C-441/93, ECLI:EU:C:1996:92) observed that decision was delivered:-

> *"before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring,*

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

32. If I am wrong on that and the decision of the CJEU is as limited to the Directive as the plaintiffs maintain, I am satisfied that the Act is nevertheless consistent with European law including Article 63 TFEU having regard, *inter alia*, to the provisions of Article 65 which provide that Article 63 is without prejudice to the right of the Member States to take measures which are justified on grounds of public policy. Counsel for the State submitted to this Court that the decision of the CJEU justifying the Direction Order was a reflection of public policy, albeit without expressly referring to Article 63, and relied on the following from para. 50 of the CJEU's decision which described the order as:

"an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of the referring court, would threaten the financial stability of the European Union. The protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned."

A similar point was made by Peart J. in addressing the plaintiffs' express submissions on Article 63 in his decision on the March Direction Order ([2012] IEHC 436) where he said, at paras. 182 to 185**:**

"182. The Minister has argued that even if there is some scope to argue Article 63 TEU on the present application, it is clear that there are compelling public policy considerations which can justify the Minister's actions, given the clearly stated purposes of the Act, the unprecedented financial catastrophe with which this country is struggling, and also the fact that the owner of the asset is being compensated at what the minister considers and has been advised is a fair and reasonable price. I note also the provisions of Article 65 TEU which at 1 provides that the provisions of Article 63 shall be without prejudice to a number of

matters, including 'the right of Member States ..... to take measures which are justified on grounds of public policy or public security.'

183. The Minister submits that the Direction Order does not represent an unlawful restriction on the movement of capital as submitted by the applicants. He submits also that there is clearly no discrimination on grounds of nationality since all shareholders are equally affected, if any are affected adversely at all. It is submitted also that even if the Direction Order is to be seen as a restriction on the movement of capital, same is justified on a clear public policy ground, and, moreover, compensation is being paid in the form of €I.3 billion.

184. In addition, the Notice Party, ILP has submitted that it could not be said that by taking certain action which is required to be taken by the State in order to comply with the Implementing Decisions of the Council the Minister would in some way be acting in breach of the Treaty, and the provisions on the free movement of capital. ILP submits also that there could be no arguable breach for the State to take action the effect of which is to sustain and preserve the very institution of which the applicants are shareholders, particularly in circumstances where no viable alternatives have been offered, or are available. In any event, it is submitted that any restriction, if there be such, is amply justifiable on the grounds of the public interest bearing in mind the nature of the Minister's actions and the purpose behind them.

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

Whilst Peart J.'s comments may be viewed as *obiter*, I find them compelling in support of my view that this Act is compliant with Article 65 and with European law on, *inter alia*, public policy grounds.

1.3 Proportionality in European law

33. The Act complies with the fundamental principle of proportionality in European law, as has been found previously in decisions that are binding on this Court. The law of the Union was cited by the CJEU in their decision in *Dowling*, at para. 91, where they held that *"the operations which the*

Union financial assistance helps to finance must be compatible with Union policies and comply with the law of Union". The law of the Union includes the principle of proportionality. The Advocate General explained at para. 91 of the Opinion of 22 June 2016, *Dowling,* Case C-41/15, ECLI:EU:C:2016:473, that proportionality *"requires Member States to employ means which, while enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and principles laid down by the relevant EU legislation."* Subsequent to the decision of the CJEU, Hogan J. in the Court of Appeal applied the Irish test of *Heaney* in finding that the Direction Order satisfied the requirements of the proportionality test. Both the CJEU and the Court of Appeal (whose decisions are all binding on this Court) were satisfied that the State's decision to seek a Direction Order was proportionate to the objectives being pursued. Similarly, the Act itself, pursuant to which the Direction Order was sought and granted, must also satisfy that proportionality test.

34. In addition, I consider the decision of the CJEU in *Kotnik*, discussed above at para. 31, to be relevant to an assessment of proportionality as it confirms that burden swapping or capital dilution of shareholding in a serious financial crisis is a proportionate interference with property rights. The decision was expressly followed by Hogan J. in the Court of Appeal in finding at para. 159 that,

> "*the bank was failing and without this State investment it would – as O'Malley J. expressly found in her first judgment – in all probability have collapsed within days, leading in that situation to a total loss of shareholder value. In a market economy such as ours shareholders cannot realistically expect to be compensated by the State for what amounts, objectively, to a poor investment decision. As I have already observed, these were also the sentiments expressed by the Court of Justice in Kotnik, even if these comments were admittedly made in the context of State aid."*

1.4 ECHR

35. The plaintiffs assert that the Act, in particular ss. 53 and 7(1), are inconsistent and/or incompatible with the ECHR, in particular Article 1, Protocol 1. The decision of the European Court of Human Rights in application number 43209/19 dismissed the plaintiff's claim that the State had violated their rights under Article 1, Protocol 1 and Article 6, as manifestly ill-founded, and the State says this puts an end to this aspect of the plaintiffs' claim. The plaintiffs' response to that was that the European court's decision was *"underpinned by the presumption of constitutionality of the Act"* (transcript, Day 1 of p. 150). I do not accept that submission for the same reasons as I have set out at above in relation to the plaintiffs' Article 63 point. If I am wrong on that, I consider the relevant

article of the Convention to mirror the constitutional protections for private property, fair procedures and access to the courts, and I find no inconsistency between the provisions of the Act and those rights, whether pursuant to the Convention or the Constitution, for the reasons I set out below in my discussion on the relevant constitutional protections.

2. <u>The Constitution</u>

36. I turn now to the plaintiffs' case that the impugned provisions of the Act are unconstitutional on three grounds:-

(i) Article 15;

(ii) A breach of the property rights pursuant to Article 40.1.2 and Article 43;

(iii) A breach of a constitutional right to fair procedures and access to the courts.

2.1 Article 15

37. Article 15.2.1 provides that *"[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."*

38. The plaintiffs argue that ss. 7(1) and 53 along with ss. 46, 47 and 48(2) are inconsistent with Article 15.2.1 because they empower the Minister to effect measures notwithstanding any enactment or other rule of law and they usurp the lawmaking powers of the Oireachtas. They claim that the Minister acted in excess of his powers in what they describe as "*forcing*" the two Direction Orders, stating at para. 28B of their submissions:

> *"Without prejudice to the foregoing, the Minister, in forcing the two ex parte direction orders, acted ultra vires his powers, having regard, inter alia, to Art 15.2.1 of the Constitution.*
>
> *Note: This Court determined in* ***Dowling [2014] IEHC 418****: '38.34 The respondents place reliance on the fact that the direction order must be made by the court.' 'However, it would not be wise to exaggerate the significance of the court's role under the Act.' '38.36 … the reality of the case is that it is the decision of the Minister that is in question and not that of the court' (see also* ***Dowling [2013] IESC 58****, §41; and* ***Dowling [2018] IECA 300****, §131)."*

39. They cite the well known authorities on delegated legislation that were found to exceed the statutory powes of the parent act to make regulations (*Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232; *McDaid* [1991] 1 I.R. 1). They contend the Act's delegation of power to the

Minister failed to allow the Oireachtas a power of supervision including revocation and/or cancellation, failed to set boundaries or identify an objective justification intended to be achieved and that the preamble to the Act does not constitute a sufficient reason for the empowerment that the Act allows.

40. The plaintiffs' arguments do not seem to appreciate that the radical effects of a Direction Order are provided for by the Act itself in s. 53, which was passed by the Oireachtas. The Oireachtas provided for the Minister to exercise the very power, albeit wide-reaching, that the plaintiffs say usurps the Oireachtas' lawmaking powers. But it was the Oireachtas' own lawmaking that led to the enactment of the statutory provision that allows the Minister to exercise those powers. That cannot be a usurpation of the Oireachtas' exclusive constitutional power to make the law. A direction order is an administrative act as found by Hogan J., at para. 132, and does not make law. There is no democratic deficit here.

41. In addition there are a number of important safeguards built into the Act before the Minister can exercise the powers that s. 7 confers on them. The purposes that the Oireachtas had identified in s. 4 of the Act must be furthered and the Minister must follow the consultation procedures laid down by the Oireachtas with named office holders, including the Governor of the Central Bank. The Minister must then, pursuant to s. 9, obtain the confirmation of the High Court which has to be satisfied that the Minister's opinion in relation to the necessity of the order was not vitiated by an error of law and was not unreasonable.

42. The serious financial crisis that was facing the State and the European Union when the July Direction Order was made in relation to ILPGH demonstrates why the Oireachtas considered s. 53 to be necessary. The removal of the rights the plaintiffs had under the Companies Act, including s. 27 thereof, was undoubtedly a serious and radical step, but the Minister was only permitted to take that where it was considered necessary to achieve the purpose of the Act and, as occurred with ILPGH, the company had refused to act. O'Malley J. found, as a fact, that the State was the only source of the money required to recapitalise the company. The law must provide for the views of the members of a company to be overridden as an alternative to them refusing recapitalisation and thereby having a veto on the recapitalisation of an institution of systematic importance to the State and to the EU. The Act reflects that necessity, in particular, at sections 53 and 7.

43. The mechanics of making a Direction Order also recognised and reflected the speed with which financial matters must be able to proceed, an approach that was endorsed by the Supreme Court in *Collins v. Minister for Finance & ors* [2016] IESC 73.

44. The judgment of the Supreme Court in *NECI v. Labour Court* [2021] 2 ILRM 1 sets out what is required for a power to have been lawfully delegated. That decision addresses points that apply to this Act, including establishing that the Oireachtas was the sole legislator, the need to have regard to the entire Act and for the legislation to set boundaries, regard can be had to statements of principle as well as objectives (in this case, to the preamble of the Act as well as the purposes set out in s. 4), whether the Act delimits the power, the safeguards that exist and whether the matter delegated is apt for the legislative process.

45. Given what the Minister is required to do by s. 7 of this Act, the purposes identified by s. 4, the principles set out in the preamble, the safeguards in ss. 9 and 11 and the sunset clause at s. 69, along with the unique nature of a severe financial crisis where things move dangerously quickly, I am satisfied that the Act lawfully and constitutionally delegated powers to the Minister to be exercised in very specific circumstances and subject to very particular requirements and to judicial oversight. The Act did not breach the requirements of Article 15 of the Constitution.

2.2 Constitutional property rights

46. The plaintiffs contend that their constitutional property rights as shareholders have been violated by sections 53, 7(1), 46, 47 and 48(2). They emphasise the recognition by Finlay Geoghegan J. in *Re Eylewood* [2010] IEHC 57 of the rights of shareholders to participate as a constitutionally protected right even where the shares were economically valueless as a result of the insolvency of the company. Whilst they attempted to rely on what they say is the fact that ILPGH was solvent, that was previously found by O'Malley J. not to be so.

47. The views of the High Court and Court of Appeal that the plaintiffs' property rights were not violated by the Direction Order are relevant. If the Direction Order did not breach those rights, it is difficult to see how the legislation pursuant to which they were affected could do so.

48. Article 43.2.2 permits the State to *"delimit by law the exercise of* [the right to private property] *with a view to reconciling their exercise with the exigencies of the common good."* Delimiting property rights in the common good has been approved of by the courts in other times of financial emergencies, for example *J. & J. Haire & Company Ltd v. Minister for Health* [2010] 2 I.R. 615, where McMahon J. found, at para. 86, that "*it is clear that Article 43 itself contemplates that the State may 'regulate' the exercise of property rights having regard to 'the principles of social justice' and 'the exigencies of the common good".* Later in his judgment he endorsed the dictum of Murray C.J. in *Re. Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] I.R. 105 relating to fair procedures who stated at p. 206 that:

> *"Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances".*

McMahon J. states at para. 124 that:

> *"Although a strict reading of this dictum does not unequivocally say that such a crisis will justify such abrogation, it could be argued that it strongly suggests it. In any event, there can be no doubt that there exists at present, in the State, 'an extreme financial crisis or a fundamental disequilibrium in public finances'".*

49. A similar approach can be seen in the decision of the Supreme Court in *Dellway Investments & ors v. NAMA & ors* [2011] IESC 14 in relation to the NAMA legislation where Murray C.J. commented that:

> *"The State, in exercising its powers through the organs of government designated by the Constitution, has extensive powers to regulate and limit the exercise of individual rights in the interest of the common good and this may be relevant where the State is faced with a national crisis, such as one of a fiscal nature. The State has the power to act in the interests of the common good because the Constitution, in its provisions, expressly envisages that."*

He went on to hold, at para. 36 of his judgment in *Dellway* [2011] 4 IR 182, in response to the applicants' challenge to the breadth of the statutory definition of eligible bank assets as an unjust attack on their property rights, that the Oireachtas was entitled as a matter of policy to include that broad definition.

50. Insofar as the Act permits a restriction of the plaintiffs' property rights including by any dilution of the value of their shareholding, I am satisfied that this was done in the common good, which finds expression in the purposes of the Act as set out at s. 4 and the principles espoused in its Preamble. The Act applied a requirement of reasonableness on any Direction Order made thereunder and, as established by the Court of Appeal, that fully complies with the test of proportionality set out by the Supreme Court in *Heaney*. Given its purposes and principles, there is nothing disproportionate either in the Act or in how it was applied to the plaintiffs and to their constitutional property rights at an extraordinary time of severe financial crisis for the State and the European Union. The fact that the Act could retrospectively affect a shareholder's rights does not affect its constitutional validity.

2.3 Fair procedures/access to court

51. The plaintiffs, in particular Messrs. Neugebauer and McGann, contend that the very short period of 5 days allowed by s. 11 to apply to set aside a Direction Order, along with the limitations on judicial review imposed by ss. 63 and 64, violate their constitutional rights of fair procedures and access to the court. Mr. Skoczylas makes the same case by reference to the, ultimately unsuccessful, attempts made by the State to challenge his *locus standi* to challenge the July Direction Order, a challenge that was abandoned by the State after a number of years. The manner in which the litigation progressed does not allow Mr. Skoczylas to make a case that his constitutional rights were violated where he was afforded not only the opportunity to make his case in spite of the State's attempt to challenge his *locus standi* to do so, but he secured a costs order arising from their unsuccessful objections. That was a vindication rather than a violation of his rights.

52. Both Messrs. Neugebauer and McGann said that they could not move to challenge the Direction Order made within the 5 days permitted due to their lack of legal representation, their residence outside the jurisdiction and in relation to Mr. Neugebauer, the fact that English is not his native language. However, neither of them could identify what points of law or evidential challenges they were deprived of putting before the court, in circumstances where they both supported the extensive submissions made by Mr. Skoczylas, whose participation as a minority shareholder in the company did not differ in any substantial or relevant way from theirs.

53. In addition, it is clear that all the shareholders, including the plaintiffs, were on notice some time before the commencement of the 5 day time limits, of the possibility that the Minister would apply for a Direction Order by way of correspondence from the then Chairperson of the company at the EGM (as found by Hogan J. in his decision in the Court of Appeal).

54. The fact that Mr. Skoczylas, whose submissions were supported by Messrs. Neugebauer and McGann, was able in spite of the impugned provisions to challenge the Direction Order in a series of legal challenges, including a reference by the High Court to the CJEU, an appeal to the Court of Appeal, an application for leave to appeal to the Supreme Court and an application to the European Court of Human Rights, demonstrates the plaintiffs' ability to access the courts and pursue extensive, if ultimately unsuccessful, litigation. There is no evidence of any breach of the constitutionally protected rights of access to the court or fair procedures.

55. For the avoidance of doubt, I am also of the view that it was lawful and proportionate for the Act to limit the right to make an application pursuant to s. 11 to challenge a Direction Order to

the relevant institution and its shareholders. There is nothing unconstitutional in limiting a challenge to a shareholder of a relevant institution, a position that has already been upheld by this Court and by the Court of Appeal ([2022] IECA 256) in the plaintiffs' unsuccessful attempt to challenge the Minister's Direction Order due to their lack of *locus standi* as they were shareholders in ILPGH and not in ILP.

Conclusions

56. The plaintiffs' assertions that the Act is unconstitutional and/or inconsistent with European law has no basis in fact or law. There is no reason to refer questions to the CJEU. I dismiss the proceedings in their entirety.

Indicative view on costs

57. In accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that the State is entitled to their costs to be adjudicated upon in default of agreement. I will put the matter in at 10:30am on 13 June 2024 for making final orders including costs.

The third, fifth, and sixth named plaintiffs appeared for themselves.

Counsel for the defendants: Eoin McCullough SC, Ailbhe O'Neill SC.