



THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Record Number 2021/41

Costello J.

Neutral Citation Number [2022] IECA 8

Noonan J.

Barniville J.

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF / RESPONDENT

- AND -

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED

DEFENDANT / APPELLANT

- AND -

**THE MINISTER FOR JOBS, ENTERPRISE AND INNOVATION, IRELAND AND
THE ATTORNEY GENERAL**

DEFENDANTS / RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 21st day of January 2022

1. This is an appeal against the judgment and order of the High Court (Simons J.) dated 4 February 2021 which addressed two issues arising in consequence of a preliminary ruling delivered by the Court of Justice of the European Union (CJEU) in respect of a reference under Article 267 of the TFEU. An application for the trial of preliminary issues was made in long running proceedings taken by Recorded Artists Actors Performers Ltd. (“RAAP”) against Phonographic Performance (Ireland) Ltd. (“PPI”) and Cregan J. directed the trial of

these preliminary issues by order dated 30 April 2018. The trial was heard before Simons J. over four days in November 2018 and by judgment delivered on 11 January 2019, the trial judge made a reference concerning the correct interpretation of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (“the Directive”). The CJEU subsequently delivered judgment in September 2020, and thereafter the proceedings were relisted before the trial judge to address (1) the appropriate form of order, and (2) the allocation of the costs associated with the trial of the preliminary issues and the proceedings before the CJEU. The trial judge made declarations in terms of reliefs (1) and (3) of the order and statement of claim and awarded RAAP the costs of the trial of the preliminary issues and the reference to the CJEU against PPI and the State defendants on a joint and several basis.

2. PPI appealed both the form of the order and the order as to costs.

Background

3. RAAP is a collective management organisation for performers, including performers on sound recordings. PPI is a collective management organisation for producers of sound recordings and is the licensing body for producers for sound recordings.

4. The national legislation governing license fees due to producers of and performers on sound recordings is the Copyright and Related Rights Act 2000 (“the Act”), which provides that users of sound recordings must pay a single fee to the licencing body representing the producer (ss. 37 and 38). Under s. 204(2) of the Act, a performer is conferred a right known as the “*reproduction right*”. The Act purports to transpose into national law the right of performers to “*equitable remuneration*” set out in the Directive, in particular Article 8(2).

This provides:-

“Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States, in the absence of agreement between the performers and the phonogram producers, lay down the conditions as to the sharing of this remuneration.”

5. While performers have a right to equitable remuneration pursuant to the Directive, a user of a phonographic performance within the scope of Article 8(2) pays a single equitable remuneration which is to be shared between the relevant performers and phonogram producers.
6. While the Act provides that users of sound recordings must pay a single fee to the licensing body representing the producer, in this case PPI, the sharing of remuneration between producers and qualifying performers is to be that agreed between them. An agreement was made between RAAP and PPI in 2002 further to the statutory scheme. The dispute between the parties concerns the entitlement, under the terms of the agreement of 2002, of certain non-EEA (primarily U.S.) performers to participate in the distribution of licence fees as between producers of and performers on sound recordings. The issue arises because under the Act not all performers qualify for a share in the fees that are paid. A performer only receives his or her share if he or she is an Irish citizen and/or resident or domiciled in Ireland or any other EEA country.
7. On 28 July 2016, RAAP instituted these proceedings pleading that *under the agreement of 2002*, as properly interpreted in light of the Act and the Directive which it sought to transpose, RAAP was entitled to payment from PPI in respect of certain non-EEA performers. Separately RAAP sought declaratory relief against both PPI and the State

defendants as to the meaning of the Directive and a conforming interpretation of the Act in light of the Directive as properly construed. *In the alternative*, it sought a declaration of non-transposition as against the State.

8. As this appeal turns in part on the terms of the first three prayers for relief in the statement of claim it is appropriate to reproduce them in full:-

“As against Phonographic Performance (Ireland) Limited and, insofar as it is necessary, as against the Minister for Jobs, Enterprise and Innovation Ireland and the Attorney General:

1. A declaration that Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property requires the right to remuneration accorded to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings to be equally accorded to all performers whose performances are incorporated on the said sound recordings;

2. A declaration that the proper construction of the Copyright and Related Rights Act 2000, in the light of Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, taking account of the EU law treaty-based obligation of consistent interpretation, is that the right to remuneration accorded thereunder to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings is also accorded to any and all performers whose performances are incorporated on the said sound recordings;

In the alternative to the foregoing declaratory relief sought, as against the Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General:

3. A declaration, in so far as the Copyright and Related Rights Act 2000 cannot be construed so as to accord to all performers whose performances are incorporated on sound recordings, a right to remuneration in respect of the broadcasting and communication to the public in the State of their said recorded performances in circumstances where the owners of the rights in the sound recordings carrying such performances are accorded such a right to remuneration, that the said Act does not properly transpose Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, and in particular Article 8(2) thereof, into Irish law.”

9. PPI brought an application to the High Court pursuant to O. 25 of the Rules of the Superior Courts to seek a trial on a point of law as a preliminary issue as to the entitlement of RAAP to the three declarations it sought in its prayer for relief in the statement of claim. The affidavit grounding the application was sworn by Ms. Helen Sheehy of Helen Sheehy & Co. Solicitors for PPI. At para. 7, she identified as issues in these proceedings (which were referred to as “the first proceedings” in her affidavit as there are related proceedings which she referred to as “the second proceedings”):-

“... (2) Whether all performers (i.e., all performers including non-EEA performers whose performances were recorded outside the EEA) are entitled to payment of royalties from PPI in respect of the playing in public, broadcasting or cable transmission of recordings of their performances in the State by virtue of the EU Rental & Lending Directive 2006/115?

- *This is the issue raised by paragraphs 1 and 2 of the Prayer for Relief in the Statement of Claim. The claim to the relief is founded upon paragraph 19 of the Statement of Claim. The matters set forth in paragraph 19 and its sub-paragraphs (from which it is clear that Article 8(2) of the 2006 Directive is primarily relied upon by RAAP) largely consist of contentions of law which are in dispute. However, there does not appear to be any factual matter pleaded therein which is in dispute. The “legislative backdrop” pleaded at paragraph 7 of the Statement of Claim, which is also relevant, does not raise any matter of fact (as opposed to contentions of law) that is in dispute.*

...

(3) *If so, whether the Copyright & Related Rights Act, 2000 correctly transposes that obligation?*

- *This is the issue at paragraph 3 of the Prayer for Relief. It is an issue of law.*

(4) ***Whether non-EEA performers, whose performances were recorded outside the EEA, were nonetheless entitled to payment of royalties from PPI in respect of the playing in public, broadcast or cable transmission of recordings of their performances in the State pursuant to the Agreement dated 23 April 2020 between PPI and RAAP in circumstances where the track in question featured an EEA performer?***

- *This is an issue of contractual interpretation. **It is not proposed that it will be addressed** in the first module nor, of course, **by way of a preliminary issue of law**. It will nonetheless be noted that the Statement of Claim correctly places the 2002 Agreement in its statutory context and that the contractual and statutory issue are interwoven.” (emphasis added)*

At para. 34, she discusses the centrality of the points of law to the interpretation and understanding of the agreement of 2002:-

“34. Whilst it may be technically correct that determining the meaning of the EU Directive, the legislation and RAAP’s statutory position is not ipso facto dispositive of the first and second proceedings, the proper understanding of the Directive, the legislation and RAAP’s statutory position is indisputably the critical element for the proper interpretation and understanding of the agreement.” (emphasis added)

10. At paras. 35 and 36, she says that there is no dispute between the parties that they were effectively mandated by the Act to put in place an agreement as to what constituted the amount of equitable remuneration and thus the agreement of 2002 has a statutory context. She says this makes the case very different from an ordinary contractual case. At para. 37 she says:-

“Once the statutory framework is determined, one or other of the parties as between PPI and RAAP will be left to have to argue that it was the mutual agreement of the parties that they agreed that equitable remuneration would be paid/not paid in circumstances other than those provided for in the legislation or that the appointment of RAAP as agent of PPI was/was not necessary. For instance, if it was determined by the Court that neither the EU Directive nor the legislation requires PPI make payments of equitable remuneration to non-EEA citizens in respect of public performances in Ireland of recordings recorded outside the EEA, then it will be left to RAAP to have to argue that nonetheless PPI had agreed to make such payments despite the Act providing otherwise. It would be a matter for RAAP whether it wishes to proceed with such an argument. On the other hand, if it were to be determined that RAAP was correct in its argument that it was entitled to be paid royalties in respect of non-EEA

performers appearing on non-EEA recorded performances, then PPI will be confronted with a like decision. ...

38. ...

37.3 While the determination of these questions are not necessarily dispositive of the contractual dispute in the first proceedings, there can be no doubt whatsoever that the determination of these questions will at the very minimum serve to greatly focus the nature of the proceedings in respect of the contractual issues...”. (emphasis added)

She does not state that if RAAP's contention in relation to the rights of performers under the Directive is correct, it is not open to the High Court to give a conforming interpretation of the Act. Nor does she suggest that a finding in support of RAAP's interpretation of the Directive coupled with a decision that it is not possible to give the Act a conforming interpretation would dispose of a substantial part of RAAP's claim as it would mean that RAAP's claim for breach of the agreement *must* fail, as RAAP may not rely upon the terms of the Directive against PPI. On the contrary, she indicates that the court will not be determining the issues of the interpretation of the agreement which will fall to be determined at the trial of the action.

11. She addresses the relevance of the preliminary issues for the future dealings between the parties. Under a heading “*Resolution of Issues of Law will Allow Post-2017 Payments of Equitable Remuneration to be Negotiated*” she avers at paras. 42 and 44:-

“42. In principle under section 208 of the Act it is open to the parties to enter into negotiations to review the amount of equitable remuneration payable to performers and RAAP has sought such negotiations, including in recent correspondence. However, without the resolution of the issues of interpretation of the EU and Irish legislation as to the basic matters of (i) the scope of performers who are entitled to payments of equitable remuneration in the first place and (ii) whether it is PPI, or RAAP, which

should be carrying out the actual determination of sums due to individual performers, and (iii) whether RAAP is entitled by virtue of section 281 of the Act to act on behalf of all performers, whether or not they have been authorised by a performer to so act, it is impossible for the parties to engage in meaningful negotiation as to the amount of equitable remuneration payable to performers. Likewise, it would seem impossible for the Controller to determine the amount of equitable remuneration payable pursuant to section 208(8) when such fundamental statutory questions are unresolved.

...

44. The resolution of these fundamental issues would clear the way for negotiation as to the amount of equitable remuneration payable in the future under section 208 of the Act, or in default of agreement, its determination by the Controller.”

12. She expresses the clear opinion that there is a utility in resolving the issues in respect of which PPI sought the trial of a preliminary issue both in terms of the entitlements as between the parties in the past and for negotiating the future terms upon which they must reach agreement, or the Controller must determine.

13. In written submissions to the High Court on its application for the trial of preliminary issues, PPI said that construing the Directive and the Act will determine the entitlement of RAAP to the declaratory reliefs sought at (1)-(3) of the first proceedings. It submitted that determining what are the requirements of European and Irish law is *also* critical for the contractual claims in the first proceedings because the 2002 agreement is not like an ordinary contract: it has a statutory context. At para. 69 of the written submissions, it said *“it is the legislative background, and not RAAP’s request for [reliefs (1)-(3)], that makes the legislation relevant to the interpretation of the agreement. Therefore, withdrawing those reliefs would not alter the necessity for a determination of the entitlement to reliefs (1) to (3) in the first proceedings.”* This is a clear acknowledgement of the distinction between the

declaratory reliefs and the contractual reliefs claimed by RAAP and of the need to determine the entitlement of RAAP to contractual relief separately from declaratory relief.

14. In his judgment of 21 February 2018, Cregan J. set out the case advanced by PPI for the trial of a preliminary issue in respect of reliefs (1), (2) and (3). At para. 37 he said:-

“... the essential question which is sought to be tried as a preliminary issue is whether, in relation to the Directive and the Copyright Act, the right to remuneration given to owners of sound recordings is also accorded to all performers whose performances are incorporated on these said sound recordings.”

He does not identify the question whether it is possible to give the Act a conforming interpretation (assuming RAAP’s construction of the Directive is correct) as the central or critical issue.

15. At para. 81, he identifies ten submissions advanced by PPI in support of the application for a trial on the preliminary point of law. The following are relevant to this appeal:-

*“(iii) it also submits that the resolution of these legal issues **will have a significant bearing on issues in relation to contractual liability and quantum** given that the agreement itself over which there is a dispute is itself dependent upon the terms in the 2000 Act and that the plaintiff itself has pleaded that there is a legislative backdrop to the agreement between the parties.*

...

*(vi) it also submits that, **even though the preliminary issue would not be dispositive of the entire proceedings**, it is absolutely necessary for the determining of the contractual issues in dispute between the parties, that the preliminary issue is substantial in its own right and would clearly benefit the action in an overall sense.” (emphasis added)*

16. It is clear that PPI did not make the case – and he did not understand it to make the case – that a determination that the Act could not be given a conforming interpretation, even if RAAP was correct in the construction of the Directive, would mean that RAAP’s case for breach of the 2002 agreement must fail (as PPI now argues) or that it would not be possible to make an order against PPI in the terms pleaded and in respect of which PPI sought a preliminary trial.

17. In his analysis of the submissions, Cregan J. held that “*the plaintiff’s claim is essentially a breach of contract and an alleged breach of the 2002 Agreement*”. He refers to the terms in the agreement and the terms in the Act and concludes “[i]t is clear therefore that *the agreement is inextricably linked with the statute.*” At paras. 97 and 98 he held:-

“97. It is, in my view, clear therefore that ***the issues of breach of contract which arise in this case fall to be determined in the light of the interpretation of the relevant provisions of the statute and the Directive.*** This seems to me to be an obvious and inescapable fact given the fact that the agreement itself defines terms as these terms are defined in the legislation and it is clear that there is a difference of interpretation of the legalisation by both parties to this dispute.

98. ***PPI submit that the proper construction of the Directive and the Act of 2000 will determine the entitlement to the declaratory reliefs sought at paras. 1 to 3 of the prayer in the statement of claim. PPI also submit that deciding these legal issues will also have an important bearing on the plaintiff’s claim for [breach of contract] in the first set of proceedings because the 2002 agreement has a statutory context. I agree with these submissions.*** (emphasis added)

18. At para. 105 he said that “*the central issues in relation to the declaratory reliefs sought and the issues of breach of contract are clearly interrelated and depend fundamentally on a legal interpretation of the Directive and the Act.*” (emphasis added)

19. PPI submitted and Cregan J. understood that the determination of the three preliminary points of law was highly relevant to the resolution of RAAP's claims that PPI breached the agreement of 2002 *but that it would not resolve those claims*, which would be tried subsequently; the declaratory reliefs and the issues of breach of contract, though interrelated, were separate. It was not argued that if the interpretation of the Directive advanced by RAAP was to succeed and if, therefore, it was not possible to give the Act a conforming interpretation, that it necessarily followed that RAAP's claim for breach of the agreement must fail, as the Directive does not have direct effect between private parties (as opposed to a claim against the State based upon a failure properly to transpose the Directive).

20. Cregan J. determined that he would make an order pursuant to O. 25, r. 1 directing a trial of a preliminary issue as requested by PPI. He heard submissions from counsel for RAAP and PPI as to the form of the order. He accepted the submissions of PPI and made the order sought by PPI in the terms it advanced. On 30 April 2019, he made an order that the following matters be dealt with by way of preliminary hearing:-

“THE COURT DOTH ORDER that the following matters be dealt with by way of preliminary hearing:-

Whether the Plaintiff is entitled to the Reliefs set forth at paragraphs (1), (2) and (3) of the Statement of Claim herein which provide as follows:

“As against Phonographic Performance (Ireland) Limited and, insofar as it is necessary, as against the Minister for Jobs, Enterprise and Innovation Ireland and the Attorney General:

- 1. A declaration that Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain right related to copyright in the field of intellectual property requires the right to*

remuneration accorded to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings to be equally accorded to all performers whose performances are incorporated on the said sound recordings;

2. *A declaration that the proper construction of the Copyright and Related Rights Act 2000, in the light of Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, taking account of the EU law treaty-based obligation of consistent interpretation, is that the right to remuneration accorded thereunder to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings is also accorded to any and all performers whose performances are incorporated on the said sound recordings;*

In the alternative to the foregoing declaratory relief sought, as against the Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General:

3. *A declaration, in so far as the Copyright and Related Rights Act 2000 cannot be construed so as to accord to all performers whose performances are incorporated on sound recordings, a right to remuneration in respect of the broadcasting and communication to the public in the State of their said recorded performances in circumstances where the owners of the rights in the sound recordings carrying such performances are accorded such a right to remuneration, that the said Act does not properly transpose Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on*

certain rights related to copyright in the field of intellectual property, and in particular Article 8(2) thereof, into Irish law.”

21. The order directs the judge trying the preliminary issue to determine whether the plaintiff is entitled to the relief in para. (1) of the statement of claim, which is a declaration *“as against [PPI] and, insofar as it is necessary, as against the Minister for Jobs, Enterprise and Innovation Ireland and the Attorney General.”*

22. At no point did PPI assert that it was not open to a court to make a declaration in terms of relief no. (1) *“as against”* PPI on the grounds that a Directive cannot have direct horizontal effect between private parties, so that RAAP cannot rely upon the terms of the Directive against PPI. PPI’s whole application for the trial of a preliminary issue was predicated upon the assumption that, not merely would there be a judgment on the issues by the High Court, and possibly the CJEU, but that the trial of the preliminary issues would culminate in the court making orders in respect of the matters which were to be dealt with by way of preliminary hearing. PPI did not argue that the relief sought in respect of para. no. (1) could only be made against the State. If that was its position it ought to have made this clear to Cregan J., as it was potentially relevant to his decision, and it was certainly relevant to the terms of the order he was asked to make.

23. The scope of the hearing of the trial of a preliminary issue before Simons J. was governed by the terms of the order of Cregan J. Simons J. was very conscious of the limited nature of the issues he was called upon to decide. This is apparent from his judgment of 11 January 2019 and his order for reference of 20 March 2019.

24. The first sentence in the judgment of 11 January 2019 is *“[t]hese proceedings concern the proper interpretation of the provisions of a European Directive on copyright in the field of intellectual property.”* At para. 4, he says that *“[t]he central issue in these proceedings is whether it is consistent with EU law to exclude certain performers from the benefit of a share*

in this equitable remuneration [as occurs under the Act of 2000] where the producer of the same sound recording will be paid.” At para. 6 he said:-

*“The resolution of these proceedings necessitates careful consideration of the relevant European Directive, and two international agreements which, or so it is said, the Directive is intended to give effect to. This court is then invited either (i) to interpret the domestic legislation in such a way as to give effect to what the plaintiff says are its rights under EU law or, alternatively, (ii) to disapply the relevant provisions of domestic law. The striking feature of the case is that the relevant provisions of domestic law are clear and unambiguous, and expressly prescribe less generous eligibility criteria for performers than for producers. Thus, **even if the plaintiff is correct in its argument that the imposition of such eligibility criteria is inconsistent with EU law, it does not seem that the domestic legislation can be interpreted so as to conform with what the plaintiff says are the requirements of EU law. In effect, the plaintiff is contending that domestic law must be overridden by provisions of EU law. This is so notwithstanding the fact that the domestic legislation is clear and unambiguous; and the Court of Justice has ruled that the relevant provisions of the treaty relied upon do not have direct effect.**” (emphasis added)*

25. In the course of the hearing before Simons J., PPI had opposed RAAP’s application that the issues canvassed should be referred to the CJEU pursuant to Article 267. Simons J. rejected PPI’s argument and determined that a ruling by the CJEU was required in order for him to resolve the issues before him. He concluded his judgment by stating that he would hear further submissions as to whether the proposed Article 267 reference should include an additional question on the nature of the remedy, if any, which might arise in the circumstances of the proceedings. PPI did not avail of the invitation. Specifically, it did not argue that, in light of his conclusion that it was not possible to give the Act a conforming

interpretation (assuming the construction of the Directive advanced by RAAP was correct), a reference was no longer necessary or relevant as RAAP's claim for breach of contract against PPI was bound to fail.

26. In his Order for Reference to the CJEU, Simons J. said that the outcome of the main proceedings depends on the correct interpretation of the Directive; that the dispute in the main proceedings concerns the collection and distribution of licence fees payable in respect of the playing of recorded music in public, or the broadcasting of recorded music; that RAAP represents certain performers and PPI represents certain producers and that RAAP and PPI are in dispute *“as to the interpretation and operation of the contractual agreement entered into between them. The resolution of this dispute necessitates the interpretation of domestic legislation, which in turn must be interpreted in the light of European law.”*

27. Simons J. clearly did not regard the answers to the questions he referred to the CJEU as determining the contractual dispute between the parties, which remain to be tried. He did not include any question relating to the remedies sought by RAAP in the proceedings before him.

28. PPI participated fully in the reference before the Grand Chamber of the CJEU. It delivered judgment on 8 September 2020 stating that Article 8(2) of the Directive precludes a Member State from excluding in its transposing legislation performers who are nationals of states outside the EEA, with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram were made in the EEA. It also ruled:-

“... Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram.”

29. The judgment of the CJEU rejected the interpretation of the Directive advanced by PPI and the State and upheld the interpretation contended for by RAAP.

30. In the normal way, the matter was relisted before Simons J. to make orders on the preliminary issues in light of the ruling of the CJEU.

The Judgment of the High Court

31. On 29 January 2021, Simons J. heard submissions as to the form of order to be made having regard to the judgment of the CJEU and the appropriate order for costs associated with the trial of the preliminary issues and the proceedings before the CJEU. He delivered a written judgment on 4 February 2021. He set out the procedural history and quoted the order of Cregan J. directing the trial of a preliminary issue. At paras. 9 and 10 of the judgment he said:-

“9. As appears, the first issue to be determined centres on the correct interpretation of the EU Directive. The second and third issues are interrelated, and centre on the ancillary question of whether the domestic legislation is consistent with the EU Directive (on its correct interpretation). The latter two issues are presented as alternatives: either the domestic legislation is open to an interpretation which is consistent with the EU Directive or it is not, in which case the EU Directive has not been properly transposed.

10. It should also be explained that the preliminary issues were presented at a level of generality, divorced from the underlying facts of the contractual dispute between the parties. This is important because it delimits the findings which this court can properly make in the context of the trial of the preliminary issues.”

32. He reiterated that the principal issue which arose for determination on the trial of the preliminary issues concerned the correct interpretation of the EU Directive. In light of the judgment of the CJEU he held that *“the right to equitable remuneration under the EU Directive must be granted both to performers and phonogram producers who are nationals of Member States of the European Union and to those who are nationals of other contracting*

parties to the WPPT [WIPO Performances and Phonograms Treaty 1996]". He said that by contrast, under the Act, a performer is not entitled to share in equitable remuneration unless they are (1) an Irish citizen or domiciled or resident in Ireland, or (2) domiciled or resident in an EEA country. To this extent, the Irish State had failed properly to transpose the EU Directive.

33. PPI submitted to Simons J. that "*irrespective of the correct interpretation of the EU Directive, RAAP cannot succeed in its proceedings against*" PPI. This was the first time it advanced this argument and it was based on para. 108 of his judgment of 11 January 2019 where Simons J. stated:-

*"The final issue to be considered is whether the Article 267 reference should also raise questions as to the **nature of the remedy** which should be provided in the event that RAAP were to be successful in its arguments as to the correct interpretation of the 2006 Directive. The case as pleaded invites the court to give a purposive or conforming interpretation to domestic legislation. However, **in circumstances where the domestic legislation is clear and unambiguous, it does not seem to me that a conforming interpretation is open. The legislation clearly discriminates on the basis of domicile and residence, and there is no room for reading any other interpretation into the legislation.**"* (emphasis added)

(It will be noted that he regarded this issue as arising in the context of the remedies open to RAAP in the event it was successful on the substantive point and that PPI had made no submissions on this point prior to the drafting of the order for reference).

34. At para. 109, Simons J. noted that the alternative approach was to invite the court to disapply the provisions of the domestic law and at para. 110 he said:-

"It is my understanding that the jurisdiction of a national court to set aside or disapply provisions of domestic legislation only arises in circumstances where (i) the EU

legislation relied upon has direct effect or is directly applicable, and (ii) the proceedings are taken against an emanation of the State. If both of those conditions are not met, then the obligation on a national court is confined to an interpretive obligation. The national court is required to interpret national legislation insofar as is possible in light of the purpose and objective of the EU legislation. This formulation implies a limitation, i.e. the contra legem principle.”

35. Based on the judgment of 11 January 2019, PPI said that the failure of the State properly to transpose the Directive cannot be relied upon in these proceedings in the dispute between two private entities. The High Court may either interpret national legislation in a manner which is sympathetic to or consistent with EU legislation or it may disapply that legislation. The second remedy is only open in cases taken against the State. PPI argued that the finding that domestic legislation cannot be interpreted in a manner consistent with the EU Directive is fatal to RAAP’s claim against it.

36. In paras. 18-22 Simons J. set out his reasons for rejecting PPI’s position as follows:-

“18. With respect, it is not open to PPI to adopt this position now, given its approach to the proceedings to date. It was PPI who applied for, and ultimately obtained, an order directing the trial of the preliminary issues. PPI itself identified the issues it wished to have tried (albeit that it did so by reference to the language used in the statement of claim served by RAAP). This court was, therefore, specifically asked to determine an issue in respect of the correct interpretation of the EU Directive. There is no doubt but that PPI failed in its arguments in this regard.

19. The second and third preliminary issues were ancillary to the first issue. The latter two issues were presented as alternatives: either the domestic legislation is open to an interpretation which is consistent with the EU Directive or it is not, in which case the EU Directive has not been properly transposed. The resolution of these latter two

issues hinged on the finding on the first issue. If the correct interpretation of the EU Directive was that contended for by RAAP, then it followed almost inevitably that there had been a failure of transposition. The definition of qualifying persons under the domestic legislation is incapable of bearing a meaning consistent with RAAP's interpretation of the EU Directive.

20. This court had not been asked to determine—and did not determine—what the consequences of a finding of non-transposition would be for the underlying dispute between the parties. It had never been suggested, for example, that a finding of non-transposition would be fatal to RAAP's claim against PPI. This question simply never arose in the context of the trial of the preliminary issues.

21. Rather, the approach adopted by PPI had been to apply to have the three identified issues determined by way of the trial of preliminary issues in advance of any adjudication on the underlying merits of the contractual dispute. This had been done on the basis that the correct interpretation of the domestic and EU legislation was relevant to the underlying dispute given the fact that certain of the contractual terms were defined by reference to the legislation. As appears from the judgment of Cregan J., part of PPI's justification for seeking the trial of preliminary issues had been that the issues were questions of law and statutory interpretation. It was never suggested that the judge hearing the trial of the preliminary issues would embark upon a consideration of the underlying dispute.

22. Having presented the issues in this way, PPI cannot now turn around and argue, in effect, that the finding in January 2019 that a consistent or sympathetic interpretation of the Directive was not open is conclusive in its favour. Indeed, it is telling in this regard that notwithstanding that the parties were afforded an opportunity to make submissions in relation to the form of the reference to the Court of Justice in the period

between the date of delivery of my judgment (January 2019) and the formal transmission of the reference to the Court of Justice (March 2019), it was never suggested that the reference was now unnecessary in that the finding as to the absence of a consistent or sympathetic interpretation was sufficient to ensure victory for PPI.”

37. The trial judge granted declarations (1) and (3) in the terms of the order for the trial of the preliminary issues. He awarded RAAP the costs of the trial of the preliminary issues, including the costs of the referral for a preliminary ruling to the CJEU, and of the hearing on 29 January 2021 against PPI and the State defendants jointly and severally, with a stay on execution pending any appeal.

PPI's Appeal

38. PPI appealed the making of a declaration as against PPI, rather than solely against the State defendants, as to the correct interpretation of the Directive. It argued that the trial judge erred in law in determining that RAAP was entitled to a declaration as to the proper construction of the Directive specifically against PPI, as RAAP was not entitled to a declaration against PPI, a private party, as to the meaning of a Directive, on the basis that Directives are only binding on member states. It submitted that established EU law principles relating to vertical and horizontal direct effect dictated that a declaration of this type as against PPI lacked purpose and could have no meaningful effect. It argued that it was contrary to the trial judge's finding that the court lacked jurisdiction to disapply the national provisions and that the making of the declaration created uncertainty in the context of RAAP's claim against PPI, as to whether PPI had been and is obliged to operate the agreement in accordance with the Directive (as construed by the CJEU), as opposed to in accordance with the Act, pending its necessary amendment, in circumstances where the CJEU had already determined that such a Directive cannot, without transposition, be used to impose a payment obligation on a collective management organisation such as PPI. It argued

that, in making the declaration against PPI, the trial judge erred in pre-emptively finding that the Directive applied to the dispute between the parties, despite the trial judge's stated position (at para. 20 of the judgment of 4 February 2021), that the court had not been asked to determine, and did not determine, what the consequences of a finding of non-transposition would be for the underlying dispute between the parties. Finally, PPI argued that Simons J. erroneously treated the principal issue as being an issue in the round of the interpretation of the Directive, when the issue before him, as fixed for determination was, in fact, whether RAAP was "*entitled*" to the three reliefs in question, which required a further step of assessment, which was never conducted by the trial judge in respect of the declaration made against PPI.

39. PPI argued, in the alternative, that were the court to find that the making of a declaration as to the meaning of the Directive as against PPI was permissible, that the High Court erred in failing to specify in its judgment or order that while the Directive has not been correctly implemented in Irish law, this could have no effect on the contractual arrangements between RAAP and PPI unless and/or until the Oireachtas amended the applicable Irish legislation to impose an obligation on PPI in national law, which would then apply prospectively and not retrospectively.

40. In addition, PPI argued that the High Court erred in awarding RAAP its costs of the trial of the preliminary issue before the High Court, of the proceedings before the CJEU and of the hearing of 29 January 2021 as against all the defendants jointly and severally on the grounds that no declaration ought to have been made as against PPI. It submitted that the trial judge had failed to distinguish between the event between RAAP and the State (in which RAAP was successful) on the one hand, and the event as between RAAP and PPI (in which RAAP had failed to demonstrate its entitlement to a declaration as to a conforming interpretation of the Act, and thus to advance its claim for breach of agreement), on the other hand. It argued that

it was entitled to an order for costs against RAAP in respect of the trial of a preliminary issue and that the hearing of 29 January 2021 and the costs order made in favour of RAAP should be made solely against the State defendants.

41. In its written submissions on the appeal, PPI argued that no declaration as to the proper construction of the Directive should have been made specifically as against PPI on four bases:

- (i) Given that declaratory relief is discretionary in nature, RAAP cannot be entitled to a declaration at all as against PPI;
- (ii) To the extent that the correct interpretation of the High Court's judgment is that it found that RAAP was entitled to have the court exercise its discretion to grant declaratory relief, the High Court erred in exercising this discretion where the declaration could have no legal effect on PPI;
- (iii) The High Court erred in failing to distinguish between the State and PPI as a private defendant; and
- (iv) The High Court erred in failing to consider whether or not RAAP should be awarded relief as against PPI as distinct from the question of the correct interpretation of the Directive.

42. PPI argued that a grant of a declaration is a *discretionary* remedy and that RAAP has no entitlement *per se* to such a declaration. It argued that the High Court erred in exercising its discretion to grant a declaration against PPI because the court should refrain from making declarations where the declaration would not serve any useful purpose (see, *Lennon v. Cork City Council* [2006] IEHC 438). It said that the CJEU has given a binding judgment on the meaning of the Directive, which could not be challenged by PPI, so RAAP cannot argue that a declaration should be made against PPI so as to prevent PPI from seeking to rely on a different interpretation of the Directive at some time in the future. It argued that the findings of the CJEU as to the meaning of the Directive are definitive and binding irrespective of any

further steps in the national proceedings, so there was no need for any further order to be made by the High Court to give effect to the judgment of the CJEU. It followed that the declaration made as against PPI could have no purpose or practical use for RAAP, as there was no situation in which RAAP could seek coercive relief against PPI in respect of the meaning of the Directive or its transposition into national law.

43. PPI referred to the distinction between the EU law doctrines of vertical and horizontal direct effect and submitted that it was impermissible to disapply national provisions where this would lead to the purported imposition of an obligation on a private party by way of the purported direct effect of an unimplemented or incorrectly implemented Directive, without that obligation having any basis in national law. Such horizontal direct effect is prohibited and where such a horizontal effect would result, the obligation of the national court is to interpret the whole of national law insofar as possible so as to conform with the Directive, but this does not extend to an obligation to interpret national law *contra legem* (see, Case C-152/84 *Marshall* and Case C-91/92 *Faccini Dori*). It cited the decision of the Grand Chamber of the CJEU of 22 January 2019, Case C-193/17 *Cresco Investigation GmbH*, at paras. 72 and 73:-

“... according to the Court’s settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. ...

Accordingly, a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive...”.

It noted that in Case C-351/12 *OSA*, the CJEU rejected the proposition that a copyright licensing body could disapply provisions of German law which excluded the defendant in that case from payment of royalties, contrary to the terms of a (different) copyright directive.

44. Separately, PPI argued that the High Court failed to distinguish PPI as a private defendant. It said that its participation in the Article 267 reference concerning the possible non-transposition of the Directive into national law was more akin to a notice party in judicial review proceedings and that, while it is entitled to participate fully in order to protect its own interests, it was not permissible to award relief against notice parties in an application for judicial review. By analogy, the principle should apply equally where an Article 267 reference “*of this type*” is made. It said that the nature of the issues canvassed “*necessarily*” limited the possibility of any relief being granted to the State defendants alone.

45. It argued that in making the declaration as against PPI, the High Court, in effect, preemptively found that the Directive applied to the dispute between the parties, despite the trial judge’s stated position at para. 20 of the judgment that “*[t]his court has not been asked to determine – and did not determine – what the consequences of a finding of non-transposition would be for the underline dispute between the parties.*” PPI argued that the High Court erred in awarding any relief “*as against*” PPI because the relief awarded against PPI “*could only be in resolution or part-resolution of the contractual dispute between RAAP and PPI, which Simons J. expressly found could not be addressed.*”

46. PPI submitted that the High Court erred in failing to consider whether or not RAAP should be awarded relief against PPI as distinct from the question of the correct interpretation of the Directive. It submitted that the onus lay on RAAP, as the plaintiff, to prove that it was entitled to the relief sought as against each defendant. The judgment of the CJEU settled the question as to the correct interpretation of the Directive, but not the question as to whether RAAP was entitled to a declaration against PPI under national law. It argued that there was no basis for placing the onus on PPI to disprove RAAP’s entitlement to relief against it simply because PPI sought to have the preliminary issues in RAAP’s case tried using RAAP’s own wording taken from the statement of claim. It said that, equally, there was no

basis for finding that by strongly contesting the issue of the correct interpretation of the Directive, PPI had conceded the issue of whether or not relief could be awarded against it, were PPI's interpretation found to be incorrect.

47. In the alternative, PPI argued that a qualified declaration ought to have been made as against PPI specifying that this could have no effect on the contractual arrangements between RAAP and PPI unless and/or until the Oireachtas amended the applicable Irish legislation to impose an obligation on PPI in national law, which would then apply prospectively and not retrospectively. It argued that any changes in national law will be of prospective effect only and to the extent that RAAP has any claim to losses for the period in which there should have been different national legislation in place, its remedy would lie against the State in damages, if the State's breach could be shown to be sufficiently serious within the meaning of the *Francovich* principles.

48. In oral submissions on the appeal, counsel for PPI said that in order for RAAP to succeed on what he described as the dependent contractual claims, RAAP must be correct as to the interpretation of the Directive *and* it must succeed on the conforming interpretation argument. While it succeeded on the former, it failed on the latter. It had not appealed the trial judge's finding that a conforming interpretation of the Act was not possible.

Accordingly, this is a binding finding. It follows, according to PPI, that RAAP's dependent contractual claims must fail as the claim for breach of agreement based upon the construction of the Act has now been definitively decided against it.

49. Counsel contended that declaration (1) in the order for the trial of a preliminary issue, is ancillary to declarations (2) or (3); the court granted declaration (3) and PPI was only interested in declaration (1) insofar as it related to declaration (2). Therefore, he said, PPI had effectively succeeded in the trial of the preliminary issue, albeit that RAAP had succeeded in its case against the State defendants.

50. PPI argued that the identity of the party applying for the trial of a preliminary issue is irrelevant to any order the court may make (save possibly as to costs). Declaration (1) could only be justified against PPI if there was the possibility of a claim based upon the direct effect of the Directive against PPI. As there can be no such horizontal direct effect between RAAP and PPI, there can be no declaration against PPI. In this regard, counsel relied upon the decisions of the CJEU in *Cresco* and *OSA*.

51. In the alternative, counsel submitted that the declaration was unnecessary because the CJEU has pronounced the law and there would be a danger that if the declaration was granted that RAAP will maintain “*that the Directive now governs the dealings between RAAP and PPI, which it clearly does not.*” Counsel submitted that:-

“PPI cannot be liable historically or into the future based on the Directive without it being transposed into domestic law.”

And, he continued:-

“It cannot govern all future dealings as between RAAP and PPI. What will govern all future dealings is the domestic legislation when this Directive is ultimately transposed and that will be prospective only.”

52. RAAP opposed PPI on the appeal on both the form of the order and the order for costs. The State defendants opposed the appeal on the order for costs but were neutral in relation to the form of the order.

Discussion and Decision

53. The High Court referred four questions relating to the construction of the Directive to the CJEU pursuant to Article 267 of the TFEU. The CJEU has given judgment determining the meaning of the Directive. Normally, this is followed by an order of the High Court in the main proceedings giving effect to the ruling of the CJEU on the questions referred to it. This is because the purpose of the referral procedure is to assist the referring court to decide the

case before it. The High Court normally does not refrain from granting a declaration in the proceedings in such circumstances. As a matter of principle, it is not incorrect for the High Court to make declarations in the proceedings, applying judgments delivered by the CJEU pursuant to a reference and, certainly, it is not an error of law on the part of the trial judge to do so simply because the CJEU has already declared the law. Insofar as PPI contends otherwise, I do not agree.

54. The reference by the High Court to the CJEU is to assist the national court in resolving the case before it. It follows that a national court must make orders once the CJEU has decided the reference (unless the parties resolve the proceedings with a request that there be no order in the case). PPI has cited no authority to support its argument that the High Court should not make a declaration simply because the CJEU has declared the law and an order from a national court is either unnecessary or, potentially, could thereby lead to uncertainty.

55. I am satisfied therefore that the trial judge did not err in granting the declarations in terms of relief nos. (1) and (3) of the prayer for relief in the statement of claim and in the order for the trial of a preliminary issue of law. These were the issues for him to determine pursuant to the order of Cregan J.

56. In the hearing before Simons J., PPI did not object to the declaration being made as against the State. Its objection was to the declaration being made “*as against PPI*”. When this court canvassed with the parties whether it would be appropriate to grant the declaration while omitting the words “*as against PPI*”, counsel for PPI submitted that it would not be appropriate for the court simply to remove the three words from the order. He submitted:-

“The fundamental problem of principle as a matter of EU law would still remain and, if anything, might be more accentuated, because it begs the question as to what is an Irish court doing granting a declaration like this erga omnes when that is the role of the judgment of the Court of Justice.”

57. I find it difficult to accept this submission and indeed it appears to contradict para. 69 of PPI's written submissions to this court where it stated:-

“PPI does not seek to argue that RAAP is not entitled to such a declaration as against the State or to dispute the unimpeachable finding of the Court of Justice as to the correct interpretation of the Directive.”

Later, PPI submitted that the CJEU judgment did not settle the question of whether RAAP was entitled to a declaration as against PPI under national law.

58. In summary, I am not persuaded by the argument of PPI that the judgment of the CJEU pronouncing the meaning of the Directive requires the High Court to refrain from granting the declaration sought as to the meaning of the Directive or that it may not be granted *“as against PPI”*, the defendant in the proceedings.

59. While the grant of a declaration is a discretionary remedy, it will normally be granted once the plaintiff's legal argument is upheld. The leading Irish authority on the granting of declaratory relief is *Transport Salaried Staffs' Association & Ors. v. CIE* [1965] 1 I.R. 180. At p. 202, Walsh J. held that the plaintiffs in that case were entitled to declaratory relief:-

“It is also contended by the defendants that the Transport Salaried Staff's Association is not competent to maintain this action. The Court of Chancery (Ireland) Act, 1867, s. 155, clearly sets out the right of the Court to make declaratory orders without granting other or consequential relief. The words of the section were repeated in Or. 25, r.5 of the Rules of 1905 and now appear in Or. 19, r. 29, of the 1963 Rules. In modern terms the virtues of the declaratory action are more fully recognised than they formally were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formally exercised “sparingly” and “with great care and jealousy” and “with extreme caution” can now, in the words of Lord Denning in the

Pyx Granite Co. Limited case, be exercised “if there is good reason for so doing” provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In Vine v. The National Dock Labour Board, Viscount Kilmuir L.C., at p.112, cites with approval the Scottish tests set out by Lord Dunedin in Russian Commercial & Industrial Bank v. British Bank of Foreign Trade Ltd., who said, at p.448:-

“The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.”

It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight.”

60. In this case, the question was real and not theoretical. RAAP had a real interest in raising it; PPI was a proper contradictor and the State was a proper contradictor as regards the meaning of the Directive and the question of the proper transposition into national law of the Directive. RAAP has identified a present interest in respect of which the declaration is required, *i.e.* in the context of negotiating the future agreement to be operated between the parties. Thus, under national law, RAAP satisfied the requirements for a declaration as established by the leading decision of the Supreme Court and *prima facie* the court should exercise its discretion to grant it the declaration sought.

61. It is worth emphasising that the declaratory relief is a standalone relief sought separately from the claims for breach of the 2002 agreement. This was clearly accepted and acknowledged by PPI as I have set out in paras. 13 and 19. Having been successful in the argument, RAAP would in the normal way be entitled to the declaration sought, absent a

compelling reason to the contrary. It is necessary to consider whether any such reason exists in this case.

62. PPI argued that the declaration should not be made as it would serve no useful purpose because RAAP could never, as a matter of law, enforce the declaration against it. This, it submitted, was a precondition to the granting of a declaration. It relied upon two decisions in support of its argument: *Lennon v. Cork City Council* [2006] IEHC 438 and *Dudley v. An Taoiseach* [1994] 2 ILRM 321. RAAP objected on the basis that the argument advanced by PPI as to alleged pre-conditions to the exercise by the court of its declaratory jurisdiction was an argument which was not made at first instance and ought not to be permitted to be advanced for the first time on appeal. While it seems to be the case that the argument has changed, and no good reason has been advanced to this court to explain why the argument was not made to Simons J., I am nonetheless satisfied that it is sufficiently close to the arguments which were advanced in the High Court that PPI ought not to be precluded from advancing the argument on appeal in accordance with established jurisprudence concerning the raising of arguments for the first time on appeal.

63. In *Lennon*, Smyth J. in the High Court refused the plaintiff a declaration on the basis that if it were granted it would conflict with earlier decisions “*and such could not harmoniously exist in law except as a source of confusion and contradiction. ... In short, to make the declaration sought (even if warranted) without an order of certiorari (which is deliberately eschewed by the applicant) would be to sew (sic) the seeds of dissension and confusion and beget (as a matter of probability at the least) further unnecessary litigation.*”

64. Having explained why Ms. Lennon was not entitled to a default planning permission he said:-

“Accordingly, in my judgment no question can arise that she has any entitlement to default permission. In circumstances where the only practical purpose of seeking the

declaration could be as a basis for asserting an entitlement for a default permission, and where it is clear that no such entitlement arises, it follows that no useful purpose would be served in granting such a declaration and that, of itself, is a ground for refusing it.” (emphasis added)

65. In *Dudley*, Geoghegan J. in the High Court gave the plaintiff leave to institute judicial review proceedings against the Government of Ireland and the Attorney General in relation to the failure to hold a by-election within a reasonable time of a vacancy occurring and whether a reasonable time had elapsed. The High Court refused leave to seek a declaration as against Dáil Éireann that it had failed to take the necessary steps to enable the by-election to take place on the grounds that such relief should not be granted where it could not be followed up by an enforceable order. The High Court held that an order cannot be made in the terms sought as the courts cannot grant an order of mandamus compelling the body of members of the Dáil to vote in a particular way on a particular motion.

66. In my judgment, neither of these decisions assist PPI in this case. In the first place, they are both decisions of the High Court and they do not discuss the relevant passage from the judgment of Walsh J. for the Supreme Court in *Transport Salaried Staffs’ Association*. It is quite striking that PPI likewise failed to address that passage. As this is the leading decision and it is binding on this court, that omission severely undermines this argument of PPI.

67. Secondly, the cases are very far removed from these proceedings. *Lennon* was concerned with an application for default planning permission. The High Court found that the relevant party would not be entitled to default planning permission and, therefore, it was not appropriate to make a declaration where the sole purpose could only be as a basis for claiming a default planning permission: therefore, the declaration could serve no useful purpose. In *Dudley*, the decision was to refuse the applicant leave to seek a declaration

against Dáil Éireann. The High Court held that it would never be competent to make an order of mandamus against the members of Dáil Éireann and, therefore, it would not be appropriate to grant a declaration which could not be so enforced. As the judgment was given on an application for leave to seek judicial review, there was no detailed analysis of whether declaratory relief as sought by way of judicial review may only be granted where it could be followed up either in the same proceedings or in some other proceedings by an enforceable order. Specifically, there was no discussion of the *Transport Salaried Staffs' Association* case. Insofar as PPI relies upon this judgment as authority for the wide, unqualified proposition, I am not inclined to follow it.

68. It is important to emphasise that *Transport Salaried Staffs' Association* does not impose a requirement that a party seeking a declaration have the right in law thereafter to enforce the declaration against the party against whom it was obtained. Insofar as PPI opposes the grant of a declaration on the basis that it would not be open to RAAP in the future to obtain a coercive order against PPI, in my opinion, this is irrelevant to the issue whether or not the High Court erred in granting the order in the form under appeal.

69. While the parties referred to decisions of the House of Lords, the Court of Appeal of England and Wales and the High Court in England and Wales, I do not propose to discuss these as, in my judgment, this case can, and should, be decided on the basis of the decision of the Supreme Court in *Transport Salaried Staffs' Association*.

70. A variation of PPI's argument was that the court ought not to make a declaration where it was of no utility to the party, aside from the issue of enforcement. PPI said that the declaration could have no legal effect against PPI and so the declaration served no useful purpose, but merely, potentially, created legal uncertainty. RAAP denies that the declaration is of no utility and asserts, to the contrary, that it was always a standalone relief, one which RAAP sought in the context of the future relations between the parties. Under the Act (as it

stands) a performer only benefits from the performers' rights provided for by the Act in respect of a particular performance if the performer has the prescribed connection of citizenship, domicile or residence in the State or an EEA member state, or if the performance in question took place in the State or an EEA member state. However, the Act does not preclude the parties from agreeing a distribution of fees collected by PPI from users of performances, be they qualifying or otherwise within the meaning of the Act, to non-EEA performers. In that context, the declaration cannot be said to lack utility and is, therefore, not a reason to allow the appeal from the order of the High Court.

71. Separately, PPI contended that the court ought not grant the declaration sought in the first prayer for relief of the statement of claim because of the implications of such a declaration for the outcome of the remainder of the case. It submitted that the Directive can have no direct horizontal effects between two private parties such as RAAP and PPI and that "*the declaration made can have no legal effect 'as against' PPI*". It follows, according to PPI, that it is not appropriate for any declaration to be made as to the "*legal implications*" arising for either RAAP or PPI from the CJEU's judgment. It submitted that the only parties for whom there can be any implications at this stage of the proceedings are the State parties. It said that in making the declaration against PPI, the High Court, in effect, pre-emptively found that the Directive applied to the dispute between the parties. Separately, it submitted that relief could only be awarded against PPI in resolution or part-resolution of the contractual dispute between RAAP and PPI.

72. These submissions ignore two realities. Firstly, that the declaratory relief is a standalone relief. The proceedings encompass both contractual issues and the underlying lawfulness of the statutory framework. The contractual issues, according to RAAP, do not rely on any particular outcome in relation to the latter issue. PPI argues to the contrary, and in fact says that RAAP's case based on the "*dependent contract claims*" must fail. Whatever

the rights of this argument – about which I make no observation and express no conclusion – it relates to the contractual claims and not to the claim for declaratory relief.

73. Secondly, this is an order made following the trial of a preliminary issue. The remaining issues remain to be tried and resolved. The implications of the orders, following the trial of the preliminary issue, for those issues will fall to be determined by the judge trying the remainder of the proceedings. Simons J. and this court on appeal cannot determine those issues. The implications of the orders made following the trial of the preliminary issue and the complexities which may or may not be created thereby, to some extent, are the result of the choice of PPI to seek a trial of a preliminary issue in the first place. This necessarily involves sequential judgments and orders. In my judgment, it is not open to a party to ask the High Court to direct the trial of a preliminary issue and then to ask the court to refrain from making an order following the trial because of the possible implications for the parties of an order on the balance of the proceedings. That is the very purpose for which the relief was sought in the first place.

74. Somewhat at odds with this argument, is the submission advanced by PPI to the effect that because Simons J. has determined that the Act cannot be giving a conforming interpretation in line with the judgment of the CJEU, RAAP's dependent contractual claims must fail. Quite apart from the fact that RAAP argues that none of its contractual issues rely upon the conforming interpretation of the Act, this is a matter which has not been argued or determined by the High Court. In the circumstances, this court could not – and should not – conclude that what PPI characterises as dependent contractual claims must fail for the reasons it advances. The issues of contractual interpretation raised in these proceedings were not the subject of the trial of a preliminary issue and have not even been argued before the High Court. Neither the High Court, nor this court could conclude the issue against RAAP without hearing its case. In my judgment, it is a most surprising proposition for PPI to advance,

particularly in light of the basis upon which the trial of the preliminary issue was sought, granted and argued.

75. In view of the fact that the issues have yet to be argued and determined, it is appropriate that I say no more other than the fact that these issues have not been resolved by any judgment to date in the proceedings. Insofar as PPI appeals from the decision of Simons J. based on this argument, I have no hesitation in rejecting it.

76. I am not satisfied that the grant of the declaration sought creates legal uncertainty as PPI alleges will arise in some unspecified way. This seems to me to be completely inconsistent both with the basis upon which PPI sought the trial of the preliminary issue and with the fact that, as it accepted and acknowledged, contractual issues were not to be resolved at the trial of the preliminary issue. Therefore, it is not a basis for overturning the decision of the High Court.

77. One of the principal arguments advanced by PPI in opposing the making of declaration (1) against it was that to do so would be to give impermissible direct horizontal effect to the Directive between two private entities contrary to EU law. I do not agree. In its terms, the declaration does no more than declare the law. PPI is concerned with the implications of the declaration, *i.e.* the possible future application of it in the balance of the proceedings. As I have stated, that is not a matter for this court on this appeal, and it is not a reason to refuse to make the declaration sought.

78. PPI argues that the declaration should not be made as against it by analogy to a notice party in judicial review proceedings. First, PPI is not a notice party; it is a defendant in a breach of contract claim. Secondly, these are not judicial review proceedings but, insofar as they concern PPI, they primarily involve a breach of contract claim, as was stated by Cregan J. The fact that Cregan J. directed that there be a trial of a preliminary issue does not mean that PPI thereby became a *quasi* notice party in the trial of the preliminary issue (which

PPI sought) as to the proper meaning of the Directive or the reference to the CJEU on the issue. The order for the trial of a preliminary issue (and the anticipated preliminary reference to the CJEU) is of an issue in the proceedings in which PPI is a defendant. The focus on one legal aspect of the entire dispute cannot change the role of PPI in the proceedings. In my judgment, the analogy is misconceived. It does not afford a reason to allow the appeal.

79. In its second, alternative, ground of appeal, PPI submitted that the High Court ought to have made a declaration which specified that it could have no effect on the contractual arrangements between RAAP and PPI unless and/or until the Oireachtas amended the applicable Irish legislation to impose an obligation on PPI in national law, which would then apply prospectively and not retrospectively. In my judgment, it was not open to the High Court to make such an order as it would involve the court straying outside the parameters of the issues to be tried as preliminary issues and amount to a ruling on matters which have yet to be tried in the High Court. It would also involve trespassing on the role of the Oireachtas in legislating and thus give rise to an impermissible breach of the separation of powers. In my judgment, the High Court did not err when it did not limit its order as advocated by PPI. I agree with the submission of RAAP that this ground of an appeal amounts to an attempt by PPI to have the consequences of the findings as to the preliminary issues determined in advance of the trial of the main proceedings.

80. The position adopted by PPI in relation to the issue whether the High Court, or this court, should make declarations in terms of paras. (1) and (3) of the order for the trial of a preliminary issue is, to my mind, inconsistent with the basis upon which PPI sought the trial of a preliminary issue in the first instance, and the basis upon which Cregan J. ordered the trial of the preliminary issue as I have set out from paras. 9-19.

81. At no point did PPI argue that if the interpretation of the Directive advanced by RAAP was to succeed, and if the High Court held that it was not possible to give the Act a

conforming interpretation in line with RAAP's interpretation of the Directive, it necessarily followed that RAAP's claim for breach of the agreement of 2002 must fail as the Directive cannot have direct horizontal effect between the private parties, RAAP and PPI. It is striking that it failed to make this point after Simons J. had delivered his principal judgment when he said that the Act could not be given a conforming interpretation. This omission is all the more significant in view of the fact that PPI successfully argued that the High Court should make the order in the precise terms adopted by Cregan J., notwithstanding the fact that RAAP had contended for an alternative form of order.

82. If, as PPI now maintains, as a matter of law it was not open to the High Court ever to grant a declaration "*as against PPI*" in relation to the meaning of the Directive as sought in declaration (1), it is difficult to understand why it insisted on a trial of a preliminary issue in this express form. It would have been open to it to request the High Court to determine the issue of the rights of performers under the Directive without seeking the order in the precise terms upon which it insisted. It is no answer to say that the pleading was that of RAAP, not PPI, and that it was somehow constrained to seek the order in the precise terms of the prayer for relief. It could always have rephrased the question it sought to have tried as a preliminary issue and then, if necessary, subsequently argued that no such declaration in the terms pleaded could be made against it.

83. Furthermore, in my view, PPI ought to have made clear in its submissions requesting the trial of a preliminary issue that it would be contending that no such declaration could be made as against it, regardless of the proper construction of the Directive, because to do so would amount to giving impermissible horizontal effect to the Directive between private parties. At the very least, it was relevant to the terms of the order for a trial of a preliminary issue if not, in fact, whether such an exercise would not serve any useful purpose in the overall conduct of the litigation.

84. For these reasons, I would dismiss the appeal on the form of the order granted by the High Court and I would affirm the order.

Appeal on Costs

85. On the appeal in relation to costs, PPI accepted that it must bear its own costs of the hearing of the preliminary reference before the CJEU. However, it argued that RAAP did not succeed at all as against PPI on the preliminary issues and, accordingly, PPI should be entitled to recover its costs from RAAP of the preliminary hearing before the High Court and the hearing of 21 January 2021, and that RAAP's costs of the preliminary hearing, the proceedings before the CJEU and the hearing of 21 January 2021 ought to be recoverable against the State alone.

86. PPI argued that the High Court directed that three issues be tried as preliminary issues. Declarations (2) and (3) were alternatives. RAAP could only ever obtain declarations (1) and (2) or declarations (1) and (3). It was not entitled to declaration (2) because the High Court held that a conforming interpretation of the Act was not possible. RAAP, accordingly, was entitled to declarations (1) and (3) as against the State. Declaration (3) was not directed against PPI and, for the reasons it had argued in its appeal against the form of the order, it submitted that the court ought not to make declaration (1) as against PPI. Therefore, according to PPI, because no declaration could be given against PPI, notwithstanding the fact that it had lost the argument as to the proper construction of the Directive, it had been entirely successful on the preliminary issues tried by the High Court; RAAP had lost its case against PPI and, accordingly, PPI should obtain its costs against RAAP. According to PPI, the event for the purposes of an order of costs is that RAAP is not entitled to reliefs (1) and (2); therefore, PPI has been successful and is entitled to its costs.

87. It is apparent that PPI's appeal on costs is entirely dependent upon succeeding on the appeal as to the form of order, *i.e.* it is dependent upon their being no declaration made as

against PPI. As, in my judgment, that appeal should be rejected, it follows that the appeal in relation to costs also fails.

88. Separately, I agree with counsel for the State, that the approach adopted by PPI in dividing up the three issues to be tried as preliminary issues is artificial and the trial judge was correct in his approach. He heard the case over four days and held that the central issue was the proper construction of the Directive. Once that had been determined, it largely determined the question as to whether a conforming interpretation of the Act was possible in light of the proper construction of the Directive, or whether the Directive had been properly transposed by the State. Simons J., in my opinion, correctly identified the case before him as being about the correct interpretation of the Directive. On that view of the matter, RAAP was on one side of the argument and PPI and the State were on the other side. They lost that issue. The only point upon which RAAP lost was the alternative argument as to a conforming interpretation of the Act. It is frequently the case that parties advance cases in the alternative. When they win on one but not all points, this does not mean that they are not therefore entitled to the costs of the proceedings. Such an outcome would be, in the words of counsel for RAAP, a travesty.

89. Furthermore, having regard to the decision of this court in *J.O. & Ors. v. The Minister for Justice and Equality*, [2021] IECA 293, I am not satisfied that PPI has established a basis upon which this court ought to intervene in the decision of the High Court on costs. At para. 30 of the judgment, Collins J. stated:-

“(1) While costs orders are discretionary, this Court nonetheless has “full appellate jurisdiction in respect of such orders”: Godsil v Ireland [2015] IESC 103, [2015] 4 I.R. 535, per McKechnie J. (Dunne and Charleton JJ. concurring) at para. 65, citing In bonis Morelli; Vella v Morelli [1968] I.R. 11.

(2) It follows that the Court “may substitute its own discretion in place of that of the trial judge”: *Mangan v Independent Newspapers* [2003] 1 I.R. 442, per *McCracken J.* (*Geoghegan and Fennelly JJ. concurring*) at 447.

(3) The jurisdiction “is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously” (*Godsil*, at para. 65)

(4) At the same time, however, an appellate court “will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs”: *MD v ND* [2015] IESC 66, [2016] 2 I.R. 438, per *McMenamin J.* (*dissenting in the result*), at para. 46.

(5) Furthermore, an appellate court “should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of “the event” itself”: *Nash v DPP* [2016] IESC 60; [2017] 3 I.R. 320, per *Clarke J.* (*as he then was*) ((*Denham C.J. and O' Donnell, Dunne and Charleton JJ. concurring*), at para 67.

(6) Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it “feels that the exercise by the trial judge of an assessment in relation to costs has gone outside of the parameters of that margin of appreciation which the trial judge enjoys”: *Nash*, at para. 67. Where the costs order is “within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded to a High Court judge”, there will be no basis for appellate intervention: *Nash*, para. 73.”

90. In my view, in this case, the exercise by the trial judge of his assessment in relation to the costs of the trial of the preliminary issue, the reference to the CJEU and the hearing on 21 January 2021 was well within the parameters of the margin of appreciation which a trial

judge enjoys and there was no basis for appellate intervention. For these reasons, I would refuse the appeal in relation costs.

91. Noonan and Barniville JJ. have read this judgment and have indicated their agreement with it.

92. The appellant has lost its appeal and the normal rule is that costs should be awarded to the party that has been entirely successful. My provisional view is that the respondents are entitled to the costs of the appeal, to be adjudicated in default of agreement. If PPI wishes to contend for an alternative order as to costs it may contact the Office of the Court of Appeal within 7 days of the delivery of this judgment to request a short hearing on the matter. If a party requests a further hearing and does not succeed in altering the provisional order for costs, it may be required to pay the additional costs incurred in such a hearing.