Neutral Citation [2012] IEHC 438

THE HIGH COURT

Record Number: 2012 No.116 MCA

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

Between:

Gerard Dowling, Padraig McManus, Piotr Skoczylas, Scotchstone Capital Fund Ltd, John Paul McGann, Georg Haug, Tibor Neugebauer, and J. Frank Keohane

Applicants

And

The Minister for Finance

Respondent

And

Irish Life & Permanent Plc

Notice Party

Judgment of Mr Justice Michael Peart delivered on the 28th day of June 2012:

1. On the 28th March 2012, the Minister for Finance ("the Minister") applied *ex parte* to the High Court (Kearns P.) for, and obtained, a Direction Order pursuant to the provisions of Section 9 of the Credit Institutions (Stabilisation) Act, 2010, as amended ("the Act of 2010") whereby Irish Life & Permanent Plc ("ILP") was directed to sell its life assurance business, Irish Life Limited and its subsidiaries ("Irish Life"), to the Minister for the sum of €1.3 billion, such sale to be completed not later than the 30th June 2012. ILP was directed also by this Order to take a number of specified steps preparatory to and necessary for the completion of the sale.

2. The application for this Direction Order was made *ex parte* as provided for under the Act of 2010. I shall refer to that Direction Order as the "March Direction Order". There have been two earlier Direction Orders - one dated 9th June 2011 ("June Direction Order") in respect of ILP, and another dated 26th July 2011 ("July Direction Order") in respect of both ILP and Irish Life & Permanent Group Holdings Plc ("ILPGH") which is the holding company of ILP and its only shareholder. While reference may be made during the course of this judgment to the June Direction Order and to the July Direction Order it is important to say at this point that while they are part of an overall background to the circumstances in which the Minister for Finance came to make an application for the March Direction Order on the 28th March 2012, the present application to set aside relates only to the March Direction Order. No application to set aside the June Direction Order was ever filed, and there are separate proceedings in existence, and which have not yet been heard, which seek to have the July Direction Order set aside pursuant to the provisions of Section 11 of the Act of 2010. This Court is concerned only with an application to set aside the March Direction Order.

3. Section 11 provides for who may seek to have a Direction Order set aside, and the criteria by which such an application must be considered and determined by the Court. Section 11 (1) as amended provides that "the relevant institution", or "any member of ***that*** institution" may apply to have such a Direction Order set aside, but must move to do so not later than 14 days from the date of publication of the making of same.

4. ILP, which owns Irish Life, and in respect of which the March Direction Order was made, is said by the Minister to be "the relevant institution" for the purpose of Section 11 (1) of the Act since no other institution or other entity is directed to do anything or refrain from doing anything under the terms of the Direction Order – in contrast, say, to the July Direction Order by which both ILP and ILPGH were each the subject to certain directions intended to enable the Minister to subscribe up to €3.8 billion in connection with a required recapitalisation of ILP.

5. The sole member of ILP is ILPGH. By virtue of his purchase of some 36 billion shares in ILPGH for €2.3 billion under the July Direction Order the Minister owns 99.8 % of the shares in ILPGH. The balance of the shares in ILPGH are held by some 130,000 shareholders, including the present 8 applicants.

6. Section 11(3) of the Act of 2010 provides that *"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".*

7. Prior to the expiration of the period of 14 days from the publication of the March Direction Order, the applicants herein (being 8 shareholders of ILPGH) issued and served motions seeking to have it set aside. As stated, none of the applicants is a member of ILP, but nevertheless they argue that they have locus standi on the basis that as shareholders of ILPGH their property rights and interests will be adversely affected by the forced sale of Irish Life by the Minister to himself at an undervalue, and in circumstances where the Minister has acknowledged that it is his intention to re-sell ILP at some time in the future "when the time is right". As we shall see, the Minister had attempted to dispose of ILP through an Initial Placement Offer (IPO) pursuant to the June Direction Order, but having concluded that the financial and economic climate was unfavourable in that regard, he then took steps to sell Irish Life by private sale during 2011, again under the June Direction Order.

8. Those efforts came to an end on the 25th November 2011 when the highest of 5 bidders withdrew. The Minister did not consider that any the lower bids was acceptable, and decided that the only way forward at that point was for the Minister himself to purchase Irish Life for €1.3 billion, but with the intention that it will be re-sold at a later date when the time is right. He made a public

statement in that regard at the end of November 2011.

9. Not only do the applicants say that the Minister wishes to acquire ILP at a gross undervalue, and to their detriment as shareholders of ILPGH, but also that it is not "necessary" that Irish Life be sold at all, or if it be necessary, that ILPGH be excluded from the benefit of any profit which the Minister may gain from the later sale of ILP at a higher price, for the purpose of complying with the recapitalisation requirement for €1.3 billion into ILP.

10. The applicants say also that it is not an objective or purpose of the Act of 2010, as defined and set forth in Section 4 of the Act of 2010 that the Minister make a profit from any forced sale of Irish Life to himself by a resale at a higher price. They submit that the injection of €1.3 billion can be achieved in a proportionate manner by the Minister acquiring Irish Life now for €1.3 billion if he wishes by the deadline of 30th June 2012, but that his purchase of Irish Life for this sum could easily be made conditional upon any profit on the resale being available to ILPGH. This will for convenience be referred to as a claw-back provision. They accept that if this was done, there would be no detriment to the applicants and other shareholders of ILPGH. The applicants do not seek to argue that ILP does not need to be recapitalised, since they accept that this is a mandatory requirement imposed upon ILP by the Central Bank. It is the method by which it is being done to which they object, being a method solely decided upon by the Minister, without consultation with ILPGH shareholders, and which will result in what they say is an unlawful and disproportionate expropriation of their property and a breach of their property rights. They also consider that there is mechanism, via an EGM of ILPGH, whereby the Minister could invest the further €1.3 billion without having to sell Irish Life in order to do so. For these reasons, and others, they do not consider that the Direction Order in the terms proposed by the Minister is "necessary".

11. As stated, the Minister and ILP argue that the applicants are not members of ILP, and therefore are not by virtue of the clear provisions of Section 11 (1) members of "the relevant institution", and therefore have no *locus standi* to apply to set aside the March Direction Order. The Minister submits that the only parties who may so apply are ILP itself being the "relevant institution", or ILPGH, being the sole member of that "relevant institution", neither of whom has sought to do so. The contrary argument put forward by the applicants is that the intention of the Oireachtas in enacting Section 11 (1) and the Act as a whole is that persons who may be affected by the making of a Direction Order should have an opportunity to be heard, given the *ex parte* nature of the application for a Direction Order, and that the section should be given a broad interpretation so as to embrace the present applicants who, they say, will be affected materially by the sale of Irish Life at undervalue, and much reliance is placed by them on the judgment of Feeney J. on the question of *locus standi* in *Dowling and others v. Minister for Finance and others*, unreported, High Court, 2nd March 2012.

12. Those proceedings have been brought by, inter alia, the present applicants, to set aside the July Direction Order. However, it is important to note at this stage that in relation to the July Direction Order there was no doubt that both ILP and ILPGH are each "the relevant institution", since that Direction Order directed steps to be taken by both ILP and ILPGH. Therefore the shareholders of ILPGH were clearly members of one of the "relevant institutions" to which the July Direction Order related. Nevertheless, the applicants rely heavily upon some of what is contained in that judgment of Feeney J, and I will return to it and this issue in due course.

13. A number of directions hearings took place before the President of the High Court following the issuing of their Notices of Motion to set aside the March Direction Order. The Minister and ILP urged that the present applications be dealt with and determined with the greatest expedition since in their view it is imperative that the sale of ILP be concluded no later than the 30th June 2012 in accordance with the State's obligations to the International Monetary Fund, the European Central Bank, the Council of the European Union ("the Troika" or "External Partners"), as well as in compliance with the directions of the Central Bank. Relevantly, Section 11 (3) of the Act of 2010 provides:

> *"On the hearing of such an application, the Court shall under Section 11 (2) 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".*

14. The applicants on the other hand urged that they must be afforded a reasonable and fair opportunity to prepare for the hearing, and, that given the complexity of the issues and the importance of same to them, they ought to have been afforded much more time to prepare affidavits, points of claim, bring motions for discovery, interrogatories and soforth, and they feel railroaded into an early and urgent hearing unnecessarily. Nevertheless, directions with strict time limits were given to the parties for the filing of Points of Claim, Points of Defence, and affidavits, all with a view to this hearing commencing on the 12th June 2012. Substantially these deadlines were met, and the case commenced before me on that date. One of the orders made by the learned President was to the effect that the applicants were not permitted on these applications to argue the constitutionality of the Act of 2010. At the commencement of the hearing before me, the applicants sought to re-open that question. The transcript will show what was said in relation thereto by all parties, and will record the basis of my decision that I was bound by the Order made by the President and that the applicants should proceed with their applications and without arguing that point. Before the Court also at the commencement of the hearing was an application for discovery of documents. I dealt with that application also, and refused to make such an order. Again, the transcript will show the basis for my decision.

15. The applicants do not accept that the sale of Irish Life is a necessary pre-condition for the recapitalisation of ILP prior to the 30th June 2012 as contended by the Minister, no matter how much he may prefer to achieve it by that mechanism. That mechanism is, they say, the Minister's own choice, and not a requirement imposed upon him by the External Partners as part of the Programme of Support for Ireland. In their affidavits and submissions they identify alternative methods by which this recapitalisation can be achieved by the Minister by the 30th June 2012, and which would not be what they describe as a subversion of the shareholders of ILPGH, and to their detriment. They submit that the sale to the Minister of Irish Life at what they consider to be a gross undervalue is an unlawful, unreasonable, disproportionate and unjustifiable appropriation of their property by the Minister without compensation, which also breaches their constitutional and Convention property rights, and is in breach of certain provisions of the Treaty on the Functioning of the European Union (TEU). They submit that it represents a sale of Irish Life at a "fire sale" value, and thus is also in breach of EU law. It is further submitted that the sale of Irish Life is not "necessary" for the attainment of the objectives of the Act, given the alternatives available to the Minister and to which, they say, he has failed to give any or any proper consideration, and that the opinion of the Minister in that regard for the purposes of Section 7(2) of the Act of 2010 is therefore unreasonable and vitiated by errors of law. They complain also that the Minister did not engage in any meaningful or relevant consultation with the Governor of the Central Bank, as he is obliged to do, before reaching an opinion for the purposes of Section 7 (2) of the Act. They contend also that the Minister was obliged under Section 7 to give written notice to the ILPGH in addition to ILP (which did receive written notice) of his intention to seek a Direction Order, and that his failure to do so is an error of law. I will come to these arguments and more in greater detail in due course.

16. The applicants do not have the financial resources to retain lawyers to represent them, and have agreed that the third named applicant, Piotr Skoczylas, would lead the submissions to the Court, which will then in the main be adopted by the other applicants. In

so far as the fourth named applicant is a limited liability company, solicitor and counsel have been retained on what is described as "a purely technical basis" so that the company can be part of these applications to set aside the March Direction Order. The company will in the main also adopt the submissions put forward by Mr Skoczylas on behalf of all.

17. Before proceeding to address the above and other issues which arise for determination I will set forth some general background to the Minister's application for the March Direction Order.

Some Background:
18. Time does not permit a very detailed exposition of the facts which form the background to the making of the March Direction Order. But I will give a brief outline. Other facts and materials will in any event be referred to when dealing with the various issues which have been raised.

19. The events leading up to the making of the March Direction Order can be gleaned from affidavit sworn for the purposes of the *ex parte* application by Michael Torpey who is head of the Shareholding Management Unit in the Banking Division of the Department of Finance. There are of course matters averred to, and opinions expressed, by him in his affidavits with which the applicants disagree. But I believe that what I am going to set forth is relatively uncontroversial by way of background.

20. Irish Life and Permanent Plc (ILP) was identified in the report on the Financial Measures Programme published by the Central Bank on the 31st March 2011 as requiring additional regulatory capital in the sum of €4 billion, of which a sum of €2.9 billion had to be generated by 31st July 2011. Following agreed extensions of time the balance of €1.1 billion must be generated by 30th June 2012.

21. The sum required to be generated by 31st July 2011 was generated by the Minister subscribing for certain securities in ILPGH and ILP up to the sum of €2.7 billion, that investment being, inter alia, directed by the earlier July Direction Order, with the balance of €0.2 billion being provided by ILP itself. That particular direction was given immediate effect pursuant to the provisions of Section 9 (8) of the Act of 2010 since the investment was required for recapitalisation purposes. The balance of that July Direction Order, which did not have immediate effect, is the subject of two challenges, one by a company Horizon N.V., the other by the present applicants, and to which I have already referred in the context of the judgment of Feeney J. on *locus standi* in those proceedings..

22. Following the identification in March 2011 by the Central Bank of the need for additional capital for ILP in the sum of €4 billion, following the PCAR/PLAR, it was agreed under the Programme of Support negotiated and agreed with the External Partners, and reflected in the various Council Implementing Decisions since then, that about €2.9 billion of the amount required had to be generated by 31st July 2011, with the balance to be provided by the 30th June 2012.

23. Throughout these negotiations with the External Partners, it was envisaged that Irish Life would be disposed of and that the capital raised would be used to recapitalise ILP. The extension of time to the 30th June 2012 which was agreed in respect of this balance was granted specifically to allow the disposal of Irish Life to be completed and in order to reduce the overall cost of recapitalisation to the State.

24. Under the June Direction Order, which was never the subject of any challenge by these applicants or any other person, ILP was directed to take certain preliminary steps as soon as practicable, and no later than 31st October 2011, in connection with the disposal of Irish Life, either by means of a possible Initial Public Offering ("IPO") or private sale of some or all of the business and assets of Irish Life.

25. Thereafter, since ILP was not in a position to raise capital itself to comply with the requirement to provide capital of €2.9 billion by 31st July 2011, the Minister agreed to subscribe for certain securities in ILPGH and ILP up to the value of €2.7 billion so that the monies could be placed in ILP by the due date, and for this purpose, and to progress matters also in relation to the balance of capital required, the Minister applied for and obtained the July Direction Order which took immediate effect as far as the subscription of (i) €2.3 billion for shares in the capital ILPGH, and (ii) €0.04 billion in ILP for 10.00 per cent Contingent Capital Tier 2 Notes, and which provided also, but without immediate effect, for the issuing of additional shares to the Minister in the event of any further injection of capital - i.e. the additional €1.3 billion, to meet the overall requirement for an investment up to €3.8 billion. As I have said already, the latter part of the July Direction Order in respect of the additional €1.3 billion is the subject of two challenges yet to be determined by the High Court. The said balance of the July Direction Order cannot take effect until the said challenges have been concluded, and the Minister cannot therefore make the required additional investment into ILP by the 30th June 2012 by means of the further subscription authorised by the July Direction Order, even if he wanted now to do so.

26. As I have said, the June Direction Order, which has not been the subject of any challenge, directed certain preliminary steps to be taken in relation to the disposal of Irish Life by (i) an IPO or (ii) by private sale. In September 2011 ILP decided to suspend the IPO preparatory process primarily in order to focus effort on a potential private sale and on which significant progress had been made by then. A bidding process was commenced, leading to 5 bids eventually being received. However, on the 25th November 2011 the private sale process was terminated following a decision taken by the highest bidder to withdraw its bid. The Minister considered that the two remaining lower bids were unacceptable "*on various grounds but primarily on the basis of the low price being offered*".

27. Thereafter, the External Partners were notified, which led to a discussion between the Secretary of the Minister's Department, the CEO of the NTMA and the Governor of the Central Bank on the 2nd December 2011 about alternative options to achieve the completion of the recapitalisation of ILP. On the 5th December 2011 the Minister's Department received a communication from the External Partners which indicated a wish to discuss the alternative plans for completing this recapitalisation at the forthcoming quarterly mission of the External Partners in January 2012. During that meeting on the 10th January 2012 the External Partners were fully briefed about the private sale process and the decision which had been taken to suspend it. Possible alternative ways forward were discussed.

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

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

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

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

31. He states also that if the sale is not completed by the 30th June 2012 the State and ILP could suffer other adverse consequences as it would represent a breach of the State's commitment to the External Partners leading to a decision to discontinue funding to the State, thereby reducing funding available to the State and leading to a delay in the return of the State to the financial markets, having in turn a knock-on effect on the ability of the State to service its debts. He believes it would cause damage to the State's international reputation, and cause the State to be in breach of its obligations under EU law and expose the State to a risk of penalties under Article 260 of the Treaty for the Functioning of the European Union. He fears also that the Central Bank may suspend ILP's banking business or revoke its licence if ILP breaches its capital requirements, and further that ILP and its management could be exposed to financial and other administrative sanctions under the Central Bank Act, 1942, as amended.

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

The Applicants' case:
33. Mr Skoczylas has sworn a number of affidavits at different stages of these proceedings prior to the hearing which commenced on the 12th June 2012. There is a good deal of repetition contained in these affidavits (not a criticism of Mr Skoczylas I hasten to add), but the points being made by the applicants can nevertheless be gleaned from them. There are affidavits sworn by the other applicants which mirror to a large extent the points being made by Mr Skoczylas in his affidavits, and there are affidavits sworn by experts in support of the applicants' arguments.

34. I do not propose to set forth in detail the contents of these various affidavits. Time does not permit me to do so. But in any event, I shall be referring to relevant facts as the issues are discussed.

35. The President of the High Court directed Points of Claim to be filed no later than the 23rd April 2012, despite the urgings of Mr Skoczylas that the applicants as personal litigants were unable to deal with such a tight deadline and despite his submissions generally that these proceedings should not be unfairly expedited to the prejudice of the applicants. He complains bitterly about this particular aspect of the case. The applicants' Points of Claim are set forth at paragraph 62 of his affidavit which was sworn by him on the 23rd April 2012. Almost half of this quite lengthy affidavit deals with his complaints about the lack of fair procedures resulting from the haste with which the applicants were required to prepare and file documents so as to be in readiness for a hearing commencing before me on the 12th June 2012. There is no need at this stage to detail those complaints. He filed a further and even lengthier (155 pages) affidavit on the 20th May 2012, in which he sets out his submissions in considerable detail.

36. Part of the applicants' case is there is in fact no undertaking or binding commitment in place with the External Partners that recapitalisation of ILP must take place through the sale of Irish Life by the 30th June 2012. Rather, it is submitted, the undertaking/commitment is simply that recapitalisation of ILP will be completed by that date. They characterise the sale of Irish Life as a self-imposed condition upon himself, or choice by the Minister. In that regard he has quoted a passage contained in the February Memorandum of Understanding with the External Partners which states as follows:

> *"7. We will complete by end June 2012 the recapitalisation of ILP. Following the suspension of the sale of Irish Life**, we have decided** that a government purchase purchase of this company will be the most effective mechanism to finalise the recapitalisation of ILP, and a complete separation of ILP and Irish Life that is already well advanced at an operational level. Irish Life is a valuable asset for the State and will continue to be managed on an independent commercial basis to ensure that value, and we will continue to work to dispose of Irish Life as soon as market conditions permit. (PS's emphasis added)*
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> *8. We are finalising the determination of the way forward for ILP. During February, we will prepare a preliminary proposal for financial and operational restructuring to address ILP's vulnerabilities, taking the perspective of the state on alternative restructuring options. This work builds on a preliminary analysis of restructuring options recently completed by the bank, and will benefit from third party reviews. The authorities will make a decision on the proposed way ahead by end April. We will prepare an updated restructuring plan for ILP that will detail the actions needed to ensure the bank's long-term viability, in line with EC state aid rules, by end June 2012. The plan should not be premises on there being additional capital injections from the State, and should safeguard financial stability."*

37. They consider that it is spurious for the Minister to contend that the sale of Irish Life is mandated by the 30th June 2012, and that this is simply being advanced by him in order to bolster his argument for urgency in the determination of the present application, and contrasts that alleged urgency with the more leisurely pace at which the July Direction Order application is being allowed to progress. They believe that the urgency on the part of the Minister is because he wishes to acquire Irish Life at an undervalue at the

expense of the ILPGH shareholders, and wishes to prevent close scrutiny of the transaction by the application of very strict deadlines and an expedited hearing, which will disadvantageous the applicants who have to represent themselves. They allege bad faith in this respect. The Minister denies any bad faith, and points to the unsuccessful efforts made by him through an IPO and private sale, either of which if successful would have meant that he did not have to acquire Irish Life himself, and he submits that it is clear therefore that he is a reluctant buyer, and is doing so only out of necessity.

38. At paragraph 62 of the affidavit sworn on the 20th May 2012, the applicants' Points of Claim are set forth as follows:

> *A. The Direction Order should be set aside because the opinion of the Minister under Section 7 (2) of the Act was unreasonable and vitiated by errors of law. This claim will be expanded upon and comprehensively elaborated upon in the aforementioned supplemental affidavit that I intend to issue. The supplemental, comprehensive affidavit will provide evidence in this regard. I say and believe that the comprehensive, supplemental affidavit will have more than 100 pages and will include exhibits covering hundreds of pages. On the basis of the said comprehensive affidavit, the Pro Se Applicants intend to apply for an order of discovery as well as deliver interrogatories. It is impossible at this stage – before the comprehensive affidavit has been written – to state what/whom the discovery/interrogatories will cover.*
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> *B. Making the Direction Order in the terms of the proposed Direction Order was not necessary to secure the achievement of the purposes of the Act specified in the proposed direction order of 27 March 2012 ("the proposed Direction Order"). This claim will be expanded and elaborated on in the aforementioned supplemental, comprehensive affidavit.*
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> *C. The Direction Order illegally and inequitably forces ILP to sell a very valuable asset at an undue expense of the ILPGH shareholders (to the undue detriment of the ILPGH shareholders) and for an undue benefit of the Minister. This claim will be expanded and elaborated on in the aforementioned supplemental, comprehensive affidavit.*
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> *D. The Minister instigated the Direction Order without adequate consultation and proper observation of fair procedures. This claim will be expanded and elaborated on the aforementioned supplemental, comprehensive affidavit.*
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> *E. The Act, based on which the Direction Order was made, breaches the Constitution of Ireland. This claim will be expanded and elaborated on the aforementioned supplemental, comprehensive affidavit. Given the claim, the Attorney General will have to be notified/joined as a party to these proceedings. The Pro Se applicants intend to handle this matter during the preliminary stage in the proceedings. The preliminary matters in the proceedings are covered below in this affidavit.*
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> *F. The Act/the Direction Order breach the European Union ("EU") Treaties and laws. That includes inter alia the European Convention on Human Rights. Thus, as part of the preliminary matters in the proceedings, there is a need for a notice on the Attorney General and the Human Rights Commission in respect of the making of a declaration of incompatibility regarding the Act and the Direction Order, with the meaning the declaration of incompatibility has in section 1 (1) of the European Convention on Human Rights Act, 2003.The Pro Se applicants intend to handle the matter during the preliminary stage of the proceedings. The preliminary matters in the proceedings are covered below in this affidavit.*
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> *G. It is important to emphasise that the Pro Se applicants' application for the setting aside of the Direction Order is made in the public interest, including the interest of the taxpayers, as well as in the interest of all the ILPGH shareholders.*
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> *H. Also, the Pro Se applicants' application for the setting aside of the Direction Order is made in the best interest of ILPGH as a whole and ILP as a whole.*
>
> *I. There are a number of preliminary matters in the proceedings, which are covered below in this affidavit.*

39. Points of Defence were filed and delivered by the Minister and by the Notice Party by the end of April 2012. Each document takes issue with the fact that the applicants in their filed documents includes in the title to these proceedings "*In the Matter of Irish Life & Permanent Group Holdings Plc*", stating that the *relevant institution* is Irish Life and Permanent Plc. Each document also pleads a lack of *locus standi* on the part of the applicants since none is a member of the "relevant institution". Each denies also that there are any grounds for setting aside the March Direction Order given the provisions of Section 11 (3) of the Act of 2010 which provides for the only grounds upon which the Court may set aside such an order. The Minister refers to the affidavit of Michael Torpey which grounded the application for the Direction Order and submits that it is clear from that affidavit that all the requirements of the Section 7 of the Act of 2010 have been complied with. He points also to the lack of any grounds put forward by the applicants for their various contentions that the opinion of the Minister was unreasonable, or that it is vitiated by any alleged error of law, or as to how it is being alleged that there has been a failure to comply with the provisions of Section 7 of the Act of 2010. Other issues raised by the applicants are traversed, and complaint is made about the failure of the applicants to adequately detail their points of claim. The Notice Party has similarly traversed the points of claim put forward by the applicants.

40. The applicants have made the point that the deadline for recapitalisation has been a somewhat moveable feast since the original deadline of 31st July 2011, and they say that this has happened without any apparent adverse effect on anything or anybody. They refer to the original deadline for recapitalisation of the Irish Banking system by the end of July 2011, but also state that exceptionally time was extended in respect of ILP. They refer to the fact that Irish Life was supposed to be offered for sale by the end of October 2011 according to the June Direction Order, and that the sale process was then abandoned at the end of November 2011, and that the deadline is now moved was out to the 30th June 2012. These averments in their affidavits are by way of objection to the manner in which they believe that they have been unfairly driven to an urgent hearing in breach of fair procedures, especially given that they are representing themselves, and lack the resources available to the respondent and Notice Party. It is perfectly understandable that the applicants would feel under great pressure with their preparations. Unfortunately, the nature of the application and the purpose behind the Direction Order requires that it be treated with urgency. Just as the applicants are entitled to fair procedures, so is the respondent. The respondent is entitled to as much speed as is consistent with the orderly conduct of court business, and justice. I would conclude that comment merely by stating that it is quite apparent to me that a great deal of good, hard and useful work was done on the applicants' side of the case to be ready for the hearing on the 12th June 2012. Their case has been presented with great skill and clarity by Mr Skoczylas. I have no doubt that it was an exhausting experience for him to deal with all these issues over the course of nine hearing days, including one Saturday, in an effort to meet the deadline of the 30th June 2012. But I said at the conclusion of the case, and I repeat now, that I do not believe that the applicants' case has been in any way disadvantaged by the fact they are not professionally represented.

41. I now turn to the particular issues which arise for determination on this application to set aside the March Direction Order.

Locus Standi:
42. Section 11 (1) of the Act of 2010 provides:

> *"(1) The relevant institution in relation to which a direction order is made or a member of that institution may apply to the Court by motion on notice grounded on affidavit, not later than 14 days after the publication, in accordance with subsection (1)(b) of Section 9A, of a direction order, for the setting aside of the direction order." (emphasis added)*

43. ILP, which owns Irish Life, and in respect of which the March Direction Order was made is said by the Minister to be the only "relevant institution" in this case for the purpose of Section 11 (1) of the Act since no other institution or other entity is directed to anything or refrain from doing anything under the terms of the Direction Order. That is in contrast to the July Direction Order by which both ILP and ILPGH were each the subject to certain directions intended to enable the Minister to invest up to €3.8 billion in connection with a required recapitalisation of ILP.

44. The sole member of ILP is ILPGH. The Minister is now, by virtue of his purchase for €2.3 billion of some 36 billion shares in ILPGH under the July Direction Order, the holder of a 99.8 % of the shares in ILPGH. The balance of the shares in ILPGH are held by some 130,000 shareholders, including the present 8 applicants.

45. None of the applicants is a member of ILP. They are simply shareholders in ILPGH. On a strict and literal reading of Section 11 (1) of the Act of 2010 as amended, therefore, they are not entitled to apply to set aside the March direction order. However, they argue that they have *locus standi* on the basis that as shareholders of ILPGH their property rights and interests will be adversely affected by the forced sale of Irish Life by the Minister to himself at a gross undervalue, and in circumstances where the Minister has acknowledged that it is his intention to re-sell ILP at some time in the future when the time is right.

46. The contrary argument put forward by the applicants is that the intention of the Oireachtas in enacting Section 11 is that persons or entities who may be directly and adversely affected by the making of a Direction Order should have an opportunity to be heard, given the *ex parte* nature of the application for a Direction Order, and that the section should be given a broad interpretation so as to embrace the present applicants who, they say, will be affected materially by the sale of Irish Life at undervalue, because a major asset of a company which is owned by a company of which they are shareholders is to be disposed of to the Minister without them having any say in the matter..

47. As I have stated already, much reliance is placed by them on the judgment of Feeney J. on the question of *locus standi* in the proceedings to set aside the July Direction Order. They seek support also from the judgment of Hardiman J. in *Adam v. Minister for Justice* [3003] IR. 51 for their argument that the intention of the Oireachtas is that any party who may be affected by a Direction Order should be able to seek to set it aside, so that an expansive interpretation of the section should be adopted. Adam was a case where leave to seek judicial review reliefs had been granted *ex parte* under the provisions of Order 84 RSC, and where the respondent brought an application to set that order aside, even though Order 84 RSC makes no provision for such an application by an affected respondent. The learned judge stated at p. 77:

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

48. It is important at this stage to state again that with the July Direction Order there was no doubt that both ILP and ILPGH are each one of the "relevant institution[s]", since each was the subject of certain directions contained therein. Therefore the shareholders of ILPGH are members of one of those "relevant institutions" to which the July Direction Order related, and such members were clearly within the classes of persons given standing to apply to set aside the order under the section. The issue to be decided by Feeney J. was whether the applicants in that case, who held their shares through nominees and therefore were not themselves registered as members, were nevertheless to be included within the meaning of "member of that institution" on the basis that they had the beneficial interest in the shares. In that case it was argued against them that the word "member" in Section 11 (1), and which is not defined in the Act of 2010, ought to be understood as, and confined to, a "member" as defined in Section 31 of the Companies Act, 1963, namely a person whose name is entered in the company's register of members.

49. The learned judge concluded that for the purposes of Section 11 (1) of the Act of 2010, the word "member" had to be given a sufficiently broad meaningso as to embrace not only registered members but also persons such as those applicants who held their shares through nominees, and that the meaning should not be confined to that in Section 31 of the Companies Act, 1963. It is important that the applicants appreciate that Feeney J. did not decide that persons other than "*members of that institution*" [i.e. the institution in respect of which a direction order has been made] were entitled to apply to set aside the direction order. He simply decided that persons who held shares in the relevant institution in dematerialised form and through nominees, and as such held the ultimate beneficial interest in those shares, were persons to be regarded nevertheless as members of the relevant institution to which the direction order relates, even though their actual names do not appear in the company's register of members.

50. Nevertheless, the applicants rely heavily upon some of what is contained in that judgment of Feeney J. in aid of their argument that the broad meaning to be given to "member" in Section 11 should be expanded further again so as to include any person or entity such as the present applicants who may be affected by the direction order. In that regard they include shareholders of ILPGH which is the sole registered member of ILP. They refer to one of the Recitals to the Act of 2010 which states:

> "AND WHEREAS THE COMMON GOOD REQUIRES PERMANENT OR TEMPORARY INTERFERENCE WITH THE RIGHTS, INCLUDING PROPERTY RIGHTS, OF PERSONS WHO MAY BE AFFECTED BY THE PERFORMANCE OF THOSE FUNCTIONS" [emphasis added].

50. The applicants submit that as shareholders of ILPGH, they stand to be adversely affected by the direction order since the most valuable asset of ILP, of which ILPGH is the sole shareholder, is directed to be sold under the March Direction Order and at what they consider to be an undervalue. They submit, and have adduced affidavit evidence in this regard, that the sale of Irish Life for €1.3 billion will negatively affect the value of their shares in ILPGH, and as such they are within the category of persons referred to in the Recital quoted above, namely "*persons who may be affected*". Accordingly, it is submitted that it is reasonable and permissible to see the phrase "member of that institution" in Section 11 (1) of the Act of 2010 as including the present applicants.

51. They also submit that they are affected persons since, by achieving the sale of Irish Life by means of a Direction Order, the Minister has, by virtue of the provisions of Section 53 of the Act of 2010, been able to avoid the need to hold an EGM of ILPGH for the purpose of approving the sale of Irish Life to himself at undervalue, which would otherwise be required under the Enterprise Securities Market Rules (ESM Rules) which require that where an asset representing 75% or more of the value of the company is to be sold, EGM approval is required.

52. The applicants have asked the Court to look carefully at the whole Act and not just the provisions of Section 11 (1) thereof for the purposes of establishing the precise meaning to be given to the phrases "*the relevant institution in relation to which a direction order is made*" and " *a member of that institution*" in Section 11. They point to the fact that in different parts of this statute the Oireachtas refers to "*a relevant institution*" or "the relevant institution" inter-changeably. They point to the fact, which is not in dispute at all, that ILPGH comes within the definition of "a relevant institution" given the definition in that regard contained in Section 2 of the Act, which includes the holding company of a bank to which financial support has been given by the Minister.

53. Despite the fact that the March Direction Order directs only ILP to take certain steps, and not ILPGH, the applicants urge that the word "that" in Section 11 (1) ought not to be seen as strictly confining the class of member who may seek to set aside to a member of only ILP to which the direction order is directed. I can say at this stage that I cannot accept that particular argument. The use of the words "that institution" serves to confine its application to only the relevant institution to which the direction order relates. The words "that institution"" in the section cannot on any permissible basis of interpretation be given the same meaning as "a relevant institution" without completely altering the clear meaning of the section, and altering the clear intention of the Oireachtas. This Court cannot by a purposive or expansive interpretation in effect change the statutory provision from that which the words clearly indicate.

54. I do not consider that the passage quoted above from the judgment of Hardiman J. in *Adam* can assist the applicants, because what is stated therein must be read in the context in which it is written, namely where Order 84 RSC itself provided no mechanism for an application to be brought to set aside a leave application order applied for *ex parte* and therefore without notice to any party which might be affected. The Court was deciding, inter alia, whether in those circumstances, there was an inherent jurisdiction vested in the High Court to set aside an *ex parte* order granting leave, where the Rules were silent on the point. In the present case, however, the statute itself made such a provision, and clearly delineates the classes of persons who may seek to set aside a direction order obtained *ex parte*. If it had not done so, and a party claiming to be affected thereby sought to have it set aside, such a party may have been able to argue successfully for an inherent jurisdiction in the High Court to do so, or perhaps could have moved to set aside an *ex parte* order under the Rules of the Superior Courts. Whether these present applicants would have succeeded on the sole basis that they are merely shareholders of the company to which the direction order relates as opposed to the affected company itself is another matter altogether, and I am far from expressing a view that they would have. There are clearly arguments against such a proposition given the nature of shares and the rights derived therefrom, and the principle of separate legal personality. Some of those arguments are ventilated by the respondent and Notice Party on the present application.

55. They argue that one of the consequences which flows from the principle of separate legal personality is the rule which precludes shareholders from recovering in respect of losses or wrongs done to the company. It is submitted by them that if in the present case ILPGH (the sole member) is affected by the Direction Order made in respect of ILP, then it is ILPGH which is the entity to seek to set that order aside, but not its individual shareholders. The difficulty for the present applicants is that it is the Minister who controls ILPGH being the holder of 99.8% of the shares in ILPGH following the purchase of 36 billion shares therein in exchange for an investment of €2.8 billion following the July Direction Order.

56. The Minister points also to the fact that by claiming to have *locus standi* in the present application they are attempting to prevent the sale of an asset (Irish Life) owned by another company (ILP) in which they own no shares whatsoever. It is submitted that the applicants simply cannot reasonably argue that the sale of such an asset of a different company is an expropriation of their own property as shareholders of ILPGH. The asset in question does not even belong to the company in which they are shareholders.

57. The Minister argues also that in fact Section 11 has provided what should be seen as an exception to the well-established principle that it is the company itself which must seek redress for wrongs done to the company, and not its shareholders since, absent its provisions, the shareholders themselves would have no such entitlement. The Court has been referred to the judgment of the Supreme Court in O'Neill v. Ryan (No.3) [1990] ILRM 140, and to the judgment of Denham J. (as she then was) in *Madden v. Anglo Irish Bank Corporation* [2005] I I.L.R.M. 294.

58. It is argued that since section 11 must be considered to be an exception to the general rule, this Court should not expand the scope of that exception, since its scope is clearly defined from the unambiguous wording of the section, and that if the Oireachtas had intended, where shares were held in an affected company by a corporate member, that the shareholders of that corporate member could also apply to set aside, it could and would have made that position clear by so providing.

59. In relation to this point also, the Court has been referred to the fact that in other sections of the Act of 2010 the Oireachtas has made specific reference to "*a relevant institution, any of its subsidiaries, its holding company …*". By way of example, one can refer to Section 61 in this respect. There are other such references. It is submitted that this is significant as far as the provisions of Section 11 are concerned, since it can be inferred that the absence of any reference in Section 11 to members of a holding company being able to apply to set aside a direction order is not accidental, and that the Oireachtas intended to limit the class of members to those who are members of the particular relevant institution in relation to which the direction order was made, namely in this case ILP.

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

61. But in a further effort to avoid the plain meaning of the words of Section 11 (1) the applicants submit that the Court should not confine the meaning of the words "*the relevant institution in relation to which the direction order is made*" to the institution to which the specific directions in the March Direction Order are directed, namely ILP. They submit that it is not unreasonable to include ILPGH

within the meaning of an institution "*in relation to which the direction order is made*", since it (ILPGH) is the sole member of the company which owns the asset being sold. The applicants have referred to a number of documents which, they say, make it clear that whatever about the technicalities of the transaction, in reality it is ILPGH which is disposing of a valuable asset, and they say this in fact recognised by the Minister.

62. To assist them in these arguments the applicants refer to the November 2009 Prospectus relating to the establishment of ILPGH as the Group holding company in place of ILP, which up to that point had been not only the holding company, including for its life assurance and investment management businesses, but was also a licensed credit institution operating the group's banking business. This structure was considered a disadvantage by the Board of ILP at that time given the banking and financial crisis emerging by the end of 2008. The Prospectus put forward a scheme of arrangement which, if approved, would see ILPGH becoming the parent company of the Group, with the ILP shares being cancelled and being replaced by new ILP shares which would issue to ILPGH, whereby ILPGH would become the beneficial owner of the entire issued share capital of ILP. Under the scheme, existing ILP shareholders would receive one new ILPGH share for every cancelled ILP share held at the relevant date.

63. Much weight is attached by the applicants to this Prospectus and what they see as a promise or commitment therein at page 32 thereof that "*the financial interests of existing shareholders (other than restricted shareholders) in the profits, net assets and dividends of the Group will not be affected by the Scheme. No changes are contemplated in the trading operations of the Group as a consequence of the Scheme*." Approval to this Scheme was given on the 15th December 2009, and it was approved by the High Court in early 2010. The applicants see this document as a guarantee that the major asset of the Group namely its life assurance business, the major "net asset" of the company would not be disposed of without shareholder approval given the assurance in the Prospectus that the financial interest of the shareholders in, inter alia, the net assets of the Group would be unaltered and that no changes were contemplated in the Group's trading operations. They argue therefore that given the route by which they have become shareholders in ILPGH instead of ILP, and given that the Minister is now by-passing a shareholders' EGM and disposing of the prime asset of the Group, particularly at what they say is an undervalue, that both companies are inseparable from an investor protection point of view, and that the applicants must be considered to be members of one of the relevant institutions in relation to which the Direction Order is made, and as such ought to have *locus standi* to set aside the March Direction Order since they are so directly affected by it as shareholders.

64. In support of their argument on *locus standi* the applicants refer also to the Report of the Central Bank which issued following the imposition of the €4 billion recapitalisation requirement announced by the Central Bank on the 31st March 2011 upon the completion of the PCAR stress test carried out on behalf of the Central Bank. There is a paragraph in the Report on page 4 thereof under the heading 'Proposed disposal of Irish Life Limited and associated subsidiaries' which states:

> *"The life assurance business remains for sale and in the interim, the Irish State will purchase ILL from ILPGH for €1.3 bn, with the intention of disposing it [sic] at a future date when market conditions are more favourable. As a result the acquisition of ILL and associated subsidiaries from the ILPGH plc will now be undertaken by the Minister in order that the proceeds can be used to give effect to the remaining recapitalisation of ILP to comply with Regulation 70 (1) of the European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 as agreed with the authorities."*

65. The applicants highlight the fact that even the Central Bank seems to have believed that it was ILPGH from whom the State would be purchasing the Irish Life businesses, and not ILP. This, they say, supports their contention that it is in reality ILPGH which is, at least, one of the relevant institutions for the purpose of Section 11 of the Act of 2010, and as such these applicants are members of that relevant institution and have *locus standi*. They submit also that the linkage between the two companies is further evidenced by the fact that the 2009 Prospectus stated that the directors of ILP would also be the directors of ILPGH. In fact, as things turned out, when Mr Skoczylas was appointed to the board of ILPGH at an EGM, the board of ILP decided that it would not appoint him to the board of ILP, even though the Central Bank had approved him as a director of ILP (and of ILPGH, as it happens, even though the Central Bank does not control ILPGH). But the point being made is that as there was intended by the Prospectus to be a common board between the companies, there is a clear inter-connection between the two entities such that there should be *locus standi* for the members of both entities in relation to any application to set aside the March Direction Order. As the transcript shows, the applicants submit that the Prospectus should be read as stating "*think of the ILPGH shareholders as ILP shareholders*". [T.2, p. 16 – lines 11-12)

66. In this way it is submitted that in effect the March Direction Order does in fact direct ILPGH to do something, and that this confirms that ILPGH is one of the relevant institutions "*in relation to which the Direction Order made*". It is submitted that, in effect, ILPGH is being directed to sell its major asset, even though the Direction Order directs only ILP to take steps in relation to it.

67. It is also submitted that ILPGH is one of "the relevant institution[s]" because it is affected by the March Direction Order in a particular way, which is that under ESM rules certain transactions must receive shareholder approval at a general meeting, including where the disposal in question exceeds 75% of the value of the ESM company's net assets, unless the Minister avails of Section 53 of the Act of 2010 which provides that the provisions of the Act, and any order made under the Act (e.g. a Direction Order) shall have effect notwithstanding various provisions, including the listing rules of any regulated market, which includes the ESM rules. This section meant therefore that the approval of ILPGH was not required, despite it being a requirement under ESM rules that the members approve of such a sale in a general meeting. The applicants submit therefore that ILPGH is a relevant institution in relation to which the Direction Order is made because it is affected by it in this manner, and that its shareholders, who have been by-passed by means of Section 53, ought to be seen as persons entitled to apply to set aside the Direction Order.

67. The applicants submit also that it is only the Minister who has chosen to name ILP on the proposed Direction Order, and that it would not have been in any way strange, inappropriate or incorrect for the Minister to have included ILPGH in the title of the Proposed Direction Order, given the fact that the asset being sold is in the ownership of a company of which ILPGH is the sole shareholder, and even though no specific direction is directed to ILPGH. They submit that the mere fact that the Minister did not name ILPGH in the Direction Order does not mean that ILPGH is not a relevant institution to which the Direction Order relates, and should not be determinative.

68. They go further and submit that in order to put the matter beyond any doubt the Minister in the Proposed Direction Order could have chosen to include a direction to ILPGH to in turn direct ILP to sell Irish Life to the Minister for €1.3 billion, without interfering in any way with the attainment of his objective. If he had done so there could have been no argument but that ILPGH is one of the relevant institutions, and that therefore the shareholders of ILPGH would have had standing, just as they have in relation to the July Direction Order. They urge that this Court should not be constrained in its interpretation of "*the relevant institution in relation to which a direction order is made*" by the manner in which the Minister has unilaterally chosen to word the Proposed Direction Order.

69. I am satisfied that the intention of the Oireachtas can be gleaned from the ordinary and plain meaning of the words used by the

Oireachtas in enacting Section 11. The words used are clear and easily understood. Those who may seek to set aside a direction order are confined to either the relevant institution in relation to which the order has been made (in this case clearly ILP since ILPGH is not directed to do anything or refrain from doing anything), or a member of that institution (in this case the sole shareholder of ILP). None of the applicants is a shareholder of ILP. Its only shareholder is ILPGH. ILPGH is therefore the entity which may make such an application (apart of course from ILP itself should it have wished to do so).

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

71. I have also given careful consideration to whether the recital to the Act which I have quoted above should be seen as justifying a widening of the class of persons who may seek to set aside a direction order, so that any person who claims that they may be affected by the order should be entitled to seek to set it aside, and I have concluded that this recital of itself provides no such justification.

72. In so far as the applicants have relied upon the judgment of Mr Justice Feeney in the proceedings related to the July Direction Order, it is clear that it must be read in the context of the issue before him, namely whether the term "member" was confined to its meaning in Section 31 of the Companies Act, 1963 so as to exclude those shareholders whose names are not entered in the register of members by virtue of the fact that they hold their shares in dematerialised form or through nominees. He decided that "member" was not so confined for the purpose of Section 11 and should embrace also any beneficial owner of shares. But that is all he decided. Therefore his comments generally in his judgment have to be read in that context. It cannot be concluded that he decided that any person whose rights are affected should be entitled to *locus standi* in order to seek to set aside the direction order. That would be to ignore the clear wording of the section.

73. I have also considered carefully the submission that the phrase "*the relevant institution in relation to which a direction order relates*" should not be confined to ILP simply because the Minister chose not to name ILPGH in the proposed direction order. I appreciate that in a number of documents ILPGH is referred to as being the party disposing of Irish Life. That may be so, but it cannot determine the issue of *locus standi* in my view. Neither in my view can the fact that Section 53 of the Act of 2010 has the effect that the ESM rules are over-ridden. That section does not prevent ILPGH itself from applying to set aside the Direction Order if a majority of the members of ILPGH decided that it should do so, or perhaps if the Board decided it should do so. I appreciate that the present applicants by now hold a very small minority of the shares and therefore could not themselves achieve such a resolution in the face of majority opposition. However, that is one of the characteristics of company law and the rights of individual shareholders, and perhaps exemplifies one of the disadvantages of investing in a limited liability company. A shareholder does not always have control over the decisions taken, but must be taken as accepting this disadvantage when deciding to buy shares. That risk is inherent in the nature of a share.

74. It seems to me that a helpful approach to considering whether or not the present applicants should be given standing by virtue of their shares in ILPGH is to pose the question whether, if the application for a direction order was required by the Act to be on notice, rather than *ex parte* with the right to apply to set aside, which parties would, by reference to the intention of the Oireachtas in this Act, be required to be on notice of the application so that they could exercise their right to be heard?

75. I think it is fair to say that the Minister would have been required to put ILP on notice of the application, and to put ILPGH on notice of the application being the owner and the only "*member of that [relevant] institution*" referred to in Section 11. There could not in my view have been any requirement, if the application was not *ex parte*, to put each of the 130,000 private shareholders of ILPGH on notice, in addition to ILPGH itself. Once ILPGH was on notice I consider that the Court would have been satisfied that all necessary parties were on notice of the application. Once ILPGH would have been put on notice of such an application, it would have been up to that company, and not the Minister, to decide whether or not it wished to call an EGM so that its individual shareholders could be consulted and could vote on whether or not ILPGH wished to oppose the application. In such a situation, ILPGH could as a protective measure lodge an application to set aside within time, and then seek shareholder approval if it wished to do so. This conclusion is consistent also with the accepted principle of company law to which reference has been made whereby any right of action for a wrong done to a company must be remedied at the suit of the company and not any individual shareholder.

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

77. I am conscious of the fact that in the short time available for the preparation of this judgment, it is not possible to set forth every single argument and submission made so ably by Mr Skoczylas on behalf of the applicants, but the transcripts will show them in full detail. Nevertheless I have considered all of them, and as far as practicable have tried to refer to the more salient points made.

The nature of the application under Section 11:

78. An issue has arisen as to the precise nature of the application brought before the Court by the applicants. Section 11 (1) provides, as already set forth, for an application for the setting aside of the Direction Order. A Direction Order is not an order or decision of the Minister, but is an order made by a judge of the High Court after he or she is satisfied that requirements set forth in Section 9 (2) of the Act of 2010 have been complied with, namely that the requirements of section 7 have been complied with, and that the opinion of the Minister that a direction order in the terms of the proposed direction order is necessary to secure the achievement of a purpose of the Act of 2010, was reasonable and was not vitiated by any error of law.

79. It is important to state immediately that there can be no question of this Court under Section 11 conducting a judicial review of the March Direction Order itself, since it is an order of the High Court. That is axiomatic. Rather, it is an order to set aside the order of the High Court.

80. Nevertheless, the applicants urge that on this application to set aside the *ex parte* Direction Order normal judicial review principles should be employed in this Court's consideration of whether the opinion of the Minister that the Direction Order is "necessary" is a reasonable opinion. While the applicants urge that the normal judicial review principles should apply, they submit that reasonableness should be determined by reference to an anxious scrutiny test, and not the more traditional Wednesbury reasonableness test as explained by Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, and also by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In particular the applicants urge that this Court should consider the proportionality of the Minister's opinion as to the necessity for a direction order, when considering whether or not the Direction Order should be set aside. By that they mean that if this Court is satisfied that a direction order in the terms of the March Direction Order adversely interferes with their property rights to an extent greater than reasonably necessary in order to achieve the Minister's purpose, then it should be set aside on the basis that it lacks proportionality. In that regard, the applicants accept the need for ILP to be recapitalised since it is a mandatory requirement imposed by, inter alios, the Central Bank, but they do not accept that the sale of Irish Life is mandated for that purpose, and they do not accept, even if Irish Life must be sold now to the Minister for €1.3 billion, that it needs to be achieved in a way which precludes ILPGH from benefiting from any re-sale by the Minister at a higher price when the time is right. In that regard the Minister has made statements that in due course his intention is to sell Irish Life to a third party "*when the time is right*". The applicants contend that if the Minister does so it is disproportionate that he alone should benefit from any profit on re-sale, since he can achieve his immediate purpose of injecting €1.3 billion into ILP by a measure which still enables ILPGH to benefit from any such profit on re-sale. That is the basis for the applicants' contention that the Direction Order in its present terms is a disproportionate interference with the rights of ILPGH and its shareholders.

81. The applicants refer to the fact that the Minister had before him an analysis from Goldman Sachs which makes it clear in their submission that upon a re-sale of Irish Life within a relatively short time the State stands to make a profit of at least €500,000 million, regardless of what peer group trading multiples one uses. The applicants refer to a Department memo dated 20th March 2012 to the Minister in which reference is made to the Goldman Sachs analysis which was attached to that memo, and the Department states:

> *"The table on page 11 of the Goldman Sachs paper attached to this note shows what the value of Irish Life could be at various exit points in the future if the numbers from the business plan, prepared in 2011 as part of the sale process, are achieved. While these valuations include future dividends that would be payable it is clear that the projected value of the company is likely to rise considerably over the coming years and that the eventual return to the State from an exit in 2014 or 2015, even at a relatively low implied exit multiple, could be significantly in excess of the consideration being proposed now."*

82. For these arguments they seek support from certain passages in the judgments of Murray C.J. (as he then was) and of Denham J. (as she then was) in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701.

83. It is unnecessary to delve into the judgments in Meadows in great detail. In relation to proportionality it is clear from the judgments that there has been no departure from the traditional test as set forth in Keegan by Henchy J. and as further explained by Finlay C.J in O'Keeffe. In relation to what part the principle of proportionality plays in the Court's consideration of reasonableness, it is helpful to refer to what is stated in that regard by Murray C.J (as he then was) in Meadows at p. 723:

> *"The principle [proportionality] requires that the effects on, or prejudice to, an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the court in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 or O'Keeffe v. An Bord Pleanala [1993] 1 I.R. 39 which would exclude the court from applying the principle of proportionality in cases where it could be considered to be relevant."*

Denham J. (as she then was) was also of the view, expressed at p.741, that "while the term *'proportionality' is relatively new in this jurisdiction, it is inherent in any analysis of the reasonableness of a decision*".

84. The applicants have also submitted that while the process undertaken by this Court is not strictly judicial review, and while they accept that to an extent judicial review principles should apply such as proportionality, they describe the Act of 2010 as *sui generis*, and as such seek to have the Court consider the question of reasonableness by reference to a distinct definition not generally applied, namely the ordinary dictionary or everyday meaning to of that word. In that regard they have referred to the definition of "reasonable" in The Collins Dictionary of English Language, namely sensible, not making unfair demands, logical, moderate in price, average. The same dictionary defines "unreasonable" as unfair and excessive, or refusing to listen to reason. They consider the March Direction Order to be, therefore, unfair and excessive, in much the same sense as they have said that it is not proportionate, as I have set forth already, and accordingly that the Minister's opinion under Section 7 as to necessity to be unreasonable.

85. In so far as the Court may consider the question of interpretation to be in doubt, the applicants urge that the interpretation which most protects constitutional rights is the interpretation to be preferred. In this regard they have referred to Dodd – *Statutory Interpretation in Ireland,* where the author explains at para.11.51:

> *"It is frequently said that enactments that interfere with constitutional rights are to be strictly construed. The strict interpretation rule means that where there is a genuine doubt or ambiguity as to the interpretation, a permitted meaning that is less restrictive of the constitutional right should be presumed to be the intended one. The more radically an enactment erodes the constitutional right, the more it is expected to be expressed with absolute clarity."*

The applicants submit that the plain or dictionary definition of "unreasonable" is therefore to be preferred on the present application to set aside the direction order, as that meaning provides an easier basis for the applicant's rights to be protected than does the more stringent judicial review meaning attaching to the word – a test which the applicants submit makes the Minister's opinion virtually beyond review – and since the application to set aside is not strictly speaking a judicial review application..

86. The Minister and Notice Party argue that the application under Section 11 is a quasi-judicial review, in the sense that it is an order to set aside what can be described as an order of a provisional nature, having been made *ex parte*, but that by virtue of the provisions of Section 11 (3) of the Act it may be set aside only on certain clearly prescribed grounds, namely if the Court is satisfied that the requirements of Section 7 have not been complied with, or that the opinion of the Minister as to the necessity for the Direction Order is unreasonable or vitiated by errors of law. They urge that the normal judicial review principles of reasonableness

should apply *i.e. Keegan* and *O'Keeffe* principles, and that there can be no question of a more stringent test, such as an anxious scrutiny test, being applicable even if it is accepted that fundamental rights are in play in these proceedings. They have referred to the judgment of Ms. Justice Clark in *O.A v. Minister for Justice, Equality and Law Reform* [2011] IEHC 78, in which the learned judge carefully analysed the judgments in Meadows and firmly stated that Meadows had not introduced any new test of proportionality, and that the inclusion of proportionality as part of reasonableness did not have its origins in Meadows. As far as anxious scrutiny is concerned, she stated at paragraph 73 of her judgment:

> "*The* key guidance to be derived *from Meadows is not its discussion on the inclusion of the concept of proportionality in the test of reasonableness, but rather the unanimous determination by the Court that no new standard of review such as anxious scrutiny as applied in the UK forms part of Irish law*."

87. The provisions of Section 63 of the Act of 2010 are very relevant to the Court's consideration of the nature of the application to set aside under Section 11. Section 63 provides:

> "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.*
>
> *(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."*

88. There are four decisions which the Minister may make under the provisions of the Act of 2010, requiring an application by him to the High Court for an *ex parte* order, and in respect of which the Act provides for an application to set aside such an order. These decisions relate to a proposed Direction Order under Section 7, a proposed Special Management Order under Section 13, a proposed Subordinated Liabilities Order under Section 28, and a Proposed Transfer Order under Section 33 of the Act of 2010. As I have said, the Act provides a mechanism for certain parties to seek to have an *ex parte* order made under these provisions set aside on certain grounds. Other decisions may be made under other provisions of the Act, but which do not lead to an *ex parte* order, and consequently there is no provision for an application to set aside. Since the latter decisions are administrative decisions they are naturally amenable to judicial review in the normal way, and Section 63 makes certain provisions in that regard.

89. However, Section 11(3) makes it clear that judicial review is not available in respect of a decision where a party has an entitlement to apply to have the relevant order of the Court set aside, but did not seek to do so. In addition it is provided in subsection (4) that even where such a person did exercise the entitlement to apply to set aside the order in respect of the relevant decision, but was unsuccessful in that endeavour, judicial review shall not lie. That of course makes complete sense, as it avoids a duplication of effort since the application to set aside, where provided for, already enables the decision underlying the *ex parte* order for a direction order to be scrutinised by way of judicial review principles, and where such an application has been considered and refused, it could not be the case that such an exercise would have to be undertaken a second time by way of actual judicial review.

90. I mention all of that simply to emphasise that the application to set aside the Direction Order is a quasi-judicial review application, in as much as Section 11 prescribes a basis on which this Court may interfere with the Direction Order already made which resonates with phrases familiar in a judicial review context, such as "unreasonable", "vitiated by an error of law" or where some statutory requirement has not been complied with. While not a judicial review as such, the Court must look at the reasonableness of the Minister's opinion that a proposed direction order in the terms contained therein is necessary to achieve a purpose of the Act. It is worth noting also that before making the Direction Order in terms of the proposed direction order on the *ex parte* application, the Court must be satisfied that the opinion of the Minister that the making of the direction order is necessary to secure the achievement of a purpose of the Act "is reasonable", and not vitiated by any error of law. In the present case, the President of the High Court was so satisfied, since he proceeded to grant the order. The application to set aside under Section 11 therefore comes before the Court against a background where there has already been a judicial conclusion that the opinion of the Minister is reasonable. Hence, Section 11(3) provides that a person who seeks to have that order set aside must satisfy the Court that the Minister's opinion was unreasonable. The onus is upon that person on such an application to displace that conclusion, either by the adducing of further evidence, which if available on the *ex parte* application would have persuaded the judge to refuse to make the order, or by making legal submissions which if made on the *ex parte* application might have similarly persuaded the judge not to make the order, or a combination of the two.

91. There is some assistance to be gained in understanding the nature of this process by looking at a similar provision which appears in Order 8 RSC for the renewal of an originating summons which has not been served. Such an application is one made by the plaintiff *ex parte.* Where such an order is granted, the defendant may apply to have that order set aside. I pause to remark in passing, and in the context of the *locus standi* issue which I have already determined against the applicants, that in such a case if the defendant was a limited company, could it possibly be said with any hope of persuasion that a shareholder of that defendant company could himself or herself come to court and seek to set aside the order on the basis that any award in those proceedings against the

company would be detrimental to the value of his/her shareholding, or indeed to the company generally. I think not. But to get back to the exercise performed by the Court on an application to set aside a renewal of a summons, it is helpful to refer to three judgments of some relevance. Firstly, I should refer to the judgment of Morris J. (as he then was) in *Behan v. The Governor and Company of the Bank of Ireland*, unreported, High Court, 14th December 1995 where he stated in the context of an application under O.8, r. 2 RSC:

> *"In my view in moving an application of this nature the defendant takes upon itself the onus of satisfying the Court that there are facts or circumstances in the case which, if the Court which made the order in the first instance, ex parte, had been aware of, it would not have made the order. It is clear, in my view beyond dispute, that this application is not to be dealt with on the basis that it is an appeal from the original order and accordingly it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the Court that, had these facts been known at the original hearing, the Order would not have been made."*

92. In her judgment in *Chambers v. Kenefick* [2007] 3 I.R. 526, in relation to a similar application to set aside the renewal of a summons, Finlay Geoghegan J. considered the above passage from the judgment of Morris J.(as he then was), and stated at p. 529:

> *"… it is necessary for me to consider whether the approach of Morris J. sets out in full the proper approach of the High Court on hearing an application under O.8, r.2. It appears to me that in addition to the approach set out by Morris, J. it is open to a defendant, by submission, to seek to demonstrate to the court that even on the facts before the judge hearing the ex parte application, upon a proper application of the relevant legal principles the order for renewal should not be made. This appears to me to be necessary having regard to the purpose of an application under O. 8, r. 2. It only relates to orders which have been made ex parte. On any ex parte application by a plaintiff a defendant has not had an opportunity of making submissions to the court as to why the court should not exercise its discretion under O. 8, r. 1 to renew a summons. It appears to me that the purpose of including O. 8, r. 2 is to accord to a defendant fair procedures in the High Court, and to permit a defendant where he considers it necessary to make submissions to a judge even on what might be described as an agreed set of facts that the court should not exercise its discretion to renew a summons, and therefore I propose considering this application from the defendant on that basis."*

93. In *Moloney v. Lacey Building & Civil engineering Ltd* [2010] 4 I.R. 417, Clarke J. agreed that this represented the correct approach. I agree also, as I have indicated previously in my judgment in *O'Keeffe v. G &T Crampton Ltd* [2009] IEHC 366. It is as if this Court on the hearing of the application to set aside is hearing the application for the direction order de novo, except that one has to bear in mind that there has already been a judicial decision to grant the order, and that the onus has shifted to the applicants who seek to set aside, to satisfy the Court that the opinion of the Minister referred to in Section 9 (2) of the Act of 2010 is "unreasonable".

94. It seems to me therefore that the task facing the present applicants is to satisfy the Court that the Direction Order should be set aside on the basis that if the learned President of the High Court on the 28th March 2012 had had the benefit of the additional materials that have been adduced in evidence on this application, and/or had the benefit of the submissions made very ably, if I may say so, by Mr Skoczylas, he would not have been satisfied that the opinion of the Minister for Finance that a direction order in the terms of the proposed direction order was necessary for the achievement of the purposes of the Act, as identified by him in the grounding affidavit of Michael Torpey sworn on the 27th March 2012, was a reasonable opinion. In order to satisfy this Court in that regard the applicants must demonstrate that the Minister's opinion was unreasonable. In order to succeed in that task they must demonstrate that there were no facts known to the Minister and no relevant materials before him, and therefore no reasonable or rational basis for him to reach that opinion, and that his opinion is one which no Minister for Finance acting reasonably would have reached, because it flies in the face of reason and common sense. A consideration of proportionality will inform also the consideration of reasonableness.

95. But what the Court cannot do is interfere with a decision, or, in this case, consider that the Minister's opinion is unreasonable simply on the grounds as Finlay C.J stated in O'Keeffe *"that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it …".* In the oft-quoted passage in O'Keeffe, Finlay C.J stated at p. 72:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-maker had before it no relevant material which would support its decision."*

96. While the present application is not strictly-speaking a judicial review, there is sufficient similarity to the task being undertaken for all these principles from the world of judicial review to inform the process, and I include within them the principle of proportionality as part of the examination of reasonableness. Nevertheless, I am of the view that simply because in an ideal world from the applicants' point of view the Minister might have done things differently and in a way that enabled ILPGH to retain an interest in any sum achieved on re-sale of Irish Life over €1.3 billion (i.e. by including a claw-back clause in the purchase agreement), that does not mean by reference to the principle of proportionality that his failure to do so is so disproportionate to the objective sought to be achieved as to be unreasonable, or that it flies in the face of reason or common sense.

Meaning of "Necessary" in Section 7 (2) of the Act of 2010:

97. In considering proportionality as part of the exercise of examining the reasonableness of the Minister's opinion that the particular Direction Order is required to achieve a purpose of the Act of 2010, the Court must consider what meaning is to be given to the word "necessary" in Section 7 (2) which provides:

> *"7. – (2) The Minister may make a proposed direction order only if the Minister, having consulted with the Governor [of the Central Bank], is of the opinion that making a direction order in the terms of the proposed direction order is necessary to secure the achievement of a purpose of this Act specified in the proposed direction order." (emphasis added)*

For the applicants, the word "necessary" is linked to the concept of proportionality. In other words, if a Direction Order can be made in terms which affect the rights of the shareholders of ILPGH to a lesser extent than the March Direction Order, while at the same time achieving the Minister's purpose of being able to recapitalise ILPGH by the injection of €1.3 billion required by the External Partners, then it should be considered that the *"making a direction order in the terms of the proposed direction order"* is not "necessary" – in the sense of being absolutely needed.

98. They make a different point also. They say that a direction order is not required at all, since there were and still are other

methods available to the Minister by which he can meet the requirement imposed by the External Partners and the Central Bank to provide an additional €1.3 billion of regulatory capital into ILP, such as by simply injecting €1.3 billion into the Bank on foot of a fresh Direction Order with immediate effect under the provisions of Section 9(8)of the Act of 2010, or by the holding of an EGM of ILPGH – neither of which would require the sale of Irish Life by the 30th June 2012, since that sum has, according to the applicants, already been budgeted for by the Minister.

99. As for the EGM alternative, the applicants say that the Minister as the 99.8% shareholder of ILPGH could call an EGM of ILPGH so that a resolution could be debated and passed for the sale of Irish Life. This would also avoid the need for a Direction Order, and therefore they submit that a Direction Order is not "necessary" for the purposes of Section 7 (2) of the Act of 2010.

100. As I have said, the requirement upon the State is to recapitalise ILP by the 30th June 2012. How they do it is not mandated, provided it is done by the 30th June 2012. The applicants refer to the Minister's Memorandum to Government dated 28th February 2012 in which the Minister is seeking Government authority to complete the recapitalisation of ILP through a series of actions, including the acquisition of Irish Life, and in which at paragraph 13 thereof it is stated by the Minister:

> *"Although an investment or capital contribution directly into IL&P would enable the recapitalisation to be completed more rapidly we believe that there are a number of commercial benefits that will be achieved as a result of the State acquiring ILL and completing the separation of that business from the rest of the IL&P Group". (my emphasis)*

101. The Memorandum proceeds to explain those perceived benefits, but the applicants emphasise that this document confirms that even the Minister acknowledges that there was another – an even more rapid – method by which the recapitalisation requirement could be met. The applicants submit that if the Minister had chosen that more rapid route, not only would the Minister's objective be achieved but it would be achieved by a route which interfered with their rights to a lesser extent. As I have said, this argument speaks not only to their argument on proportionality, but also to the meaning they say ought to be given by this Court to the word "necessary" in Section 7 (2) of the Act of 2010.

102. The applicants submit that the word "necessary" should be given its ordinary meaning, since it has not been the subject of any definition in the Act itself. In pleading for an ordinary meaning the applicants refer to the judgment of Feeney J. in July Direction Order proceedings on the *locus standi* issue in that case, and to his comments about the appropriateness of the literal approach to statutory interpretation. The applicants have relied upon the Oxford Dictionary definition of "necessary" namely "*required to be done, inevitable or inevitably resulting from the nature of things so that the contrary is impossible*". The Collins Dictionary definition was also stated as "indispensable, unavoidable or "certain". Given these ordinary meaning definitions, it is submitted that the necessity for a Direction Order in the terms of the proposed direction order has been rebutted given the alternatives which the Minister had open to him, and given that those alternatives achieve the Minister's purpose which is to comply with the recapitalisation requirement for ILP, and which would encroach upon the applicants' rights to a lesser extent.

103. The Minister submits that in relation to the word necessary and its meaning, what the Court is required to do on this application to set aside is to decide whether or not the Minister's opinion that the Direction Order was necessary is an unreasonable opinion. He submits that there is ample material set forth in the grounding affidavit of Michael Torpey sworn on the 27th March 2012 for the Court to conclude that the opinion reached by the Minister was a reasonable opinion, and in that regard it is urged that the meaning to be attributed to the word "necessary" is one which must be informed by the decisions of the Courts here on this question.

104. In that regard, the Court is referred to a number of authorities for their view that the meaning to be given to that word is not that of absolute necessity but rather something akin to "reasonably required" or "expedient", and that the context in which the word is being used is very important to consider. In *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 AC 660, Lord Griffiths concluded that it was not helpful to consider the meaning of the word "necessary" by reference to its use in the narrow context of discovery of documents and then apply it in other cases to broader considerations in other contexts. He stated:

> *"I doubt if it is possible to go further than to say that 'necessary' has a meaning that lies somewhere between 'indispensable' on the one hand and 'useful' or 'expedient' on the other, and leave it to the judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is 'really needed'."*

In the same case, Lord Oliver stated:

> *"Necessity is a relative concept and the degree of need before an act or measure can be said to be necessary, although not, clearly, a question which is to be answered without reference to some objective standards, must, in the end, be and remain a matter of judgment."*

105. In this jurisdiction, Herbert J. (sitting in the Supreme Court) *in Dunnes Stores (Ireland) Ltd v. Ryan* [2002] 2 I.R. 60 considered the question of what the word "necessary" should be taken as meaning, albeit in the context of section 19 of the Companies Act 1990 which allows the Minister for Enterprise and Employment to give certain directions to a body to produce documents where he is of opinion that it is necessary to examine same before determining, inter alia, whether an inspector should be appointed to conduct an investigation of the body under the Companies Acts. He concluded:

> *"In my judgment, "necessary" is not used in any extreme or compelling sense in this subsection. In my judgment, it has the meaning of 'reasonably expedient' in contrast to merely optional. Again, it is important to emphasise that the question of whether it is or is not reasonably required is not a matter of objective proof, or an issue to be decided by the court. The determination is that of the second named respondent alone and that decision cannot be usurped by the court and may only be set aside on clear proof that it flies in the face of fundamental reason and common sense."*

Chief Justice Murray reached a similar conclusion as to the meaning, stating:

> *"The word 'necessary' could not be read as an absolute condition precedent to the making of an application to the court for the appointment of an inspector, but as the practical necessity of obtaining sufficient information to justify the decisions which would be involved in making an application to the court, which could have damaging effects for the company in respect of which the application was made."*

106. Other authority was referred to by the Minister, but it is unnecessary to quote from same, as what appears is very much in line with the above, which establish beyond doubt that the meaning to given to the word 'necessary' when used in a statute is not that contended for by the applicants, namely absolute necessity because no alternative exists, but rather one with the inbuilt flexibility to

ensure that a decision-maker may consider the requirement for necessity to be fulfilled where the proposed action or decision is one reasonably required to be taken in order to achieve the desired purpose of the particular decision under the relevant Act, or will reasonably facilitate the achievement of the objective, even where alternative actions or decisions are open and available to be taken.

107. In the present case, it may well be the case that any one of a number of possible strategies might have been adopted by the Minister in order to achieve the objective of recapitalising ILP. If the meaning of 'necessity' contended for by the applicants was to prevail, one could see a situation where, whatever option the Minister ultimately adopted, somebody could come along later and say the choice of that particular option was not 'necessary' because there were one or more available alternative choices he could have made. That would lead to absurdity in my view. It would lead to a situation where in effect this Court would be substituting its choice of what was "necessary" in place of the Minister's choice. My view is that whether or not a particular course of action is or is not necessary for the achievement of an objective of the Act is a matter for the Minister. It is a decision for the executive arm of government, and one which ought not to be lightly interfered with by the Court. It is of course the case that such a decision may be reviewable, but where the decision is not manifestly irrational, unreasonable, capricious or arbitrary, or - to put it another way as is done in the jurisprudence in this area – where it is not a decision that no Minister acting reasonably would make, then this Court ought not to interfere.

108. The applicants have gone to extraordinary lengths in the time available to amass a great deal of material in the form of statistical analyses and reports of various kinds in order to demonstrate that the recapitalisation of ILP by the sale of Irish Life is not "necessary", and to show that while the Troika and the Central Bank have required a capital injection of €4 billion, it is not a requirement for the solvency of ILP as such, but rather a precaution which grossly exaggerates the risk of future losses resulting from loan impairments, particularly having regard to the actual losses reported over the last two years. In fact they say that by any reasonable yardstick, the Bank is greatly over-capitalised as things stand compared to most other credit institutions internationally. A great deal of time and care was taken by Mr Skoczylas in going through material in this regard and in relation to other arguments to which these materials and figures were relevant. But in my view, these materials go towards demonstrating his disagreement with conclusions reached by the Minister and experts on whom the Minister was entitled to rely when reaching his opinion. They cannot in my view speak to the reasonableness of the Minister's opinion that the proposed direction order was "necessary" i.e. a reasonably expedient and/or advantageous method of achieving the sale of Irish Life to himself in all the circumstances – something which he considered was required in order to comply with the obligations of the State to the Troika and in order to comply with the Central Bank's requirements by the 30th June 2012, given the suspension of the private sale process at the end of November 2011. If this Court is to be required to consider, absorb and reach conclusions on the statistics, reports and other such materials adduced by the applicants, its only purpose in my view would be to carry out a merits type review of the Minister's decision/opinion. That is not this Court's function under the Act. The Court is essentially considering the reasonableness of the Minister's opinion by reference to the judicial review principles outlined above, and that is judged by reference to the process by which the opinion was reached.

Application of Court's interpretation of "reasonable" and "necessary" to this case:
109. From what I have concluded thus far, the position is that the applicants must, in order to achieve an order setting aside the March Direction Order (excluding for the moment the questions of non-compliance with Section 7 and any vitiating errors of law) satisfy this Court that the opinion reached by the Minister, on the basis of the materials which the Minister had before him when deciding to make a proposed direction order, that the sale of Irish Life to himself under a direction order in the terms proposed is a method of doing so which is reasonably expedient and/or advantageous in order to fulfil the mandatory requirement to complete the recapitalisation of ILP by the 30th June 2012, is not an opinion reasonably open to him on those materials and information, that it flies in the face of plain reason and common-sense, and is not an opinion which any Minister acting reasonably would have made.

110. That is a very long sentence, but I believe that it encapsulates the task which faces the applicants in view of the conclusions which I have reached as to the nature and standard of review applicable to this application to set aside the Direction Order, and the meaning to be attributed to the word "necessary" in Section 11 (2) of the Act of 2010.

The materials which were before the Minister:
111. The starting point for considering the reasonableness of the Minister's opinion must be the evidence of what materials and information he considered when forming that opinion, and also the context. This can be gleaned from the grounding affidavit of Michael Torpey (and exhibits) sworn on the 27th March 2012 in order to ground the application made on the 28th March 2012 to the President of the High Court, and on foot of which the learned President was satisfied that the Minister's opinion was reasonable for the purposes of Section 9 of the ct of 2010, and his second affidavit, and its exhibits. A great deal of material is shown to have been before the Minister and considered by him.

112. There is no need to set forth in exhaustive detail the background and general context in which the Minister came to seek the March Direction Order, since the dire financial and economic circumstances in which this country found itself in 2009 and still finds itself is well-known. But it is those unfortunate circumstances which led to the State being unable to access its own funding on the international markets, leading in turn to the need for outside assistance in the form of funding from what are usefully described in Mr Torpey's affidavit as the External Partners, namely the IMF/ECB/EC. That assistance comes at a cost to sovereign independence, since the State upon seeking such outside assistance becomes subject to a Programme of Support which was first approved by the External Partners in December 2010. There have been a number of updates to that Programme since then, the latest being at the date of swearing of Mr Torpey's affidavit the 10th February 2012. This Programme put in place an €85 billion financing facility for the State to be drawn upon as necessary to meet the State's funding requirements. It required, inter alia, a recapitalisation, downsizing and restructuring of the banking sector in the State, all with a view of re-establishing confidence in the banking sector so that in due course these banks could return to the markets in order to access their own funding in the normal way. The funding was provided through the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM), as well as through bilateral loans from the UK, Sweden and Denmark, and the IMF's Extended Fund Facility. Further funding was also anticipated through the National Pension Reserve Fund.

113. The legislative basis in EU law for that Programme of Support is Council Regulation (EC) No. 407/2010 of 11 May 2010 ("the EFSM Regulation") and the EFSF Framework Agreement incorporated on 7 June 2010 and which was signed up to by the Minister on behalf of the State on the 10th June 2010. The EFSF is a body set up in order to borrow up to €440 billion on the market so that it might grant financial assistance to EU member states which are in difficulty accessing the markets themselves.

114. Under the EFSF Framework Agreement loan funding is made availability under strict conditionality, including that the Member State requiring funding enters into a Memorandum of Understanding ("MoU") in relation to budgetary discipline and economic policy guidelines with the European Commission.

115. The EFSM Regulation also makes provision for the conditions under which financial assistance will be provided to a Member State,

as well as the procedures to be undertaken in that regard. Article 3 (5) of this Regulation provides:

> *"5. The Commission and the beneficiary Member State shall conclude a Memorandum of Understanding detailing the general economic policy conditions laid down by the Council. The Commission shall communicate the Memorandum of Understanding to the European Parliament and to the Council"*

116. In relation to Ireland, and pursuant to the ESFM Regulation, the Council adopted Council Implementing Decision on granting of European Union financial assistance to Ireland (2011/77/EU) in view of the increasing pressure on Ireland at that time in the financial markets. This decision approved a Programme for Ireland which had been prepared by the Government. It provided for the assistance to be given in 13 instalments, the first being released subject to entry into force of the Loan Agreement and the MoU, with later instalments being conditional upon a favourable quarterly assessment by the Commission in consultation with the ECB of Ireland's compliance with the general economic policy conditions as defined in the Decision itself and the MoU, which also would contain agreed specific economic policy conditions.

117. This Implementing Decision provided also that there would be a recapitalisation, rapid deleveraging and restructuring of the banking system. In particular it was required by Article 5 (a) thereof that Ireland would take action to ensure that AIB Bank, Bank of Ireland, and Irish Life and Permanent (ILP) would be recapitalised in the form of equity, if needed, so as to ensure that a minimum capital requirement of 10.5% core tier 1 capital will be maintained depending on the results of the Prudential Capital Adequacy Review for 2011 ("PCAR"). This was all with the aim of restoring confidence in the financial sector, and part of a strategy to ensure that eventually Irish credit institutions would operate without further need for State support. This Implementing Decision made a number of requirements as to steps to be taken during 2010 and 2011 in line with the MoU, including that set forth in Article 3 (7)(g) as follows:

> *"(g) the recapitalisation of Irish domestic banks to an initial level of 12% core tier 1 capital taking account of haircuts on the additional loans to be transferred to NAMA, and funding of early deleveraging by making available €10 billion in the system. The recapitalisation shall take the form of equity shares …".*

118. Some tweaking of the requirements under the above Council Decision was effected by subsequent Council Implementing Decisions as a result, inter alia, of the PCAR/PLAR completed by March 2011. Those reviews found that Irish banks, including ILP were in need of additional capital in the sum of €24 billion. It is worth noting that in the amending Implementing Decision dated 30 May 2011 (2011/77/EU) at Recital (6) one finds reference for the first time to an expected asset disposal by ILP as part of the recapitalisation plans for Irish domestic banks by the end of July 2011. A later such amending Implementing Council Decision issued on the 2nd September 2011 following the third review under the External Partners (2011/542/EU). This again refers to the expected sale of ILP assets and to "*any further recapitalisation of Irish Life & Permanent will be completed following the disposal of the insurance arm*". The reference to "further recapitalisation" refers to the fact that under the July Direction Order the Minister had already invested a total of €2.7 billion at the end of July 2011 as required, leaving a balance of €1.3 billion still outstanding.

119. Another important provision in the Implementing Decision for Ireland is what would lead to the enactment by the Oireachtas of the Act of 2010. It was required that the State would "*submit draft legislation to the Oireachtas on the financial stabilisation and restructuring of credit institutions which will, inter alia, address burden sharing by subordinate debt bondholders*".

120. PCAR/PLAR was carried out as part of the Financial Measures Programme Report ("FMPR"), which was one of the conditions of the Programme of Support. The FMPR had identified a total gross capital requirement for ILP, and in turn the Central Bank increased capital ratios and introduced new requirements for the composition of regulatory capital for a number of Irish credit institutions, including ILP.

121. The Central Bank wrote to ILP on the 31st March 2011 informing it that under the PCAR/PLAR, a requirement for €4 billion capital had been identified, and directed ILP to meet that requirement no later than 31st July 2011.

121. In the first update to the Programme of Support in May 2011 the State set out certain matters relating to the recapitalisation of ILP, which included at page 25 the following:

> *"A capital plan for Irish Life & Permanent ("ILP") group has been produced. Plans for the execution of ILP's recapitalisation will be agreed between the authorities and ILP by end-May 2011 (proposed structural benchmark). A process to effect the sale of ILP's life insurance subsidiary, Irish Life Assurance, will start immediately and it will be offered for sale by end-October 2011."*

In the same document the State also committed to completing the recapitalisation of ILP by the end of July 2011, including the placement of contingent capital "subject to appropriate adjustment for expected asset sales in the case of ILP (proposed structural benchmark".(emphasis added)

122. This part of the background story provides a context against which to consider the applicants' contention that the sale of Irish Life is something which the Minister has himself chosen to do in order to provide additional regulatory capital for ILP, as opposed to being required to do it. The Minister and Notice Party argue that even if the State was not directed to sell Irish Life in order to achieve the recapitalisation requirement, there nevertheless was a consistent commitment given by the State that this was how part of that capitalisation would be achieved, or at least that following the recapitalisation of ILP by the provision of €4 billion extra regulatory capital, a sale of ILP assets would be undertaken. It was part of the plan outlined by the State to the Externl Partners, and is referred to consistently in the various MoUs and updates to the Programme. In this way it is urged that despite the applicants' disagreement with the Minister's analysis of data and figures and his view that the sale of Irish Life is required in order to complete the recapitalisation of ILP, the Minister's opinion that the sale of Irish Life is necessary is a reasonable one, particularly given that he has consistently informed the External Partners that this sale will be undertaken.

123. It will be remembered that the State was committed under the Programme of Support and the Council Implementing Decisions to ensuring that the additional €4 billion capital for ILP would be in place by the 31st July 2011. Prior to that, however, it had already been contemplated that Irish Life would be disposed of, but when that disposal would be actually achieved and completed was not precisely known though it was hoped to achieve it by the end of October 2011. But the fact that the disposal of Irish Life was in the mind of the Minister as early as March 2011 is clear. The June Direction Order (June 2011) was obtained so that certain preliminary steps could be taken towards the disposal of Irish Life, either by means of an IPO or alternatively by private sale.

124. However, the July Direction Order was obtained so that the Minister could be in a position to invest up to €3.8 billion equity capital in ILPGH. That July Direction Order gave immediate effect to the direction enabling the Minister to pay €2.3 billion for ILPGH shares and for the provision of an additional 0.4 billion for Contingency Capital Notes in exchange for 36 billion ordinary shares in ILPGH

by which the Minister became a 99.8% shareholder, and of course which resulted in a major dilution of the shares of the existing shareholders, including the present applicants.

125. No immediate effect was given to the balance of the recapitalisation (€1.3 billion), as it had been agreed that this would be achieved through a disposal of Irish Life. It was recognised that this would take some time to achieve either through an IPO or a private sale, and agreement was reached that this balance would be completed by, I think, the end of November 2011. However, the IPO was abandoned at a relatively early stage due to adverse financial conditions prevailing. Thereafter a private sale process was undertaken. But despite considerable work and effort, and a measure of success in attracting interested parties, producing in the end a handful of actual bids, the highest of those bidders withdrew on the 25th November 2011. Mr Torpey believes that this was due to "*the crisis in the Eurozone at the time*", though he states that the highest bidder did not communicate its withdrawal or the reasons for it in writing to Minister, and nor did it make any public comment on the matter. The lower bids received were not considered adequate by the Minister and the private sale process was suspended, again according to Mr Torpey because "*it was decided that the very challenging market environment at that time was not conducive to achieving a price which recognised the strength of the Irish Life business*". A public statement by the Minister at that point in time makes it clear that Irish Life will be sold when the time is right.

126. Following the suspension of the private sale of Irish Life, agreement was reached with the External Partners that the recapitalisation of ILP would be completed by the 30th June 2012. This agreement is reflected in the Fourth Update to the MoU published on the 10th February 2012. On page 11 of that update under the heading "*2. Actions for the seventh review (actions to be completed by end Q2 – 2012)*" it is stated: "*Government will ensure that the recapitalisation of IL&P, as identified in the 2011 Prudential Capital Assessment Review [PCAR], is completed, following the suspension of the sale of Irish Life*".

127. If one advances to page 26 thereof, one sees the following:

> *"7. We will complete by end-June 2012 the recapitalisation of ILP. Following the suspension of the sale of Irish Life, we have decided that a government purchase of this company will be the most effective mechanism to finalise the recapitalisation of ILP, and complete the separation of ILP and Irish Life that is already well-advanced at the operational level. Irish Life is a valuable asset for the State and will continue to be managed on an independent commercial basis to ensure that value, and we will continue to work to dispose of Irish Life as soon as market conditions permit." (emphasis added)*

I have underlined a sentence in the above as it seems very relevant considering my conclusions as to the meaning to be given to the word "necessary" in Section 11 (2) of the Act of 2010.

128. It is worth noting also that this Fourth Update to the MoU on page 11 and under the heading "*Financial Sector reforms – reorganisation*" – states at the second bullet point therein:

> *"The authorities will make a decision on the proposed way ahead for ILP by end April and will prepare an updated restructuring plan that will detail the actions needed to ensure the bank's long-term viability, in line with EC state aid rules, by end June 2012. The plan should not be premises on there being additional capital injections from the State, and should safeguard financial stability."*

129. Mr Torpey states in his grounding affidavit at paragraph 119 thereof that while the private sale process was underway, the Minister had reviewed with his officials and with advisers, Goldman Sachs, four alternatives or contingency plans which ILP might implement in relation to the sale of Irish Life, one of which was the State acquisition of the Irish Life business.

130. He goes on to state that having considered all these alternatives, three were rejected because the Minister and his advisers were of the view that none of them was likely to deliver a better outcome for the State or other shareholders than the private sale to the Minister of Irish Life at a price of €1.3 billion. This was considered to be positive as the price was higher than the highest bid received by the end of November 2011, and was the only realistic alternative left to the Minister to ensure the recapitalisation of ILP in the required amount by the 30th June 2012, in line with the commitment given to the External Partners in that regard. Mr Torpey stated in his grounding affidavit that there were a number of advantages for the State in the Minister acquiring Irish Life. These were (i) that it would assist in ensuring that the State maximises the proceeds of the eventual sale of Irish Life to a third party; (ii) that much progress had been made by ILP in completing the Separation, and sale of Irish Life to the State would ensure that the critical Separation issues would be resolved in advance of any onward sale by the State to a third party; (iii) the Separation would limit the risk of contagion from Permanent TSB to Irish Life and would allow for a much more clear focus of Permanent TSB management and staff on the restructuring of that business; and (iv) A full completion of the Separation will be viewed positively by the financial markets which may result in an upgrade in ILA's credit rating, which in turn should assist in the retention and recruitment of additional customers and a possible increase in the potential value of Irish Life. According to Mr Tarpey, these matters were discussed with the External Partners who in turn agreed with the proposal for the purchase by the Minister of Irish Life for €1.3 billion, and it was apparently agreed that this should be achieved by the 30th June 2012, and that is reflected in the MoU of the 10th February 2012. It was considered by the Minister and his advisers that the price was appropriate. The basis for that view is to an extent commercially sensitive, and while the Court has an unredacted affidavit, there have been redactions made, and I will not expand upon that matter herein.

131. The applicants of course have a major issue with the basis upon which the Minister has concluded that the price of €1.3 billion is a reasonable and fair price, in addition to whether a sale is necessary at all. They consider by reference to Price/EmbeddedValue multiples, and peer group comparisons, and other matters to which they have referred in great detail that the value of Irish Life is significantly greater, and I have already referred to the fact that they have referred to a later Deutsche Bank Report which in their view provides a basis for a much higher figure, particularly when one includes also the benefit to be derived from a distribution agreement in relation to Irish Life products entered into with Allied Irish Banks. In case the actual figures are commercially sensitive I will not refer to them specifically.

132. I am concerned with what the Minister's opinion was, and whether there was a reasonable basis for him coming to the view that he did, in consultation with his advisers, namely that the sale of Irish Life to the State for €1.3 billion in March 2012 was reasonable as to price, and, in all the circumstances prevailing, reasonably expedient so that the recapitalisation of ILP would be achieved by the 30th June 2012, as agreed with the External Partners..

133. It should be borne in mind also that the Board of ILP itself, even before the Minister invested €2.7 million for 99.8% shareholding in ILPGH in July 2011, had announced to the Irish Stock Exchange on the 31st March 2011 following the receipt of the PCAR/PLAR and the Central Bank's requirement for an additional capital requirement of €4 billion, that in order to meet this additional requirement

there would be an asset disposal programme which would include the sale of its life and pensions and investment management business, and also through a Liability Management Exercise ("LME"). It was stated that, together, these exercises were expected to contribute incremental capital for the Group of a net €1.1.billion, leaving a balance of €2.9 billion to be raised. This as we have seen was achieved by the Minister's equity purchase for €2.7 billion, and in addition of some €240 million from the Group's own resources.

134. It is also clear from the Central Bank Report which the Minister had received before he brought his application for the March Direction Order that the Governor considered that the disposal of Irish Life "*forms part of the Memorandum of Economic and Financial Policies (MEFP) entered into as part of the Programme of Financial Support for Ireland ("the Programme") on 17 and 18 May 2011…*". He notes in the report that Irish Life is still for sale, but that "in the interim" the State will purchase it for €1.3 billion "*with the intention of disposing of it at a future date when the market conditions are more favourable*". He notes also that as a result of that acquisition "the proceeds can be used to give effect to the remaining recapitalisation of ILP to comply with [the Capital Adequacy Regulations 2006] as agreed with the authorities".

135. The Minister considered also that a Direction Order under Section 9 of the Act of 2010 was the appropriate method by which to achieve completion of the sale by ILP of Irish Life to himself. There were a few reasons for this, and Mr Torpey has explained them at some length in his grounding affidavit. I will mention them more briefly.

136. Firstly, it would ensure and orderly, timely, and controlled sale process bearing in mind the need to have matters concluded no later than the end of June 2012 in accordance with the State's commitment in that regard to the External Partners in order to achieve the required recapitalisation of ILP by that date. It would avoid the need for an EGM of ILPGH shareholders, even though the Minister himself is the holder of 99.8% of the shares in ILPGH. The need for such an EGM would otherwise arise by virtue of the ESM Rules which I have already referred to. But section 53 provides the protection to the Minister because it provides that a Direction Order shall have effect "*notwithstanding anything in … (d) the listing rules of any regulated market or rules of any other market on which the shares of a relevant institution may be traded from time to time*".

137. Secondly, the Minister would be provided under the provisions of Section 61 of the Act of 2010 with protection against even the possibility that a senior bondholder might consider trying to argue that the sale of Irish Life constituted an event of default, thereby accelerating an obligation to repay on foot of the bonds in question. Similarly it would avoid the possibility of an argument by ILP bondholders that the steps taken to dispose of Irish Life amounted to ceasing or threatening to cease its business or a substantial part of it thereby giving rise to those bonds becoming repayable. While the Minister would contend that this sale does not trigger any such event of default, he considers that any possible risk that such arguments might be made would have to be avoided. Sections 52 and 61 of the Act of 2010 provide the necessary protection in that regard.

138. Section 52 provides that "*any order made under this Act …… that is declared to have been made with the intention of preserving or restoring the financial position of a credit institution is intended to have effect in accordance with the CIWUD Directive and any law giving effect to it*" (emphasis added)

139. The CIWUD Directive (2001/24/EC) on the Reorganisation and Winding Up of Credit Institutions ensures that "reorganisation measures" taken in one member state to restore the viability of a credit institution that "runs into difficulties" are recognised by and in other member states, and are effective in all member states, including measures taken which involve "*the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims and any other measure which could affect third parties' existing rights*".

140. This Directive was first given effect to by the European Communities (Reorganisation and Winding Up of Credit Institutions) Regulations, 2004 (S.I. No. 198 of 2004. However, those Regulations were later revoked and replaced by the European Communities (Reorganisation and Winding Up of Credit Institutions) Regulations, 2011 (S.I. No. 48 of 2011) and in which the term "reorganisation measure" is defined in terms of Article 2 of the CIWUD Directive and includes "a Direction Order" under the Act of 2010.

141. Section 61 provides that where certain consequences would otherwise flow from the making a Direction Order or steps taken on foot of it or omitted to be taken on foot of it, then those consequences do not flow by virtue of the section. This so called 'switch-off' effect applies throughout the European Union by virtue of the CIWUD Directive. In the particular instance, the Minister is of the view that the Section gives protection against even a remote possibility that a bondholder might successfully argue that the disposal of Irish Life by ILP constitutes an event of default, and he considered it necessary to protect against even that remote risk by choosing to achieve the sale of Irish Life under a Direction Order. The applicants argue that this reason is spurious and that and self-serving. They have submitted that the CIWUD Directive does not relate to the need to recapitalise a credit institution. They submit in fact that it relates only to a liquidation, examinership/administration scenario (e.g. T. 4, p.80). In so far as the term "reorganisation measure" has been defined as a measure "that is intended to preserve or restore the institution's financial position" they argue that ILP is viable and in fact over-capitalised by international standards, and therefore the Direction Order is not a measure needed to preserve or restore ILP's financial position. They submit that the Minister is confusing the concept of preserving or restoring ILP's financial position with the need to comply with what they consider to be the excessive and over-precautionary regulatory capital requirement of the Central Bank following the PCAR/PLAR in March 2011. They submit also that the Minister has incorrectly stated that the Direction Order and each and every part of it is a "reorganisation measure" for the purpose of CIWUD. It is accepted that one or even some could be so regarded, but not all of them as stated by the Minister. They submit that the Minister is in fact misusing what are serious and draconian powers which have the effect of depriving the applicants of their interest in this valuable asset of ILPGH (see generally T.4,pages 79 -84).

142. I should refer to the fact that the Minister received a letter dated 16th March 2012 from the Chairman of ILP, Alan Cook in which the latter explained that ILP was not prepared to take any action or make any decision which would risk a claim that an event of default under senior bonds issued by ILP had occurred, and stated that if any sale of Irish Life is to take place safely, it should be done under a Direction Order. Mr Cook pointed to the protections provided in terms of Section 61 of the Act of 2010. The applicants say that it is clear that his letter is what brought about the need for a Direction Order, and that it is the prospect or risk that the sale would be seen as an event of default which drove the need for the Direction Order. I have to say that, even if the applicants are correct in their view in this regard, it certainly justified a view that a Direction Order was required in view of the protections afforded by the provisions of Section 53 of the Act and CIWUD, provided of course that the remainder of the relevant provisions of the Act could be met and complied with.

143. In addition to that letter, I should refer also to a letter from the Minister to the Governor of the Central Bank dated 21st March 2012, and the Governor's reply dated 22nd March 2012. I will be referring to these letters later different in the context of the applicants' submission that the Minister acted in breach of the provisions of Section 7 of the Act of 2010 by not, in their submission, consulting with the Governor as the section requires him to do before reaching the opinion a Direction Order in the terms of the proposed direction order was necessary. But apart from the question of proper consultation, the letter explains to the Governor why

in the Minister's opinion a sale to the Minister is necessary, and why it ought to be achieved through a Direction Order. In this regard, the Minister states that it will be necessary to rely upon the CIWUD Directive. The Minister ends the letter by stating that before making the application for the Direction order "I would be grateful for your views". The Governor responded by, inter alia, stating his view that the proposed Direction Order to facilitate the sale of Irish Life "*is appropriate to achieve the purposes of the Credit Institutions (Stabilisation) Act 2010 cited in paragraph 2 of the proposed direction order*".

144. Mr Torpey also gives other reasons under the paragraph heading "Necessity for the Direction Order" as to why the sale of Irish Life is required. In reality I suppose these other reasons speak to the Minister's view that the recapitalisation is required and the consequences that would flow if that is not achieved by the 30th June 2012 as mandated and agreed. They do not speak so directly, as do the two already mentioned, to the need for a Direction Order as such, save that the Minister considers that it to be the best method of achieving a controlled purchase. He states in this regard that the failure to recapitalise would have very serious consequences for ILP itself as well as for the State. For ILP it could result in the collapse of the Bank if in its discretion the Central Bank was to refuse further ELA funding in view of what would be a breach of its regulatory capital requirement. It would expose ILP in addition to serious penalties and other sanctions under the Central Bank Act, 1942. In addition ILP's licence could be revoked.

145. He states that not only ILP would suffer serious consequences, both financial and reputational, but the State itself would also, since its ability to access funding from the External Partners is dependent upon compliance with the Programme for Support and the Council Implementing Decisions. Any failure to comply with these obligations and commitments would have serious consequences for the State by way of financial sanctions and reputational damage, quite apart from the risk that external funding support might be withdrawn. The applicants submit that these particular concerns relate only to the need to increase the regulatory capital of ILP and not to the necessity for a Direction Order in the terms proposed in relation to the sale of Irish Life for €1.3 billion.

146. I have to say at this stage that thus far, and in spite of having heard the applicants' submissions which were so ably and fully made by Mr Skoczylas on their behalf, I am left asking myself rhetorically how could it possibly be argued with any persuasion, that the Minister's opinion that a Direction Order in the proposed terms was a method of disposing of Irish Life which was necessary (in the sense of reasonably expedient or useful for the achievement of the purposes of the Act) is an unreasonable opinion. I am leaving aside for the moment the issue of proportionality in so far as it forms part of the exercise in determining reasonableness. I will come to that. But in my view, there is an overwhelming basis for the Minister considering that the sale of Irish Life by means of a Direction Order was a preferred method, a reasonably expedient method, of doing so in order to achieve the recapitalisation of ILP no later than the 30th June 2012, a deadline which had already been extended from the end of July 2011 to facilitate that very sale. In fact, it is hard to see how the Minister could reasonably have formed the opinion that the recapitalisation of ILP could, in the time available, be achieved by any other means, once the private sale process came to an end.

147. I said to Mr Skoczylas at the very end of the hearing that as far as I am concerned his performance as an advocate and the preparation for the case satisfied me that the applicants were not in any disadvantaged in their application by being unrepresented. I hold to that view, and the fact that I am concluding the application against them does not in any way alter that view. Nevertheless, and as a precaution lest I be misunderstanding or giving less than adequate weight to the submissions being made by the applicants, I have re-read the transcripts in full for the purpose of preparing my judgment, and I have once again examined their written submissions. I have not re-read all the affidavits filed on the application, but I read them before the hearing commenced, and many of them were referred to in some detail by all sides.

148. A point that I have not covered in relation to the reasonableness of the opinion that a Direction Order was "necessary" is one to the effect that before the Minister could reach an opinion in March 2012 that this Direction Order was "necessary", the Minister ought to have gone back to all the parties who had expressed an interest in the private sale process (including those who had made bids) in order to see if any of them might now be interested, given the improvement in the economic and financial environment since the private sale process was suspended at the end of November. The applicants gave some detail as to the improvements to which they are referring. They make a similar point about the price of €1.3 billion, since that is a figure that was being spoken about for over a year, and has not changed despite what the applicants consider to be a more favourable economic and financial environment, with a knock-on effect into the embedded values to be given to Irish Life. Similar argument was made that the Minister could have sought out any potential investors who may have shown interest in the IPO earlier in 2011 in order to see if any might now be interested. The Minister has responded by submitting that it would be invidious to go back to under-bidders or the highest bidder in some sort of desperate effort to sell Irish Life, and that any such efforts are likely to have produced bids of lower value than already offered. It was also pointed out that while some investors/bidders had carried out a significant amount of due diligence, many others had not, and if any of the latter was to express renewed interest due diligence would take to long and result in the deadline of the 30th June 2012 being missed.

149. I do not consider that the possibility that one of the previous interested parties might still show an interest given the improvement in the market, and the possibility that the Minister might have approached any of these again is something which ought to outweigh or negate the reasonableness of the Minister's opinion that he formed that the March Direction Order was necessary to achieve the identified purposes of the Act.

150. Much of the applicants' submissions on reasonableness of the Minister's opinion is predicated upon the absolute necessity meaning of "necessary" rather than the one which this Court, based on authority, considers to be the appropriate meaning, closer to "reasonably expedient" or "useful". Many of the submissions relate also to the proportionality of the opinion in view of its effect on their property rights and the lack, in their view, of any justification for the interference with their property rights, particularly given the availability of alternative methods of achieving recapitalisation of ILP, and the undervalue of the asset which they say €1.3 billion represents. Other submissions are predicated upon a disagreement on the part of the applicants with the view that ILP is in need of recapitalisation, other than by reason of the Central Bank's requirement of it following PCAR/PLAR. They say it is solvent and viable and therefore the purpose of the Act is not being achieved by the Direction Order.

151. They deny that it is necessary that the Minister gain any profit from any re-sale of ILP in the future "when the time is right" in order to achieve now the recapitalisation of ILP by a further €1.3 billion, and that there could and should be a claw-back clause in the share purchase agreement for Irish Life that in the event of a re-sale in due course achieving more than €1.3 billion, the excess would be available to ILPGH and not the Minister. They say that such a provision would respect the principle of proportionality. As I have said they consider that there are alternative methods of achieving the aim of capitalising ILP as required, and therefore the proposed Direction Order is not necessary and the opinion of the Minister that it is necessary is unreasonable.

152. The applicants have submitted also that while they accept that the capital requirement must be met, and met by the end of June 2012, because this has been required, nevertheless it has to be borne in mind that it is an excessively cautious or conservative requirement, and not one needed for viability, or which can be used as a justification for an unjust expropriation of the applicants' assets. In this way it is suggested that the Minister's opinion is disproportionate as it does more than is necessary for the

achievement of any purposes of the Act, as set forth in Section 4 thereof. It is submitted that while the Minister is under the obligation to recapitalise ILP by a further €1.3 billion, he can only avail of a Direction Order if it is obtained for the achievement of a purpose of the Act. Otherwise his opinion expressed as to the need for a Direction Order is not a reasonable opinion.

153. I should set forth the purpose as provided in Section 4, and then identify from the proposed direction order which of those purposes are said by the Minister to be achieved by the Direction Order.

> *"Section 4:*
>
> *The purposes of this Act are –*
>
> *(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 an 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 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 begun with the Angl 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 or 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."*

154. Of these purposes, the Minister identified (a), (b), (e), (f), (g) and (h) as being the purposes sought to be achieved by the proposed Direction Order in this case. In relation to (g) it is important to refer to the definition of "preservation" contained in section 2 (5) of the Act, which was introduced by way of an amendment to section 2 by Section 110 (5) and Schedule 2, Part 5 of the Central Bank and Credit Institutions (Resolution) Act 2011. Section 2 (5) as inserted, provides:

> *"(5) – A reference in this Act to the preservation of the financial position of a relevant institution shall be taken to include the need for the relevant institution to comply with such one or more of the following as apply to it:*
>
> *(a) an order made in relation to it under this Act;*
>
> *(b) a requirement imposed on it under section 50;*
>
> *(c) the European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 (S.I. No. 661 of 2006)"*

155. The applicants had initially sought to argue that since the ILP was in their view a viable and overcapitalised bank there could not be any possibility that it required to be restored or preserved, and therefore that (g) in Section 4 was not fulfilled. However, the definition of "preservation" disposes of that argument.

156. I am not going to spend more time setting out the applicants' arguments. I have considered them fully and in my view have set them forth adequately. If necessary at any later stage the transcripts can be resorted to for any fuller exposition of their submissions.

157. I will briefly set forth the respondent's response to the proportionality argument – i.e. that based on a contention that the recapitalisation of ILP could be achieved by a means other than a Direction Order in the proposed terms, and in a way which does not interfere with the rights of the applicants as much as the present order will. The respondent and Notice Party make the general point again that proportionality is part of the process of assessing reasonableness. I have referred to that issue already, and agree with it. If the opinion was so grossly disproportionate that no Minister acting reasonably would form the opinion, and any decision or action taken on foot of it would have to be declared invalid on reasonableness grounds. The Respondent and Notice Party have, in relation to the argument that there could be a claw-back mechanism built into the Share Agreement for the sale of Irish Life shares by which the ILPGH shareholders could benefit from any uplift in price on any subsequent sale by the Minister, by referring to the undoubted fact that because of the PCAR/PLAR requirement for €4 billion regulatory capital, the taxpayers of this country, through the Minister have already bailed out ILP to the tune of €2.7 billion, and they submit that there is nothing unfair and inequitable about the Minister achieving the sale to himself of Irish Life in a manner which leaves open the possibility that at some future date some of that money

can be recouped on a profitable sale to a third party. They submit also that were it not for the fact that the Minister did in fact inject that €2.7 billion in July 2011, ILP would have had its licence withdrawn and would cease to exist as a bank, and with even more catastrophic consequences for the shareholders of ILPGH, including the present applicants.

158. Proportionality is a question of balancing competing rights and duties, so that rights are not invaded and breached unjustifiably, unnecessarily and unfairly by heavy-handed executive action. It is hard to disagree with the submissions of the Minister and Notice Party on this point. It is hard to see what is so unfair as to breach the principle of proportionality by ILP being saved on the one hand to the benefit of the applicants, even though this involved a significant dilution of the shareholdings, and on the other hand the Minister retaining an entitlement to recoup from a later sale some at least of what he has put into the bank, even if that results in the applicants not seeing any benefit from that re-sale by the value of their shares perhaps rising a little thereafter. I should add of course, and as submitted by the Respondent and the Notice Party, that should any subsequent re-sale have to be at a figure lower than €1.3 billion, there would be a loss to the State.

159. I cannot and do not consider the Minister's opinion, that the Direction Order is necessary, to be an unreasonable on the basis that it breaches the principle of proportionality.

Compliance with Section 7 of the Act of 2010:
160. It will be recalled that under Section 11 (3) of the Act of 2010, this Court shall set aside the *ex parte* Direction Order only if it is of the opinion that there has been non-compliance with any of the provisions of section 7 of the Act of 2010, or that the opinion of the Minister was unreasonable or vitiated by an error of law. I will deal now with the applicants' submissions that there has been non-compliance with section 7 in two respects.

161. Firstly, it is submitted that the letter dated 21st March 2012 from the Minister to the Governor of the Central Bank seeking the latter's views on the proposed Direction Order, and the latter's reply on the following day can be regarded as a sufficient discharge of the Minister's obligation under Section to have first consulted with the Governor before forming his opinion that a Direction Order in the terms of the proposed Direction Order is necessary.

162. Secondly, they submit that the provisions of Section 7 (4) imposes an obligation on the Minister to serve the notice in writing referred to therein not only on ILP but also on ILPGH given the latter's ownership of the shares in ILPGH, and as such a relevant institution or one of "the relevant institution[s]" for the purpose of the section. It is a fact that only ILP was given the written notice referred to in that section. They suggest that the need to do this is enhanced even by the fact that by availing of the procedures for a Direction Order the Minister was by virtue of Section 53 of the Act able to overriding and disregarding the shareholders of ILPGH who otherwise had the protection of the ESM Rules whereby they have to be consulted before the sale of any asset of the company representing more than 75% of its value could be undertaken.

Consultation with the Governor:
163. What constitutes 'consulting with the Governor' is not defined or explained in the Act. The applicants submit that on the authorities it is clear that there must be a meaningful consultation and not simply a letter and a reply to that letter as in the present case. They regard this exchange of letters to be a mere formalistic compliance with the section, and not in compliance with the substance and intent of the section, and not a 'bona fide' consultation. Again, a dictionary definition of 'consult' is called in aid. The applicants submit that the Oxford Dictionary definition is that there is a seeking of information or advice. They characterise what happened in this case as simply a rubber-stamping exercise. They refer to the fact that the price of €1.3 billion was a figure which appeared back in June 2011 as evidenced by a letter dated 29th June 2011 from the Group Chief Executive of ILP to the Central Bank and in which a figure of €1.3 billion is mentioned, and a rationale given. But the applicants say that there is no evidence that the Minister consulted with the Governor in relation to this figure and whether by March 2012 it was a fair and reasonable figure given the change in market conditions since June 2011. They submit that there is no evidence that there was any consultation in order to discuss the merits of any other method which would equally well achieve the recapitalisation requirement by the 30th June 2012, such as a further capital injection by the Minister, as envisaged by the July 2011 Direction Order. They submit that there is no evidence that there was any consultation around the question of whether there were by March 2012 some buyers or investors who, though unwilling to get involved up to November 2011 might be interested in March 2012. They submit that there is no evidence that there was any consultation with the Governor about the fact that the Direction Order in the terms proposed would affect shareholders' rights in ILPGH. They submit that all these matters are matters which go to the question of whether the proposed Direction Order is necessary, and are matters, therefore, upon which the Minister was obliged to consult the Governor, and failed to do so, and that therefore Section 7 has not been complied with adequately.

164. I should refer to an authority to which the applicants referred in order to assist the court in relation to the meaning to be given to the term "*having consulted with the Governor*". They rely upon a passage from the judgment of Hodgson J. in *R v. London Borough of Brent*, *ex parte Gunning* [1985] 84 LGR 168. It was apparently a case in which it was found that consultation by a respondent local authority with parents in relation to decisions to close two schools was wholly deficient both as to content and the amount of time allowed to parents to express their views. The learned Hodgson J. appears to have approved of four principles suggested to him by "Mr Sedley" (as he then was), namely:

> *"First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response, and, finally, fourth, that the product of consultation must be consciously taken into account in finalising in finalising any statutory proposals."*

165. All the above make complete sense in my view. But I would add that each case will be dependent on its own particular facts and circumstances, so that the Court when considering the extent of the consultation required can take account also of any process or sequence of events leading up to the point at which consultation takes place. If for example the consultation itself in whatever form it takes is the first time that the person or persons who are being consulted have ever had to consider the matters at issue and form a view on them, then that is a matter to consider and take into account. On the other hand, if there has been lengthy, detailed and ongoing communication and involvement of the players in relation to the matter, then the assessing the nature of the "consultation" required to have taken place by statute can take account of the previous involvement and interaction between the person doing the consulting and the person to be consulted, and the time given and taken for it to take place.

166. In the present case, as submitted by the respondent and the Notice Party there had been a great deal of participation by the Governor in relation to the recapitalisation requirement following PCAR/PLAR. He was by the time the Minister canvassed his views about the need for a Direction Order in the terms proposed already completely aware of the background to the Minister's letter. He was already aware that there had been an unsuccessful search for investors and bidders for Irish Life. He was already fully aware of the requirement to have the recapitalisation completed by end-June 2012. He may not have been aware of the possible risk that an

event of default might be argued for by a senior bondholder, giving rise to the need to avail of a Direction Order because of the existence of Section 61 protection in that regard. But it could not be reasonably said that a more elaborate consultation process was required by somebody of the expertise of the Governor to help him appreciate the obvious importance and significance of such a risk, and the need to avoid it by means of a Direction Order and Section 61 of the Act. The Governor clearly was fully briefed, knowledgeable and aware over many months about the predicament of ILP following the PCAR/PLAR, and was aware of the step taken to try and address the requirement. In my view, the letter from the Minister to the Governor dated 21st March 2012, which itself stated explicitly that it was in order to fulfil the requirement for consultation and to seek the Governor's views that the letter was writen, is more than adequate to fulfil the requirement to consult, given the extensive background of which the Governor was intimately aware over many months.

167. It could be said also that if the Governor had felt that he needed more time to consider what the Minister was saying in his letter dated 21st March 2012, there is no doubt that he could have requested more time, or could have requested a further meeting with the Minister or his officials in order to discuss the matter further. He did not do this, and it must be presumed therefore that given his previous involvement and knowledge of relevant facts and matters, he saw no need to do before expressing his approval for the course which the Minister was proposing to adopt, as he did in his response of the 22nd March 2012. In fact the Governor's consent as such is not required – just that he is consulted. What would happen if there was a disagreement expressed by the Governor, and yet, the Minister wished to press ahead, I do not, thankfully, have to consider.

No Written Notice to the ILPGH:
168.Section 7 (4) provides:

> *"7. (4) -- Unless the relevant institution concerned consents to the making of the direction order, or exceptional circumstances (within the meaning of subsection (5) exist, the Minister shall also, before making a proposed direction order –*
>
> > *(a) deliver a written notice to the relevant institution setting out the terms of the proposed direction order, accompanied by a summary of the reasons why the Minister s of the opinion that a direction order in the terns of the proposed direction order is necessary,*
> >
> > *(b) afford the relevant institution 48 hours, or a shorter period on which the Minister and the relevant institution agree, in which to make written submissions to the Minister, and*
> >
> > *(c) consider any submissions made under paragraph (b)."*

Just as I concluded for the purpose of *locus standi*, I must conclude again that ILPGH is not "the relevant institution" for the purposes of Section 7 (4) of the Act of 2010. Section 7 (1) provides that the Minister may make a proposed direction order proposing "*that a relevant institution be directed to take … or refrain from taking … any action, or a series of actions that are together designed to achieve a specified objective ….* etc.

169.Clearly while ILPGH is "a relevant institution" as that phrase is defined in the Act, it does not become for the purpose of Section 7 (4) "the relevant institution" for the purpose of being given in advance of the making of the proposed direction order a written notice unless it is being directed to do something or to refrain from doing something as provided for in Section 7(1) of the Act of 2010.

170. I have already dealt with the applicants' submissions in the context of *locus standi*. The Act says what it says. The target of the proposed direction order is the institution which under the proposed direction order will be required to do something or to refrain from doing something. It is not contemplated that the shareholder of that relevant institution would be separately given written notice of the Minister's intention to make the proposed order. If the Oireachtas had wished to extend the class of persons or bodies to whom such written notice had to be given, it would have been very easily done. There is no such intention evinced in the Act. The applicants conflate these particular arguments with arguments that the Minister had in any event a requirement under fair procedures to consult with the ILPGH shareholders given the serious effect such a Direction Order would have on their rights and interests. For the reasons already appearing I am not satisfied that the Minister failed under this heading to comply with the requirements placed upon him by the provisions of Section 7 of the Act.

Opinion of the Minister vitiated by errors of law:
171. In his affidavits and in their written submissions a number of alleged errors of law are referred to. But some of them are more relevant to the challenge to the July 2011 Direction Order and for that reason not all of them are addressed herein.

Constitutional rights breached:
172. The applicants prepared their submissions and grounding affidavits on the basis that they would be arguing that the Act of 2010 and the Direction Order obtained thereunder are in breach a number of articles of the Constitution of Ireland. As I ruled at the commencement of the hearing, and in line with the ruling made by the President of the High Court, that is not an issue which is before this Court on the present application to set aside the Direction Order. I will not address the arguments which are contained in the written submissions for that reason. The applicants have accepted that the issue does not arise on the present application.

173. However, they have submitted that the Minister's opinion is vitiated by an error law in as much as they claim that it breaches their constitutional rights to their property. But without going into the arguments made in any detail, the position is clear, as it is in relation to their standing as I have concluded. The property rights of the applicant ILPGH shareholders are not in issue or adversely affected in the legal sense as it is ILPGH which owns ILP. It is not the individual shareholders. The applicant's property rights do not extend to the value of those shares being maintained at any particular level, or even that the value will not be reduced. The value of shares rises as well as falls. If any wrong is being committed against property rights, it is a wrong against those of ILPGH as a company, and the individual shareholders cannot plead that case on this application. However, the Minister has urged that even if it could be established that some cognisable property right of the applicants was engaged in these proceedings, any interference with it can be easily justified in the present case on the basis of proportionality, given the compelling need to achieve the recapitalisation of ILP in the interests of the common good, and given the amount of money which the State has already invested in ILPGH by way of assistance to that company, the shares of whose shareholders would be worthless by now without it. The Minister refers to *Heaney v. Ireland* [1994] 3 I.R. 593 in this regard. I agree with the Minister's submissions in this regard.

174. Before leaving the issues related to the Constitution, I should refer briefly to an issue sought to be raised by the applicants, namely that the provisions of Section 53 of the Act result in the Minister being in breach of Article 15 of the Constitution. It is a misguided submission really. It is being said that since this section enables the Minister to override the ESM rules requirement for an EGM, it in some way means that the Minister can write his own laws and legislate in breach of Article 15.2 of the Constitution which

provides that vests in the Oireachtas the sole and exclusive power to make laws. I do not fully understand this submission, but in so far as it is a contention that in some way the Minister is writing his own laws in relation to overriding the ESM rules, that is just not correct. It is the Act of 2010 – passed by the Oireachtas and not the Minister - which makes provision in Section 53 for the making of a direction order to have effect notwithstanding anything in, inter alia, the ESM rules.

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

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

The Direction Order is an unlawful restriction on the free movement of capital:
177. The applicants refer to the provisions of Article 63.1 of the Treaty on the Functioning of the European Union ("TEU") which provides:

> *"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."*

In so far as some of the applicants are non-Irish EU persons, and in so far as minority shareholdings constitute capital movements under Article 63 of TEU, the applicants submit that the March Direction Order effects an abrogation of the rights of minority shareholders by forcibly diminishing the value of ILPGH by removing from the Group the most valuable asset (Irish Life) at an undervalue. This, they say, is an unlawful transfer of wealth from these shareholders to the Minister, and what they describe as an abrogation of the free movement of capital.

178. The applicants have referred to an article by the law firm White & Case in March 2008 to assist them in explaining the submission they are making. It is a useful article for that purpose but quite obviously it cannot be regarded as authoritative. Nevertheless the authors explain that a broad interpretation is given by the ECJ to the scope of Article 63, which has since 1994 been held to be directly effective, and in particular to the definition of "capital" to that it includes the freedom to acquire, dispose of and benefit from shares. This clearly has implications for any nationalisation of undertakings by a Member State, and it is worth noting perhaps that the White & Case article, writing in March 2008, state that this whole question became of increased interest following the nationalisation of Northern Rock by the UK. The authors explain that the purpose of Article 63 TEU is "*to permit the free flow of investments, in the widest sense, between Member States*". The authors go on to state that Article 63 rights, including the right to peaceful enjoyment o possessions (i.e. in this case, shares) should not be infringed by "*confiscation, expropriation or nationalisation*", unless this can be justified on public policy grounds, and appropriate compensation paid.

179. The applicants refer also to the provisions of Article 106.1 TEU which provides:

> *"1. In the case of public undertakings and undertakings to which the Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."*

Article 18 prohibits any discrimination on the grounds of nationality. Articles 101 – 109 provide rules on Competition and rules on State Aid.

180. It has been submitted by the applicants that a cross-border investment in shares within the European Union constitutes a movement of capital, and that any interference with or abrogation of rights associated with such a transaction is a breach of the free movement principle. It is submitted that this encroachment on property rights by the removal of the most valuable asset of ILPGH restricts the applicants' ability to invest in shares in Irish Life and repels people generally from doing so in the future. The applicants equate the acquisition by the Minister of Irish Life with the nationalisation of Northern Rock by the UK. They say that the Direction Order is a restriction on the movement of capital because, firstly, it restricts the applicants' ability to invest across the European Union because their money has been lost not because they made an unwise investment but simply because of a Ministerial decision which deprives them of their money; and secondly, on the more general level that it repels the ability of international investors to invest in Ireland – again, not because of the economic climate but because of the actions of the Minister.

181. It seems to me that the arguments being advanced under this heading have been borrowed from the applicants' challenge to the July 2011 Direction Order, so to speak, as in that case what is under challenge, as far as I have been informed, is the process by which the Minister became the owner of 99.2% of ILPGH, by directing under the provisions of the Act of 2010 that 36 billion new shares in ILPGH be issued to him in exchange for his investment of €2.7 billion. That action had of course the effect of greatly reducing the value of the existing shareholders' shares. The arguments being advanced seem more appropriate to that scenario, as opposed to one, such as the present case, where the Direction Order merely directs the sale of an asset belonging to ILP at a price which equates to or even exceeds the price being offered by the highest bidder during the private sale process.

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 €1.3

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.

Lack of Candour on ex parte application:

186. On the final morning of their opening submissions to the Court the applicants, for the first time, raised an issue as to the lack of good faith on the part of the Minister and a breach of his duty to fully disclosure all material facts and documents on the *ex parte* application to the President of the High Court on the 28th March 2012. A significant number of complaints are raised in this regard as appears in the written submissions prepared for this submission, and as appear in the transcript. Time does not permit me to set out all those complaints in his judgment, or indeed the answers to those complaints as submitted by the Minister. Having re-read the submissions and the relevant transcript I am satisfied that there has been no breach by the Minister, or indeed his legal team, of any duty owed to the Court on the *ex parte* application. Of course it is true that the applicants on the present application have adduced even more documentation into evidence, and have stated many more facts, and have indeed contradicted facts sworn to by Mr Torpey and others on behalf of the Minister. But it is not the case that the Minister was required to do more than frankly and honestly provide to the Court on the *ex parte* application any facts and materials which, in a bona fide way, he considers to be relevant. He is of course obliged not to deliberately exclude from the documentation any facts and documents which he believes might be relevant to the Court's decision. But the fact that on a set aside application, the applicants might dispute facts asserted on the *ex parte* application, or produce additional facts, and refer to and exhibit further documents which they believe have some relevance does not of itself mean that there has been some breach of the Minister's duty of good faith to the Court – even in circumstances where the Court might accede to the application to set aside the *ex parte* order. The duty of the utmost good faith exists so that the Court is not deliberately led astray or led into error. The duty is not to mislead the Court. While the present applicants have disagreed with many things which have been stated on behalf of the Minister, and they are perfectly entitled to do so when seeking to set aside the *ex parte* order, and have said many more things with which the Minister in turn disagrees, and have produced additional documents for the consideration of the Court, there is no question of any conclusion that the Minister has been guilty of any breach of his duty of utmost good faith to the Court. In fact, in quite a number of instances, the Minister has demonstrated in response to these submissions that the applicants are simply in error in saying some of what they are saying under this head of objection. The transcript will show this if necessary. One way or another there has been no such breach of duty as alleged.

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