THE HIGH COURT

[Record No. 2011/239 MCA]

IN THE MATTER OF IRISH LIFE AND PERMANENT GROUP HOLDINGS PLC AND IN THE MATTER OF IRISH LIFE AND PERMANENT PLC AND IN THE MATTER OF AN APPLICATION FOR THE SETTING ASIDE PURSUANT TO SECTION 11 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 OF THE DIRECTION ORDER WHICH WAS MADE ON THE 26TH JULY 2011 PURSUANT TO SECTION 9 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 AND ANCILLARY ORDERS

BETWEEN/

GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS AND SCOTCHSTONE CAPITAL FUND LIMITED

APPLICANTS

AND

THE MINISTER FOR FINANCE

RESPONDENT

AND

PERMANENT TSB GROUP HOLDINGS AND PERMANENT TSB PLC

NOTICE PARTIES

JUDGMENT of Ms. Justice O'Malley delivered the 1st day of December 2017

Introduction

1. This judgment relates to three issues – whether the unsuccessful applicants require the leave of the Court to appeal; whether, if it is required, leave to appeal should be granted; and whether any party is entitled to an order for the costs of the High Court proceedings.

2. The application in the case was to set aside a direction order made by the High Court under s. 9 of the Credit institutions (Stabilisation) Act 2010. Pursuant to s.11, such an application could only be granted if the Court to which the application was made formed the opinion that there was non-compliance with any of the procedural requirements set out in s.7 of the Act, or that the opinion of the Minister (that the direction order was necessary to achieve a specified purpose of the Act) was unreasonable or was vitiated by error of law.

3. Two substantive judgments have been delivered in the matter. In the first (*Dowling v. Minister for Finance* [2014] IEHC 418) I determined that the procedural requirements had been complied with. However, I found it necessary to refer certain issues of law to the Court of Justice of the European Union for preliminary ruling. Upon receipt of that ruling, and after hearing further submissions, I delivered a final judgment dismissing the application on the 31st July 2017 (*Dowling v. Minister for Finance* [2017] IEHC 520).

4. I held, in summary, that the applicants had not discharged the onus of proving that the Minister's opinion was unreasonable or vitiated by legal error.

The nature of the Act

5. The relevant parts of the Act, including the long title and the preamble (in itself an unusual feature) are considered in detail in Section G of the first judgment. They will not be set out in full here, but it is necessary to mention briefly the references in the preamble to the "serious disturbance in the economy of the State"; the necessity for measures to address a "unique and unprecedented economic crisis"; a "continuing threat to the stability of certain credit institutions in the State"; and the legislative perception that "the urgent reorganisation of certain credit institutions" was of "systemic importance" to the State. It was stated that the common good required "permanent or temporary interference with the rights, including property rights" of persons affected by the performance of functions under the Act.

6. In the introductory paragraphs of the first judgment I referred to some other judicial descriptions of the Act – Fennelly J. called it "an extraordinary piece of legislation" in *Dowling v. Minister for Finance* [2013] IESC 58, while in *Dowling v Minister for Finance* [2012] IEHC 89 Feeney J. had expressed the view that it was "unique, unprecedented and stringent".

7. I noted (see: [2014] IEHC 418) that the statute permitted a "truly radical encroachment on the legal rights of shareholders". I described (at para.1.8) its operation in this case as follows:

> *"In summary, the effect of the order was to enable the Minister to acquire 99.2% of the company. This was done by compelling it to issue a very large number of new shares to him, at a share price dictated by him (being just under 6.5 cents per share), in return for the sum of €2.7 billion. For this purpose control of the company was taken from its organs and shareholders; the Memorandum and Articles of Association were altered; the decisions taken at the EGM were nullified and the company was delisted from the London and Irish Stock Exchanges. Further, various relevant legal rules, whether deriving from statute, common law, equity, codes of practice or contract were in effect disapplied insofar as the company was concerned."*

8. The purposes of the Act, intended to be achieved by the direction order mechanism, are set out in s. 4. So far as they are relevant, they are to be found in paragraph 26.4 of the first judgment.

9. The statutory procedure for obtaining a direction order firstly required the Minister for Finance ("the Minister") to form an opinion that a direction order was necessary to achieve a specified purpose of the Act. Having done so, he could make a proposed direction order in accordance with s. 7. The Act imposes certain obligations in relation to that process – the Minister was obliged to give notice to the company and to consult with the Governor of the Central Bank. That process having been carried out, (and the company having refused, in the circumstances set out in the first judgment, to consent to the Minister's proposals) he made an ex parte application to the High Court under s. 9 for a direction order in terms of the proposed direction order. The Court hearing that application was obliged to make the order if of the opinion that the procedural requirements had been complied with and that the Minister's opinion as to the necessity for the order was reasonable and was not vitiated by any error of law.

10. Although the procedure was *ex parte*, no further hearing was provided for and the order took full effect as directed. Section 10

provided that the Minister (but not, it would appear, any other person) might apply to the Court, on notice or otherwise, for a variation where he considered such to be necessary.

11. By virtue of s. 11, either the institution or a member of the institution was entitled to apply, under strict time constraints, for the setting aside of the order. Again, the test was whether the statutory requirements had been met and whether the Minister's opinion was reasonable or vitiated by any error of law. If any of those conditions had been found not to be satisfied, the Court would have been empowered set aside, vary or amend the direction order.

12. The Act did also envisage the possibility of judicial review proceedings, but it must be noted that, firstly, an order of the High Court cannot be challenged by way of judicial review (although presumably a proposed direction order made by the Minister could be) and, secondly, that s. 63 of the Act provided that a person entitled to seek an order under s.11 would not be entitled to judicial review if either they did not pursue the former remedy or did so unsuccessfully. It would seem, therefore, that judicial review proceedings were to be confined to persons, other than the company itself or members thereof, aggrieved by the actions of the Minister in or about the obtaining of a direction order.

Rights of Appeal under the Act
13. The first question now arising is whether or not the provisions of s. 64 of the Credit Institutions (Stabilisation) Act 2010 apply to these proceedings, with the effect that the unsuccessful applicants require the leave of the Court to appeal. The Act has now expired, but obviously these proceedings continue to be governed by its terms.

14. Section 64 of the Act set out certain limitations on the right of appeal against orders made under the Act as follows:

> *"64.— (1) The determination of the Court of an application for leave to apply for judicial review, or an application for judicial review, is final and no appeal lies from the decision of the Court to the Supreme Court in either case, except with the leave of the Court.*
>
> *(2) A direction order, special management order, subordinated liabilities order or transfer order, and an order varying such an order or setting it aside, is final and no appeal lies from the order of the Court to the Supreme Court except with the leave of the Court.*
>
> *(3) The Court shall grant leave under subsection (1) or (2) only if the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.*
>
> *(4) On an appeal from a determination of the Court in respect of an application referred to in subsection (1), or an appeal from an order referred to in subsection (2), the Supreme Court—*
>
> > *(a) has jurisdiction to determine only the point of law certified by the Court under subsection (3), as the case may be (and to make only such order in the proceedings as follows from that determination), and*
> >
> > *(b) shall, in determining the appeal, act as expeditiously as possible consistent with the administration of justice.*
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> *(5) This section does not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."*

15. The applicants' case in respect of this provision is straightforward. The ultimate order to be made in this Court is an order refusing the application to set aside the direction order. That is not one of the orders listed in s. 64, and therefore the limitations imposed by the section do not apply. They rely upon the judgment of Geoghegan J. in A.B. v Minister for Justice [2002] 1 I.R. 296 and the following passage commencing at p. 316:

> *"It would seem to be clear from the authorities, however, that an exclusion or regulation of the right to appeal to the Supreme Court need not be expressed. It is a matter of construction of the relevant statutory provision in each case, but there must not be any lack of clarity or ambiguity. Hamilton C.J. in Hanafin v. Minister for the Environment [1996] 2 I.R. 321 at p. 389 put it this way:-*
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> > *'None of these cases affect the fundamental position that if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the Court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdiction of this Court is effective so to do.'"*

16. In the same case Fennelly J. said (at p. 325):

> *"The notion that a double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right (see Toth v. Austria (1991) 14 E.H.R.R. 551). It is, however, recognised throughout the legal structure of this State. It should not be lightly encroached upon or invaded by ambiguous language. The least that is required is that, if the right is to be excluded, this should be done by clear and unambiguous words."*

17. The same theme – the need for clarity of language if the right of appeal is to be excluded or restricted – is to be found in *Canty v Private Residential Tenancies Board* [2008] 4 I.R. 592 and *Clinton v An Bord Pleanala* [2007] 1 I.R. 272.

18. The respondent and notice parties submit that the intention of the Act is that a direction order should stand unless varied or set aside. Section 64 must be read by reference to the other provisions in the Act, and it is, it is said, clear that what was sought was finality. The need for finality lay in the potential impact on the institution in question.

19. However, since I expressed a view during the hearing of the substantive matter that I would be unlikely to refuse leave to appeal (if needed) in a case of this nature, and since it appears likely that the respondent and notice parties will make the same argument again in the Court of Appeal, I invited the applicants to indicate, without prejudice to their argument that they did not require leave,

what grounds they would wish to pursue. All parties then made submissions as to whether these were points that would meet the statutory criteria.

20. The respondent has submitted that leave should be refused. It was argued that only one complex issue of law arose, and that that issue has been determined by the CJEU. The Act itself has expired. Should a similar economic crisis arise in future, it will be dealt with under new European Union legislation. The issues raised by the applicants on an indicative basis are, it is said, relatively minor points. There is therefore no requirement for clarification of a matter of public law, or for the benefit of public administration, and an appeal is not in the public interest.

21. The applicants have informed the court (on a "without prejudice" basis) that there are seven matters that they wish to raise in an appeal, each of which is sub-divided into a number of issues. In summary, they submit:

> (i) That this Court erred in the application of EU law in failing to apply properly the principles regarding reference under Article 267 of the TFEU by:
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> • failing to acknowledge that in paragraph 48 of its ruling the Court of Justice of the European Union exceeded its jurisdiction and made an erroneous finding of fact (that the direction order was the "only" means of ensuring the recapitalisation) coupled with an erroneous finding that this Court had conducted a proportionality test as between the competing interests;
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> • interpreting the ruling as meaning that a State had carte blanche to disregard the principle of proportionality whenever there was a crisis such as that referred to in the ruling; and
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> • failing either to apply the jurisprudence of the CJEU on the Second Company Law Directive or to make another reference under Article 167 asking whether that jurisprudence applied to measures that were not the "only" means of ensuring recapitalisation.
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> (ii) That this Court erred in applying the CJEU case law on State aid and burden sharing by:
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> • Failing to recognise that State aid approval from the Commission does not amount to legal justification for the direction order; and
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> • Misapplying the judgment of the CJEU in *Kotnik*.
>
> (iii) That this Court failed to recognise that there was no obligation on the State to recapitalise ILP in the manner prescribed in the direction order.
>
> (iv) That this Court erred in failing to apply the extant jurisprudence on the Second Company Law Directive and on the EU legal principles of proportionality and legal certainty by failing either to apply the jurisprudence or to reconcile it with the preliminary ruling (as illustrated in the opinion of Advocate General Wahl) so as to ensure that the measure was the "least detrimental" to the objectives and principles of the Directive.
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> (v) That this Court erred in failing to apply the provisions of the Bank Recovery and Resolution Directive 2014/59/EU.
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> (vi) That this Court erred in "manifestly non-engaging with essential parts of the evidence emanating, *inter alia*, from EU law" as well as failing to draw correct and consistent inferences from the evidence and to "properly apply EU law and legal presumptions to the consideration of the evidence glaring at the trial" by making hypothetical findings on the balance of probabilities, which were by definition hypothetical and were not supported by evidence emanating from EU law.
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> (vii) That this Court erred in failing to apply EU law regarding breaches of Article 10 of Directive 2009/101/EC, Articles 5, 42 and 45 of Directive 2001/34/ EC, Article 42 of MiFID, Article 3 of the Takeover Directive, Article 63 of the TFEU; and in failing to vindicate the property rights guaranteed by the Constitution and the European Convention on Human Rights.

Costs

Application by the Minister

22. The Minister seeks his costs of the proceedings, pursuant to O.99 r. 1(3) of the Rules of the Superior Courts. It is submitted that there is no rationale for departure from the rule. The rule provides:

> *"The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

23. The Minister disputes the contention made by the applicants that the litigation was in the public interest, since they acted on their own behalf and in pursuit of their own private, commercial interests. Their argument has been that the shareholders should have been afforded a better outcome in terms of the value of their shares and the amount of equity that should have been left to them. Reliance is placed upon the judgment of Peart J. in the case of *Dowling v. Minister for Finance* (8th August 2012), where it was observed that "[t]he general public had nothing to gain directly by the Applicants' success".

24. Of note, Peart J. did not consider that any public benefit was gained from his substantive judgment in that matter, which concerned an attempt by the applicants to set aside a direction order compelling ILP to sell Irish Life. The primary issue, and the *ratio* of the judgment, was that the applicants lacked *locus standi* under s. 11 because they were not members of that company.

25. The Minister submits that this case will not be of direct relevance to other litigants, not least because the legislation has lapsed. He contrasts the circumstances with those in *Curtin v Dail Eireann* [2006] 2 I.R. 556, where Murray C.J. said that the litigation had clarified constitutional norms in "a core area of constitutional governance as between the three organs of State."

26. Reference is made to the decision of the Supreme Court in *Dunne v. The Minister for the Environment* [2008] 2 I.R 775 and to the ruling of the Divisional High Court in *Collins v Minister for Finance* [2014] IEHC 79 and the analysis of the case law set out therein.

27. The relevant passage from Dunne is at pp. 783-784, where Murray C.J. observed:

> *"26. The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.*
>
> *27.Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."*

28. In Collins, the Court considered the following principles to be relevant (at pp. 5 to 8):

> *"13. First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include Norris v. Attorney General[1984] I.R. 36 (homosexuality) Roche v. Roche [2006] IESC 10 (the constitutional status of human embryos) and Fleming v. Ireland (2014)(assisted suicide).*
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> *14. Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government. Examples here include Horgan v. An Taoiseach[2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and Curtin v. Dáil Éann [2006] IESC 27 (aspects of the judicial impeachment power).*
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> *15. Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include TF v. Ireland [1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989), O'Shiel v. Minister for Education[1999] 2 I.R. 321 (aspects of the State's duty under Article 42.4 to provide for free primary education), Enright v. Ireland[2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) and MD (a minor) v. Ireland [2012] IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females).*
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> *16. Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in Curtin…*
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> *17. Fifth, as Murray C.J. pointed out in Dunne, the fact that the litigation has not been brought for personal advantage and that the issues raised "are of special and general public importance are factors which may be taken into account." As Dunne itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s. 8 of the National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.*
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> *18. Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both Horgan and Curtin the respective plaintiffs were awarded 50%of their costs. In yet other cases - such as Roche v. Roche and Fleming v. Ireland - full costs were awarded to the losing party in this Court."*

Application by the notice parties

29. The notice parties also seek their costs as against the applicants. They say that they were joined in the proceedings as full notice parties by order of the Supreme Court, on the basis that their vital interests were directly affected, in circumstances where a successful outcome for the applicants could have had potentially catastrophic consequences for them. The notice parties make, essentially, the same arguments as the Minister in relation to the general principle, contending that the applicants were motivated solely by personal advantage and that the principles derived from cases where unsuccessful parties were awarded costs therefore do not apply.

30. It is contended that no novel issue of Irish law was raised, and that the issue of EU law referred to the Court of Justice was determined on the basis argued for by the State and the notice parties.

Application by the applicants

31. The applicants seek their costs/outlay as against the Minister. They submit that a number of features in the case warrant a departure from the normal rule that costs follow the event. In that regard they rely on:

- The exceptional nature of the legislation and the fact that it involved significant interference with fundamental rights.

- The public importance of the proceedings, a fact stressed by the respondent and notice parties when referring to the need to protect the interests of the State.

- The desirability of achieving clarity on vitally important issues of EU law.

- The importance accorded to the matter by the Grand Chamber of the Court of Justice.

- The fact that it was found necessary by this Court to seek a preliminary ruling.

- The claimed status of the case as a test case.

- The applicability of the principles established in the case to future situations involving "emergency" measures of a similar nature.

Conclusions

Conclusions on the right to appeal
32. It seems to me that, having regard to the authorities on the point, the legislature has not clearly provided that the right of appeal against a refusal to set aside a direction order is limited by s. 64. I appreciate the argument made by the respondent and notice parties as to the desirability of achieving finality as swiftly and efficiently as possible but that does not entitle a court to "read in" limitations on appeal rights. It is possible that this was an oversight by the draughtsman but there is at least some indication to the contrary. The list of matters in s. 64(2) is drafted carefully in specific terms. Furthermore, I note that there is no restriction in the case of a refusal of an application by the Minister for an order varying a direction order under s. 10.

33. I therefore am of the view that these applicants do not require the leave of the court.

Conclusions on the grant of leave to appeal
34. As mentioned above, I invited the applicants to indicate the grounds that they would wish to have leave on, should leave be required. In order to avoid further needless dispute, I propose granting leave in relation to certain grounds on the basis that it may subsequently be found to be necessary.

35. I will refrain as far as possible from appearing to add a gloss, or further reasoning, to the substantive judgments – they must, after all stand or fall on their own terms. However, it is necessary to make some comment in explaining why I consider that some of the grounds proposed by the applicants would merit a grant of leave and some would not.

36. It is my view that this case was one of exceptional public importance. The unprecedented nature of the Act, the incursions authorised into the established legal rights of shareholders, and the complexity of reconciling the existing EU and Irish jurisprudence and the new measures, coupled with the sheer scale of the stakes for the State, the public interest and the private interests are sufficient indicators of that.

37. Where leave to appeal is required under the statute, it must be in respect of a *point of law* of exceptional public importance. Therefore, it is not necessarily the general importance of the case that is in question but the point or points of law raised. However, I think that it is probably fair to say that a case that is of exceptional public importance will carry with it a particular public interest in ensuring that points of law are determined correctly.

38. The respondent points out that the Act has expired and that new EU legislation means that, should a similar crisis recur, domestic legislation of this nature would probably not be required. Whether that is so is not a topic upon which I find it necessary or desirable to embark. The point that seems to me to be relevant is this – in an emergency situation, the legislature conferred extraordinary powers on the Minister to take measures that radically reduced legal protections hitherto taken for granted. In the circumstances of this case, the emergency was of a financial and economic nature in which the capitalisation of Irish banks played an enormous role. However it is entirely possible to conceive of emergency situations that might arise in the future, affecting the vital interests of the State, that may not be related to banks and their resources. The criteria according to which a court might find invalid the exercise of powers such as those in this case is, I believe, a matter giving rise to a point of law of exceptional public importance.

39. The first point raised, and part of the second, arise out of the analysis in the second judgment of the rulings of the CJEU in this case and in *Kotnik and Others v. Slovenia* (C-526/14). The question whether there was an error in this analysis does, I consider, raise a point of law of exceptional public importance. However I do not accept the applicant's contention that I proceeded on the basis that State aid approval amounted to legal justification for the direction order – that is expressly dealt with in the first judgment.

40. I will accordingly grant leave on the question whether I correctly applied the rulings of the Court of Justice in this case and in *Kotnik*.

41. Points (iii) and (iv) seem to me to go to the proper application of the criteria set out in s. 11 of the Act and in particular might fairly be said to relate to the interpretation given in the first judgment to the concepts of "reasonableness" and "necessity". The applicants have consistently argued that the direction order was neither reasonable nor necessary, on the basis that alternative methods of recapitalisation were open.

42. Given the exceptional nature of the legislation, the correct application of these concepts is a matter of exceptional public importance. Should legislation of this nature be considered desirable by the Oireachtas to deal with some future crisis, it would be in the public interest that there should be an authoritative analysis of the criteria to be applied by a court considering similar powers.

43. A further consideration is the obligation, imposed on the Court by Articles 40.3 and 43 of the Constitution, to vindicate the property rights of the applicants in the case of unjust attack.

44. I will accordingly grant leave on the question whether I correctly interpreted and applied the terms of s.11 of the Credit Institutions (Stabilisation) Act 2010.

45. I do not believe that point (v) is capable of consideration in these proceedings.

46. I feel it necessary to say that it is difficult to make legal sense of category (vi). Evidence does not "emanate" from law. It is part of a judge's function to draw inferences. Any assessment of the "reasonableness" of, or the "necessity" for, an action taken before a court hearing must, by definition, involve the court's assessment of what might have occurred had the action not been taken. Civil matters are determined on the balance of probabilities. I do not believe that the issues raised here amount to stateable points of law, still less points of exceptional public importance.

47. In the first judgment, I observed that the breaches alleged in respect of the EU legislation listed in category (vii) depend, in reality, on a finding that there was a breach of the Second Company Law Directive. That is the applicants' principal argument and they cannot, in my view, succeed in relation to the other issues in the absence of success on that point. I would not, therefore, grant leave in respect of those matters. The constitutional argument can, I consider, be accommodated within a discussion of the correct interpretation of s.11.

Conclusions on costs

48. The case law makes it clear that it is appropriate, in some circumstances, to award costs to an unsuccessful litigant. The categories of case in which this may be done do not appear to be closed.

49. I do not accept the argument advanced by the Minister and the notice parties to the effect that litigants acting in their own interests cannot come within the "public interest" category. On the facts of this case, the only persons with *locus standi* to challenge the direction order were (apart from the company itself) the shareholders. By definition they have a material interest in the outcome, even if (as I have found in this case) their assessment of the potential benefit is misconceived. It seems to me that the implications of the argument would mean that, in any circumstances where the legislature and executive interfered with the legal rights of property owners, no public interest could be claimed in litigation arising therefrom. That cannot be correct as a matter of principle. The rule contended for would also have precluded the outcome in relation to costs in Curtin, where the plaintiff was undoubtedly acting purely in his own interests. However, I consider that the presence of a material interest is a factor to be taken into account.

50. I consider the factors relied upon by the applicants, listed at paragraph 31 above, to be relevant to the exercise of my discretion. For the avoidance of doubt, I should say that I do not consider other matters raised by the applicants, such as complimentary remarks passed by judges (including myself) who have dealt with aspects of the proceedings, or by other individuals, to be relevant to the issue of costs. Nor is the fact that the applicants did not have legal representation. The fact that the applicants suggested, after the ruling of the Court of Justice, that an Alternative Dispute Resolution method might be adopted came far too late in the day to be of any real relevance.

51. I am of the view that the importance of this case transcends the interests of the applicants. It was undoubtedly considered, for obvious reasons, to be extremely important by the executive of this State. It was also, it seems to me, very significant in clarifying (along with *Kotnik*) the scope of EU company legislation in the circumstances brought about by the financial crisis.

52. Having regard to the nature of the legislation, and the unprecedented nature of the interference with the property rights of the applicants, I consider that there has been a public benefit in terms of domestic law, in the analysis of the proper approach of a court to the exercise of the powers conferred on the Minister. It will be noted that, in the section of the first judgment dealing with the test to be applied to the statutory criteria of reasonableness and necessity, I did not accept the formulation urged by the Minister but rather adopted a somewhat more stringent approach.

53. While this legislation has lapsed, it is, as I have already said, not inconceivable that future emergencies (not necessarily of a financial nature) may bring about legislative incursions relating to fundamental rights.

54. I therefore propose to grant to the applicants a proportion of their outlay and legal costs. In declining their application for a full award, I take into account the fact that this was undoubtedly a "material interest" case. Apart from the legal issues, I have found their arguments in relation to the viability of the bank and the options available for its recapitalisation to be entirely misconceived.

55. In the circumstances I consider that the figure of 40% of allowable outlay in respect of Mr. Skoczylas is appropriate. Without wishing to seem disrespectful it must be said that Mr. Dowling and Mr. McManus played lesser roles. It also seems likely that they had considerably less outlay. I will award each of them 20% of their allowable outlay.

56. As far as Scotchstone is concerned, I note that in some previous litigation the costs of its legal representation were treated as "out of pocket" expenses on the part of Mr. Skoczylas. While this may well have been appropriate in respect of shorter hearings, I have to bear in mind that in the substantive hearing (which lasted for several weeks including many days with extended hours) Scotchstone was represented by a solicitor and junior counsel. The solicitor also represented Scotchstone in the Court of Justice. Balancing this with the fact that both counsel and solicitor largely adopted Mr. Scoczylas' submissions, I consider that a figure of 30% legal costs is appropriate for Scotchstone.