THE HIGH COURT

[2013 No. 36 COS]

IN THE MATTER OF PERMANENT TSB GROUP HOLDINGS PUBLIC LIMITED COMPANY AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012 AND IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT 1963

BETWEEN

GERARD DOWLING, PADRAIG MCMANUS, JOHN PAUL MCGANN, TIBOR NEUGEBAUER, PIOTR SKOCZYLAS, MURIEL SCORER AND GEORG HAUG

PETITIONERS

AND

ANDY COOK, JEREMY MASDING, EMER DALY, MARGARET HAYES, SANDY KINNEY, RAY MCSHARRY, PAT RYAN, KEVIN MURPHY, DAVID MCCARTHY, BERNARD COLLINS, ROY KEENAN AND THE MINISTER FOR FINANCE

RESPONDENTS

JUDGMENT of Mr. Justice Gilligan delivered on the 27th day of March, 2013

Introduction

1. This is an application for an interlocutory injunction before the hearing of an action pursuant to s. 205 of the Companies Act 1963 (hereinafter "the main proceedings").

2. The petitioners in this case were granted leave to issue a Notice of Motion returnable before this Court on 15th March, 2013 seeking an interlocutory injunction restraining the respondents, by themselves or by their agents or servants or plenipotentiaries, from undertaking any actions to terminate the directorship of Mr Piotr Skoczylas (the fifth named petitioner) at Permanent TSB Group Holdings plc until the adjudication of the main proceedings. The petitioners also seek a preliminary reference under Art 267 of the Treaty on the Functioning of the European Union (the TFEU) in relation to certain questions of interpretation of EU law.

3. I have had the benefit of considering the papers, the written submissions on behalf of Mr Skoczylas, the written submissions on behalf of the first eleven named respondents and the oral submissions as given in Court by Mr Skoczylas, Mr Gallagher SC on behalf of the first eleven named respondents, Mr McCullough SC on behalf of the Minister for Finance, Ms Moynihan BL on behalf of the third and seventh named petitioners and the petitioners Mr McManus and Ms Scorer.

Background Circumstances

4. The petitioners are all members of Permanent TSB Group Holdings Public Limited Company (the Holding Company) which is a company limited by shares and incorporated under the Companies Act 1963 on 24th August, 2009. There are approximately 134,000 shareholders of the Holding Company. The Respondents are all directors of the Holding Company. Te Holding Company holds 100% of the shares of Irish Life and Permanent plc (the Bank). The Holding Company is not a credit institution but is listed on the Enterprise Securities Market of the Irish Stock Exchange. The Bank is a credit institution.

5. A scheme of arrangement (the scheme) was sanctioned by the High Court on 11th January, 2010 whereby the Holding Company replaced the Bank as the listed holding company of the Irish Life and Permanent Group. The scheme provides that the Holding Company would be held by the shareholders in the same proportions and on the same basis as they held shares in the Bank. The Holding Company also, under the scheme, beneficially owns the issued share capital of the Bank. The scheme also provided that the Holding Company would have the same capital structure, board and management as the Bank and there would be no changes in corporate governance and the interests of the shareholders of the Holding Company in the assets and dividends of the Bank would not be effected by the scheme.

6. As part of a series of recapitalisation programmes, the economic context of which need not be set out here, the Minister for Finance (the twelfth named respondent) acquired 99.2% of the shares of the Holding Company pursuant to a direction order made on 26th July, 2011 (the July direction order) by the High Court under the Credit Institutions (Stabilisation) Act 2010 (the 2010 Act).

7. The Bank formerly held 100% of the shares in Irish Life Group Limited until 29th June, 2012, when the latter asset was sold to the Minister for Finance under a second direction order made on 28th March, 2012 (the March direction order) again pursuant to the 2010 Act. Irish Life Assurance is a wholly owned subsidiary of Irish Life Group Limited and the former is an undertaking authorised under the European Communities (Life Insurance) Regulations 1994 to carry on Life Insurance Business. The Holding Company does not conduct any business itself.

8. The petitioners claim that under the terms of the scheme directors of the Holding Company must also be directors of the Bank and that a director of the Holding Company who is prevented from having access to information and involvement in the decision-making regarding the Bank is not in a position to discharge his duties as a director of the Holding Company. With the exception of Mr Skoczylas, the fifth named petitioner in these proceedings, all other members of the board of directors of the Holding Company (the first to seventh named respondents) are also members of the board of directors of the Bank. Mr Skoczylas claims that this is the result of him being "illicitly blocked from being on the [Bank] board."

9. Before examining the specific claims the subject of these proceedings it is necessary, for the sake of clarity, to set out the details of a number of other on-going proceedings which arise out of these factual circumstances. All of the petitioners except the sixth named petitioner, Ms Scorer, were applicants in the proceedings which challenged the Direction Order obtained by the Minister for Finance on 28th March, 2012 (Rec No. 2012/116). The first, second and fifth named petitioners are the applicants in proceedings in relation to the Direction Order of 26th July, 2011, which are ongoing (Rec. No 2011/239). There were also further proceedings brought by the first, second, third and fifth named petitioners seeking mandatory orders appointing Mr Skoczylas to the Board of Directors of the Bank. The reliefs sought on this application were refused by Murphy J on 27th February, 2012. This order has not yet been

perfected though Mr Skoczylas stated in his oral submissions that it was intended to appeal this decision when that becomes possible. An attempt was also made by all of the petitioners to bring an application under s. 160(2) of the Companies Act 1990 against the first eleven named respondents seeking disqualification orders. The respondents and the Bank were granted an interlocutory injunction by Cooke J on 4th February, 2013 restraining the petitioners from bringing that application. This decision is under appeal by the petitioners.

Specific Facts pertaining to the directorship of Mr Skoczylas

10. On 20th July, 2011, prior to and in contemplation of the July Direction order, an Extraordinary General Meeting of the Holding Company took place, its purpose being to vote on seven resolutions, three proposed by the Board and four proposed by the shareholders. The fifth named petitioner was appointed, subject to prior regulatory approval, as a director of the Holding Company by 67.5% of the shareholder vote at that meeting. The three resolutions proposed by the Board of the Holding Company were rejected and the four resolutions proposed by the shareholders were passed. It is only "Resolution 7" in relation to the appointment of the fifth named petitioner as a director of the Holding Company which is of strict relevance to this application.

11. In consequence of this the High Court made the July direction order on 26th July, 2011, pursuant to the 2010 Act, on the application of the Minister for Finance, the twelfth named respondent. This order was in similar terms to the three resolutions proposed by the directors of the board and rejected by the shareholder vote which related to the recapitalisation of the Bank, including an increase in the authorised share capital of the Holding Company. The four resolutions proposed and passed by the shareholders were revoked except Resolution 7 in relation to the appointment of Mr Skoczylas as a director of the Holding Company. These issues are termed the "first phase of recapitalisation" by the petitioner.

12. The "Second phase of recapitalisation" occurred between December, 2011 and March, 2012. The twelfth named respondent, the Minister for Finance, made an offer to purchase Irish Life Group Limited to finalise the recapitalisation of the Bank. The directors of the Holding Company authorised the negotiations with the Minister in relation to this transaction. On 28th March, 2012 a further direction order was made by the High Court pursuant to s. 9 of the 2010 Act under which the Bank sold Irish Life Group Limited to the twelfth named respondent. It is in relation to these two direction orders and in relation to the role of Mr Skoczylas as a director of the Holding Company which the oppression forming the basis of the s. 205 Companies Act 1963 claim is said to have arisen by the petitioners.

S205 in relation to the Petitioners as a whole

13. A number of alleged breaches of EU law are claimed in relation to both of the direction orders.

14. The petitioners claim that in relation to the EGM of the 20th July, 2011, the directors of the Holding Company exercised their powers in breach of EU law and therefore in a manner oppressive to the members of the Holding Company including the petitioners and in disregard to the interests of those members.

15. The petitioners claim that:

> (i) The directors of the Holding Company did not comply with s. 29(4) of the Second Council Directive 77/91/EEC in respect of the requirement to present to the EGM a written report indicating the reasons for the restriction or withdrawal of the right of pre-emption and justifying the proposed issue price.
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> (ii) The directors, in accepting or failing to object to the proposals of the July direction order, acted in breach of Arts 8(1), 25(1) and 29(1) of the Second Council Directive 77/91/EEC.
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> (iii) The directors failed to comply with Art 10 of the Directive 2009/101/EC in respect of an act which abolishes resolutions lawfully passed by a general meeting of shareholders.
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> (iv) The directors failed to comply with Art 5, 42 and 45 of the Directive 2001/34/EC in respect of an act abrogating obligations provided for in the Directive that the legal position of a Company admitted to an official listing must be in conformity with all regulations to which it is subject as regards its formation and its operation.
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> (v) The directors failed to comply with Art 42 of the Financial Instruments Directive 2004/39/EC in relation to an act which derogates from transparent and non-discriminatory rules, which a regulated market established and maintains, governing access to or membership of that regulated market.
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> (vi) The directors failed to comply with Art 2 of the Takeover Directive (Directive 2004/25/EEC) regarding an act abrogating the protection of shareholders in a financial institution which is the subject of a takeover or change of control when a government of a Member State acquires control of the financial institution.
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> (vii) The directors failed to meet the requirements of Art 63 TFEU in relation to the free movement of capital.

16. The resolutions adopted at the EGM are in breach of EU law and ultra vires the corporation and the directors therefore exercised their powers in a manner which comes within s. 205 of the Companies Acts. In relation to these complaints the petitioner acknowledges that the fourth and sixth named respondents recused themselves from all or most of the decision at issue before the EGM on this occasion and they are therefore excluded from the petitioner's complaint.

17. In relation to the second phase of recapitalisation and the March direction order the petitioner claims that the directors of the Holding Company have again acted in a manner characterised as oppressive within the meaning of s. 205 of the Companies Act 1963.

18. The petitioner claims that:

> (i) effecting an increase in the capital in the Bank and ensuring the sale of Irish Life Group Limited under the March Direction order without a resolution of the general meeting of the Holding Company was in breach of Art 25(1) and Art 42 of the Second Council Directive 77/91/EEC.
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> (ii) The Minister breached Art 14.4 of the Financial Instruments Directive 2004/39/EC by effecting the increase in capital without a resolution of the general meeting of the Holding Company.
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> (iii) The Minister breached Art 5 and Art 42 of the Directive 2001/34/EC in effecting this sale.
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> (iv) The Minister also acted in breach of Art 63 TFEU during this recapitalisation process.

(v) The directors of the Holding Company have also breached Art 10 Directive 2009/101/EC, Art 5, 42, 45 of Directive 2001/34/EC and Art 63 TFEU by supporting the increase in capital of the Bank in a manner that favoured the majority shareholder; the Minister.

(vi) The directors also breached Rule 15 of Art 14.4 of the Financial Instruments Directive 2004/39/EC in actively arranging and supporting the sale of Irish Life Group Limited to the Minister without the consent of the Holding Company general meeting

(vii) The directors are also not compliant with Rule 13 of Art 14.4. of the Financial Instruments Directive 2004/39/EC by actively supporting the sale of Irish Life Group Limited to the Minister.

19. The relief claimed in the Notice of Motion relates to an interlocutory injunction restraining the board from giving effect to the requirement in the Articles of Association of the Holding Company that the fifth named petitioner retire at the next AGM of the Holding Company on 22nd May, 2013. The alleged breaches of EU law set out above relate to the petitioners as a whole and not specifically to the fifth named petitioner's directorship.

S. 205 in relation to Mr Skoczylas

20. The fifth named petitioner claims that the boards of the Holding Company and the Bank have prevented him from being an active part of the board of the Holding Company and from discharging his duties as a director of the Holding Company and that this behaviour constitutes oppression within the meaning of s. 205 of the Companies Act 1963.

21. Mr Skoczylas was elected as a director of the Holding Company at the EGM of 20th July, 2011, and his appointment was approved by the Central Bank of Ireland on 22nd December, 2011. However the Central Bank of Ireland required that Mr Skoczylas undergo a form of training or induction before he commenced his role. Mr Skoczylas submits that despite his efforts to procure this training from the board of the Holding Company there was an element of procrastination on the part of the board. The induction was scheduled for 26th – 27th March, 2012, which, Mr Skoczylas in his petition notes, was the same date as the March direction order would have been proposed. An application was made to the High Court on 20th February, 2012, by sixteen shareholders of the Holding Company, including the first, second, third, fifth and seventh named petitioners for a mandatory injunction requiring that the fifth named petitioner be appointed and fully installed as a director of the Holding Company and of the Bank by 1st March, 2012. This latter claim was brought on foot of the letter of 22nd December, 2011, from the Central Bank of Ireland which consented to the appointment of Mr Skoczylas as a director of the Holding Company and which, according to Mr Skoczylas, intimated that he should also be appointed a director of the Bank. By consent of the respondent to that application on 27th February, 2012, Mr Skoczylas was permitted to attend and participate at board meetings of the Holding Company between 1st March, 2012 and 3rd April, 2012, on the same basis as the other Board members but without having the right to vote. The training programme required was to be scheduled for 2nd – 3rd April, 2013.

22. On 16th March, 2012, the Company secretary of the Holding Company, Mr Ciaran Long sent a letter of confirmation of appointment to the fifth named petitioner. Mr Skoczylas made a number of additions and amendments to that letter and signed and returned it. The amendments included a stipulation that he be expected to serve two three year terms and that he would not resign from the Board and offer himself for reappointment before the third annual general meeting following his original appointment on 20th July, 2011. According to the petition these amendments were "accepted…without any comments" and Mr Skoczylas was appointed to the board on 30th March, 2012 effective from 4th April, 2012. On 17th April, 2012, the board of the Holding Company refused to appoint Mr Skoczylas to the board of the Bank. Mr Skoczylas also submitted that all directors of the board of the Holding Company are also directors of the board of the Bank and that this is clear from the standard form contract for directors of the Holding Company.

23. Mr Skoczylas also claims that he has been prevented from properly discharging his duties as a director as he has been confined to participating in three board meetings only. Mr Skoczylas also states that he has been excluded from adequate information sharing, that he has not been permitted to meet with any member of the management of either the Bank or the Holding Company or the employees of either body and that he has not been inducted to the Company. Extensive correspondence was exhibited to the Court in relation to these claims. He submitted that only three board meetings of the Holding Company, in comparison to thirteen meetings of the board of the Bank, have been held in the last year.

24. On 14th December, 2012, Mr Skoczylas was provided with a legal opinion from A&L Goodbody solicitors, requested by the board of the Holding Company, which indicated that, based on Art 87 of the Articles of Association of the Holding Company, that he ought to resign from the Board because he was the director longest in office since all the other directors had been re-elected at the AGM on 22nd May, 2012. Mr Skoczylas replied to the opinion by letter of 18th December, 2012 pointing out that the opinion was not correct in law. Mr Skoczylas then initially requested that the Company provide funds for the procurement of additional legal advice on the matter but then changed his mind and decided that this was not appropriate.

25. Mr Skoczylas also submitted that, despite making clear that he was dissatisfied with the corporate governance mechanisms of the Bank and the Holding Company at the three board meetings of the Holding Company at which he participated, there was no thorough or adequate discussion of these complaints. Mr Skoczylas also claims that he was unable to approve the accounts of the Holding Company for 2011 due to the inadequate information in relation to their preparation with which he was prepared.

26. A number of submissions were made by other petitioners either on affidavit or orally before the Court. By affidavit sworn on 19th March, 2013, Georg Haug, the seventh named petitioner averred that he considered the directorship of Mr Skoczylas as vital for the protection of the rights of the current minority shareholders of the Holding Company. Mr Haug also avers that at the AGM of 22nd May, 2012 he asked the Chairman of the Board, Mr Cook, a number of questions in relation to the delay of the board in properly appointing Mr Skoczylas to the board of the Holding Company and to the board of the Bank. No adequate response was received to these inquiries. Ms Muriel Scorer, former director of Irish Life and Permanent plc and the sixth named petitioner to this application also swore an affidavit on 13th March, 2013, filed it on 14th March, 2013, in which she stated that the majority of the shareholders of the Holding Company voted Mr Skoczylas as director of the Holding Company so he could best represent the interests of the smaller shareholders of that company and that the treatment of the fifth named petitioner by the other members of the Board of the Holding Company "is an unprecedented abuse of power….which flies in the face of the most fundamental corporate governance canons." She averred that the fifth named petitioner has been consistently marginalised and deprived of an opportunity to adequately discharge the functions of his office. Ms Scorer also made oral submissions to the Court stating that in her view the board of the Holding Company had treated the fifth named petitioner very differently to how she had been treated in her time as a director, particularly as regards the access which the fifth named petitioner was granted to information regarding the business. The second named petitioner Mr Padraig McManus also made oral submissions at the hearing of this application in relation to the delay in the appointment of the fifth named petitioner to the board of the Holding Company and in relation to the alleged requirement that a director of the Holding Company also be a director of the Bank. The Court has noted all of these submissions in arriving at its conclusion.

Specific provisions of Articles of Association
27. Art 87 of the Articles of Association of the Holding Company provides for retirement by rotation of the members of the board of directors. It provides that:

> "(a) Each director must retire not later than the third annual general meeting following his last appointment or re-appointment in general meeting.
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> (b) In any event at each annual general meeting of the Company a minimum number of directors are subject to retirement by rotation and that number includes any Director retiring under Art 87(a) but does not include any Director who wishes to retire and who does not wish to offer himself for re-appointment. The minimum number is one third of the Directors for the time being subject to retirement by rotation (calculated as aforesaid and subject also to the provision of Article 90) or if the said number of Directors is not divisible by three, the number which is nearest to and less than one-third. If there is only one director who is subject to retirement by rotation then he shall retire.
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> (c) The Directors (including any directors holding executive office pursuant to these Articles) to retire by rotation shall be those who have been longest in office since their last appointment or reappointment but as between persons who became or were last reappointed directors on the same day those to retire shall be determined (unless they otherwise agree among themselves) by lot."

28. In relation to the specific claim made in this interlocutory application the petitioners are seeking an order restraining the respondents from undertaking any actions to terminate the directorship of Mr Skoczylas (the fifth named petitioner) at Permanent TSB Group Holdings plc until the adjudication of the main proceedings and in particular until the question of the mandatory order, that Mr Skocztylas be inducted to the Company and be enabled to discharge his duties as a director of the Holding Company and that he be appointed to the board of the Bank, is determined.

29. Counsel for the respondents submitted that this was, in effect, an application for a mandatory injunction and that therefore the higher threshold of a "strong case" as set out by the Supreme Court in *Maha Lingham v Health Service Executive* [2006] ELR 137 rather than the usual "fair question to be decided at the trial" standard set out by Keane J (as he then was) in *Campus Oil v Minister for Industry and Commerce* [1983] 1 IR 96 should apply in this instance. The Court, however, is of the view that while the reliefs sought at the hearing of the main proceedings may, in effect, be mandatory in nature, the relief sought on this interlocutory application is a prohibitory order restraining the respondents from taking certain actions (i.e. restraining the respondents from removing the fifth named petitioner from his directorship of the Holding Company at the next AGM). Therefore the traditional Campus Oil test, as contended for by the petitioner, will be applied in this instance.

Submissions of Mr. Skoczylas
30. Mr Skoczylas, in the course of his oral and written submissions placed considerable emphasis on the importance of the existence of agreements affecting the rights of shareholders and directors in a s. 205 Companies Act 1963 claim such as that in the main proceedings. The fifth named petitioner cited *McGilligan v O'Grady* [1999] 1 IR 346 at page 161 where the Court placed emphasis on the existence of an agreement similar to that at issue in this case.

31. Mr Skoczylas also submits that, in relation to the adequacy of damages, such relief would not be sufficient to preserve the rights of the petitioners due to the importance of Mr Skoczylas' role on the board of the Holding Company and his view that he represents the interests of the minority shareholders who are also petitioners on this application. It is also submitted by the petitioners that allowing the respondents to remove Mr Skoczylas from the board of the Holding Company would irreparably prejudice the s. 160 Companies Act 1990 proceedings against the first eleven named respondents. An injunction restraining the bringing of these proceedings by the petitioners is currently under appeal. Mr Skoczylas submitted that bringing these proceedings as a director would place him in a "unique position" and he would be prejudiced if his directorship did not, therefore, continue. Mr Skoczylas did not elaborate further on the nature of this "unique position." However, s. 160(4) of the Companies Act 1990 provides that an application under s160(2) of that Act, which is the section under which Mr Skoczylas and the other petitioners to that application appear to be moving, can be brought by a range of legal and natural persons including:

> "(a) the Director of Public Prosecutions or
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> (b) any member, contributory, officer, employee receiver, liquidator, examiner or creditor of the company in relation to which the person who is the subject of the application –
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> (i) has been or is acting or is proposing to act as officer, auditor, receiver, liquidator or examiner or
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> (ii) has been or is concerned or taking part, or is proposing to be concerned or take part, in the promotion, formation or management of any company,
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> and where the application is made by a member, contributory, employee or creditor of the company, the Court may require security for all of some of the costs of the application."

32. Given that this is the case, it is difficult to see what prejudice, if any, the petitioners to the s160 application could suffer if Mr Skoczylas were to be removed from his directorship at the AGM of the 20th May, 2013.

33. Mr Skoczylas also states that a general award of compensatory damages is not permitted in the within s. 205 Companies Act 1963, proceedings and that there is no question of the Respondents suffering any damages by him maintaining his position as director until the determination of the s. 205 Companies Act 1963 proceedings, even though this will take place after his purportedly required retirement from the board of the Holding Company at the AGM on 22nd May, 2013.

34. In relation to the balance of convenience element of the Campus Oil test Mr Skoczylas submits that the balance favours the grant of the injunctive relief sought as if it is not granted he and the other petitioners will suffer irreparable harm and the position of the respondents would not be significantly altered or prejudiced.

35. Mr Skoczylas also makes a number of submissions in relation to the alleged breaches of EU law which are outlined at paras. 17-21 of this decision. He submits that the full effectiveness of European Union Law would be impaired if a rule of national law could prevent a court seised of an EU matter from granting interlocutory relief that is sought in order to ensure the full effectiveness of the

judgment to be given on the existence of the rights claimed under European Union law. In support of his claim Mr Skoczylas cites from the well known decision of the Court of Justice of the European Union C 213-89 *Factortame*. He submits that this decision implies that this Court should grant the interlocutory injunction to restrain the Respondents from undertaking any actions to terminate the directorship of Mr Skoczylas until the determination of the main proceedings have been concluded.

36. Mr Skoczylas makes further submissions in relation to the characterisation of the Bank and the Holding company as an "emanation of the State" and therefore a body which, since it is state owned and state controlled, can have liability for breaches of obligations imposed on the State by EU law imposed upon it. The fifth named petitioner cites C188-89 *Foster v British Gas* and C222-84 *Johnston v Chief Constable of the RUC* in support of these claims. However, the relevance of these to the interlocutory application before the Court in this instance is not obvious and so it is not necessary to deal with this particular issue since it does not appear to contribute to the question of the appropriateness of awarding interlocutory relief.

Submissions of the Respondents
37. Mr Gallagher on behalf of the first eleven named respondents submits that the application for interlocutory relief is misconceived in that the petitioners are seeking an order requiring the directors of the Holding Company to ignore the Articles of Association to which they and the Holding Company are bound and neither the Holding Company nor the other members of the Holding Company are parties to the proceedings. Counsel for the respondents proceed with their submissions on the basis that the test to be applied for the granting of an injunction is the "strong case" test from *Maha Lingham*. As set out above the Court is of the view that the injunction sought is prohibitory in nature and so the test to be met is rather the "fair issue" test from *Campus Oil*.

38. The respondents submit that simply by acting in the manner required by the Articles of Association, in preparing the AGM for the 22nd May, 2013, and the retirement of Mr Skoczylas as the longest serving director, the respondents could not be said to be acting in an oppressive manner within the meaning of s. 205 Companies Act 1963. This is particularly true given that Art 87 of the Articles of Association operates automatically and the directors of the Board of the Holding Company are granted no discretion with regard to its operation.

39. It is contended on behalf of the first eleven named respondents that Art 87 of the Articles of Association is clear on its face that the director "longest in office" since the date of his appointment is subject to retirement by rotation. It is also contended that it is clear that the fifth named petitioner is the director longest in office and that there is no scope for an argument that he is not "in office" as he was appointed on 4th April, 2012. It was submitted that the fifth named petitioner has been paid fees as a Director since his appointment, he has attended all board meetings of the Holding Company and he has at all times claimed to be a director of the Holding Company. He is estopped therefore from claiming that he is not a director of the Holding Company. In relation to the claim by the fifth named petitioner that there were too few board meetings it was submitted that this could not have been the case as the fifth named petitioner, as a director, was entitled to call a board meeting of the Holding Company but this was never done. The fifth named petitioner was never a director of the Bank and therefore there can be no "status quo" to preserve in relation to this application. The unilateral insertion of a term into the letter of appointment of the fifth named petitioner as a director by him cannot be said to be binding on the Holding company or the respondents.

40. In relation to the balance of convenience the respondents submit that this element of the test favours the refusal of the interlocutory injunction as the fifth named petitioner is entitled to put himself forward for re-election at the AGM on 22nd May, 2013, and may be re-elected by the shareholders. Mr Skoczylas would also remain entitled to any reliefs which he would be awarded if successful in the main proceedings. But if the present relief as sought was granted this would result in the Holding Company acting in breach of the Articles of Association.

41. The respondents also note that given the delay which Mr Skoczylas purportedly showed in bringing this application, since he was aware of the requirement for him to retire from 14th December, 2012, the date at which he received the legal opinion of A&L Goodbody solicitors in relation to the issue, the Court should exercise its discretion to refuse the relief sought. The Court however accepts the submissions of Mr Skoczylas in this regard that he took reasonable time to consider whether he required legal advice in relation to this opinion and in the end decided that this was not required and that it would be possible for him and the majority of the other petitioners to make this application as litigants in person. The Notice of Motion was returnable for 15th March, 2013. The petitioners acted with reasonable expedition. No issue of delay, therefore, arises.

42. Ms. Muriel Scorer, a petitioner and former director of Irish Life and Permanent from 1994 to 2003, in an oral submission to the court criticises the respondents for the manner in which Mr. Skoczylas has been treated and in her view, victimised. She refers to the fact that when she was a member of the Board she was given full cooperation and she is of the view that Mr. Skoczylas should be treated in the same manner.

Conclusion
43. The petitioners are seeking interlocutory relief restraining the respondent directors from acting in compliance with the Articles of Association of a public limited company, the Holding Company. Art 87 of the Articles of Association is mandatory in nature and operates without any scope for discretion being exercised by the Directors. No finding of fact can be made that the Board have sought to preclude Mr Skoczylas from standing for re-election at the AGM on 22nd May, 2013, or that Mr Skoczylas will, on the balance of probabilities, not be re-elected by the shareholders on that date. It cannot be said that even if, as Mr Skoczylas submits, he was not permitted to effectively discharge his duties as a director, he was not validly appointed as a director on 4th April, 2012. Since all other directors of the Holding Company were appointed on 22nd May, 2012, he is strictly the longest serving director and therefore, in accordance with the articles must retire.

44. It is also clear from *McGilligan v O'Grady* [1999] 1 IR 346 that the Court has jurisdiction to restrain the removal of a director of a company by the shareholders by way of interlocutory relief in order to allow ongoing s205 proceedings to be determined. In arriving at this conclusion Keane J (as he then was) stated at p. 362:

> "Why then should the court, on an application for an interlocutory injunction, be unable to restrain the company from removing a director pending the hearing of a petition under s. 205 where he has established that there is a serious question to be tried as to whether his exclusion from the affairs of the company constitutes conduct which would entitle the shareholders to relief under s. 205?....I am bound to say that, with all respect, that I do not understand why it should be thought that because the relief sought in the interlocutory proceedings is not the same as the relief which will ultimately be sought in the s. 205 proceedings, an interlocutory injunction should not be granted on that ground alone. If it is desirable, in accordance with the principles laid down in the *American Cyanamid Company* and *Campus Oil* cases to preserve the plaintiff's rights pending the hearing of the s. 205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason why interlocutory relief should not be granted."

The court accepts the legal principle that it has jurisdiction to restrain the removal of directors as set out in the decision of Keane J (as he then was) above. But each case has to be distinguished on its own particular facts. In *McGilligan v O'Grady* the facts were that there was a determined attempt to remove as directors the two applicants in that case. In this instance however Mr Skoczylas is entitled to put himself forward for re-election at the AGM of the Holding Company on 22nd May, 2013. He may or may not be re-elected and this is at the discretion of the shareholders but this Court cannot decide, as a matter of probability in advance, that he will not be re-elected. In addition in *McGilligan v O'Grady* the first named plaintiff was, under the terms of an investment agreement of 25th July, 1998, between an investment company (Business and Trading House Investment Company Limited) and the Bank of Ireland and the fourth defendant to those proceedings, Premier International Trading House Limited, engaged to represent the interests of a number of investors. This fact is likely to have influenced the Court in coming to its conclusion on the balance of convenience in that instance. Though Mr Skoczylas claims to represent the interests of other minority shareholders no such agreement exists in this instance between Mr Skoczylas and those shareholders. This is of importance for the consideration of the balance of convenience and the respect which must be given to the voting rights of the other shareholders. Bearing in mind that only 400 shareholders voted Mr Skoczylas as a director to the Board and so it can only be the interests of those shareholders which Mr Skoczylas claims to protect. The interests of all other shareholders must also be protected. Therefore in my view the facts of this case are distinguishable from the situation in *McGilligan v O'Grady*.

45. The factual situation is that Mr Skoczylas was elected as a director of the Holding Company pursuant to the Articles and Memorandum of Association. The Holding Company is a publically quoted company on the stock exchange with over 134,000 shareholders. The applicant for interlocutory relief is entitled to put himself forward for re-election as he is the longest serving director even though he was only elected a director in April, 2012. He takes issue with the other directors all putting themselves forward for re-election in May, 2012 when it was only legally necessary for one third of the directors of the Holding Company to go forward for re-election. However, it does appear that this practice had occurred previously, and all the directors have resigned and put themselves forward each year for re-election since 2009. It also appears that this aspect was covered in the A&L Goodbody opinion. The applicant Mr Skoczylas can put his name forward for re-election and take his chance. The effective application as made by Mr Skoczylas to the Court is to ignore the Articles of Association to which he agreed to be bound.

46. There is clearly a serious issue to be tried with regard to the s. 205 aspect of these proceedings and with regard to the application for a reference to the Court of Justice of the European Union in Luxembourg. If Mr Skoczylas successfully stands for re-election he can continue as a director and shareholder of the Company and if not then he can continue as a shareholder on the same basis as the other petitioners. If the application of the Articles of Association and Memorandum of Association and in particular Art 87 of the Articles are to remain suspended pending the determination of these proceedings then the Company will remain in breach of its own articles. In essence I consider the application of Mr Skoczylas to be misconceived. I do not consider that there is a serious issue to be tried in respect of the present position pertaining to Mr Skoczylas' directorship.

47. Mr McCullough on behalf of the Minister for Finance submitted that Art 87 of the Articles of Association is the basis of a contract which the Minister is entitled to respect and which should not be set aside because of an internal dispute between Mr Skoczylas and the Holding Company. It was also submitted on behalf of the Minister that the shareholding of the Minister was acquired following the July direction order. Under s. 9 of the 2010 Act this direction order is to have immediate effect and under s. 11 of the 2010 Act a challenge to a direction order will be without prejudice to actions taken on foot of the direction order. The Minister is therefore entitled to act on the basis of Art 87. In relation to the balance of convenience it was submitted that since there are 134,000 shareholders whose voting rights must be respected the balance must favour the refusal of the injunction. The Court notes and accepts these submissions.

48. Due to the conditions of his appointment and the Articles and Memorandum of Association of the company I am satisfied that on this particular aspect the overall reliefs afforded to Mr Skoczylas as a petitioner in the s. 205 proceedings and in respect of his directorship and the claim for damages will afford him adequate relief and compensation. Further, in my view the balance of convenience clearly favours compliance with the Holding Company's Memorandum and Articles of Association and in particular Art 87 thereof.

49. The Court exercises its discretion to refuse the preliminary reference sought by the petitioners under Art 267 TFEU on this application. Such a decision as to the making of a preliminary reference would be premature at this stage and is more appropriate for consideration at the substantive trial of the action.

50. Therefore, the interlocutory relief as sought is refused.