Neutral Citation: [2014] IEHC 595

**THE HIGH COURT**

**Record No. 2014 9908 P**

**IN THE MATTER OF APPLICATIONS FOR INJUNCTIONS**

**Between/**

**GERARD DOWLING, PADRAIG McMANUS AND PIOTR SKOCZYLAS**

**Plaintiffs**

**AND**

**THE MINISTER FOR FINANCE**

**Defendant**

**AND**

**(By order of the Court)**

**PERMANENT TSB (GROUP HOLDINGS) PLC and PERMANENT TSB**

**Notice Parties**

**Judgment of Ms Justice Iseult O'Malley delivered the 18th of December, 2014**

**Introduction**

1. These proceedings are, in effect, an offshoot of the proceedings between the same parties in *Dowling and ors. v. The Minister for Finance* (Record No. 2011 239 MCA) in which this court delivered a written judgment on the 15thAugust, 2014 ([2014] IEHC 418 – hereafter "the earlier judgment"). The decision of the court at that time was to request a preliminary ruling from the Court of Justice of the European Union on two questions. The plaintiffs now seek injunctive relief pending the receipt of the ruling.

2. The substantive case concerns a direction order made under the provisions of the Credit Institutions (Stabilisation) Act ("the Act"), in respect of Irish Life and Permanent Group Holdings (now Permanent TSB (Group Holdings), hereafter "the company") and Irish Life and Permanent (now Permanent TSB, hereafter "the bank"). The company was and is the sole shareholder in the bank. The bank was the owner of the Irish Life group. The plaintiffs are shareholders in the company.

3. The direction order was made in July 2011 by the High Court, on foot of an application by the Minister for Finance. In brief, the order brought about a situation where the defendant now owns 99.2% of the shares in the company, in return for an investment by him of €2.3 billion, a "standby" investment of €1.3 billion and €400 million in contingent capital notes.

4. In the substantive proceedings, the plaintiffs are seeking to have the direction order set aside. The evidence, submissions, legal rulings and findings of fact upon which the decision to request the ruling from the CJEU was based are set out in the earlier judgment and will not be repeated here save where necessary – however, it should be noted that a significant part of the argument concerned the provisions of the Second Company Law Directive and a number of European Court of Justice rulings thereon.

5. After the delivery of the earlier judgment, the matter was put back for submissions on the terms of the reference to be made. Those were heard on the 30thOctober, 2014 and the court handed down its decision, and the reference, on the 12th November, 2014. The plaintiffs had at all times made it clear to the court, the defendant and the notice parties that they might wish to seek injunctive relief pending the CJEU ruling and a hearing date was reserved by the court for that purpose. The plaintiffs (with the exception of Scotchstone Capital, a company owned by Mr. Skoczylas) then issued the within proceedings. The injunction application was heard on the 9th and 10th December, 2014.

**The reliefs sought**

6. Pursuant to the plenary summons issued on 21st November, 2014. The plaintiffs' claims are for the following:

> (i) A declaration that the Defendant is precluded from completing, whether by himself or by his agents or servants, any irreversible disposal, transition or cancellation of his shareholding in Permanent TSB Group Holdings plc ("ILPGH"), before the court proceedings record number 2011 239 MCA have been adjudicated upon following the preliminary ruling of the Court of Justice of the European Union pursuant to Article 267 TFEU.
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> (ii) An injunction restraining the Defendant from completing, whether by himself or by his agents or servants, any irreversible disposal, transition or cancellation of his shareholding in ILPGH, before the court proceedings record number 2011 239 MCA have been adjudicated upon following the preliminary ruling of the Court of Justice of the European Union pursuant to Article 267 TFEU.
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> (iii) A declaration that the Defendant is precluded from using, whether by himself or by his agents or servants, the voting rights attached to his ILPGH shareholding to overrule a relevant majority of votes of the other outstanding ILPGH shares in respect of special business at a general meeting of ILPGH regarding any further irreversible diminishing of the stake in ILPGH of the current ILPGH minority shareholders (whose stake in ILPGH was reduced for the benefit of the Defendant from 100% to less than 0.8% as a result of the ex parte provisional direction order effected by the Defendant on 26 July 2011). Until the court proceedings challenging the said *ex parte* provisional direction order effected by the Defendant ( the High Court record number 2011 239 MCA) have been adjudicated on following the preliminary union of the Court of Justice of the European Union pursuant to Article 267 TFEU.
>
> (iv) An injunction restraining the Defendant from using, whether by himself or by his agents or servants, the voting rights

attached to his ILPGH shareholding to overrule a relevant majority of votes of the other outstanding ILPGH shares in respect of special business at a general meeting of ILPGH regarding any further irreversible diminishing of the stake in ILPGH of the current ILPGH minority shareholders (whose stake in ILPGH was reduced for the benefit of the Defendant from 100% to less than 0.8% as a result of the *ex parte* provisional direction order effected by the Defendant on the 26 July 2011), until the court proceedings challenging the said *ex parte* provisional direction order effected by the Defendant ( the High Court record number 2011 239 MCA) have been adjudicated upon following the preliminary ruling of the Court of Justice of the European Union pursuant to Article 267 TFEU.

**The Supreme Court judgment in Dowling v The Minister for Finance [2013] IESC 37**

7. Since it is agreed that this judgment sets out the appropriate legal test for an application of this nature, and since it concerns (for the most part) the same parties, significant reliance has been placed on this judgment in various ways. It is therefore necessary to deal with it in some detail.

8. By virtue of a direction order made by the High Court in March, 2012 (generally referred to as "the 2012 direction order"), on foot of an application by the Minister, the bank was directed to sell the Irish Life insurance company and its subsidiaries to the Minister for the sum of €1.3 billion. An application by the plaintiffs to set aside that direction order was unsuccessful and the sale was completed. Subsequently, the plaintiffs sought an injunction to prevent the Minister from selling the Irish Life group onwards pending the outcome of various other proceedings including the substantive application to set aside the July 2011 direction order. Much of their argument in the case, as in this one, concentrated on issues of European Union law regarding the rights of shareholders.

9. In the appeal from the refusal of the High Court to grant an injunction, the Supreme Court dealt with a number of issues. The matters relevant to the instant case are summarised here.

*Delay*

10. In both cases it has been argued by the Minister that the plaintiffs have been guilty of delay in seeking the injunction. The Supreme Court observed that, because of the potential consequences of delay in this context, the issue is subject to much stricter scrutiny than would apply where a court is considering an application to strike out proceedings on grounds of delay. The conclusion of the Court was that a party should be excluded from obtaining an interlocutory injunction on the grounds of delay if the court concludes, on the facts, that that party

> "*could and should have applied with much greater expedition*". (Emphasis in original.)

11. On the facts of that particular case, the Court was not satisfied that the appellants had moved with anything like reasonable expedition but it did not find it necessary to determine whether the delay could have justified a refusal of an injunction.

*The legal test for an injunction*

12. The Supreme Court considered that the applicable test for the granting of injunctive relief in a case of this nature is that set out in *Okunade v The Minister for Justice Equality and Law Reform* [2012] 3 IR 152. The *Okunade* test was formulated to deal with the possibility that, in public law cases, the traditional *Campus Oil* test for an interlocutory injunction could amount to a denial of an effective remedy.

13. The factors to be considered were set out in *Okunade* follows:

> *"(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*
>
> *(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
>
> > *(i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
> >
> > *(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and*
> >
> > *(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;*
> >
> > *but also*
> > *(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*
>
> *(c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.*
>
> *(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."*

14. In Dowling, the plaintiffs submitted that *Okunade* did not sufficiently protect their interests. The Supreme Court gave particular attention to the argument made by them that the balance of convenience had to favour "the preservation of EU law and the vindication of minimum rights enshrined in EU law." In that regard the Court considered the decisions of the European Court of Justice in Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Suderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR 1-145 ("*Zuckerfabrik*") and in *Unibet (London) Ltd and Unibet (International) Ltd. V Justitiaekanslern* [2007] ECR 1-2271 ("*Unibet*"). In those cases the ECJ considered the applicability of interim measures by national courts pending a ruling by it, where such measures are necessary to protect rights held under EU law. In principle, it is for national law to determine the procedural rules to safeguard the rights of individuals under EU law, provided that the rules are no less

favourable than those governing similar domestic issues and do not render the exercise of those rights impossible or excessively difficult. These considerations include a requirement to take account of the possibility that an applicant will suffer serious and irreparable harm if protective measures are not granted.

15. Having considered its own jurisprudence and that of the ECJ, the Supreme Court determined that the proper approach was to apply *Okunade*, while having regard to the question of whether it could properly be said that a party might be deprived of an effective remedy. In assessing the latter question, the court should have regard to *Zuckerfabrik* and allied case law.

16. The Court again referred to *Okunade* in relation to the concept of "serious and irreparable harm" and cited the following passage from that judgment:

> *"There is reference in the judgment in the High Court in this case to "irreparable harm". It is not clear whether the trial judge intended the term "irreparable harm" to mean something other than harm that is not adequately compensatable in damages. However, it seems to me that the true question is as to whether any relevant harm can be compensated in damages. The reason for this stems from the underlying principle. If a plaintiff can adequately be compensated in damages then no real injustice is risked by the plaintiff being required to wait until the trial of the action before obtaining any court intervention. Even if whatever wrong is alleged continues until the trial of the action (and thus the wrong is greater by lasting longer) nonetheless if an award of damages amounts to adequate compensation (and provided that the defendant is likely to be a mark) no real injustice will have been suffered for the plaintiff will recover additional damages to reflect the fact that the wrong was greater by lasting longer. If, and to the extent that, it can be said that exposing the plaintiff to the wrong for a longer period of time than might otherwise be the case is unjust then that will only represent a significant argument if the additional damages which would follow would be inadequate to compensate for the additional period of time for which the wrong was suffered. Any arguments that can arise under that heading are, in truth, therefore arguments as to whether damages are really an adequate remedy in the first place."*

17. The Court therefore concluded that if damages were an adequate remedy, it was hard to see how any irreparable damage could arise. It also referred to the view of the ECJ, referred to in *Zuckerfabrik* that, as a matter of EU law, purely financial damage cannot in principle be regarded as irreparable.

18. The judgment goes on to deal with the fact that in all cases there is a risk of injustice in either granting or refusing interim measures, given that the court will have limited information and does not know what the outcome of the case is going to be.

> *"The most important point to emphasise is that the risk of injustice works both ways. While, understandably, the appellants emphasised the risks which would apply to them in the event that an interlocutory order was not granted but they ultimately succeeded, it must also be acknowledged that, provided that there is an arguable case for the defence, there is a real risk of injustice in the other direction as well. If the Minister succeeds in these proceedings then the Minister will establish that the asset which he wishes to sell is his asset. The Minister's property rights would be interfered with. In that eventuality, the Minister would have suffered a breach of his property rights to deal with an asset in whatever way the Minister considered to be to his best advantage (within the law) without interference. It is acknowledged that the appellants would not be able to compensate the Minister if losses were to be established in that eventuality. This is, therefore, a case where the Court was required to assess the risk of irreparable damage being caused to the Minister in the event that an interlocutory order was granted but the Minster ultimately succeeds. That irreparable damage would interfere with the Minister's property rights.*
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> *In that context, it is important to emphasise that the Minister, in seeking to sell Irish Life, is acting in a quasi private capacity in the sense that the Minister is simply seeking to sell an asset which, on his case, he owns and is entitled to sell. In that context it does not seem that there would be any legitimate basis for treating the Minister in any more favourable way (because he is a Minister) than if a private commercial entity which found itself in exactly the same position. This is not, therefore, one of those cases where some additional weight needs to be attached to the position of the Minister, as Minister, acting on foot of a duly enacted measure even where the measure concerned is under challenge.*
>
> *But it cannot be the case, as is essentially asserted by the appellants, that the mere fact that there is a challenge to the ownership by the Minister (or any other person) of the asset in question, necessarily leads to the grant of an interlocutory injunction. There is at least the potential risk of irreparable damage either way…"*

19. The Court next examined the Minister's defence in the proceedings, being the basis upon which he claimed lawful ownership of Irish Life. On the facts of the case, it considered that the correctness of that claim did not necessarily depend on the lawfulness of the 2011 direction order, since he could have exercised his powers under the Act to obtain the order in respect of Irish Life whether or not he was a shareholder in ILPGH. The Minister therefore had an arguable defence to the claim that he did not legitimately own Irish Life and had no right to sell it.

20. It was accepted by the Minister, as it is in this case, that the plaintiffs had an arguable case.

21. The Court therefore proceeded on the basis that it was possible that either party might succeed.

22. As far as the possibility of irreparable harm to the plaintiffs was concerned, the Court noted in passing that, should they succeed in some or all of the related proceedings, the question of remedies was a "difficult" one. In the circumstances, its focus was on the issue of Irish Life. The plaintiffs had submitted that, in the event that Irish Life was sold, their proceedings might be argued to be moot. The Court considered that if the sale would indeed render any aspect of the proceedings moot, that would constitute strong support for the proposition that they would suffer irreparable harm. There was also the complicating factor of the rights of the intended purchaser, and the question whether it would be possible to reverse the sale transaction.

23. The Court stated that it would have been impossible for it to have reached a concluded view on the mootness question in the interlocutory context were it not for the fact that Counsel for the Minister obtained instructions to the effect that the Minister would not argue that any of the substantive proceedings would become moot in the event that Irish Life had been sold before the proceedings were finally determined.

24. Given the complexities involved in relation to undoing a sale of Irish Life, the Court decided to assume, for the purposes of the application, that it might prove impossible and that the asset would be lost.

25. The Court then considered the question of adequacy of damages in this context. It referred to the judgment of Clarke J in *AIB v. Diamond* [2011] IEHC 505, citing the following passage:

> *"The courts have always been anxious to guard property rights in the context of interlocutory injunctions. See for example Metro International SA v Independent News & Media plc [2006] 1 ILRM 414. The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages can amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsorily acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value."*

26. However, it was necessary to have regard to the fact that the Minister could be ordered to pay full compensation, or to deal with the company in such a way as to ensure that it was compensated for any loss occasioned. The value of any shareholding in the company would thus not be materially affected.

27. On the other hand, if the Minister was prevented from selling Irish Life pending the outcome of all of the related proceedings, there was

> *"…a significant and material risk that the Minister will suffer a significant financial loss in the event that an injunction is now granted but the Minister ultimately succeeds. In addition there is a material risk to the national finances. The one thing that is absolutely clear is that, in the event of such loss arising, there are no practical circumstances in which the appellants would be able to compensate the Minister. It also needs to be recorded that, in that eventuality, the Minister would, even in the absence of financial loss, suffer irreparable damage in the sense that he would be deprived of what would, in that eventuality, be found to have been his right to deal with his own asset as he wished. That is something which cannot be reversed or compensated for. In addition, any consequences for the national finances could not be reversed."*

28. It was stressed by the Court that the Minister had put forward a significant defence, and that what was being dealt with was not a situation where a strong party was being permitted to act unlawfully on the basis that he would be in a position to pay compensation.

29. In conclusion, the Court found that there was indeed a risk of injustice to the plaintiffs, in that, assuming that they were ultimately successful, it might not prove possible for a court to reverse the sale of Irish Life.

> *"However, it is also clear that imposing an obligation on the Minister to refrain from selling Irish Life at what the Minister considers to be an opportune occasion, both from the point of view of the price to be achieved, but also from the point of view of the effect which a sale now will have on the national finances, also runs the risk of injustice if the Minister succeeds. In addition, any financial consequences, direct or indirect, of such a situation will not be capable, in practice, of being compensated in damages. Having regard to all of the factors in this case, this Court was satisfied that the least risk of injustice is met by not granting an interlocutory injunction."*

30. This conclusion did not, in the view of the Supreme Court, deprive the plaintiffs of an effective remedy.

**The plaintiffs' case**

31. The plaintiffs seek to distinguish certain facts of the Irish Life injunction case, while contending that the legal principles outlined in it support their case.

32. They argue that the July 2011 direction order must be seen as provisional only because, firstly, it was made on an *ex parte* basis. They refer to the judgment of Hardiman J. in *Adam v. Minister for Justice* [2001] 3 I.R. 53, where the following passage is found:

> *"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 having been heard. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases."*

33. The plaintiffs have therefore adopted the practice of referring to the direction order as a "provisional direction order" and to the Minister as "the provisional majority shareholder".

34. It is then argued that the Minister's ownership should not be regarded as *prima facie* valid, because, unlike the situation in the Irish Life injunction proceedings, it has not been established to be lawful in *inter partes* litigation. This submission is based on the proposition that, after hearing the *inter partes* proceedings, this court was not "able to uphold" the legality of the direction order and instead decided to request a preliminary ruling. It is contended that one implication of this is that the original order would never had been made, at least in the same terms, if there had been an *inter partes* hearing.

35. The plaintiffs then argue that it follows, on this line of reasoning, that the court should be taken to have found that the defendant did indeed breach the provisions of the Second Company Law Directive, but that the court allowed for the possibility that the breaches were legal because of current circumstances (relating to the financial and economic crisis) and the Credit Institutions Winding-Up Directive, CIWUD. This outcome, they say, is possible only if the Court of Justice of the European Union "retroactively" changes its jurisprudence on the Second Company Law Directive. This submission, it is said, goes to the weight of the plaintiff's case, as one of the factors to be considered in the context of the injunction application.

36. It is submitted that the principle of legal certainty requires this court to regard the current jurisprudence of the Court of Justice as being fully in force. It is also submitted, in reliance on *Opel Austria v The Council* (ECR ll-39 Case T-115/94), that the principle of legal certainty carries with it a legitimate expectation that those who act in good faith on the basis of the law as it is or as it appears to be should not be frustrated in their expectations.

37. The plaintiffs say that all they wish to achieve in this application is the preservation of the status quo, although what they mean by "status quo" is not the current state of affairs, or the state of affairs subsisting when the proceedings seeking the injunction were issued, whereby the defendant exercises all the rights of a majority shareholder. They submit that they are not seeking to suspend the operation of the direction order, but merely to ensure that their minimum rights under EU law are protected. They rely on the judgment of Evershed MR in *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd*., as cited in Delany on *Equity and the Law of Trusts*, and quote the following passages:

> *"It is, I think, well settled that if A proves that his property rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstances that damages are an adequate remedy for the wrong that he has suffered….*
>
> *The essential aim of an interlocutory injunction is to preserve the status quo existing between the parties to an action until the trial of the issues in dispute can take place and it will have effect until the final determination of the rights of the parties by the court. The rationale behind the grant of such injunctions is primarily the need to protect the rights of a plaintiff by preserving the circumstances which exist at the time he institutes proceedings to prevent him suffering irreparable prejudice by reason of the delay which must necessarily occur between the institution of proceedings and the trial of the action."*

38. It is submitted that the avoidance of irreparable prejudice requires ensuring that the proceedings do not become moot by reason of the Minister's actions. The plaintiffs make the case that if the injunctions are not granted the substantive proceedings will become moot. This is because the remedies prescribed by the Act – the setting aside, or variation or amendment of the direction order – will not be possible to implement if the Minister has disposed of his shareholding, whether by way of direct sale or other "sophisticated financial engineering". The eventual decision of the court will then become "*of no practical significance*" (citing *Goold v Collins* [2004] IESC 38) and the ruling of the CJEU will be rendered hypothetical. There will not, in those circumstances, be an effective remedy for the plaintiffs. To put it another way, achievement of the remedy will be rendered "*practically impossible or excessively difficult*", as described in *Unibet*. The plaintiffs also rely on *Brinks Security Luxembourg v The Commission* (Case T-437/05) and *R. v Secretary of State, ex p. Factortame (*Case C-213/89) in relation to the obligation of national courts to ensure that an effective remedy is available and to grant interim relief where such is necessary. Article 47 of the Charter of Fundamental Rights of the European Union (the right to an effective remedy and a fair trial) is also prayed in aid.

39. Apart from the practical difficulties inherent in setting aside or varying the direction order in circumstances where the Minister is no longer a shareholder, the plaintiffs point to other consequences which would follow a finding of unlawfulness in respect of the Minister's actions, which can only be dealt with if he retains his shareholding. In particular, they refer to the waiver given to the Minister by the Irish Takeover Panel in respect of the obligation that would, in normal circumstances, have compelled him to make an offer to the existing shareholders, and to the legal consequences under s.27 of the Companies Act of being found to have unlawfully allotted shares at a discount to the par value. In relation, to the former, they say that the obligation cannot be enforced if the Minister is no longer a shareholder.

40. In dealing with the issue of the impact of an injunction on the defendant, the plaintiffs rely on the Supreme Court judgment for the proposition that the Minister should, for the purposes of this application, be seen as acting in a quasi-private capacity, and not *qua* Minister. He should not, therefore, be treated any more favourably than any other shareholder opposing an application to restrain him in the disposal of his shares. The defendant is described as "*a provisional majority shareholder who appears to wish to cash out and exit his investment before the CJEU ruling determines the court proceedings…"*

41. Anticipating the arguments put forward by the defendant and notice parties, the plaintiffs say that the damaging consequences predicted result only from the choice of the defendant to inject the capital *via* the holding company rather than directly into the bank. The injunctions sought would not prevent the latter course of action.

**The case of the defendant and notice parties**

42. The affidavits on behalf of the Minister have been sworn by Mr. Desmond Carville, Head of the Shareholding Management Unit in the Department of Finance.

43. Mr Carville refers to the fact that the regulatory landscape has changed to some extent in recent times. By virtue of the European Union (Single Supervisory Mechanism) Regulations 2014 (S.I. No. 495/2014), ILP's banking licence is now deemed to be an authorisation granted by the European Central Bank ("the ECB") under Council Regulation (EU) No. 1024/2013. As of the 4thNovember, 2014, certain of the supervisory responsibilities and powers previously held by the Irish Central Bank have moved to the ECB. Under the new system, banks in the Eurozone have been categorised as "significant institutions" and "less significant institutions". The company and the bank have been designated as "significant" institutions. They are now supervised by a Joint Supervisory Team consisting of ECB and Central Bank personnel. The ECB now has the power to enforce compliance with regulatory capital requirements and can impose penalties or withdraw a bank's licence for breach.

44. In November, 2014 the ECB carried out an assessment of the bank (amongst other institutions). The assessment involved an "Asset Quality Review" and a "stress test". The bank, in common with the other Irish banks, passed both the asset quality review and the baseline stress test scenario. However, it failed the adverse stress scenario, which requires banks to hold 5.5% common equity tier 1 capital. The conclusion was that an additional €855 million capital was required.

45. Under the applicable rules, the bank had two weeks to submit a capital plan. It has until the 26thJuly, 2015 to execute that plan, assuming that it is approved. It should be noted that the details of the bank's capital plan have not, with some exceptions, been disclosed to the court for reasons of confidentiality. However, Mr Carville has deposed to the fact that it includes reference to the €400m Contingent Capital Notes held by the State (which was part of the original investment package put in place by the Minister in 2011) and a plan for the raising of additional capital "through a new issue of equity or qualifying instruments." This latter aspect is referred to as the "Capital Raise".

46. The plan has not, as yet, been approved by the ECB. Mr Carville says that if it is not, the bank is highly unlikely to be able to find alternative methods for meeting the capital requirement.

47. In summary, Mr Carville describes the process that would be involved in the capital raise as requiring the issue of a prospectus (to be approved by the Central Bank) and, because of the number of shares which may be required to be issued to new investors, a general meeting of the shareholders of the company.

> *"While the resolutions cannot be finalised until the structure of the Capital Raise has been decided, it is expected that the resolutions would be typical of a transaction of this nature and, at a minimum, would require resolutions amending the current share capital and authorising the issue of new shares, and would comprise both ordinary and special resolutions. It is likely that the resolutions that will be required in this regard would be precluded by the injunction sought by the plaintiffs in this regard if granted."*

48. This last sentence reflects the belief of the defendant and notice parties, that the minority shareholders will oppose proposals made by them. If the Minister is not allowed to exercise his voting rights, it is believed that the Capital Raise plan will be defeated. In this eventuality, Mr Carville says that the bank will not meet its regulatory requirements. It will not be open to the Minister to seek a further direction order from the High Court to override the minority, since the Act will expire at the end of this year.

49. Apart from the consent of the shareholders, the Capital Raise will require approval from various bodies including the European Commission. According to Mr Carville, there will at the same time be a process of negotiations between the State, the bank and the European Commission to secure approval of a revised Restructuring Plan for the bank. He says that it is assumed that there will be no further State aid – i.e. further State investment – available to the bank.

50. In a supplemental affidavit, Mr Carville has taken issue with the description of the Minister by the plaintiffs as a shareholder

> *"who appears to wish to cash out and exit his investment before the CJEU ruling…"*

Mr Carville says that

> *"there is no basis for any suggestion that the minister is planning to sell his shares in ILPGH prior to the ruling of the CJEU. As explained in my first affidavit, the Capital Plan for ILP requires the approval of the ECB, which has not yet been given but is expected shortly. Accordingly, the details of the Capital Raise, which is required to be completed by 26 July 2015, are not settled at this point in time."*

51. Mr Carville also disagrees with the plaintiffs' view that a sale of part of the Minister's shareholding would not alter the capital position of ILP because it would simply mean that a new shareholder would replace the Minister. He says that it is more likely that ILPGH would seek new equity

> *"and, if successful in attracting such investment, the Minister would choose not to take up his pre-emption rights. In such a scenario, the Minister's shareholding would be diluted and the capital position of the ILPGH/ILP Group would be improved by an overall increase in investment by way of new equity."*

52. The suggestion is also made that "certain putative investors" would only be interested in a capital raise of such a size that it would require the sale of a portion of the Minister's shareholding as well as a subscription for new equity.

53. On behalf of the defendant, Mr Carville says that the granting of the injunctive relief is likely to prevent the implementation of the Capital Plan and the Capital Raise for the bank. He says that if this is the result, the bank could be subject to "censure, sanction or fine" by the ECB. Potential fines could be up to 10% of the bank's total annual turnover. He predicts that the group's ability to access funding would be reduced and the cost of its funding would increase. Further, he says that there would be a risk "in an extreme scenario" that the bank could have its licence suspended or revoked.

54. Mr Carville goes on to suggest that there would be a risk that the bank would be placed into resolution. If the bank were to be placed into resolution, this would not alone leave all of the shareholders with valueless shares, and affect unguaranteed and unsecured creditors (including depositors) but would be "highly likely to adversely affect the stability of the financial sector in the State." This is because a large proportion of the bank's funding is still guaranteed by the State through the Deposit Guarantee Scheme and the Eligible Liabilities Guarantee, to a combined figure of about €16.9 billion. In addition, the State would almost certainly lose all of the €2.7 billion it has put into the bank.

55. On behalf of the notice parties, the Company Secretary, Mr Ciaran Long, also deals with the outcome of the stress tests. He points out that there is no mechanism for an extension to the nine months permitted for implementation of the Capital Plan. If the bank does not cover the shortfall by the 26th July of next year, the bank will be in breach of its regulatory capital requirements and its licence will be at risk.

56. Mr Long avers that detailed plans have been prepared to raise the necessary capital and that there has been engagement with potential investors. The plans contain "optionality" as to how the capital will be raised – that is, the plans include but are not limited to a placement, and a public offering, each of which would involve the issue of new shares. The capital raise is intended to proceed in the second quarter of 2015, and there will be a need to obtain shareholder approval at a general meeting in the first half of the year. Mr Long says that it is "envisaged" that the pre-emption rights of existing shareholders will be allowed for.

57. It is averred that if the reliefs sought were to be granted

> *"it would have serious direct adverse consequences for the Bank and serious indirect consequences for Group Holdings which could place the Group in a very uncertain commercial position."*

58. Mr Long agrees with much of what is raised by Mr Carville – the unlikelihood, if not impossibility, that the necessary capital could be raised within the timeframe; the reduction of access to funding; the impact on its business; the possibility of censure or fine and, ultimately, the possibility of a suspension or revocation of the bank's licence. However, he does not suggest that the bank might end up in resolution.

59. It is averred that the approval of the Minister, as majority shareholder, will be required in order to proceed with the capital raise and that this can only be obtained through the exercise by the Minister of his voting rights at a general meeting, in order to effect a capital raise and the issuance of any new shares.

60. Mr Long says that, having regard to the damage that would be suffered by the Minister and the bank in the event that the latter is unable to fulfil its regulatory requirements, the undertaking as to damages given by the plaintiffs is meaningless.

61. The defendant submits that, no matter what transpires in relation to the capital raise, the case will not become moot. There will still be a live legal dispute between the parties. Furthermore, it has been confirmed to the court that no case will be made in relation

to mootness on behalf of the defendant on the return of the case from the CJEU. If he is no longer a shareholder in the company, no case will be made that because of that fact he has no case to meet.

62. On the evidence, the defendant submits that there is at least an arguable case as to the potentially very serious consequences for the capital plan if an injunction is granted.

63. In relation to the plaintiff's submission that the capital plan can proceed on the basis that the bank can be recapitalised without reference to the company and its shareholders, it is said that the same argument was made in the substantive proceedings, and that the answer remains the same – the Minister must keep some control over an investment of this scale, and does so through his shareholding in the company.

64. The facts of the Irish Life case are distinguished to a certain extent in relation to the role and capacity of the Minister. In that case, it is submitted, the Minister was found to be acting in a "quasi-private" capacity because he had previously paid the purchase price for Irish Life, and the funds used for the purchase had been used for the recapitalisation. What was at issue in the injunction proceedings was his right to sell on the asset thus acquired by him. In the current circumstances, recapitalisation is ongoing and the Minister is not simply dealing with assets that happen to be in his ownership.

65. It is submitted on behalf of the notice parties that there is no provision in the relevant regulations for an extension of the deadline and that a bank which cannot raise regulatory capital is wholly weakened in the commercial context, even if no sanction is imposed. It is stressed that the issue is now out of the hands of the national authorities of this State - the relevant supervisory body is now the ECB, not the Irish Central Bank, and the ECB considers itself responsible for a broader situation. The point is also made that the bank has yet to get final approval for its restructuring plan, and that there will be no more State aid available.

**Damages as an adequate remedy in the instant case**
66. The plaintiffs have not included a claim for damages in these proceedings (and it is accepted that they probably could not have included such a claim in the substantive proceedings, which are based on the statutory remedies).

67. The defendant and notice parties have submitted that a case of this nature falls within the restricted category of public law cases where damages would be appropriate as a remedy. They say that damages would be an adequate remedy for any loss that the plaintiffs can prove, in the event that the court ultimately finds against the Minister. The fact that a share carries both property and contract rights does not, it is submitted, mean that there is no financial remedy for the rights of a shareholder. The Minister has stated that he will consent to an amendment of these (injunctive) proceedings, or indeed any of the outstanding proceedings taken by these plaintiffs, to include a claim for damages.

68. It is stressed that this is not a case to be equated with the scenario posited by Clarke J. in Diamond – in these proceedings, the minister maintains that he is the lawful owner of the shares. If he is wrong, the illegality sounds in damages, but there has not been a knowing invasion of rights coupled with an offer to pay damages.

69. The plaintiffs say that they are entitled to stand by their choice not to seek damages, preferring, as they do, the statutory remedy of setting the direction order aside. They argue that they should not have to go to the trouble and expense of putting together evidence as to the valuation to be put on their loss. They say, in any event, that the wrong that they have suffered is not one that can be compensated for. This is because, they maintain, a share does not simply amount to a saleable property right but also confers a degree of control over the company that cannot be translated into financial terms.

70. An undertaking as to damages has been given by the plaintiffs. The defendant and the notice parties say that damages would not be an adequate remedy for them in the circumstances, not least because of the inability of the plaintiffs to make good any loss caused by reason of the injunctions, should the defendant succeed in the case.

**Delay**
71. The defendant makes the case, while accepting that it may not be his strongest point, that the plaintiffs should have moved for an injunction once the court had delivered its judgment in August and informed the parties that there was to be an Article 267 reference.

**Discussion and conclusions**
72. In the first instance, it is important to make it clear that the belief of the plaintiffs that the decision to request a preliminary ruling from the CJEU somehow alters the legal status of the direction order is misconceived. That status remains as it was – the direction order was made by the High Court under the terms of a statute carrying the benefit of the presumption of constitutionality, and is legally valid unless set aside or varied by a court which comes to the conclusion that the underlying opinion of the Minister was unreasonable or vitiated by legal error. The fact that the court decided to refer certain issues to the CJEU does not of itself change that – it is simply a reflection of the fact that the court considers a ruling to be necessary to its decision. Nor does it in any way undermine the legal standing of the *ex parte* order, which was found in the earlier judgment to have been made in compliance with the procedural requirements of the Act. To speak, therefore, of the order as being "provisional," or as having no *prima facie* validity, is not correct. If one were to take that approach, it would be more logical to say that the request for a ruling demonstrated that the plaintiffs had not discharged the burden of proof – but the fact is that that would be equally misconceived. The case has not concluded.

73. The principle enunciated by Hardiman J. in *Adam*, which was a case concerned with the jurisdiction of the court to set aside a grant of leave to seek judicial review, does not in my view cover an order made under the terms of a statutory procedure. This Act, as has been said before, is unique, but its provisions must be accepted by the court unless a finding is made in other proceedings that it lacks Constitutional validity.

74. Secondly, the court does not accept that the only basis upon which the defendant can succeed before the CJEU is if that court retrospectively alters the jurisprudence on the Second Company Law Directive. As detailed in the earlier judgment, the defendant has put forward a number of different arguments: - that the scope of ECJ authorities relied upon by the plaintiffs is not, on their true interpretation, as contended for by the plaintiffs; that the authorities are inapplicable to the factual situation which pertained at the time the direction order was made and that new legal obligations, imposed upon this State as a result of the economic crisis and the "bailout" by the External Partners changed the legal landscape in ways not anticipated in the Greek cases of the 1990s. The only comment I wish to make on the merits of these arguments is that, had I been persuaded that the situation was indeed fully covered by the Greek cases, as submitted by the plaintiffs, I would not have found it necessary to request an Article 267 ruling.

75. That being so, the issue on this application is whether or not the court should restrain the defendant from exercising what are, on

the face of it, property rights associated with his ownership of the shares allotted to him on foot of the direction order.

76. The approach that the court should take to this issue is clearly governed by the Supreme Court judgment dealt with at length above.

77. Applying the *Okunade* analysis, it is obvious that the plaintiffs have, as conceded by the defendant and notice parties, established an arguable case. So too has the defendant.

78. In considering where the greatest risk of injustice lies, the court is obliged to "give appropriate weight to the orderly implementation of measures which are *prima facie* valid". In this instance, I take the "measure" to be the direction order, which is valid unless set aside or varied on the grounds set out in the Act. In considering what is meant by its "orderly implementation", I have to bear in mind the statutory objectives set out in the Act, the reasons given by the Minister in his application for the order and the findings made by this court in the earlier judgment. These are fully dealt with in that judgment. In my view, the "orderly implementation" of the direction order, as envisaged by the Act, requires that the Minister be entitled to utilise the rights associated with the share ownership acquired by him on foot of the State investment.

79. The public interest in the operation of the measure in question is something that has probably undergone a transition from the stage at which the immediate priority was to recapitalise the banks in this State so as to prevent their potential collapse, and the consequential effects on the State and, indeed, the European Union. At this point, it appears from the affidavits that the bank is in a rather healthier condition. However, it is clearly not out of the woods yet and, as a regulatory matter, requires further recapitalisation. There is in my view a real and serious risk, if the Minister is prevented from either selling his shares or voting on measures such as the issuance of new shares, that the bank's efforts to meet the regulatory requirement will fail. This will leave it open to sanctions, including a fine, suspension or revocation of its banking licence. I do not find, on the evidence presented in this application, that there is a serious risk that the bank would go into resolution, but the consequences of such sanctions as seem likely would certainly make it considerably more difficult to access funding and attract investment and thereby cause very significant damage. Having regard to the very large amount of public money invested in the bank, I consider that it would not be in the public interest that the Minister be restrained from seeking to utilise his shareholding in the manner that seems best calculated to ensure the required recapitalisation.

80. The court must then consider the consequences for the plaintiffs if the defendant is not restrained in the manner sought.

81. As was the case with the Irish Life injunction proceedings, the court would find strong support for the plaintiffs' submissions on the question of irreparable harm if it seemed that the case might become moot. However, the defendant has clarified that issue by confirming that mootness will not be raised on his behalf. It seems to me that the plaintiffs may not fully appreciate the importance of a statement of this kind to the court – it is a position from which the defendant may not resile, and the court can rely upon it as did the Supreme Court.

82. Similarly, the defendant has undertaken to consent to an amendment to the proceedings to include a claim for damages. However, the plaintiffs have not claimed, and as of now do not wish to claim, an award of damages.

83. This raises an unusual question – whether damages can be considered to be an adequate remedy where the plaintiffs expressly say that they do not want them and prefer the remedies they have looked for in their pleadings.

84. It seems to me that in such circumstances, the court must consider whether the *availability* of damages, having regard to the undertaking to consent to an amendment, is sufficient. Otherwise, the choice of remedy by the plaintiffs could have the effect of determining the issues in an injunction application without reference to the potential damage to the opposing party.

85. In this case, I consider that the defendant's undertaking meets the case in relation to the adequacy of damages.

86. I bear in mind the plaintiffs' argument that their shares carry a right to participate in the control of the company, and their contention that the Minister has wrongfully usurped that control. However, I do not consider that this is a matter that cannot be remedied in damages. To begin with, shares in public companies are quintessentially saleable items. Secondly, in assessing this issue, I must have regard to the facts of the case. These plaintiffs, before the Minister obtained the direction order, owned a fraction of 1% of the shares in the company. Their rights in relation to the control of the company were far from significant. (While the plaintiffs occasionally seem to suggest that they speak on behalf of 135,000 shareholders, this is not a class action or a representative action.) The *status quo*, at the time of the initiation of these proceedings, is that the Minister owns 99.2 % of the shares and the plaintiffs own a very small fraction of the remaining 0.8%.

87. In determining the question as to where the greatest risk of injustice lies, I find that the most compelling consideration is that to grant the injunctions sought would be to prevent the majority shareholder from taking any meaningful steps in relation to the required implementation of the capital plan. This carries obvious risks to the commercial wellbeing of the company and, potentially, to the State. I do not find that refusal of the reliefs will cause irreparable harm to the plaintiffs, should they ultimately succeed in the substantive proceedings. This is a case where the loss is financially remediable, even if the calculation of loss is complex. Any other remedy would also be complex – unwinding the legal effects of the direction order would be far from straightforward.

88. I also find that damages are available to the plaintiffs in the event of a successful outcome, should they wish to amend their proceedings to claim them, and that damages would constitute an adequate remedy. Further, I do not see that there is any reality in the plaintiffs' undertaking as to damages. If the company does not meet the capital requirement there is no prospect of the plaintiffs being able to make good the losses that could ensue.

89. For the sake of completeness I should say that I do not find that the plaintiffs are debarred from seeking the injunctive relief on the basis of delay. This was a case where, in discussion with the parties' representatives, the court had actually set aside dates for the hearing before the injunctive proceedings issued. Dates were also set for the lodgement of papers and submissions, and were on at least one occasion the subject of an application by the notice party. At no stage was the court informed by the defendant that there was any degree of urgency about the matter.

90. In all of the above circumstances, I refuse the reliefs sought.