Neutral Citation [2013] IEHC 39

THE HIGH COURT

[2012 No. 3230 P]

BETWEEN

DAVID HALL

PLAINTIFF

AND

MINISTER FOR FINANCE, IRELAND, THE ATTORNEY GENERAL AND THE CENTRAL BANK OF IRELAND

DEFENDANTS

AND

THE IRISH BANK RESOLUTION CORPORATION AND THE EDUCATIONAL BUILDING SOCIETY

NOTICE PARTIES

JUDGMENT of Kearns P. delivered on the 31st day of January, 2013

The plaintiff in these proceedings is an Irish citizen who operates a private ambulance company employing some 70 staff in the State. He has brought these proceedings to challenge the validity of the mechanism or procedures adopted by the Minister for Finance whereby financial support by means of promissory notes was provided to three financial institutions in 2010. He is not a member of the Oireachtas but brings these proceedings as a taxpayer and concerned citizen.

In the aftermath of the banking crisis which led to the bank guarantee provided by the Government in September 2008, the Oireachtas thereafter passed the Credit Institutions (Financial Support) Act 2008 (hereinafter "the Act") on 2nd October, 2008. It quickly became apparent that, over and above the Government guarantee, various credit institutions, including the notice parties herein, required capital support. During the course of 2009 and 2010, a total of €4.1 billion was provided to Anglo Irish Bank (to which the assets of Irish Nationwide Building Society were transferred in July, 2011) in the form of ordinary equity and special investment shares (the consideration for which was cash) and a total of €30.6 billion in the form of capital contributions (the consideration for which was promissory notes provided by the State). Anglo Irish Bank changed its name to Irish Bank Resolution Corporation (IBRC) on 14 October, 2011. As the promissory notes could be written up for full value in the accounts of the recipient financial institution, the institution in question thereby remained solvent and, in the case of IBRC, the promissory notes are pledged as collateral for Exceptional Liquidity Assistance funding provided to IBRC under a special master repurchase agreement with the Central Bank of Ireland. The total capital thus provided to IBRC was €34.7 billion. Capital was also provided to the Educational Building Society (EBS) by way of €625 million in the form of special investment shares and €250 million by way of a promissory note.

In making this provision, the Minister for Finance relied upon the provisions of the Credit Institutions (Financial Support) Act 2008 which, in its long title, is described as:-

> "An Act to provide, in the public interest, for maintaining the stability of the financial system in the State and for that purpose to provide for financial support by the Minister for Finance in respect of certain credit institutions, to amend the Competition Act 2002 and other enactments, and to provide for connected matters."

"Financial support" was defined in s. 1 of the Act as including a loan, a guarantee, an exchange of assets and any other kind of financial accommodation or support.

Section 2 of the Act (in unamended form) provided as follows:-

> "(1) The Minister has, in the public interest, the functions provided for under this Act because, after consulting the Governor and the regulatory authority, the Minister is of the opinion that-
>
> (a) there is a serious threat to the stability of credit institutions in the State generally, or would be such a threat if those functions were not performed,
>
> (b) the performance of those functions is necessary, in the public interest, for maintaining the stability of the financial system in the State, and
>
> (c) the performance of those functions is necessary to remedy a serious disturbance in the economy of the State."

Section 6 of the Act authorises the Minister to provide financial support for credit institutions as and from the relevant date (being 30th September, 2008) as follows:-

> "(1) As and from the relevant date, the Minister may provide financial support in respect of the borrowings, liabilities and obligations of any credit institution or subsidiary which the Minister may specify by order having regard to the matters set out in s. 2, the extent and nature of the obligations (including the degree of control over possible abuse of the financial support) undertaken and which might be undertaken in the future and the resources available to him or her in that behalf.
>
> (2) In subsection (1) a reference to borrowings, liabilities and obligations includes borrowings, liabilities and obligations to the Central Bank or any person.
>
> (3) Financial support shall not be provided under this section for any period beyond 29th September 2010, and any financial support provided under this section shall not continue beyond that date.

(4) Financial support may be provided under this section in a form and manner determined by the Minister and on such commercial or other terms and conditions as the Minister thinks fit. Such provision of financial support may be effected by individual agreement, a scheme made by the Minister or otherwise. Without prejudice to the Minister's discretion as to such conditions, all financial support provided shall so far as possible ultimately be recouped from the credit institution or subsidiary to which the support was provided.

(5) Where the Minister proposes to make a scheme under subsection (4) —

(a) he or she shall cause a draft of the proposed scheme to be laid before each House of the Oireachtas, and

(b) he or she shall not make the scheme unless and until a resolution approving of the draft has been passed by each such House."

Section 6 (12) provides:-

"All money to be paid out or non-cash assets to be given by the Minister under this section may be paid out of the Central Fund or the growing produce thereof."

The plaintiff contends that the provision of financial support pursuant to s. 6 (1) of the Act, as amended, constitutes an appropriation of revenue or other public moneys within the meaning of Article 17 of the Constitution. That Article provides as follows:-

"(1) 1° As soon as possible after the presentation to Dáil Éireann under Article 28 of this Constitution of the estimates of receipts and the estimates of expenditure of the State for any financial year, Dáil Éireann shall consider such estimates. 2° Save insofar as may be provided by specific enactment in each case, the legislation required to give effect to the financial resolutions of each year shall be enacted within that year.

(2) Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

The plaintiff in these proceedings seeks a declaration that the appropriation of revenue or public moneys by the Minister for Finance authorised otherwise than by vote of Dáil Éireann is unlawful, in that the payment out of public moneys on foot of the promissory notes issued by the first defendant to the notice parties herein is an appropriation of public moneys within the meaning of Article 17 of the Constitution and, absent authorisation by Dáil Éireann, is unlawful.

It is common case that no such vote or resolution was passed by Dáil Éireann.

The plaintiff thus seeks a declaration that the provision or making in 2010 by the first defendant of promissory notes to the notice parties herein was made *ultra vires* the terms of s. 6 (1) and s. 6 (3) of the Act as amended. Section 6, if construed constitutionally, must be taken as meaning that the Minister must first get Oireachtas approval by way of an appropriation for a specific sum subject to a temporal limitation. In that latter context, the plaintiff notes that repayments on foot of the promissory notes will continue up to 2031.

In the alternative, the plaintiff claims that s. 6 of the Act is unconstitutional as an impermissible assumption of power by, or delegation of power to, the Minister.

In short summary, therefore, the plaintiff's claim may be seen as one premised on the proposition that inappropriate and impermissible mechanisms or procedures were adopted and implemented by the Minister for Finance whereby Dáil Éireann was bypassed and deprived of an opportunity of voting either in favour or against the appropriation of moneys, a safeguard and right vested in Dáil Éireann by Article 17. In the defence delivered on behalf of the various defendants the first line of defence is to deny that the plaintiff has *locus standi* to institute or maintain these proceedings or to seek the declarations and reliefs sought. It is further contended that the plaintiff failed to bring the proceedings promptly or "within the time provided for by the Rules of the Superior Courts in relation to public law issues" and is thus out of time for seeking the public law declarations and injunctions now sought.

Otherwise the defence admits that certain credit institutions sought to access Emergency Liquidity Assistance (ELA) from the fourth named defendant which required to be guaranteed by the first named defendant to the extent that the ELA requirement exceeded the collateral available from the credit institutions. Such a guarantee was given pursuant to the Act. It is admitted that the capital provided was shown on the general Government deficit in 2010, with the result that the deficit for 2010 was estimated to be in the region of 32% of GDP. Eurostat rules required the full amount of the capital provided to be recorded in 2010 although no payment in respect of the promissory notes was made until March 2011. The IBRC promissory notes are to be paid over a period to 2031, with equal instalments of €3.06 billion being paid from 31st March, 2011 and with the amounts to be paid decreasing from 31st March, 2024.

The defence denies that the specific mandate of Dáil Éireann was required for the making of the promissory notes and/or the granting of the guarantee to the Central Bank concerning the Emergency Liquidity Assistance or that the measures undertaken by the first named defendant were *ultra vires* as alleged. On the contrary, the first named defendant contends that he acted lawfully under the powers conferred on him by the Act. Specifically, it is denied that the provisions of the Act, as amended, do not authorise the making of the promissory notes without a resolution of Dáil Éireann prior to the provision of same. Further, it is contended that, pursuant to s. 6 (3A) of the Act as amended, the first named defendant may specify a later end date for the provision of financial support in accordance with the requirements of the section.

It is further denied that the provision of financial support pursuant to the Act as amended constitutes an appropriation of revenue or other public monies within the meaning of Article 17 of the Constitution or that in providing such promissory notes the Minister was acting unlawfully in the absence of a resolution providing for same voted upon by Dáil Éireann in accordance with Article 17. It is further denied that s. 6, or any part thereof, is unconstitutional as alleged.

AGREED FACTS

The parties have agreed certain facts as follows:-

1) The Credit Institutions (Financial Support) Act 2008 (the Act) was enacted on the 2nd day of October, 2008.

2) Five Schemes were made pursuant to section 6(4) of the Act. The said schemes were approved by the Oireachtas and are contained in the following statutory instruments:

- S.I. 411 of 2008
- S.I. 490 of 2009
- S.I. 470 of 2010
- S.I. 546 of 2010
- S.I. 634 of 2011
- S.I. 519 of 2012

3) The period in which financial support provided under s. 6 of the Act shall not continue beyond was extended pursuant to the following Orders made by the Minister:

- S.I. 488 of 2009 - to 29th September 2015
- S.I. 471 of 2010 - to 31st December 2015
- S.I. 548 of 2010 - to 30th June 2016
- S.I. 256 of 2011 - to 31st December 2016
- S.I. 636 of 2011 - to 30th June 2017
- S.I. 225 of 2012 - to 31st December 2017
- S.I. 520 of 2012 - to 30th June 2018

4) On 15th January, 2009 the Government announced that it would take steps that would enable Anglo Irish Bank to be taken into State ownership. The Anglo Irish Bank Corporation Act, 2009 provided for the transfer of all the shares of the Bank to the Minister for Finance and was enacted under Irish law on 21st January, 2009. On the same date, the Bank was re-registered as a private limited company.

5) During the course of 2009 and 2010 a total of €4.1 billion was provided to the Irish Bank Resolution Corporation (IBRC) in the form of ordinary equity and special investment shares (the consideration for which was cash) and a total of €30.6 billion in the form of capital contributions (the consideration for which was promissory notes provided by the State). The Promissory Notes are pledged by IBRC as collateral for Exceptional Liquidity Assistance funding provided to IBRC under a Special Master Repurchase Agreement with the Central Bank of Ireland.

6) The total capital provided to IBRC was €34.7 billion.

7) This capital was provided by the Minister for Finance to IBRC in 2009/ 2010.

8) The instalments due to IBRC under the promissory notes are to be paid over a period from March 2011 to March 2031.

9) Capital was provided to the Educational Building Society Limited (EBS) by way of €625 million in the form of special investment shares and €250 million by way of a promissory note.

10) IBRC and EBS sought to access Emergency Liquidity Assistance (ELA) from the Central Bank of Ireland which was guaranteed by the Minister for Finance to the extent that the ELA requirement exceeded the collateral available from the credit institutions. Such a guarantee was given pursuant to the Credit Institutions (Financial Support) Act 2008, and was extended.

11) The Capital provided was shown in the General Government Balance in 2010, with the result that the deficit for 2010 was estimated to be in the region of 32% of GDP. Eurostat rules required the full amount of the capital provided to be recorded in 2010 although no payment in respect of the promissory notes was made until March 2011.

12) The full amount of the capital provided was added to the level of General Government Debt in 2010.

13) The interest rate charged on the promissory notes was referenced to Irish Government bond yields at the date that each tranche of promissory notes was issued. An interest holiday was included in the terms of each of the IBRC promissory notes which meant that between 1st January 2011, and 31st December 2012, no interest was payable.

14) The IBRC Promissory Notes are to be paid over a period to 2031, with equal instalments of €3.06 billion being paid from 31st March, 2011 and with the amounts to be paid decreasing from 31st March, 2024.

15) The 31st March, 2011 IBRC promissory note payment was by way of cash payment, the IBRC promissory note payment due on the 31st March, 2012, was settled by the delivery of a long term Irish Government Bond to the IBRC.

16) The 31st March, 2011 IBRC promissory note payment was made from the Central Fund and was subject to the grant of a credit by the Comptroller & Auditor General for it.

17) A higher interest rate will be chargeable on the IBRC promissory notes from 1st January, 2013 to reflect the fact that an interest holiday was taken for the full calendar years 2011 and 2012.

18) A number of Statutory Instruments have been made pursuant to section 6(3) of the Credit Institutions (Financial Support) Act 2008, which allows for the extension of the period of financial support beyond 29th September, 2010, by Ministerial Order. Statutory Instrument S.I. 520 of 2012 extends the date for the provision of financial support to 30th June, 2018. Furthermore, pursuant to s. 6(3A) of the Act as amended, the first named Defendant may specify a later end date for the provision of financial support in accordance with the requirements of that section.

19) In the Estimates of the Receipts and Expenditure of the State for the financial years 2011 and 2012 the payment of the Promissory Notes is set out under Non-Voted Capital Expenditure.

20) In relation to the Financial Support given to Anglo Irish Bank, the Minister, having consulted with the Governor of the Central Bank and the Financial Regulator, was of the opinion that:

(a) There was a serious threat to the stability of credit institutions generally in the State or would be if financial assistance was not provided;

(b) The provision of financial assistance was necessary in the public interest for maintaining the stability of the financial system in the State and was necessary to remedy a serious disturbance in the economy of the State.

21) The Minister having regard to those matters and the extent and nature of the obligations undertaken and which might be undertaken in the future and the resources available to him for that purpose the Minister provided financial support to Anglo Irish Bank in the form of ordinary shares and Promissory Notes.

22) In relation to the Financial Support given to INBS. The Minister having consulted with the Governor of the Central Bank and the Financial Regulator was of the opinion that:

(a) There was a serious threat to the stability of credit institutions generally in the State or would be if financial assistance was not provided;

(b) The provision of financial assistance was necessary in the public interest for maintaining the stability of the financial system in the State and was necessary to remedy a serious disturbance in the economy of the State.

23) The Minister having regard to those matters and the extent and nature of the obligations undertaken and which might be undertaken in the future and the resources available to him for that purpose the Minister provided financial support to INBS in the form of special investment shares and Promissory Notes.

24) In relation to the Financial Support given to the EBS, the Minister, having consulted with the Governor of the Central Bank and the Financial Regulator, was of the opinion that:

(a) There was a serious threat to the stability of credit institutions generally in the State or would be if financial assistance was not provided;

(b) The provision of financial assistance was necessary in the public interest for maintaining the stability of the financial system in the State and was necessary to remedy a serious disturbance in the economy of the State.

25) The Minister having regard to those matters and the extent and nature of the obligations undertaken and which might be undertaken in the future and the resources available to him for that purpose, provided financial support to EBS in the form of special investment shares and Promissory Notes.

26) Before the beginning of the year (usually in December of the previous year), the Government presents to the Dáil, on or before Budget Day, in accordance with Article 28.4.3 of the Constitution, a White Paper on Receipts and Expenditure setting out its forecasts of the State's receipts and expenditure for the coming year.

27) This is followed a few days later by the Budget, a central element of which is the Financial Statement of the Minister for Finance, in which the Minister sets out on behalf of the Government its overall budgetary policy for the year ahead and proposed changes in taxation. Since 2011, the Estimates for Voted Expenditure, which form part of the overall Budget, have been presented to the Dáil separately by the Minister for Public Expenditure & Reform.

28) The Budget covers Non-Voted Expenditure - which is set out in the White Paper on Receipts and Expenditure with a break down of Non-Voted current expenditure and Non-Voted Capital expenditure. When total expenditure is expected to exceed total receipts the Budget sets out how much the Government proposes to borrow.

29) Proposed taxation measures which are intended to have immediate effect are contained in Financial Resolutions. These Resolutions are debated and voted on in the Dáil on Budget day. The Budget is also debated in the Seanad on Budget Day although, in keeping with the primacy of the Dáil in financial matters, the imposition of taxation measures by Financial Resolution does not involve a vote in the Seanad.

30) Following the end of the year, the Department of Finance prepares detailed accounts (the Finance Accounts) showing all receipts into and issues from the Exchequer for the year in question together with details of the national debt, which are based on data supplied by the NTMA. The Revenue Commissioners prepare Revenue Accounts and the Departments to which money is voted directly by the Dáil prepare Appropriation Accounts which account for their spending of the amounts appropriated to them during the year. These Accounts are signed by their Accounting Officer (usually the

Secretary General).

31) All these accounts are then examined by the Comptroller & Auditor General who audits and certifies them and reports on them to the Dáil. The Comptroller & Auditor General's Report is then examined by the Public Accounts Committee which then makes a Report on them to the Dáil. The Minister for Public Expenditure and Reform responds to the Committee's Report by way of a Minute of the Minister for Public Expenditure and Reform and this Minute is then considered by the Committee on Public Accounts.

32) Government spending is divided into two broad categories according to the authority for making it - Voted Expenditure and Non-Voted Expenditure. Voted Expenditure is the money used to fund the ordinary services, both capital and non-capital, provided by Government Departments and certain Offices (*e.g.* the Office of the Attorney General) and Agencies (such as the Courts Service or the HSE). The funds are provided for under "Votes", one or more covering the functions of each Department or Office. A "Vote" is an amount of money allocated directly by the Dáil to a Government Department or Office to carry out its services for the year. The annual Budget also includes expenditure which is not voted annually by the Dáil. This is called Non-Voted Expenditure and it is paid out of the Central Fund on the authority of various Statues enacted by the Oireachtas rather than through the annual Estimates procedure.

33) Non-Voted expenditure has a long provenance and has been part of the system since before the foundation of the State.

34) Non-Voted Expenditure is reported on and accounted for in the annual Finance Accounts as are issues for voted spending. The Finance Accounts are an account of payments into and out of the Central Fund. This includes the issues or payments for non-voted spending including the sinking fund, servicing the National Debt, the Capital Services Redemption Account, payments to the holders and former holders of political and constitutional offices, payments to the EU budget together with various payments relating to the State's international obligations and payments in relation to elections and referendums. It also covers non-voted capital expenditure.

35) Non-Voted expenditure divides into two broad categories - Central Fund Charges and Other Central Fund Issues. Central Fund charges are permanent charges on the State Revenues paid under the continuing authority of specific statutes. They include the servicing of the national debt and the salaries, pensions and allowances of the constitutional officer holders such as the President, the Judiciary and the Comptroller & Auditor General. Other Central Fund Issues are not constant regular payments. Such Issues are repayable advances to State bodies in respect of investment in projects making up part of the Public Capital Programme. Payments made to the banks in recent years are included in this category of expenditure.

36) Authority for Non-Voted Expenditure (whether they are Central Fund charges or issues) may provide for the payment of a fixed amount annually or it may enable payment up to a certain limit or it may not specify any limit at all (as in the case of national debt service costs). The statutory authority for Central Fund Issues usually provides that public money may be made available by the Minister for Finance from the Central Fund or the growing produce thereof.

37) Even when public expenditure has been approved by the Oireachtas, whether through the annual Estimates "Voted Expenditure" or through specific legislation, "non-voted Expenditure" the authorisation for the disbursement of this money is subject to controls. The spending is subject to the sanction of the Minister for Finance (and since 2011 the Minister for Public Expenditure and Reform) under the Exchequer and Audit Department Act 1921 and the Ministers and Secretaries Act 1924 (as amended). It is also subject to the approval of the Comptroller & Auditor General pursuant to Article 33 of the Constitution and the Comptroller & Auditor General Acts 1923-1993.

38) It is the Comptroller & Auditor General's functions (as Comptroller) to control on behalf of the State all disbursements of moneys and to audit all accounts of moneys administered by or under the authority of the State. He must ensure that no money is issued from the Exchequer by the Minister for Finance except for purposes approved by the Oireachtas.

39) Before any money can issue from the Exchequer, the Minister for Finance (or a senior official duly authorised by the Minister) must first make a written Requisition to the Comptroller & Auditor General for an issue of a credit on the Exchequer Account for a stated sum. If the Comptroller & Auditor General is satisfied that the Requisition is correct and that the amount is properly issuable, he then informs the Central Bank that the credit in question is granted. Only then can the issue from the Exchequer be made.

40) The Comptroller & Auditor General will not issue a credit in respect of non-voted expenditure unless satisfied that the Oireachtas has given statutory authorisation for the relevant charge on the Central Fund. A payment from the Central Fund can only be made if there is a legislative provision authorising the payment and the Comptroller & Auditor General gives the necessary credit.

41) Bills providing for Central Fund services are accompanied by a "Money Message" *i.e.* a prior recommendation from the Government signed by the Taoiseach as required by Article 17.2 of the Constitution.

42) The Department of Public Expenditure and Reform, Central Expenditure section / Estimates Office arranges for Money Messages, pursuant to requests from the Bills Office of the Houses of the Oireachtas, in respect of any Bills which involve appropriation, irrespective of which Department is sponsoring the Bill. The wordings of the Money Message differ depending on the type of Message in question.

43) On the 30th September, 2008 the Money message for the Credit Institutions (Financial Support) Bill 2008 was signed by the Taoiseach Brian Cowen and submitted to Dáil Éireann and the Bill was passed through the Dáil and Seanad and signed into law by the President on the 2nd October, 2008.

44) The legislation was legislation passed by the Oireachtas to deal with an unprecedented banking crisis which threatened the collapse of the Irish banking sector and the economy. The Minister for Finance has in accordance with the provisions of s. 6 (15) of the Act provided the Houses of the Oireachtas with Annual Reports informing the members of each House on the situation with regard to the financial support provided under section 6.

45) Since any moneys to be paid out under s. 6 are to be paid out of the Central Fund, they require the sanction and approval of the Comptroller & Auditor General.

46) For the purposes of paying the sums due on the promissory notes on the 31st March 2011, in the sum of €3.06 billion the Minister for Finance was required to and did raise a Requisition for Credit on the Account of the Exchequer requesting that the Comptroller & Auditor General grant to the Minister a credit to provide for those payments.

47) The necessary credit was then granted to the Minister by the Comptroller & Auditor General.

In addition to these agreed facts, evidence was given to the Court by both the plaintiff and by two witnesses called by the defendant from the Department of Finance, namely, Mr. Jimmy McMeel, Principal in charge of the Accountant's Branch/Paymaster General's Office and Ms. Ann Nolan, Second Secretary General of the Department of Finance both of whom furnished witness statements, on which they were cross examined, providing helpful background to explain how payments into and out of the Central Fund are made and effected. Specifically, they sought to explain the distinction to be drawn between voted expenditure and non-voted expenditure.

In short, voted expenditure is the money used to fund the ordinary services, both capital and non-capital, provided by Government departments and certain offices and agencies, such as the Courts Service or the HSE. These funds are provided for under "Votes", one or more covering the functions of each department or office. A "vote" is an amount of money allocated directly by the Dáil to a Government department of office to carry out its services for the year.

Authorised voted public expenditure demands that three key steps be taken:-

(a) The presentation of spending estimates to the Dáil;

(b) Dáil approval of the estimates (the vote of supply) which sets the ceiling on the maximum amount that can be spent;

(c) The Appropriation Act at the end of each year which provides the statutory authority for the appropriation of the money issued to specific public services and purposes.

In addition public financial procedures require to be followed. A sanction of the Department of Public Expenditure and Reform is required. Further, a credit from the Comptroller & Auditor General is also required in respect of disbursements from the Central Fund for voted moneys.

Non-voted expenditure was stated by Mr. McMeel to have a long provenance, going back to s. 14 of the Exchequer and Audit Departments Act, 1866 which provided that monies could be made available either by a resolution of the House or by an Act of Parliament to defray expenses for any specified public services. This Act was carried over by the adoption of Enactments Act 1922 and Article 37 of the 1922 Constitution provided that "money shall not be appropriated by vote, resolution or law unless the purpose of the appropriation has in the same session been recommended by a message from the representative of the Crown …." Thus Mr. McMeel stated that non-voted expenditure – and the Minister contends that the provision of financial support by means of promissory notes may be so described – has been part of our financial system since the foundation of the State. It, in turn, divides into two broad categories. The first category is called Central Fund Charges which are permanent charges on the State revenues. They are paid under the continuing authority of specific statutes which have already been enacted by the Oireachtas. These charges include the service of the national debt by the National Treasury Management Agency and also include the salaries, pensions and allowances of the President, the Judiciary and the Comptroller & Auditor General. The policy basis for treating such charges as non-voted expenditure is that they are regarded as being such permanent or fundamental obligations on the State as to be required to be put beyond the usual annual review. They are thus given priority over all other spending obligations and are in the nature of a first charge on the State.

The second category of non-voted expenditure is referred to as "Other Central Fund Issues". Unlike Central Fund Charges these issues are not constant regular payments. Generally such issues are repayable advances to State bodies in respect of investment and projects making a part of the public capital programme. Payments made to the banks in recent years are included in this category of expenditure. Payments of this nature are provided for by specific legislation in each case which usually authorises (rather than requires) the expenditure by the Minister. Authority for non-voted expenditure may provide for the payment of a fixed amount annually or it may enable payment up to a certain limit or it may not specify any limit at all. The statutory authority for Central Fund issues usually provides that public money may be made available by the Minister for Finance from the Central Fund or the growing produce thereof. Similar to legislation which involves spending from annually voted supply services, Bills providing for Central Fund services, *i.e.,* that concern non-voted expenditure are accompanied by a "money message", *i.e.,* a prior recommendation from the Government signed by the Taoiseach as required by Article 17.2 of the Constitution.

Even when public expenditure has been approved by the Oireachtas, whether through the annual estimates "Voted Expenditure" or through specific legislation, "Non-Voted Expenditure", the authorisation of the disbursement of this money is subject to strict controls. The voted spending is subject to the sanction of the Minister for Finance and (since 2011) the Minister for Public Expenditure and Reform. It is also subject to the approval of the Comptroller & Auditor General pursuant to Article 33 of the Constitution and the Comptroller & Auditor General Acts 1923 – 1993. It is the Comptroller & Auditor General's function "to control on behalf of the State all disbursements of moneys and to audit all accounts of moneys administered by or under the authority of the State" (Article 33.1 of the Constitution). Thus he must ensure that no money is issued from the Exchequer by the Minister for Finance except for purposes approved by the Oireachtas. Accordingly, before any money can issue from the Exchequer, the Minister for Finance must first make a written requisition to the Comptroller & Auditor General for an issue of a credit on the Exchequer account for a stated sum. If he is satisfied that the requisition is correct, and the amount properly issuable, the Comptroller & Auditor General then informs the Central Bank that the credit in question is granted. Only then can the issue from the Exchequer be made. The Comptroller & Auditor General will not issue a credit in respect of Non-Voted Expenditure unless satisfied that the Oireachtas has given statutory authorisation for the relevant charge in the Central Fund. Thus a payment from the Central Fund can only be made if there is a legislative provision authorising the payment and the Comptroller & Auditor General gives the necessary credit. The payment made on foot of the promissory notes in March 2011 had a credit from the Comptroller & Auditor General.

The money is then transferred from the Central Fund to the Paymaster General's supply account to make good deficits on that account arising from the spending of departments. Most Non-Voted spending is transferred directly from the Central Fund to the bank account of the recipient.

Similar to legislation which involves spending from annually voted supply services, Bills providing for Central Fund services, *i.e*., that concern Non-Voted Expenditure, are accompanied by a "money message" *i.e*. a prior recommendation from the Government signed by the Taoiseach as required by Article 17.2 of the Constitution. This practice reflects the broad meaning of the term "appropriation" in this context that includes not only a "grant" by way of a vote or resolution of the Dáil and confirmed in the Appropriation Act but also

any proposal in a resolution or bill which involves a charge upon public funds and a consequent appropriation of money. Article 17.2 requires express legislation to be passed for the provision of Central Fund charges, *i.e.*, Non-Voted Expenditure, thus such legislative basis may be provided either through primary or secondary legislation. For example, statutory instruments enacted under the European Communities Act 1972 serve as the basis for EU contributions from the Central Fund. With respect to Central Fund Services, Article 11 of the Constitution requires that any such "charges of liabilities" on the Fund must be grounded in law.

The National Treasury Management Agency (NTMA) raises funds for the State under the authority of s. 54 of the Finance Act 1970 which grants the Minister the authority to raise funds on terms, including terms as to repayment, he deems fit and provides that such funds are to constitute a charge in the Central Fund. Section 18 (1) of the Finance (No. 2) Act 1981 clarifies that s. 54 (1) of the Finance Act 1970 was intended to cover loans and not merely securities. Thus the servicing of the national debt is a significant appropriation of funds by way of Non-Voted Expenditure. The deficit is not solely related to Voted Expenditure – it is made up of both Voted and Non-Voted Expenditure. Were it not possible for the Oireachtas to authorise payments out of the Central Fund by way of statutory authority, and in the manner achieved by the Finance Act 1970 (or indeed the Credit Institutions (Financial Support) Act 2008) the Minister would be unable to raise funds to finance the State in the bond markets. If the obligation or ability to repay bonds were contingent on the Oireachtas choosing to vote in favour of the repayment the uncertainty thereby introduced would render Irish bonds unmarketable at realistic yields. Market participants would not choose to purchase Irish bonds which carried such a risk when other states do not have such a requirement in respect of their bond issuances. An additional constitutional and legislative check is the role of the Comptroller & Auditor General. Any moneys to be paid out under s. 6 of the Act are to be paid out of the Central Fund and require the sanction and approval of the Comptroller & Auditor General.

He concluded by stating that the ability of the State to be able to make payments by way of Non-Voted Expenditure is an important part of the proper functioning of the State. If all the expenditure had to be Voted Expenditure going through the annual estimates, not only would this create an enormous administrative inconvenience, but it would mean that the State would be unable to raise funds with a tenor in excess of one year or whatever time remained until the next Budget. Thus all debt would have to be short term. His view was that such a change would also be a breach of multiple existing debt obligations since the promise to repay debt in both loan and bond obligations with a maturity greater than one year would be compromised.

Evidence was also given by Ms. Ann Nolan, Second Secretary General of the Department of Finance who has been responsible for the Financial Services Division of the Department since July 2010.

She stated that the Act of 2008 did require a message from the Government signed by the Taoiseach recommending it to Dáil Éireann. On 30th September, 2008 such a message for the Act of 2008 was signed by the Taoiseach and submitted to Dáil Éireann. The Bill was passed through the Dáil and Seanad and signed into law by the President on 2nd October, 2008.

She stated that the legislation was passed by the Oireachtas to deal with an unprecedented banking crisis which threatened the collapse of the Irish banking sector and the economy. It was important, and remains important, that the Minister could take swift, decisive and certain action which would be seen to adequately deal with the serious threat to the stability and systemic risk to the financial system and the economy which had arisen.

Ms. Nolan informed the Court that the Act as amended specifically provides the authority for non-voted expenditure by the payment of moneys out of the Central Fund. She underlined that there were constitutional checks and balances built into the legislation. Before the Minister can provide financial support pursuant to s. 6 of the Act he must have regard to and form an opinion in relation to the matters set out in s. 2 of the Act and must further have regard to the matters referred to in section 6 (1) (b) and (c). Furthermore, he is obliged under s. 6 of the Act to provide the Houses of the Oireachtas with annual reports informing the members of each House of the situation with regard to financial support provided under section 6. An additional constitutional/legislative safeguard is the control of the Comptroller & Auditor General. Since any moneys to be paid out under s. 6 are to be paid out of the Central Fund, they require the sanction and approval of the Auditor General. In fact, for the purposes of paying the sums due on the promissory notes on the 31st March, 2011, in the sum of €3.085 billion, the Minister for Finance was required to and did raise a requisition for credit on the account of the Exchequer requesting that the Comptroller & Auditor General grant to the Minister a credit to provide for those payments. Once satisfied as to the correctness of the requisition, the necessary credit was then granted to the Minister by the Comptroller & Auditor General, indicating that he was satisfied that the Oireachtas has authorised the making of the payment by means of the Act. The financial support by way of the promissory notes was thus effected individually or otherwise than by way of a scheme. The primary distinction between financial assistance by way of a scheme and financial support effected individually or otherwise is that the former is more appropriate when the financial support is to be given to the sector or a large portion of the sector whereas the latter is provided on an individual basis. In the case of the promissory notes and indeed in the case of previous payments of large sums of cash to financial institutions a scheme was not used since these were individual financial supports. The Oireachtas chose to differentiate between the provision of a scheme and the provision of individual financial assistance. The former required to be laid before the Oireachtas whereas the latter did not. A scheme was not suitable in the recent banking crisis, given that the banks were free autonomous institutions and were free to say they did not wish to participate in the Credit Institutions Financial Support Scheme (CIFS scheme) and were free to stay in or out of it as they decided.

On the issue of the date up to which financial support may be provided, Ms. Nolan was careful to point out that the financial support was provided at the time the promissory notes were provided, regardless of the payment schedule under the promissory notes. This is a structured form of financial support where the cash flows are scheduled over a number of years. However, the actual financial support is given at the time the asset was provided (*i.e.*, the time of the promissory note was issued) and subsequent payments do not amount to additional financial support but rather payments required under financial support previously provided.

THE ISSUE OF LOCUS STANDI

The Court has set out the background facts in considerable detail so as to make clear the matters upon which the plaintiff seeks adjudication in these proceedings.

However, the critical issue of the plaintiff's *locus standi*, that is to say his standing or entitlement to bring and maintain this challenge must first be considered. This issue was clearly flagged in the defence delivered on behalf of the various defendants on 15th June, 2012. The requirement to show *locus standi* is not a mere *pro forma* or token requirement. There are important considerations with regard to litigation challenging the constitutionality of legislation which the court must consider.

Accepting the plaintiff in this case to be a person acting in good faith, counsel for the defendants, Michael McDowell S.C., nonetheless argued that he lacked the requisite *locus standi* to mount this particular challenge. He drew attention to the fact that the plaintiff is a business man who owns and runs a private ambulance service. He is not now nor has he at any previous time been a member of the Dáil or Seanad. In these proceedings he does not contend for any loss, damage or prejudice unique to him or separate and distinct from that which affects every citizen in this country by the commitments entered into in 2010. Mr. McDowell argued that,

in reality, the plaintiff's proceedings involve an attempt to police Oireachtas procedures by alleging that the rights of Dáil Éireann and its members have been by-passed by the failure of the Minister to seek and obtain a Dáil resolution before making the promissory notes. This was a right which fell to be asserted by a member of that body, specifically elected as its members were to represent the interests of persons such as the plaintiff.

Following the closure of the defendant's case in which the *locus standi* issue was argued, an application was made to the Court by Mr. Anthony Williams, a solicitor acting on behalf of three Dáil deputies, namely, Shane Ross, Stephen Donnelly and Joan Collins. None of these deputies were either parties or witnesses in the case but it was intimated to the Court that all three deputies were supportive of the plaintiff's challenge to the legality of the notes. Mr. William's intervention was limited to a request to the Court to consider certain correspondence passing between Deputies Ross and Donnelly and the Minister for Finance between 3rd January, 2013 and 16th January, 2013. This correspondence was, without objection from counsel for the defendants, received and considered by the Court. No application was made either by Mr. Williams or by counsel for the plaintiff to join one or more of the deputies to the proceedings as notice parties or co-plaintiffs in the proceedings nor was any application made by the plaintiff to call any of the deputies to give formal evidence in support of the plaintiff's claim.

As is apparent from the letter dated 3rd inst., deputies Ross and Donnelly, having adverted to the present proceedings, focused their attention on any "deal" which might be made by the Minister in relation to the promissory notes which might involve a sovereign commitment to appropriate public funds. The deputies called upon the Minister to confirm that no binding agreement would be entered into by him on behalf of the State, absent approval of the members of Dáil Éireann. The letter proceeds to state:-

> "Clearly a right to negotiate is unaffected. The sole requirement is that the members of Dáil Éireann will be asked to authorise the agreement and subsequent payments on foot of any agreement. In the event that you do not provide such commitment to us on or before 15th January 2013, we intend to seek relief in the courts including by way of application for injunctive order restraining you from entering into any agreement on behalf of the State."

By letter of reply dated 10th inst., the Minister stated:-

> "It would not be appropriate for me to restrict the negotiating position of the Government with regard to any discussions relating to the promissory note, but I can assure you that the Government will be fully cognisant of, and in conformity with, all legal and constitutional requirements in the conduct of such discussions and in any agreement reached.
>
> Should the approval of Dáil Éireann or the Oireachtas be required to give effect to any agreement reached or proposed it will be sought at the appropriate time. An assessment of that issue can best be made when the shape of a final agreement is fully apparent and finalised."

By further letter dated 15th inst., the Dáil deputies again sought confirmation that the Minister would seek the approval of Dáil Éireann before finalising any agreement on the promissory notes. The letter continued:-

> "In deference to your position regarding an assessment being made, and strictly without prejudice to our clearly articulated view, we are willing to accept an undertaking from you that pending any finalisation of agreement you will make the terms of such agreement available to the members of Dáil Éireann, so that the members (including us) can consider whether the approval of Dáil Éireann is required. This would afford us an opportunity to bring the matter before the courts should we differ in our assessment as to whether the approval of Dáil Éireann is required."

In his reply dated 16th inst., the Minister reiterated what he had said in his previous letter and stated:-

> "In your letter you make a number of incorrect statements which appear to derive from your understanding of the litigation which is listed for hearing in the High Court on 22nd January. I confirm that the Government accepts the general principle that approval of Dáil Éireann or the Oireachtas is required for the appropriation of public revenues from the Central Fund. Contrary to the matters pleaded and asserted by or on behalf of the plaintiff in the litigation to which you refer, I have not appropriated public funds without adequate authorisation."

While this correspondence may be seen as supportive of the contentions advanced by the plaintiff in these proceedings, it is more particularly directed at this juncture to any renegotiation of commitments already entered into with regard to the payments reserved under the promissory notes, the next of which falls due on 31st March, 2013.

Counsel on behalf of the Minister took the position that the correspondence simply underlined that it was open, and always had been open, to any member of Dáil Éireann who believed that a resolution or vote of Dáil Éireann was a prerequisite to the execution of the promissory notes to have brought the very proceedings threatened in this correspondence.

However, notwithstanding that these legal proceedings had been commenced as far back as 28th March, 2012, with a defence being delivered on 15th June, 2012 in which the issue of the plaintiff's *locus standi* was specifically pleaded, no member of Dáil Éireann had been joined in the proceedings, either as co-plaintiff or notice party. Given that the case was entirely focused on the Minister failure to seek Dáil approval for a vote or resolution to authorise the making of the promissory notes, Mr. McDowell argued that the entitlement to mount the constitutional claim in this case was one which lay with members of Dáil Éireann and not a non-member. It was submitted on behalf of the defendants that legal authority was firmly in favour of the proposition that one litigant (in this case a member of the public, Mr. David Hall) should not be permitted to argue a *ius tertii*, that is to say, a claim which properly belonged to a third party, in this case the 'third party' being the members of Dáil Éireann.

In reply, counsel on behalf of the plaintiff relied on the seminal authority of *Cahill v. Sutton* [1980] I.R. 269 to argue that there can be cases, such as the present one, where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a "transcendent need" to assert against the statute the constitutional provision that has been invoked. No other authority on this issue was opened to the Court or relied upon by the plaintiff in either written or oral submissions.

DECISION

The plaintiff undoubtedly brings these proceedings in his capacity as a citizen and taxpayer only. He does not claim any actual breach or threatened breach of his rights specifically, nor does he claim to have been affected by the obligations arising under the promissory notes to a greater degree than any other citizen or taxpayer.

The general principle regarding standing under the Constitution is that the courts will only entertain a constitutional challenge "where

it is demonstrated that the litigant's rights have either been infringed or are threatened". (See Hogan & Whyte (eds.), J.M. Kelly: *The Irish Constitution* (4th Ed. at 6.2.117)). In *Cahill v. Sutton* [1980] I.R. 269 the plaintiff had issued proceedings against a medical practitioner claiming damages for an injury that he had suffered by reason of the defendant's breach of contract. The defendant pleaded that the plaintiff's action was barred by s. 11 (2) of the Statute of Limitations 1957. Her claim having failed in the High Court, the plaintiff in the Supreme Court sought a declaration that the relevant statutory provision was invalid having regard to the provisions of the Constitution. She based her challenge to the validity of the subsection on the fact that the Act of 1957 did not contain any exception in favour of an injured person who did not become aware of the relevant facts on which a claim might be based until after the expiration of the period of limitation or until a short time before its expiration. However, it was an agreed fact in the case that the plaintiff had known shortly after her accident all the facts necessary to enable her to institute an action. Accordingly, as her challenge to the constitutional validity of the section was based solely on the absence of statutory provisions which, if present, would not be applicable to the facts of her claim, she could not establish that any right of hers had been infringed or was threatened by the absence of such provisions. In those circumstances she had failed to establish the requisite *locus standi*. Henchy J. made a number of observations in the course of his judgment which are of particular relevance in the instant case. At p. 283 he stated:-

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case is being put forward unsuccessfully by another may be left with a grievance that his claim is wrongly or inadequately presented."

At a slightly earlier point in his judgment (at p. 282) Henchy J. had expressed the general rule in the following terms:-

> "This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

Henchy J gave as an example the ruling of court in *East Donegal Co-Operative v. The Attorney General* [1970] I.R. 317 where at p. 339 the Supreme Court stated:-

> "In the present case all the plaintiffs are engaged in the type of business which is directly affected, and subject to control, by the provisions of the Act and it is the opinion of this Court that they have, therefore, a right to maintain these proceedings"

Then at p. 284 of the judgment in *Cahill v. Sutton*, an important passage of particular relevance to the instant case appears:-

> "…if the Courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse….. In particular, the working interrelation that must be presumed to exist between Parliament and the Judiciary in the democratic scheme of things postulated by the Constitution would not be served if no threshold qualification was ever required for an attack in the courts on the manner in which the legislature has exercised its law-making powers. Without such a qualification, the courts might be thought to encourage those who have opposed a particular bill on its way through Parliament to ignore or devalue its elevation into an Act of Parliament by continuing their opposition to it by means of an action to have it invalidated on constitutional grounds. It would be contrary to the spirit of the Constitution if the courts were to allow those who are opposed to a proposed legislative measure, inside or outside Parliament, to have an unrestricted and unqualified right to move from the political arena to the High Court once a Bill had become an Act. It would not accord with the smooth working of the organs of State established by the Constitution if the enactments of the national parliament were liable to be thwarted or delayed in their operation by litigation which could be brought at the whim of every or any citizen, whether or not he had a personal interest in the outcome."

In the next paragraph (also at p 284) he stated:-

> "The Constitution has given Parliament the sole and exclusive power of making laws. The Courts normally accord those laws the presumption of having been made with due observance of constitutional requirements"

It is only fair to acknowledge, as has been pointed out by counsel for the plaintiff in this case, that Henchy J. had stressed that such a rule of practice must, like all such rules, be subject to exception or qualification where the justice of the case so requires. Thus the normal *locus standi* rule may be overlooked if, in the circumstances of the case, there is a "transcendent need to assert against the Statue the constitutional provision that has been invoked" (at p. 285). That said however, Henchy J. in the following lines went on to give illustrations which indicate clearly what he had in mind in adverting to such an exception.:-

> "For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned Statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the court might decide to ignore the want of normal personal standing on the part of the litigant before it. Likewise, the absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest – particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision.
>
> However, those examples of possible exceptions to the rule should not be taken as indicating where the limits of the rule are to be drawn. It is undesirable to go further than to say that the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of the case, the court finds that there are weighty countervailing considerations justifying a departure from the rule" (Emphasis added)

Apart from the obvious importance of the issue itself (which, without more, cannot create *locus standi*), it seems to me that no such countervailing considerations arise in the present case, because, as is clearly evident from the correspondence made available to the Court from two members of Dáil Éireann, there is no want of an entire body of persons who were in a position to assert the supposed failure of the Minister to seek Dáil approval for the making of the promissory notes. Two of them are now threatening to vindicate

their rights through the courts. The members of Dáil Éireann represent the citizens of this country and must be taken as knowing both how Government expenditure works and their rights in relation to it. Indeed the correspondence set out above so confirms as it indicates that the deputies in question have in mind a challenge through the courts to any renegotiated deal which the first defendant might make without Dáil approval. But on the issue before me now, nothing was done in terms of any court challenge by any member of Dáil Éireann to assert that rights vested in Dáil Éireann under Article 17 of the Constitution were usurped or bypassed in the creation of the promissory notes. The plaintiff himself is represented by Dáil deputies who could have brought such a challenge, but he cannot even go as far as to show that he wrote with negative results to his local representative(s), or indeed all or any member of the House, requesting that they assert and vindicate the rights contended for in these proceedings, a step which conceivably might have given him some sort of case to argue that *locus standi* must be taken as devolving on an ordinary citizen in such circumstances. In the present situation the court can not itself become an alternative version of the legislature, ignoring the particular allocations of responsibility provided for in the Constitution.

As pointed out by Henchy J. at p. 286 of *Cahill v. Sutton*:-

> "Were the Courts to accede to the plaintiff's plea that she should be accorded standing merely because she would indirectly and consequentially benefit from a declaration of unconstitutionality, countless statutory provisions would become open to challenge at the instance of litigants who, in order to acquire standing to sue, would only have to show that some such consequential benefit would accrue to them from a declaration of unconstitutionality – notwithstanding that the statutory provision may never have affected adversely any particular persons interests, or be in any real or imminent danger of doing so. It would be contrary to precedent, constitutional propriety and the common good for the High Court, or this Court, to proclaim itself an open house for the reception of such claims"

To this I would only add that no evidence was placed before the court to suggest that a declaration of invalidity could lead only to benefits for the plaintiff. There might be every reason to suppose that such a declaration of invalidity would have very serious adverse implications both for him and all other citizens in terms of both the immediate implications for the State's finances, the country's financial reputation and the Government's ability to continue its programme for the financial recovery to which it is committed.

There is then the further issue of delay and the implications of such delay for this issue. In the instant case, the promissory notes were issued by the Minister under the Act to Anglo and INBS on 31st March, 2010 and 22nd December, 2010 respectively. Adjustments to the promissory note in respect of Anglo dated 31st March, 2010 were made in May and August 2010 pursuant to the adjustment instruments provided for in the March notes. Two years then elapsed before the present challenge by the plaintiff was brought to the making of the promissory note. In reality, therefore, the plaintiff in these proceedings is not only endeavouring to assert a *ius tertii* (because he is in effect arguing a point of constitutional order more properly to be advanced by a member of Dáil Éireann) but he has also been in significant delay. That delay was also a factor to be considered in the context of a *locus standi* argument was recognised by Henchy J. in *Cahill v. Sutton* (at p. 287):-

> "The plaintiff's lack of standing to raise the constitutional point is aggravated and compounded by her inordinate and inexcusable delay in initiating and prosecuting her claim."

This delay in the instant case has meant that payments on foot of the promissory note have already been made. The 31st March, 2011 IBRC promissory note payment was by way of cash payment and that of 31st March, 2012 was settled by the delivery of a long term Irish Government Bond to the IBRC. The arrangements solemnly put into place are now entering their third year of operation. It can only be the case that all manner of financial institutions, both at home and elsewhere, have proceeded with matters during this time on the basis of the validity of steps taken by the first defendant. This is a consideration of great importance when considering if this particular plaintiff should be regarded as having *locus standi* to try and unravel as invalid the making of the promissory notes in circumstances where no member of Dáil Éireann has seen fit to do so.

It is of course true that there have been important decisions, such as *Crotty v. An Taoiseach* [1987] 1 I.R. 713 where the requirements of *Cahill v. Sutton* have to some extent been relaxed and it is apparent that appropriate justification did exist for some relaxation of the rule in that and some other cases also.

In *Crotty*, the plaintiff challenged the ratification by the Government of the Single European Act in circumstances where the Government had not first sought the approval of the people by way of referendum. While the plaintiff could not point to any specific injury or prejudice to himself more so than any other citizen, both the High Court and Supreme Court considered he had standing to make the challenge. In adjudicating on this point on the interlocutory hearing in the High Court, Barrington J. accepted the plaintiff's argument that the Single European Act should be put to the people in a referendum, that he had a right to be consulted in any such referendum and that, accordingly, if his contention was correct but no relief was granted, his right would be infringed.

While a divisional hearing of the High Court later took a different view, holding the plaintiff did not have *locus standi*, the view expressed by Barrington J. was upheld in the Supreme Court where Finlay C.J. stated (at p.766):-

> "The Court is satisfied, in accordance with the principles laid down in *Cahill v. Sutton* [1980] I.R. 269, that in the particular circumstances of this case where the impugned legislation, namely the Act of 1986, will if made operative affect every citizen, the plaintiff has a *locus standi* to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act"

However, an important feature of the *Crotty* case which distinguishes it from the present case is that the Act in that case had not yet come into force, whereas in this case the relevant law was put in place in 2008 and the programme for payments on the promissory notes is now coming up to its third year of operation.

In *McKenna v. An Taoiseach* (No. 2) [1995] 2 I.R. 10, the plaintiff successfully argued that expenditure by the Government to favour a particular outcome in a referendum gave rise to countervailing circumstances justifying a relaxation of the *locus standi* rules. Keane J. stated in the High Court:-

> "At the outset I must deal with the standing of the plaintiff to initiate and maintain these proceedings. It is clear that the present proceedings belong to a category of cases in which a challenge to the constitutionality of the legislation or other acts is unlikely to emerge if the specific criteria enunciated by the Supreme Court in *Cahill v. Sutton* [1980] I.R. 289 are applied. It is clear from the observations of Finlay C.J. in *Crotty v. An Taoiseach* [187] I.R. 713 that a broader approach should be adopted in cases of this nature and I have no hesitation in concluding that the plaintiff was entitled to institute and maintain the present proceedings." (Emphasis added)

I am also mindful that in *T.D. v. Minister for Education* [2001] 4I.R. 259 at 282, Keane C.J. stressed that the *Cahill v. Sutton* rules:-

> "… must on occasions yield the overriding necessity that law is passed by the Oireachtas or acts or omissions of the Executive should not go unchallenged, simply because it is difficult, if not impossible, for individual citizens or groups to establish that their individual rights are affected." (Emphasis added)

These difficulties, underlined in the above citations, simply do not arise in the instant case where each and every member of Dáil Éireann had ample opportunity to bring a timely constitutional challenge had he or she been minded to do so.

In *Riordan v. Government of Ireland* [2009] 3 I.R. 745, the plaintiff challenged the constitutionality of certain provisions of the courts legislation relating to the composition of the Irish Superior Courts. He argued that he had standing on the basis that he had appeared before the courts in their various compositions being challenged. The Supreme Court in that recent case reaffirmed the principles in *Cahill v. Sutton* in the following terms:-

> "The rules relating to *locus standi* are of ancient origin and require that a person who wishes to initiate or participate in court proceedings should himself have a cognisable interest in the subject matter of the proceedings. The leading modern statement of the rule is that to be found in *Cahill v. Sutton* [1980] I.R. 269. There, this court refused the plaintiff a right to maintain the proceedings in order to 'champion the putative constitutional rights of a hypothetical third party'. A plaintiff must have a personal standing in the sense of being able to show (in this case) that the impugned statutory provisions adversely affected or threatened his own personal interest … all citizens have a right of access to the courts, which, in other cases, the courts have been sedulous in protecting. This right of access is for the purpose of resolving justiciable issues and not for the purpose of constituting the courts as a sort of debating society or deliberative assembly for the discussion of abstract issues."

Finally, the court must be cognisant, particularly in the country's present financial circumstances, that applications of the sort brought here, particularly when they run their full course through the High Court and Supreme Court, tend to involve significant costs which often fall as a burden on the taxpayer. As pointed out by Murray C.J. in *Riordan v. Government of Ireland* [2009] 3 I.R. 745 (at p.765):-

> "It must also be borne in mind that all litigation, even groundless litigation, causes expense to the individuals or entities impleaded in it and that this expense will often fall on the taxpayer."

Ultimately I have come to the conclusion in the instant case that the plaintiff is endeavouring to assert a *ius tertii*, that is to say, to advance a case or argument which more properly should have been brought, and may yet still be brought, by an individual member or members of Dáil Éireann. This is not a case where there is no other suitable plaintiff can be found as the developments towards the end of the hearing amply demonstrate. No member of Dáil Éireann is precluded from mounting the very challenge brought by the plaintiff in these proceedings and nothing in this judgment should be taken or construed as indicating what view the Court might take of the merits of such a claim if and when so brought. Secondly, the plaintiff has not shown that he himself has suffered any prejudice which puts him in a different position from any other taxpayer in this country. Thirdly, the delay in bringing the application must be afforded particular weight in this case having regard to the solemn undertakings entered into by the Executive which at this point have been operational for almost three years.

Thus, for all the reasons outlined above, the Court must dismiss the plaintiff's claim on the basis that he lacks *locus standi* to bring this particular challenge.