



THE COURT OF APPEAL

Record No. 2014/1017

Neutral Citation [2022] IECA 22

**Haughton J.
Binchy J.
Pilkington J.**

IN THE MATTER OF INJUNCTION TO RESTRAIN THE MINISTER FOR FINANCE FROM COMPLETING ANY MAJOR IRREVERSIBLE RESTRUCTURING OF PERMANENT TSB PLC BEFORE RELEVANT COURT PROCEEDINGS, GOVERNED BY EU LAW, WHOSE OUTCOME CAN IMPACT THE OWNERSHIP OF PERMANENT TSB GROUP HOLDINGS PLC AND THE TERMS OF THE RECAPITALISATION OF PERMANENT TSB PLC, HAVE BEEN ADJUDICATED UPON AND IN THE MATTER OF HIGH COURT PROCEEDINGS RECORD NUMBER 2011 239 MCA AND IN THE MATTER OF HIGH COURT PROCEEDINGS RECORD NUMBERS 2013 2708P AND 2013 2709P

BETWEEN/

**GERARD DOWLING, PADRAIG MCMANUS, JOHN PAUL MCGANN, TIBOR NEUGEBAUER,
PIOTR SKOCZYLAS, MURIEL SCORER AND J FRANK KEOHANE**

PLAINTIFFS/APPELLANTS

- AND -

THE MINISTER FOR FINANCE

DEFENDANT

-AND-

PERMANENT TSB GROUP HOLDINGS PLC AND PERMANENT TSB PLC

NOTICE PARTIES/RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of January 2022

1. This is an appeal from a decision of the High Court (Charleton J.) delivered on 17th October 2013, *ex tempore*, whereby, on the application of the respondents, he made an order joining them as notice parties to the within proceedings.

2. These proceedings are but one chapter in a saga of litigation arising out of the reorganisation and recapitalisation of the respondents pursuant to an order made by the High Court under the Credit Institutions (Stabilisation) Act 2010 ("the Act of 2010") in July 2011, and it is perhaps for that reason that this appeal was not prosecuted with greater expedition.

Background

3. In July 2011, on the application of the defendant, the High Court made an order (hereafter the "2011 Direction Order") pursuant to s.9 of the Act of 2010, the effect of which was that the defendant was authorised to invest the sum of €2.7 billion in the share capital of the first named respondent (which party I shall hereafter refer to as "Holdings"), in exchange for which the defendant was to be allotted a shareholding, after the share allotment, corresponding to 99.2% of the issued share capital of Holdings. As a consequence the appellants, all shareholders in Holdings, issued proceedings (which I shall hereafter refer to as the "2011 Direction Order proceedings") challenging the lawfulness of the 2011 Direction Order.
4. Those proceedings were the subject of two substantive decisions of O'Malley J. in the High Court, the first being on 15th August 2014, when, having made important findings of fact, she made a reference to the Court of Justice of the European Union (CJEU) concerning the compatibility of the Act of 2010 with Council Directive 77/91/EEC. The CJEU handed down a decision on that reference on 8th November 2016, leading to the second substantive decision of O'Malley J. on 31st July 2017, whereby she upheld the lawfulness of the 2011 Direction Order, concluding that the applicants in those proceedings (who included the first, second and fifth appellant in these proceedings) had not succeeded in demonstrating that the 2011 Direction Order was unreasonable or vitiated by legal error and accordingly she dismissed the proceedings. The applicants in those proceedings appealed that decision, and this Court (Hogan J.) in a decision handed down on 2nd October 2018 upheld the decision of O'Malley J. The applicants then applied for leave to appeal the decision of this Court to the Supreme Court, but that application was refused, on 1st March 2019, thereby bringing an end to the challenge of the lawfulness of the 2011 Direction Order. Nonetheless, there are extant proceedings separately issued by the appellants and other parties challenging the constitutionality of the Act of 2010 (the "Constitutional proceedings"), and I understand that the plaintiffs in those proceedings have not sought in any meaningful way to progress those proceedings, although at the hearing of this appeal the appellants indicated their intention to do so.
5. The respondents also applied, in the course of the 2011 Direction Order proceedings, to be joined as notice parties thereto. In a decision handed down on that application, on 21st February 2013, Charleton J. acceded to that application in part only. He considered that there was no benefit to be gained by the court from the joinder of the respondents to the proceedings for the purpose of supporting the defendant in arguing that the 2011 Direction Order was correctly made. However, Charleton J. was of the opinion that since the Act of 2010 permits the High Court to set aside a direction order made pursuant to s.9 of the Act of 2010, and, if it considers it appropriate to do so, to substitute an

alternative direction order, it was appropriate to join the respondents as notice parties for the limited purposes of providing evidence as to their then financial situation and as to the appropriate terms of an alternative form of direction order. However, the respondents appealed the restrictions imposed upon their joinder as notice parties to the Supreme Court, in which appeal Fennelly J. handed down its decision on 19th December 2013. I will return to that decision in due course.

6. By these proceedings, which were issued on 2nd September 2013, the appellants seek the following reliefs: -
 - (1) *A declaration that the defendant is precluded from completing, whether by himself, or by his servants or agents, any major irreversible restructuring of the second named respondent including by any irreversible major disposal of assets before the conclusion of proceedings bearing record number 2011/239 MCA (these are the 2011 Direction Order proceedings) and also proceedings bearing record numbers 2013/2708P and 2013/2709P (these latter proceedings together being the Constitutional proceedings);*
 - (2) *An injunction restraining the defendant from completing any major irreversible restructuring of the second named respondent before the conclusion of the aforementioned proceedings;*
 - (3) *If necessary, an order making a reference to the Court of Justice of the European Union on certain provisions of European Union law.*
7. Accordingly, it is apparent that the appellants do not seek substantive relief within these proceedings. Rather they seek to restrain certain conduct on the part of the defendant, consequent upon the 2011 Direction Order, that would result either in an "*irreversible major disposal of assets*", or a "*major irreversible restructuring*" of the second named respondent, pending the determination of the lawfulness of the 2011 Direction Order, and the constitutionality of the Act of 2010.
8. Separately, the appellants also issued a notice of motion, on 2nd September 2013, seeking an interlocutory injunction in similar terms. This application was not pursued.
9. By notice of motion dated 27th September 2013, the respondents sought an order joining them as notice parties to the within proceedings. That motion was grounded on the affidavit of Mr. Ciaran Long, then secretary of both respondents, dated 27th September 2013. The appellants opposed the application, and in support of their position, the fifth named appellant, Mr. Skoczylas swore an affidavit dated 16th October 2013. It is opportune to mention now that Mr. Skoczylas is the driving force behind these proceedings and this appeal and he represented himself both at the hearing before Charleton J. and at the hearing of this appeal. In the High Court, the other parties to the proceedings simply adopted the arguments made by Mr. Skoczylas, and similarly, those of the appellants that pursued this appeal relied upon and adopted the arguments advanced by Mr. Skoczylas.

10. At the outset of the hearing of the appeal, the Court was informed that neither the first or second named appellants (Mr. Dowling and Mr. McManus) were pursuing their appeals, and by consent, their appeals were struck out with no order as to costs. The third and fourth named appellants, Mr. McGann and Mr. Neugebauer, respectively, appeared and confirmed to the Court that they were pursuing their appeals, and were adopting the submissions made by Mr. Skoczylas. They did not otherwise address the Court. There was no appearance by either the sixth or seventh named appellants, Ms. Scorer or Mr. Keohane. Their appeals were therefore struck out, with an order for costs against each, but with liberty to apply as regards the order for costs. Ms. Scorer subsequently exercised that liberty, and following a brief hearing on 23rd November 2020, the Court vacated the costs order made against Ms. Scorer.

Affidavit of Mr. Long

11. In his affidavit, Mr. Long deposes that since the respondents benefited from State support in the form of the investment made by the Minister in 2011, the State was required under EU State Aid rules to submit a restructuring plan to the European Commission for its approval. He avers that the European Commission was required make a decision as to whether or not to authorise the aid measures provided by the defendant to the respondents in accordance with EU State Aid rules. Mr. Long states that, if approved by the European Commission, the restructuring plan would then be implemented by the second named respondent. However, if the restructuring plan is approved by the European Commission but is not implemented then the conditions for approval will not have been met, and he says that the respondents' legal advisors have advised that if conditions for approval are not met, then the Commission could seek to order the recovery by the State of the aid in the form of the investment of €2.7 billion from the respondents. He says that the second named respondent would not be able to repay €2.7 billion and would have to cease to trade.
12. On this basis, Mr. Long says that the respondents have a vital interest in the outcome of these proceedings and they consider that it is appropriate for them to be joined as notice parties: -

“...in order to protect their legitimate interests. Group Holdings and the Bank are anxious that their position be properly represented before the Court. Furthermore, Group Holdings and the Bank believe it would be of assistance to the Court to have evidence and submissions directly from Group Holdings and the Bank on consequences that would flow on foot of any finding in favour of the Plaintiffs in respect of both the interlocutory and final reliefs that are sought.”

Affidavit of Mr. Skoczylas

13. In his replying affidavit (at para. 7) Mr. Skoczylas avers that: -

“the object of the within proceedings is an injunction restraining the Defendant from completing, whether by himself or by his agents or servants, any major irreversible restructuring of Permanent TSB plc... before the relevant court proceedings (record numbers 2011 239 MCA and 2013 2708P/2709P), governed by

EU law, whose outcome can impact the ownership ILPGH and the terms of ILP recapitalisation have been adjudicated upon.”

Mr. Skoczylas avers that ownership of the respondent remains legally uncertain pending the determination of these various proceedings. He further avers that **these** proceedings “are, *inter alia*, in the matter of the proceedings record number 2011 239 MCA, which are governed by EU law and which are aimed at setting aside the direction order made on 26th July 2011...” and that “[t]he within proceedings are also in the matter of the proceedings record numbers 2013 2708P/2709P... which are governed by EU law and which are aimed at rectifying the alleged unconstitutionality of the Credit Institutions (Stabilisation) Act 2010...” He states (at para. 13) that the purpose of these proceedings is to ensure the full effectiveness of the decisions to be given by the courts in the various proceedings which were ongoing at the time. In effect, the point he makes is that no major irreversible restructuring of the second named respondent should be permitted such as might frustrate any court order that might be made in the future. In that event, the interests of the current minority shareholders in Holdings could be irreversibly prejudiced, most particularly in circumstances whereby the court might set aside the 2011 Direction Order which would result in ownership of Holdings returning to its original shareholders, i.e. the shareholders in that company prior to the 2011 Direction Order.

14. Mr. Skoczylas takes issue with the argument advanced by Mr. Long concerning the implementation of the restructuring plan. He claims that it is the State that will be responsible before the Commission for the implementation of the restructuring plan, and not the respondents. In so far as the respondents have any involvement at all in the implementation of the restructuring plan, it will only be to comply with directions given by the defendant, in his capacity as the controlling shareholder of Holdings.
15. Mr. Skoczylas takes issue with the argument advanced by Mr. Long that, if the restructuring plan is not implemented, the respondents could be obliged to repay the State aid of €2.7 billion. At para. 43 of his affidavit he sets out eight reasons why the respondents’ application should be refused: -
 - (1) *The respondents are controlled by the State and have nothing to add to the proceedings;*
 - (2) *Any support that the defendant requires from the respondents, can be provided through affidavits;*
 - (3) *The respondents would not be independent parties, as they are effectively emanations of the State, and there is no reason for the State to duplicate its pleadings and submissions;*
 - (4) *The respondents should not be permitted to be parties to the proceedings so as to allow their directors to explain themselves;*

- (5) *As a matter of law, the appellants are entitled to sue whomever they wish and not to sue whomever they wish, and the respondents do not meet the legal test to become a notice party and nor are there exceptional circumstances whereby they should be admitted as a notice party to these proceedings;*
- (6) *Many of the reasons given by Charleton J. (in his earlier decision on the same application within proceedings record no. 2011/239 MCA, referred to above) whereby he refused to make the respondents full notice parties to the July 2011 Direction Order proceedings apply to these proceedings also;*
- (7) *The respondents should not become notice parties to these proceedings in order to defend the validity of the July 2011 Direction Order and;*
- (8) *The appellants would be prejudiced by the respondents being made notice parties.*

Judgment of the High Court

16. The application came on for hearing before Charleton J. on 17th October 2013, and as I have indicated above, he handed down an ex tempore decision on the day. He identified five reasons for granting the application: -

- (1) *Firstly, he referred to the principles applicable to such applications, both in the context of private law proceedings and public law proceedings. As far as private law proceedings are concerned, he referred to the decision of Lynch J. in Fincoriz S.A.S. Di Bruno Tassan Din v. Ansbacher & Company Limited 1987 WJSC-HC 592 and quoted the following passage from page 3 of that judgment:-*

"The exceptional circumstances (to join a defendant in circumstances where the plaintiff doesn't want them there and the plaintiff hasn't issued proceedings against them,) must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance, or alternatively even if it is not unreasonable that they were not joined as defendants by the plaintiff in the first instance it is shown at the time of the application to the Court to join them that their presence before the Court was as a matter of probability necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter."

- (2) *Having considered the applicable test in private law proceedings, the trial judge then went on to consider and apply the test applicable to such applications in public law proceedings, being the test referred to by Kearns J. (as he then was) in the Supreme Court in BUPA Ireland Ltd. v. Health Insurance Authority [2005] IESC 80 which he said established that "where a party has a vital interest in the outcome of proceedings or is vitally interested in the proceedings, or would be very clearly affected by the result of the proceedings, it is appropriate for that party to be a notice party in the proceedings." The trial judge was of the view that since the appellants intended to apply for injunctive relief restraining the implementation of the restructuring plan of the respondents, this engaged the commercial interests of*

the respondents to the extent that there was a sufficiently real risk that the second respondent would be seriously adversely affected in terms of its functioning and its finances. This, he concluded, could arise from an obligation to repay the aid received from the State or more generally from being unable to implement its restructuring plan in a timely manner, and this risk was sufficient to trigger the test referred to in BUPA.

- (3) In arriving at these conclusions, Charleton J. took into account that in general the courts will leave parties to pursue remedies as against such other parties as they consider appropriate, and the Rules of the Superior Courts prevent the joinder of parties who are uninterested in the proceedings or whose joinder is an abuse of process.*
- (4) Charleton J. further acknowledged that the courts must be vigilant, in the interests of the efficient and proper administration of justice, to ensure the fostering of limited court time for the proper disposal of the proceedings.*
- (5) Furthermore, the courts must be vigilant to ensure that the costs incurred by parties to proceedings are controlled (to the extent that the courts can do so) therefore parties should not be joined for proceedings for no other purpose than "the tiresome reiteration of the same arguments".*

17. While the trial judge did not expressly say that these are public law proceedings, it is clear from his reliance upon *BUPA* that this formed the basis of his decision, and there was no dispute about that at the hearing of this appeal. It is clear that the trial judge considered that this was consistent with the decision (to which I have referred above) that he had previously made within the 2011 Direction Order proceedings, whereby he joined the respondents as notice parties for limited purposes, including for the purpose of addressing the court on any reliefs that might be granted to the appellants if they were successful in those proceedings, because those very reliefs would have a direct impact upon the respondents.

Developments Since the Decision of the High Court

18. Since the trial judge handed down his decision, there have been several significant developments. Some of these are already summarised at para. 4 above. On 19th December 2013, the Supreme Court handed down its judgment, referred to at para. 5 above, allowing the appeal of the respondents from the decision of Charleton J. in the 2011 Direction Order proceedings relating to the joinder of the respondents herein as full notice parties to those proceedings. In December 2014, O'Malley J. made an order joining the respondents as notice parties to proceedings issued by the first, second and fifth named appellants herein, whereby they sought very similar reliefs to those sought in these proceedings by the appellants. On 9th April 2015, the European Commission approved the restructuring plan thereby, in effect, affirming that the grant of State aid in the circumstances did not violate the Treaty on the Functioning of the European Union. I address these various developments below, where appropriate and necessary.

Is This Appeal Moot?

19. In the course of the hearing of this appeal, counsel for the respondents informed the Court that the implementation of the restructuring plan is complete and the respondents exited the plan on 31st December 2018. While there was no evidence before the Court in this regard, this was, in effect, conceded by Mr. Skoczylas who said: -

"Admittedly as far as the restructuring is concerned, as I said to Judge Haughton, it is likely that there isn't much of the restructuring left to be done".

20. In an exchange with the Court, Mr. Skoczylas was asked what remains of these proceedings in circumstances where the 2011 Direction Order proceedings have been resolved, and the restructuring of the respondents is complete. In answer to this question, he said that it remains the case that the defendant owns 75% of Holdings, and that it would have to be restructured in the sense that at some point in the future the defendant will have to exit his investment. He argued that this can be done in various ways, and that it could be done to the detriment of the minority shareholders, including the appellants. Also, while the 2011 Direction Order proceedings have been concluded, the separate proceedings challenging the constitutionality of the Act of 2010, which are also referred to in the reliefs sought in the proceedings, remain extant.
21. Furthermore, Mr. Skoczylas argued, it is necessary for the Court to determine this appeal because the trial judge also ordered that the costs of the application should be borne by the appellants, in view of the fact that the respondents had succeeded fully with their application. He stated "*[b]ut the costs is an important part of why this appeal is before you.*"
22. While I did not find the arguments advanced by the appellants under this heading to be persuasive, the difficulty for the Court in considering the question of mootness is that no evidence was placed before the Court as regards the implementation of the restructuring plan, and, in particular as regards any major irreversible disposal of assets or irreversible restructuring of the second named respondent. In the absence of such evidence it would, in my view, be inappropriate for the Court to dismiss the appeal on grounds of mootness.

Standard of Review

23. The applicable standard of review by an appellate court of decisions made by a lower court in interlocutory matters was addressed by this Court in *Lawless v. Aer Lingus Group Plc* [2016] IECA 235. In that case, Irvine J. (as she then was) held at paras. 22 and 23 as follows: -

"22. The first matter to be briefly addressed in the course of this ruling is the court's jurisdiction on this appeal. This is an appeal against an order made by the High Court in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision of the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless

allow an appeal if satisfied that the justice of the case can only be met by such an approach. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this Court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by McMenamin J. in *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6.

23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this Court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.”

24. While *Lawless* was concerned with an application for discovery, the principles recited above are of equal application to interlocutory matters generally. It is therefore incumbent on the appellants to persuade this Court that there was a clear error on the part of the trial judge in his approach to the application before him or that the justice of the case requires the setting aside of the decision made by the trial judge.
25. The appellants advanced no arguments under the latter heading, other than to say that they would in some general way be prejudiced by the respondents joining forces with the defendant if joined as notice parties to the proceedings. This falls well short of establishing any injustice, never mind a real injustice, flowing from the joinder of the respondents as notice parties.
26. The appellants did argue however that the High Court judge erred in the test to be applied and/or in the application of the test to be applied in such applications.

Submissions of the Parties

Submissions of the Appellants

27. While the appellants made very lengthy submissions and placed before the Court very significant volumes of documentation for the purposes of this appeal, in their written submissions they identify what they say are two key issues which they submit arise for a decision: -
 - (1) “Was the substantive ruling the subject of this appeal wrong in law having regard to the applicable legal test and the facts of the matter, in the important additional light of the abuse of process by ILPGH and ILP since said ruling?”

(2) "Should, therefore, the costs not have been awarded against the Plaintiffs?"

28. It is the appellants' submission that the trial judge applied the test applicable to public law proceedings rather than private law proceedings, and that in doing so he fell into error. It is submitted that there is no public issue in these proceedings that could affect third parties at large, and moreover the respondents in any case are emanations of the State whose interests are indistinguishable from the interests of the defendant in these proceedings.
29. The appellants submit that the within proceedings are private proceedings, governed by O.15, r. 13 of the Rules of the Superior Courts, and the respondents fail to satisfy the requirements for joinder of parties pursuant to that rule and in accordance with the test laid down in *Barlow v. Fanning* [2002] IESC 53, [2002] 2 IR 593. In particular, the respondents have failed to establish that there are any exceptional circumstances that would warrant the joinder of the respondents as notice parties to the proceedings. The appellants submit that the interests of the respondents overlap completely with those of the defendant in this case, and that the joinder of the respondents would achieve nothing other than to duplicate the submissions of the defendant, thereby increasing costs significantly and unnecessarily.
30. The appellants submit that the circumstances pertaining to this application differ significantly to those pertaining in the application of the respondents to be joined as notice parties to the 2011 Direction Order proceedings, which the appellants accept are public law proceedings. Furthermore, the appellants submit, unlike in the application in the 2011 Direction Order proceedings, in these proceedings the respective interests of the defendant on the one hand and the respondents on the other are identical.
31. The appellants also seek to distinguish this application from the decision of O'Malley J. handed down on 9th December 2014, in proceedings 2014/9908P, whereby she made an order joining the respondents as notice parties to those proceedings, in which the appellants sought injunctive relief restraining the defendant from disposing of any of his shares in Holdings pending the conclusion of the 2011 Direction Order proceedings. In granting the order sought, and in ordering that the respondents should be made notice parties to those proceedings, O'Malley J. observed: -

"... This application before the Court now, the injunction application that is, is not just derived from those proceedings [i.e. the 2011 Direction Order proceedings], it is squarely located within the context of those proceedings to the extent that it could in fact just as easily have been made as an interlocutory application in those proceedings without issuing a fresh plenary summons..."

In her judgment on the injunction application itself, handed down on 18th December 2014, she described the injunction proceedings as being an "offshoot" of the 2011 Direction Order proceedings. The appellants contend that these proceedings however are very different and are not squarely located within the context of the 2011 Direction Order proceedings, and that it would not have been possible to apply for the reliefs sought in

these proceedings by way of interlocutory application in the 2011 Direction Order proceedings.

32. The appellants further argue that the abuse of process on the part of the respondents disqualifies them from becoming full notice parties in these proceedings. The alleged abuse of process relied upon by the appellants in this regard is what the appellants in their submissions describe as the pooling of resources by the defendant and the respondents in all of the litigation involving the parties, with the consequent doubling of costs.
33. Finally, as far as costs are concerned, it is submitted on behalf of the appellants that the conduct of the respondents is such that costs should not be awarded against the appellants, even if the Court refuses this appeal. It is submitted that while, in the 2011 Direction Order proceedings, the Supreme Court permitted the joinder of the respondents in order to advance arguments that may not have been advanced by the defendant in the proceedings, in the time since that order of the Supreme Court, both the defendant and the respondents have at all times been fully aligned and pooled their resources against the appellants in the ongoing litigation. This conduct, it is submitted, amounts to an abuse of process such as to justify a refusal of an order for costs in favour of the respondents, even if they are successful in resisting this appeal. The appellants refer to paras. 23-19 to 23-25 of Delany & McGrath, *Civil Procedure in the Superior Courts* (3rd edn, Round Hall 2012). At para. 23-19, the learned authors state: -

"A successful party may not be awarded costs if the Court takes the view that he or she acted unreasonably or improperly."

34. The appellants rely upon the decision of Laffoy J. in *Tekenable Limited v. Morrissey* [2012] IEHC 391 in which Laffoy J. considered the application of O.99, r.1(4)(A) of the Rules of the Superior Courts which provides: -

"The High Court or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

Laffoy J. noted that in many cases there: -

"...is not the remotest possibility of injustice if costs are awarded in a particular manner. An obvious example is the award of costs to a plaintiff on a motion for judgment in default of defence. Other situations give rise to genuine concerns that to determine where the burden of costs shall lie in relation to an interlocutory application at the interlocutory stage may perpetrate an injustice."

35. Laffoy J. referred to the decision of Clarke J. (as he then was) in *Allied Irish Banks & Ors. v. Diamond* (an *ex tempore* decision of 7th November 2011) wherein he discusses the kind of difficulties that can arise in deciding upon the costs of interlocutory injunctions at the interlocutory stage of proceedings.

36. The appellants also rely upon the decision of the High Court (Clarke J.) in *Telefonica O2 Ireland Limited v. Commission for Communications Regulations* [2011] IEHC 380 as authority for the proposition that the mere fact that a party is a notice party to proceedings and has an interest to protect, does not necessarily justify doubling the costs of defending proceedings. They cite a lengthy extract from the judgment of Clarke J. in those proceedings including para. 3.7 thereof in which he says:

"Even where the notice party has something to add it is, in my view, incumbent on the notice party to consider whether their involvement necessarily justifies full representation in all aspects of the case. If their contribution is factual then it might be done by the filing of an affidavit. If there is one additional point which can, perhaps, best be made by a notice party, then there are ways in which the making of that point can be secured without incurring the full costs of the litigation."

In the same vein, the appellants also rely on the decision of Clarke J., in the High Court, in *Usk and District Residents Association v. Environmental Protection Agency* [2007] IEHC 30 in support of the same proposition.

37. Finally, with regards costs, the appellants refer to three interlocutory applications within litigation involving the same parties (including the judgment of Fennelly J. referred to above) in which the courts either made no order or reserved the costs incurred pending the final determination of the proceedings. More generally, the appellants rely on the authorities that make it clear that, while the general rule is that costs follow the event (to use the old terminology) the Court always has a discretionary jurisdiction to vary or depart from that rule, if, in the special circumstances of a case, the interests of justice require that it should do so. The appellants rely on *Dunne v. Minister for the Environment* [2007] IESC 60 in this regard.

Submissions of the Respondents

38. At the outset of their submissions, the respondents submit that this appeal is clearly moot in light of the developments that have taken place since the decision of the trial judge. They submit that there is no purpose to be served by this appeal and the reliefs originally sought by the appellants have no ongoing relevance. I have already addressed this issue above and rejected this argument on account of the absence of evidence as to the restructuring of the respondents.
39. The respondents take issue with the submission that these proceedings are entirely distinct from the 2011 Direction Order proceedings. In the submission of the respondents, these proceedings are "*an offshoot*" of those proceedings.
40. The respondents submit that the appellants have failed to identify any error in principle in the judgment of the High Court which they further submit accords entirely with the principles identified and applied by Fennelly J. in the Supreme Court. Charleton J. considered both the civil law and public law tests, and, having considered the decision of the Supreme Court in *BUPA* (and specifically the passage cited above) he found, on the

evidence before him, that the respondents had a vital interest in the outcome of the application, on the basis that if the reliefs sought were granted, it could result in the restructuring plan not being implemented in accordance with any approval that might issue from the European Commission. This it is submitted, accords with the approach taken by Fennelly J. in his decision on the same application in the 2011 Direction Order proceedings.

41. At para. 29 of his judgment in those proceedings, Fennelly J. stated: -

"29. Looking at the matter from the point of view of principle and, without reference to the applicable Rules governing the joinder of parties, it is clear that the position is significantly different depending on whether the proceedings are purely civil and private or whether they concern issues of public law. In civil litigation, generally speaking, parties are allowed to choose whom they wish to sue. In matters of public law persons other than the public authority may have a real and substantial interest in the outcome. The simplest example is the planning permission. While the judicial review must of necessity be sought on grounds that the planning authority or An Bórd Pleanála on appeal has committed an error of law affecting the validity of its decision, any decision of the court is very likely to affect the very real rights and interests of private persons or corporations. The holder of a planning permission is, of course, potentially affected by the outcome of an application for judicial review of its validity. Civil and public-law proceedings are not, however, in completely watertight compartments. There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests."

42. Fennelly J. then went on to consider the rule applicable to the joinder of parties in civil proceedings (O.15, r.13 of the Rules of the Superior Courts) and the application of that rule, in particular *Barlow v. Fanning*, as well as the judgment of Lynch J. in *Fincoriz S.A.S Di Bruno Tassan Din v. Ansbacher & Company Limited* which was approved by the Supreme Court in *Barlow v. Fanning*. At para. 33, Fennelly J. stated: -

"33. The conclusion from all of this is that a person must demonstrate exceptional circumstances in order to persuade a court to join him or her in an action against the will of the opposing party. The special circumstances must consist in (sic) some real or apprehended adverse effect on its proprietary interest. Reputational damage would not suffice. Nor would the fact that the case will lead to a decision on a point of law which could adversely affect the applicant in other litigation."

43. However, Fennelly J. considered that the 2011 Direction Order proceedings had all of the characteristics of public law proceedings. At para. 42, he stated: -

"42. I am satisfied that the application to set aside a Direction Order has all or almost all of the indicia of an application for judicial review. It has few, if any, of the characteristics of a civil action. If a choice were made between the application

of Order 15 and Order 84, the latter would have to apply. Since the Act is silent on the matter and s. 11(2) provides the only guidance by saying that the court 'may give such directions with regard to the hearing of the application as it considers appropriate in the circumstances,' it seems to me that order 84 must be applied by analogy. It follows that an applicant for an order pursuant to s. 11 should serve the notice of motion and grounding affidavit on 'all persons directly affected...'"

44. At paras. 52-53 he said: -

"52. In resolving the issue on this appeal, I start from the conclusion I have already expressed that the appropriate test to apply is by analogy with Order 84 of the Rules of the Superior Courts. I do so because an application made under Section 11 of the Act is both in form and in substance essentially a form of judicial review of the decision of the Minister. It follows that any person or body which is 'directly affected' should be joined. To begin with, any such person or body should be served with the proceedings. If that has not been done, an order joining him, her or it should be made. Finlay C.J. expressed the matter briefly and clearly in his judgment in O'Keeffe v An Bórd Pleanála.

53. It seems to me obvious, at least prima facie, that the body most likely to be directly affected by the setting aside of a Direction Order is the 'relevant institution' in respect of which the order must necessarily have been made. Section 11 itself recognises this by limiting the right to make an application to the 'relevant institution' or a member."

45. Finally, Fennelly J. took into account two further considerations; firstly, he did not consider that the respondents in those proceedings would suffer any disadvantage by the joinder of the appellants (without restrictions). Secondly, he considered that the Minister and the appellants were not necessarily in the same position; he stated: -

"If there is a debate about whether an order setting aside the Direction Order implies repayment, the Minister and the company clearly have potentially different interests."

46. For the foregoing reasons, Fennelly J. made an order permitting the appellants to be joined as notice parties to the application in the High Court, without the limitations imposed by Charleton J.
47. As far as costs are concerned, the respondents submit that the trial judge was obliged to rule on this issue unless he considered that he was not able to do so. In this case there was no such reason and the trial judge was correct to order costs against the appellants since they were unsuccessful in their opposition to the application.
48. The respondents also place reliance on the decision of O'Malley J. of 9th December 2014, referred to above, whereby she ordered that the respondents should be joined as notice parties in connection with the application for an injunction restraining the defendant from

disposing of any of his shares in Holdings pending the conclusion of the 2011 Direction Order proceedings. The appellants opposed the application of the respondents to be joined as notice parties to those proceedings on the grounds, *inter alia*, that those proceedings were private law proceedings and were separate and distinct from the 2011 Direction Order proceedings. However, O'Malley J. in the High Court rejected that argument, finding that the injunction proceedings were "*squarely located within the context of [the 2011 Direction Order proceedings] to the extent that it could in fact just as easily have been made as an interlocutory application in those proceedings without issuing a fresh plenary summons.*"

Discussion and Decision

49. The matters for decision by this Court on appeal are set and may be stated as follows:-

- (1) Did the trial judge apply the correct test in deciding to accede to the application of the respondents to be joined as notice parties to the proceedings?
- (2) If he did apply the correct test, was the decision he made within the margins of his reasonable discretion, having regard to the evidence before him?

50. The appellants submit that the trial judge applied the test applicable to such applications in public law proceedings, and that in doing so he fell into error. The appellants contend that these are private law proceedings and that they are not an "offshoot" of the 2011 Direction Order proceedings in the same way as were the proceedings before O'Malley J. in which she joined the respondents as notice parties to the proceedings. The appellants rely on the fact that the within proceedings seek orders pending the determination not just of the 2011 Direction Order proceedings, but also of the Constitutional proceedings, which they claim are private law proceedings and not public law proceedings.

51. The respondents on the other hand contend that these proceedings are indeed an offshoot of the 2011 Direction Order proceedings and the Constitutional proceedings and that this is actually acknowledged by the appellant in his replying affidavit on this application in several places. For example, in para. 9 of his affidavit, Mr. Skoczylas avers:-

"The within proceedings are, inter alia, in the matter of the proceedings record number 2011 239MCA, which are governed by EU law and which are aimed at setting aside the direction order made on 26 July 2011... The within proceedings are also in the matter of the proceedings record numbers 2013 2708P/2709P... which are governed by EU law and which are aimed at rectifying the alleged unconstitutionality of [the Act of 2010]..."

52. The appellants recognise that the 2011 Direction Order proceedings, which are now concluded, were public law proceedings. However, they submit that now that those proceedings are disposed of, the reliefs sought by these proceedings are relevant only to the Constitutional proceedings which, as I said above, the appellants contend are private law and not public law proceedings. They contend that if it were the case that all

proceedings impugning the constitutionality of statutory provisions are considered to be public law proceedings, then any citizen could apply to be joined as a party to those proceedings.

53. I consider the appellants' arguments in this regard to be unsustainable. The Constitutional proceedings are plainly public law proceedings, but this does not give any member of the public the entitlement to be joined to those proceedings. Any application must first meet the test for joinder to such proceedings. In this regard, the trial judge referred to the test applied by the Supreme Court in *BUPA v. Health Insurance Authority*, and specifically, quoting from the judgment of Kearns J. in that case, he said that the test is: -

"[W]here a party has a vital interest in the outcome of the proceedings or is vitally interested in the proceedings, or would be very clearly affected by the result of the proceedings, it is appropriate for that party to be a notice party in the proceedings."

54. While Fennelly J. in his judgment in the 2011 Direction Order proceedings expressed the view that that was not a test of general application, nonetheless it is consistent with the approach he took in applying O. 84, r. 22 of the Rules of the Superior Courts, which requires that any person "*directly affected*" by the proceedings should be joined (see the passage cited at para. 44 above). There can hardly be any doubt that the respondents would be directly affected by the orders sought by the appellants in the proceedings, for the following reasons to which the trial judge gave detailed consideration.
55. The trial judge considered the possible implications for the respondents of being unable to implement the restructuring plan, assuming that it is approved by the European Commission. He addressed the argument advanced by the respondents that this could result in an obligation to repay the aid advanced by the State to the respondents, a claim which was vehemently contested by the appellants. However, the trial judge considered, inter alia, the provisions of Council Regulation (EC) No. 659/1999 which laid down the rules for the application of Article 93 of the Treaty of Rome (which addresses State aid) and which corresponds to Articles 107 and 108 of the Treaty on the Functioning of the European Union. The Council Regulation (EC) No. 659/1999 provides detailed rules in relation to State aid and the trial judge referred to Article 14 thereof which states that Article 14.1: -

"Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if it would be contrary to a general principle of Community law."

56. The trial judge further gave consideration to the terms of a letter issued by the European Commission as regards the restructuring of the respondents, and dated 11th October 2013 in which it was stated that the aid provided by the State to the respondents had been approved on a temporary basis as rescue aid, pending a Commission decision on a restructuring plan. The trial judge stated: -

"It's clear to me on that reference to a temporary basis that if the State gave too much, or if the State should not have intervened at all, or that the restructuring plan simply said, go on as you were in 2013...sorry, 2011...and all of these are possible in those circumstances, there will have to be a repayment."

57. What is clear from all of the above is that the trial judge had ample grounds upon which to base his decision that the respondents have a vital interest in, or, in the words of O.84, r.22 of the RSC, would be "directly affected" by the outcome of the proceedings. It was not, of course, a matter for the trial judge, nor for this Court on appeal, to form a conclusion as to whether or not the respondents would be bound to return the monies invested by the defendant in the event that the restructuring plan could not be implemented. For the purposes of the application before him, in order to be satisfied that the vital interests of the respondents were engaged, or that they would be directly affected by the outcome of the proceedings, it was only necessary for him to have a reasonable basis for concluding that such a risk exists, and in my view there is not the slightest doubt that he had ample grounds for concluding that this was the case.
58. In their submissions, the appellants repeatedly argue that the defendant and the respondents have at all times taken the same side in the various proceedings arising out of the restructuring of the respondents, and the measures taken by the defendant under the Act of 2010, and they submit that this adds unnecessary expense to the proceedings and amounts to an abuse of process. It is worthwhile referring to the observations of Fennelly J. as regards such complaints. At para. 54 of his judgment he stated: -

"An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or her interests, even if the decision-maker is there to advance the same arguments. The matter was expressed by Keane C. J. when giving judgment on a question of costs in Spin Communications T/A Storm F.M. v. Independent Radio and Television Commission (Unreported, Supreme Court, 14th April, 2000):

'This is a case in which the notice party, as indeed the High Court Judge accepted, is a party with a vital interest in the outcome of the matter. As Finlay C.J. said in O'Keeffe v. An Bord Pleanála, where you have a party such as the notice party in the present case who is vitally interested in the outcome of the proceedings, they must be joined as a party and it will be joined by the court if the applicant does not join them. In those circumstances, it seems to me that, once the notice party is there, once he is in the proceedings protecting his interests, he may find himself in precisely the same position as the respondent. He may find himself in the position that he has been there, of necessity, to protect his interests, to advance arguments that may not have been advanced by the IRTC and to have had the benefit of his own counsel and solicitor to protect his interests. It would be quite unjust that he should have to pay his costs because the applicant

company has no assets, where he has been brought there as a necessary party.'

As that passage explains with the clarity characteristic of its author, a party with a direct interest in an administrative decision is entitled to have his own case put to the court by his own counsel independently of the defence made on behalf of the decision maker. That is his right. It does not depend on the court's view as to whether it finds it necessary to hear the party. Naturally, it often happens in practice, usually to save costs, that a notice party will choose not to make independent arguments and to rely on the principal respondent to defend the case. But that is his decision to make."

59. The passages above squarely address the objections advanced on behalf of the appellants as regards duplication of representation, expense and abuse of process. While it may well appear to the appellants that the respondents and the defendant are in some way joining forces against the appellants, that appearance arises merely because of the close alignment of their respective interests. It does not however follow that their interests will at all times be identical, and as Fennelly J. pointed out, their interests would diverge if the defendant became entitled to receive a return of the investment by him, and the respondents were obliged to return the same.
60. I can find no error in the decision of the trial judge, either in the test applied or in the application of the test. I might add that in the particular circumstances of this case, even if it were the case that the trial judge should have applied the civil law test to the application, the result would have been no different. This is a case in which, in my opinion, it could hardly be more clear that the respondents should have been joined to the proceedings from the outset, having regard to the nature of the reliefs sought in the proceedings, since it is the respondents themselves that were responsible for the implementation of the restructuring plan, and not the defendant. In making the argument that he did in opposition to this point, Mr. Skoczylas for all of intents and purposes ignores the fact that the company is a legal personality, separate and distinct from its shareholders. The possibility that these proceedings could lead to the respondents being unable to implement their own restructuring plan, with the further possibility of being required to repay to the defendant the sum of €2.7 billion is surely an exceptional circumstance of the kind referred to by Lynch J. in *Fincoriz S.A.S. Di Bruno Tassan Din v. Ansbacher & Company Limited* referred to above, or, as Fennelly J. put it in the passage cited at para. 42 above, the respondents clearly demonstrated that the proceedings could have a "...real or apprehended effect on [their] proprietary interests".
61. As far as costs are concerned, O. 99, r.2(3) RSC requires the trial judge, at the conclusion of an interlocutory hearing, to adjudicate upon the costs of that hearing, unless for some reason it is not possible for him or her to justly adjudicate upon the issue. The same standard of review applies to the decision of the trial judge as regards the orders he made in relation to costs as applies to his substantive order. So this Court should afford a significant deference to the decision of the trial judge in this regard, and unless satisfied

that he made a clear error or that the justice of the case still requires, this Court should not disturb the order made by the trial judge.

62. Far from making a clear error, the trial judge correctly referred to his obligations under O.99, r.1(4)(A) and considered that he was bound to make a decision on the issue at the conclusion of the interlocutory hearing. He made no order as regards the costs of the defendant stating that he considered the defendant, as Minister, to be "*fulfilling a public duty*" at that point in time and that the appropriate order as regards the costs of the defendant should be to order that those costs should be costs in the cause. But as regards the costs of the respondents, he noted that the joinder application had been opposed and, in effect, he ordered that costs should follow the event. The appellants did not put forward any arguments as to why an order for costs would result in any injustice other than to say that the relief sought in the proceedings is equitable relief of a temporary nature (pending the determination of the Direction Order proceedings, and the Constitutional proceedings). The appellants also asked for a stay on the costs order against them, which the trial judge granted until the final outcome of the proceedings.
63. I can find no error on the part of the trial judge in making the order that he did in relation to costs. The default position was that he was obliged to make an order in relation to costs under O.99, r.1(4)(A) and there was no reason why he could not do so. Nor was there any risk of injustice in his determining the issue of costs at the conclusion of the interlocutory hearing.
64. The decision that he made was that the successful party, the respondents, should recover their costs of the application. This was clearly a decision that he was entitled to make, the respondents having succeeded with their application. The reliance of the appellants on the decision of Clarke J. in *Telefonica 02 Ireland Limited v. Commission for Communications Regulation* is misplaced. That decision is of application to the determination of costs following the final conclusion of proceedings. If these proceedings are seen through to a conclusion, it may, or may not, avail the appellants at that stage. I have already addressed above the arguments advanced under the heading of "*abuse of process*", in the context of the pooling of resources by the defendant and the respondents, and what I have said above in paras. 58 and 59 are of equal application insofar as the same argument is advanced to resist an order for costs.
65. For all of the foregoing reasons, I would dismiss this appeal in its entirety. As this judgment is being delivered electronically, my provisional view is that the costs of the appeal should follow the event and that the appellants should pay the costs of the respondents, to be adjudicated in default of agreement. If any party wishes to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by each side in relation to the appropriate order for costs. Parties should note that in the event that they are unsuccessful in altering the provisional order for costs which I have indicated, that they may be required

to pay the costs of the additional hearing. Haughton and Pilkington JJ. have expressed their agreement with this judgment.