THE HIGH COURT

[2011 No.239 MCA]

IN THE MATTER OF IRISH LIFE AND PERMANENT GROUP HOLDINGS PLC AND IN THE MATTER OF IRISH LIFE AND PERMANENT PLC

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

BETWEEN

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

APPLICANTS

AND

THE MINISTER FOR FINANCE

RESPONDENT

Judgment of Mr. Justice Charleton delivered the 21st day of February 2013.

Three motions have been brought before the Court. In the first motion, Permanent TSB Group Holdings plc and Permanent TSB plc seek to be joined as notice parties to these proceedings. The second motion is that these proceedings should be case managed and travel together with another related set of proceedings. In the third motion, the applicants seek to amend their proceedings to challenge the constitutionality of certain sections of the Credit Institutions (Stabilisation) Act 2010.A concise recital of the background facts will assist in understanding the decision that follows.

Permanent TSB Group Holdings plc is a holding company for shares in Permanent TSB plc. The latter is a financial institution which historically derived from a building society but was later, as I understand it, transformed into a bank. In common with other financial institutions, that bank lent very heavily and very unwisely during the years 2000 to 2008. All the parties to these proceedings accept that there was a degree of stress on the bank thereafter which arose partly from that situation and partly from the requirement of the Central Bank of Ireland for a secure level of liquidity in financial institutions in terms of their outstanding loans. A sharp disagreement arises among the parties as to what happened thereafter. In 2011, the Minister of Finance decided that it was necessary to rescue the bank through an injection of €2.7 billion. The applicants do not accept that it was appropriate to take this step. They argue that the money could have been sourced from elsewhere, that in consequence their shareholding value should not have been written down from (the figures given to me) around €0.33 per share to less than 1c per share, and that the powers vested in the Minister for Finance under the Act of 2010 enabling this step could not or should not have been taken in law or were based on an unreasonable opinion.

Notice of this proposed action was given by the Minister to the holding company. An extraordinary general meeting of the holding company was held on 20th July, 2011. The meeting voted, using round figures, 60:40 against the intervention. Notwithstanding that, on 26th July, 2011, the Minister applied to the High Court for the relevant order. This was granted thus changing the value of the shareholding of the holding company in the bank. Later, it appeared that more money was necessary and a further sum of €1.3 billion was injected into the bank using the same procedure pursuant to an application to the High Court on 20th March, 2012. So that is €4 billion in all.

These proceedings were started on 3rd August, 2011, as a challenge under s. 11 of the Act of 2010 against the earlier injection of capital by the Minister and the consequential diminution in shareholding value. Despite the wide rehearsal of the arguments relevant to that substantive challenge during the hearing of these motions, I express no view as to the merits of any argument on either side.

Joinder of the bank and the holding company as notice parties

Permanent TSB Group Holdings plc and Permanent TSB plc claim an entitlement to participate in the proceedings as notice parties pursuant to O. 15, r. 13 of the Rules of the Superior Courts 1986; under the inherent jurisdiction of the Court; and under s. 11 (2) of the Act of 2010. Under the Rules, the Court may "at any stage of the proceedings ... and on such terms as may appear to the Court to be just, order that ... plaintiffs or defendants… who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

Under s. 11 (2) of the Act of 2010, a wide discretion is given to the Court to "give ... priority to an application … and ... give such directions with regard to the hearing of the application as it considers appropriate in the circumstances." And then, in addition, the Court has an inherent jurisdiction to order its own proceedings for the purpose of achieving justice in the context of the circumstances of the case. As the application was brought under the Act of 2010, I regard the legislation as governing this motion. The legislation clearly provides that the Court has a wide discretion to make appropriate orders so that the case may be disposed of fairly. This must include the making of an order that is conditional on the parties taking whatever steps are necessary to ensure a fair, timely and cost-effective hearing.

Difficult situations as to the joinder and non-joinder of parties commonly emerge in litigation. I might touch on four.

Firstly, a person may claim that a wrong was done to him and in consequence he brings a claim before a court. If A sues B and both are represented there is no procedural or constitutional difficulty if either looses or looses having been condemned as not telling the

truth. A person may claim, however, that he was oppressed as a minority shareholder in a company by a larger shareholder where both of them are directors. There has to be some evidence of this and the evidence may be, for instance, straightforward bullying. The character of both directors is up for scrutiny before the court. One of them may be believed in preference to the other and the court may go so far as to condemn the evidence of that other as a tissue of lies. The parties to such an action will be the director claiming relief against oppression and the company itself. The person responsible for the bullying may not be a respondent or represented. It is likely, though, that as the controlling shareholder in the company he will have his case put through the company's defence of the suit. There is no cause for complaint as to the damage done to the character of the director who was not believed, because he had full rights through the company to receive relevant papers, to cross-examine any evidence against him and to make submissions to the court. These situations are commonplace and cause no difficulty.

Secondly, someone may be a witness to the oppressive situation and may weigh in on one side or the other. Someone may be an expert witness as to the alleged psychological damage done by the bullying. These are mere witnesses and not a party with any rights to put a particular case or challenge adverse testimony. It is within the entitlement of a court hearing that evidence, nonetheless, to reject that testimony. In some cases, the court may go further. It is within its entitlement to give reasons as to why a witness is to be considered as a liar. That witness is not represented and his inability to exercise the defence of his reputation is a consequence of the trial process. Not everyone can be represented. Otherwise cases become unmanageable. Damage to the reputation of a witness is thus an unavoidable consequence of the trial process. This is anomalous. In other circumstances the law goes to extreme lengths to protect reputation. The law allows for the investigation of matters of public interest under the Tribunals of Inquiry (Evidence) Acts 1921-2001. Anyone who might be criticised is entitled to be represented and to cross examine and to make submissions and to have all relevant papers. Mostly, those people are not any different to a witness; except here they are a witness to a matter of public concern. They may have equal reason to lie as a witness in an ordinary contested court case. Were anything potentially damaging to be said about a witness before such a tribunal, that witness would have an entitlement to exercise a full range of rights, usually at public expense, and this despite the tribunal having no power other than that of giving an opinion; Re *Haughey* [1971] I.R. 217; *Haughey v. Moriarty* [1999] 3 I.R. 1.

Even where, thirdly, someone's reputation is likely to be directly in issue in proceedings, there is no automatic entitlement to be joined in proceedings. In *Barlow v. Fanning* [2002] 2 I.R. 593, the head of a university department had initially been joined in proceedings claiming oppression against him and against the university. The proceedings were discontinued by the plaintiff against him. Because his conduct in managing the department was in issue, he brought a motion to be rejoined in the proceedings as a defendant against the wishes of the plaintiff and that motion was successful in the High Court. On appeal to the Supreme Court, that order was reversed. Even though that decision was made under O. 15, r. 13 of the Rules of the Superior Courts, the principle was thereby established that there must be exceptional circumstances before a person could be joined as a defendant against the wishes of the plaintiff. Those exceptional circumstances could include the reasonable possibility that the court might make an order, or allow an order to continue, which affected the entitlements of the defendant in law; see *Fincoriz S.A.S. Di Bruno Tassin Din e C v. Ansbacher & Co Ltd*. (Unreported, High Court, Lynch J., 20th April, 1987). Merely because evidence might deal with someone's actions or end up in a court criticising someone's actions, perhaps severely, does not of itself establish an entitlement to be joined as a defendant or as a notice party; *Yap v. Children's University Hospital Temple Street Ltd.* [2006] 4 I.R. 298.

Fourthly, judicial review applications consider questions of public law. This case does as well although it has been brought specifically under the Act of 2010. In theory, every citizen in the State is affected by a constitutional challenge and as regards administrative review, everyone in the category relevant to a particular challenge, as to a licence for example, may theoretically claim what they would characterise as a particular interest. That is not enough. In *BUPA Ireland Ltd. v. Health Insurance Authority (No 1)* [2006] 1 I.R. 201, the issue was legislation which provided for payments to an existing private health insurer, the Voluntary Health Insurance Board, on the liberalisation of the relevant market and the entry of the applicant into competition with them. A notice party to a judicial review application has in law a full entitlement to argue that the order made by the administrative body which affects it was correctly made; in other words to act as an effective second defendant, or sometimes only defendant as if the main respondent is a judge there is rarely an appearance. The High Court held that the presence of the Voluntary Health Insurance Board as a notice party was not necessary for the effectual and complete determination of the questions at issue in that review. The Supreme Court overturned that decision and at pp. 211-213, Kearns J. commented:-

> While it is true, as argued by counsel for the applicant, that a challenge to legislation *per se* is a matter of public law affecting the public at large and that a private citizen normally will not be joined in proceedings where the Attorney General seeks to uphold the constitutionality of the legislation in question, a very different situation may be said to exist when, as in the present case, a particular party would be *"uniquely adversely affected"* if the application to strike down the Act and scheme were to be successful.
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> In this regard counsel for the second respondent has pointed out that it is by no means unusual for third parties to be heard where the issue is the alleged unconstitutionality of legislation.
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> Thus, for example, in *Buckley and Others (Sinn Féin) v. Attorney General and another* (1950) I.R. 67, the personal representative of the surviving trustees was a defendant. Likewise, in *Blake v. The Attorney General* (1982) I.R. 117, the tenants of one of the defendants were represented by counsel and argued the case before the High Court. Again, in *O'B. v. S* (1984) I.R. 316, where the constitutionality of certain provisions of the Succession Act, 1965 were under challenge, both the testator and the offspring appeared and argued the constitutional point. Counsel for the second respondent suggested, therefore, that it may be said there is a practice that at least a third party who stands *"immediately affected"* by the outcome of a constitutional challenge is entitled to appear and be heard in such proceedings.
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> In the instant case it may be genuinely said that the abolition of the scheme would immediately impact the legal environment in which the notice party is required to operate and would have very significant consequences for how the notice party does its business in the future having regard, in particular, to its statutory obligations to maintain reserves.
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> Furthermore, very serious allegations are made by the applicant in its points of claim to suggest that if risk equalisation payments are commenced under the scheme, the notice party will thereby be enabled to abuse its dominant position in the Irish market. In the course of the hearing before us, counsel for the notice party submitted, we believe correctly, that a detailed market analysis will in this context form an integral part of the upcoming hearing. Indeed, the exchange of evidence and other materials which has taken place since the hearing in the High Court fully supports that proposition. It is incontrovertible that the notice party is in a unique position to contribute to that debate and is, in the words of its own solicitor, likely to be *"uniquely adversely affected"* if the applicant's claims, which go beyond a mere challenge to the constitutionality of the legislation, are successful.
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> The proceedings will inevitably involve an examination of the nature of risk equalisation, the competitiveness of the

> market, the nature of community rated markets and the issue of risk selection. The role of the notice party in that market and the nature of its behaviour in the market will be central issues. It follows that the notice party has the greatest possible interest and need to express its views on matters which go to the heart of the case being made by the applicant. Any suggestion that the applicant is likely to abuse such dominance with the activation of risk equalisation makes it all the more important that the views and input of the notice party in this case would be available to the court.

Thus, it is necessary to ask, in this statutory challenge, whether the submissions of Permanent TSB Group Holdings plc and Permanent TSB plc are needed on any issue for the court to reach a just and complete adjudication.

It is now appropriate to refer to the relevant provisions of the Act of 2010. Permanent TSB plc is a financial institution which comes within the definition of a body regulated in section 2. These are referred to as a "relevant institution" which is defined as follows:

> (a) a body—
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> (i) that has its registered office in the State,
>
> (ii) that is, or was on the date on which this Act came into operation, a bank licensed under section 9 of the Central Bank Act 1971, and
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> (iii) to which financial support has been given or is to be given by the Minister,
>
> (b) a body that has its chief office in the State and is, or was on the date on which this Act came into operation, a building society within the meaning of the Building Societies Act 1989,
>
> (c) a body that has its chief office in the State and is, or was on the date on which this Act came into operation, a credit union within the meaning of the Credit Union Act 1997,
>
> (d) a person or body prescribed under section 3,
>
> (e) a subsidiary of a person or body referred to in any of paragraphs (a) to (d), and
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> (f) a holding company of a person or body referred to in any of paragraphs (a) to (d);

Under s. 7, the Minister may make a direction order in respect of a financial institution which overrides the ordinary rules of company law; such as an order that increases a bank's authorised share capital or alters its articles of association or memorandum. The injection of funding and the write-down in contravention of existing shareholder rights in favour of a resulting issue of shares, as briefly described above, constituted such an order. That order must be proposed by way of consultation with the financial institution and, following the relevant procedure, made, in effect confirmed, by the High Court. It is clear from the legislation that the intention of the Oireachtas was that a high level of certainty would attend the alteration that would normally be made for the purpose of saving a financial institution. Challenges under the Act of 2010, in its unamended form as it applies to these proceedings, had to be made swiftly. In respect of commands given by the Minister once the direction order is made, s. 63 provides for a fourteen day time limit after that decision for applications for judicial review with a possible extension for substantial reasons why the application was not made in time. As regards the direction order itself, s. 11(1) provides:

> The relevant institution in relation to which a direction order is made or a member of that institution may apply to the Court by motion on notice grounded on affidavit, not later than 5 working days after the making of a direction order, for the setting aside of the direction order.

This provision is central to the complaints made by the applicants. In particular they propose to claim that it is contrary to The Constitution of Ireland, 1937 and the European Convention on Human Rights in restricting access to justice. That is not for decision today. Seven shareholders attended the hearing of this motion on the 13th February, 2013, and asked to be allowed to participate for the purpose of setting aside the direction order. These applicants are far too late. Their application, however, does starkly highlight the delay involved in this application in the context of the time limits and the challenge to swiftly issue proceedings set out in the legislation.

On hearing a challenge to a direction order under s. 11, the High Court may only set aside the direction order on two grounds provided for by section 11(3). Firstly, "if it is of the opinion that there has been non-compliance with any of the requirements of section 7" or secondly if it is of the opinion "that the opinion of the Minister under section 7(2) was unreasonable or vitiated by an error of law." The High Court is not entitled to interfere unless one of these grounds is established. Even if the direction order was unlawful, the High Court may replace it and under s. 11(5), the original order continues to be effective "without prejudice to the validity of anything previously done or taken to have been done under the direction order."

Of course, the High Court may simply overturn the direction order, as in a judicial review application. But an application under the Act of 2010 is not a judicial review that is, instead, a statutory remedy which carries under s. 11(4) the possibility of the substitution of a new decision through the judicial arm of government for the old administrative decision confirmed by order of the High Court. That subsection reads:

> The Court may, instead of setting aside the direction order, make an order varying or amending that order in the manner it considers appropriate if the Court is satisfied that—
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> (a) there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7 (2) was unreasonable or vitiated by an error of law,
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> (b) it would be appropriate to do so, having regard to any report referred to in section 9 (4), and
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> (c) to do so is necessary to secure the achievement of the purpose specified in the direction order or any other purpose of this Act.

This is where the interests of Permanent TSB Group Holdings plc and Permanent TSB plc come in. The argument is that they have a vital interest in ensuring that the direction order is not overturned. They claim it was right. They also, they say, need to participate with a view to ensuring that whatever other order might be made by the High Court is tailored to their particular circumstances.

It must be remembered that the holding company voted against this scheme in general meeting. Now, under a new regime, it and the bank seek to come in and support the lawfulness of what subsequently happened. It is difficult to accept that it is logical for both companies to claim the right to appear as notice parties and to argue in support of the Minister that the direction order was properly granted in the first place. In doing so, they would be in effect acting as co-defendants, because that is what happens in public law challenges, and were this Court to make an unlimited order allowing them participation, that joinder of parties would take place a year and a half after the direction order was made, in circumstances where the holding company had opposed the proposal in general meeting and where the Act of 2010 specifies urgency and efficiency in the disposal of ensuing litigation.

In reality provided the direction order so states, the Minister can come into effective command of every aspect of the financial institution that is made subject to the direction order. This is made clear by s. 47 of the Act which provides for wide powers that can override the ultimate decision-making power of a corporate body, namely the general meeting:

> (1) There may be included in an order under this Act a provision that all the powers, or any specified power, exercisable by the members of the relevant institution concerned in a general meeting under, as the case may be, the Companies Acts, the Building Societies Act 1989 or the Credit Union Act 1997, any other enactment, the relevant institution's memorandum of association or articles of association, any agreement or any rule or other instrument, shall instead be exercised by the Minister. Such an exercise shall be taken for all purposes to have been that of the members.
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> (2) Where an order under this Act makes provision in accordance with subsection (1), any provision of the enactments or instruments referred to in that subsection which—
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> (a) enables or requires any matter to be done or to be decided by a relevant institution in general meeting, or
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> (b) requires any matter to be decided by a resolution of that institution, shall be taken to be satisfied by a decision of the Minister notified in writing to that institution.

In that context, there is no need, and there is no benefit to be gained by the Court, from these parties attending the hearing and backing up the contention of the Minister that the direction order was correctly made in the first place. They have claimed that their presence is necessary. That proposition is illogical. The Act of 2010 allows the Minister to override private arrangements and to bypass company law for the purposes of saving a financial institution. Through the holding company this financial institution, apparently, either did not want to be saved or believed that salvation lay elsewhere. It is entirely the business of the Minister as to whether he acted correctly. An argument is made that the financial institution and its holding company would be able to supply vital information to the Court by way of background to the order being made. That, of itself, cannot be a sufficient reason for joinder. Litigation is about finding the truth. All the rules of court do is to provide a fair means towards that end consistent with the need to manage that process. The purpose of the courts established under the Constitution is to administer justice and, in that regard, the courts are vested with such powers as are necessary to resolve litigation. Even before the Constitution, the power of courts to compel the attendance of witnesses and the production of documents was well established. It was, and remains, contempt in the face of the court, for a witness to fail to answer a relevant question. In *The People (DPP) v. J.T.* (1988) 3 Frewen 141 the constitutional position was summed up at pp. 160-161 by Walsh J. thus:-

> Attention should also be drawn to the fact that the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution itself "or other established and recognised privilege". (See the judgement of this Court in *In re Kevin O'Kelly* (1974) 108 I.L.T.R. 97.) It was pointed out by the Supreme Court in the case of *Murphy v Dublin Corporation and the Minister for Local Government* [1972] I.R. 215 that it would be impermissible for the judicial power under the Constitution, in the proper exercise of its functions, to admit any other body of persons to decide for it whether or not certain evidence should or would be disclosed or produced in Court. In the last resort the decision lies with the Courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses, the production of evidence and, *a fortiori*, the answering of questions by the witnesses. This is the ultimate safeguard of justice in the State ...

There is one respect, however, in which the participation of the bank and the holding company is necessary. If the applicants show an error of procedure such as to vitiate the direction order, an unreasonably held opinion by the Minister or an error of law in the sense needed to overturn that order under s. 11(3), the High Court has two choices; the order may be overturned or another order may be substituted for it. In effect, it is possible for the Court to be faced with substituting a new order. Subsections 11(4), (5) and (6) provide:

> (4) The Court may, instead of setting aside the direction order, make an order varying or amending that order in the manner it considers appropriate if the Court is satisfied that—
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> (a) there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7 (2) was unreasonable or vitiated by an error of law,
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> (b) it would be appropriate to do so, having regard to any report referred to in section 9 (4), and
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> (c) to do so is necessary to secure the achievement of the purpose specified in the direction order or any other purpose of this Act.
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> (5) An order under subsection (3) is effective, from the date of its making, to set aside the direction order without prejudice to the validity of anything previously done or taken to have been done under the direction order.
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> (6) An order under subsection (4) has effect, from the date of its making, to vary or amend the direction order without prejudice to the validity of anything previously done or taken to have been done under the direction order.

It was claimed by the Secretary General of the Department of Finance in an affidavit sworn into the July, 2011 application that serious consequences would result were the monies furnished by the State returned. Since this challenge is concerned not only with whether the Minister acted lawfully and reasonably, but is also intimately bound up with the necessity for the Court to at least consider making a substitute order, it becomes necessary to hear from the bank and the holding company such evidence as they wish to proffer on the effect of the reversal of the order on them and as to what alternative order might be suitable. Therefore, as to such part of the substantive hearing, but to that part alone, as deals with the current financial situation of Permanent TSB Group Holdings plc and of Permanent TSB plc and as deals with what order ought to be substituted should the direction order of July, 2011 be

impugned, they will be notice parties entitled to swear affidavit evidence or offer testimony, or challenge testimony or affidavit evidence, and proffer submissions thereon.

My decision is that Permanent TSB Group Holdings plc and Permanent TSB plc should have a limited and specific role in this litigation and should therefore be joined for that specific purpose only.

Constitutional challenge
The applicants claim that certain sections of the Act of 2010 are repugnant to the Constitution and to the European Convention on Human Rights. In brief, the effect of ss. 7, 11, 47, 53 and, combined together, 63 and 64, are argued to block and undermine access to the courts; to abrogate the right to private property; to infringe the duty of effective cooperation in the implementation of European law; and to allow the Minister to completely override private financial contractual obligations and the entire code of law on the regulation of corporate entities. There is no point in rehearsing the arguments either way; these are not germane to the decision that needs to be made.

As a matter of general principle, the courts lean against a multiplicity of proceedings on the same subject matter. This is because different cases arising out of the same facts are a cause of additional stress and expense to the litigants and take up unnecessary court resources. Furthermore, an applicant for relief before a court should generally seek all of the possible potential reliefs in the one set of proceedings and avoid the use of multiple proceedings by ensuring that everything that is said to be wrong with the situation facing that litigant is pleaded under the unified heading of one case; *Carroll v. Ryan* [2003] 1 I.R. 309. Judicial review is an effective but summary form of remedy where oral evidence is rarely heard and where the issues tend to focus on the validity of actions that are backed up by or established by documents and where disputes on the facts are seldom central to the adjudication. Hence, the vast majority of judicial review actions are heard on affidavit. It is possible to bring a judicial review which includes a challenge to the constitutionality of legislation. Where the primary relief sought is a declaration that legislation is unconstitutional, it is generally thought to be more appropriate to pursue such proceedings through a plenary action; Kelly, *The Irish Constitution*, 4th ed., p. 786. But it is not impossible to tack on a constitutional challenge to a judicial review of a judicial or administrative decision. In *Riordan v. An Taoiseach (No 2)* [1999] 4 I.R. 343, Barrington J. commented at pp. 350-351 thus:-

> This Court accepts that the system of judicial review referred to in O. 84 of the Rules of the Superior Courts, 1986, is a very useful jurisdiction. It recognises also that an application for judicial review commencing with an attack on a particular order or administrative decision may, as the proceedings unfold, raise constitutional issues and develop into an attack on a particular Act of the Oireachtas. Clearly the issue ought to be disposed of in the quickest way possible and the quickest way to do this may be to decide it in the judicial review proceedings, see the comments of Walsh J. in *The State (Lynch) v. Cooney* [1982] I.R. 337 at page 373. No rigid rule should be laid down on the matter. But when the primary relief claimed by an applicant for judicial review is the validity of an Act or the repugnancy of a Bill, having regard to the Constitution, this Court considers that the case is not an appropriate one for judicial review, and that the applicant ought to be left to claim relief, if any, in a plenary action.

While this statement of principle is binding on me, this case is different. A judicial review is possible under the Act of 2010 and must be brought under very strict time limits pursuant to s. 63 thereof. That jurisdiction, however, is concerned with actions which take place within a financial institution which has been made subject of a direction order. Under the Act of 2010, and provided the direction order so allows, the Minister may issue instructions to the financial institution and it is these instructions which may be challenged by way of judicial review.

That is not what is happening here. These proceedings are brought by an originating notice of motion backed up by points of claim and are initiated under the even more strict time limits, since amended, under section 11. There is no warrant for including within that specific statutory procedure a challenge to the constitutionality of that section or other sections of the Act. The challenge under the legislation is limited to the procedure before the direction order is made, the lawfulness of the actions of the Minister in pursuit of the direction order and whether the opinion of the Minister in pursuing the direction order under s. 7 (4) was reasonable. Whether it is a good idea or not for a constitutional challenge to be heard together with the main action is beside the point. The statute makes it clear that this cannot happen. The only way to bring a constitutional challenge is by a separate plenary proceeding. If that is brought, it must be brought on notice to the Attorney General and to the Minister. It is not necessary that these applicants should be the plaintiffs, and here I make no decision on *locus standi*, but anyone who is proposing to be a plaintiff must be aware of the financial consequences of having an order for the payment of costs made either in their favour or against them. That litigation can be heard together with these proceedings. In accordance with the decision of the Supreme Court in *Carmody v. the Minister for Justice* [2010] I.R. 635 the appropriate order for disposal of the issues will be, firstly, the non-constitutional points that are raised in these proceedings; secondly, the constitutional issues; and, finally, the points under the European Convention on Human Rights.

Case management
While there was an elaborate notice of motion issued as to case management and the consolidation of these proceedings, the order sought is in the following terms:

An order pursuant to section 11 (2) of the ... Act [of] 2010 and pursuant to the Rules of the Superior Courts for directions ... providing for:

> a) A co-ordinated case management of the ... within proceedings together with the overlapping proceedings bearing the same record number 2011 239 MCA in respect of an application by Horizon Growth Fund NV of 2 August 2011 for the setting aside of the direction order [of] 26 July 2011 (the "Horizon Proceedings"); and
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> b) a direction that ... the "Horizon Proceedings" and [these proceedings] be "joined together" in the sense of similar issues always been dealt with together by the same judge and at the same time (IE simultaneously and/or immediately consecutively); and
>
> c) a common and realistic timetable for the "Horizon Proceedings" and [these proceedings], allowing [these applicants] adequate time to properly prepare and present their evidence and comprehensive grounds to challenge in the context of [these applicants] being lay persons and not having the resources are fully legally represented persons.

I have heard this motion at length. I have received twelve large files of authorities and affidavits and pleadings. Even though the applicants are not professionally qualified, the case was presented very well but with an absence of concision and a perhaps understandable lack of focus on their part. During the course of this motion, for instance, it was proposed by the applicants that I should refer a series of elaborate questions in the context of a procedural decision for the advice of the Court of Justice of the European Union. This is not what case management is about. Case management is about giving the judge a pared down set of

relevant papers to read so that formal motions may be less necessary. Its purpose is to abide the directions of the trial judge where she or he orders that particular issues should be concentrated on with a view to disposing of a case. It may involve concise documents being drawn up as to chronology or as to questions central to the litigation. In this case, the relevant issues that will ultimately be tried seem to me at the moment to be:

a) what facts underpinned the opinion of the Minister as to the financial institution in June, 2011 and what advice was received in that regard from the Central Bank;

b) what alternative investment, or lack thereof, might have been available to the financial institution;

c) whether the correct procedure was followed by the Minister per the Act of 2010;

d) whether the opinion of the Minister was reasonable that, in that context, the order of the High Court should be applied for;

e) whether an error of law central to that exercise vitiated the action of the Minister;

f) if the direction order was wrongly granted, should it be simply quashed or should another form of order be substituted;

g) where does the financial institution now stand in the context of any contemplated reshaping of the order;

h) the constitutional issues may be decided either in the context of a unitary trial or in the context of a module but may only be embarked on should the foregoing paragraphs necessitate those issues;

i) issues under the European Convention of Human Rights, lastly, but once all domestic remedy issues have been exhausted.

The case is already subject to commercial list rules by agreement of the parties. That is enough. Those rules make it possible to make orders as to pleadings, as to preliminary steps and as to the time that will be made available for hearing.

It is reasonable, however, that the Horizon Proceedings and these proceedings should travel together and that issues which are similar to each of the sets of proceedings should be heard together where that is practical. I so order.

It is also reasonable that if there are to be plenary proceedings, these should be initiated immediately. Any proposed applicants who are also applicants in these proceedings are to have three weeks from today's date to issue a plenary summons and deliver a statement of claim to the Attorney General and to the Minister. Three weeks is more than adequate for these two steps as points of claim. These proceedings already encompass many of the points that were argued in Court. Those defendants will have three weeks to file a defence. That case will then travel together with the two cases already extant. They will be put in for mention at 10.30 am on the 9th April, 2013, with a maximum duration for the entirety of case management of 30 minutes to see what else needs to be done. Any new pleadings should be concise. The Court should be furnished with these on the Friday before through the Registrar.

Orders
The orders that I will make are therefore set out in the text of this judgment.