THE HIGH COURT

2013 No. 3285 P

Between:

IRELAND AND THE MINISTER FOR FINANCE

Plaintiffs

– and –

COMHFHOBAIRT (GAILLIMH) TRADING AS AER ARANN

Defendant

2013 No. 3288 P

Between:

IRELAND AND THE MINISTER FOR FINANCE

Plaintiffs

– and –

AER LINGUS LIMITED AND COMHFHOBAIRT (GAILLIMH)

TRADING AS AER ARANN

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 2nd July, 2019.

I. Overview

1. In these proceedings the State parties seek to recover State aid pursuant to a decision of the European Commission. A number of points have been put down for hearing at this time concerning Aer Arann's entitlement (if any) to raise a claim of set-off and the issue of liability more broadly. The background to these proceedings is identified in *Aer Lingus v. Minister for Finance and ors*, *etc.* [2018] IEHC 198, paras. 2-16. Perhaps the only additional point to note in the context of these proceedings is that the Court of Justice gave judgment on 21.12.2016 in Joined Cases C-164/15P and C-165/15P *European Commission v. Aer Lingus Ltd*, etc, upholding the European Commission's State aid decision, the within proceedings taking fresh life thereafter. Given the foregoing, it suffices in this judgment to summarise certain pertinent facts by way of summary chronology:

30.03.2009 Differential air travel tax (ATT) introduced.

21.07.2009 Ryanair complains to European Union re. tax.

15.10.2009 Ireland responds to European Commission re. Ryanair complaint.

18.03.2010 European Commission issues letter of formal notice re. tax.

22.07.2010 Ireland responds to letter of formal notice re. tax.

26.08.2010 Interim examiner appointed to Aer Arann.

08.09.2010 Examiner appointed to Aer Arann.

05.11.2010 Court confirms scheme of arrangement, sets examinership exit date.

10.11.2010 Aer Arann exits examinership.

March 2011 Flat-rate air travel tax introduced.

July 2012 European Commission issues State aid decision.

03.04.2013 State issues these proceedings.

01.04.2014 Air travel tax abolished.

21.12.2016 Court of Justice upholds decision of European Commission.

2. Although there are two cases before the court, the fact that there are two cases has become largely redundant. This is because Aer Lingus has 'stepped out of the picture', consequent upon a resolution of matters between Aer Arann and Aer Lingus as to who operated particular flights at relevant times. (The State parties initially sued Aer Lingus *and* Aer Arann because it was not clear who the operator was). So although there are two sets of pleadings, they have in effect, though not form, coalesced into one. Consequently, the court had only the pleadings in Case No.2013/3285P opened before it, that set of pleadings being a mirror image of the other.

II. State Aid Decision

3. Turning to the State aid decision (see O.J. L119, 30.04.2013, 30-39), a number of points fall to be made regarding same:

(1) it was particularly motivated by the position of Aer Arann because Aer Arann was the entity which Ryanair, as complainant, identified as particularly benefiting from the air travel tax (see *e.g.*, para. 40 of the State aid decision).

(2) at para. 50 there is a final paragraph in relation to the question of selectivity, it being a requirement of State aid, that

there must be a selective aspect to same: the Commission finds that the aid here was selective.

(3) as to the issue of advantage, another ingredient of State aid, the European Commission, at para.54, states:

> *"[T]he lower tax rate provided an advantage to airline operators serving the routes to which that rate applied. The lower cost that they had to pass on to their customers or to assume directly represented financial resources that those airlines operators could economise and therefore improved their economic situation vis-à-vis other airline operators competing in the air transport market. The advantage corresponds to the difference between the lower rate of EUR 2 and the normal rate of EUR 10 during the period between 30 March 2009 and 1 March 2011. The Commission notes that the flights to which the lower rate applied were mainly operated by airline operators with a strong connection with Ireland (Aer Lingus, Aer Arann and Ryanair were set up in Ireland and still have their headquarters there). Therefore, de facto the reduced rate provided an advantage to Irish airline operators compared to other Union operators."*

The notion that "[t]*he lower cost…represented financial resources*" to the airlines is borne out by the accountancy reports that featured in the examinership process, in which mention is made of the possible abolition of the tax and that such an abolition would eliminate a source of working capital.

(4) at p.38 of the State aid decision one finds the dispositive part of same, the Commission concluding that the lower air travel tax constituted unlawful State aid. The decision states, at para.70, that "*The State aid amounts to the difference between the lower rate of the air travel tax and the standard rate of EUR 10 (that is to say, EUR 8 per passenger) levied on each passenger*."

(5) Art.4 of the State aid decision states that "*Ireland shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries*". That is the genesis of these proceedings.

III. Elements of the Case Arising

(i) Examinership.

4. What has happened consequent upon the State aid decision? Aer Arann has paid in relation to post-examinership periods. However, it maintains that in relation to the pre-examinership period, the amount that would otherwise have been payable under the State aid decision should not be ordered by this Court to be paid because examinership operates to wipe out and forgive all debts previous to same, including State aid debt. There are a couple of immediate problems with this proposition:

(i) the State aid decision was not taken until July 2012, *i.e.* some time after the examinership, with the result that there was no State aid decision in being, no liability, no contingent liability *vis-à-vis* the State at the time of the examinership. For the reasons identified later below, the court does not accept that the State was a contingent creditor of Aer Arann at the time of the examinership.

(ii) if the court is wrong and the State *was* a contingent creditor and so the State aid amounts owing by Aer Arann to the State ought to have been determined by the Scheme of Arrangement, this is a situation established by national law and, under the principle of supremacy of EU law, such national law cannot stand in the way of recovery under a State aid decision.

(ii) Set-Off.

5. The plaintiffs maintain that any amount for which they are found liable under the State aid decision can be set off against the amount owing to them in relation to the illegal tax. Three points might be made in this regard.

6. First, the plaintiffs point to their pleadings and say 'Yes, we settled certain aspects of our case. We settled our restitution case. We deleted other parts of our pleadings; however we have asserted the illegality of the tax as part of our defence, we never struck that out, and we are entitled to rely on that.' However, this proposition cannot stand in the face of the decision of the Court of Justice in Joined Cases C-164/15P and C-165/15P, *op. cit*. That decision makes it entirely clear that the illegality of the tax cannot be raised as a defence to State aid. There, Aer Lingus and Ryanair, *inter alia*, were seeking to resist the State aid decision on the basis that the tax through which the State aid was effected was illegal, breaching the principle of free movement. The Court of Justice did not agree, concluding that illegality in, essentially, a different dimension of matters is not relevant. At para. 61 of its judgment, the Court of Justice states:

> *"Aer Lingus recalls that it argued before the General Court that the levying of ATT at the rate of EUR 10 per passenger was unlawful as it was contrary to Article 56 TFEU and Regulation No 1008/2008, and that ATT collected at that rate was liable to be repaid to the companies concerned. The fact that ATT at that rate was unlawful means that the lower rate of ATT cannot be characterised as State aid."*

7. At para.65, the Court of Justice points to how Ryanair took up the same theme, stating:

> *"By the second part of its single ground of appeal, Ryanair argues that the ATT rate of EUR 10 per passenger cannot constitute the 'reference' rate for the purpose of determining whether the lower rate of ATT may be characterised as State aid because, by analogy with the Court' finding in its judgment of 6 February 2003, Stylianakis (C-92/01…), the rate of EUR 10 per passenger was at odds with Article 56 TFEU and Regulation No 1008/2008. To take the higher rate as the reference rate would undermine the consistency of EU law."*

8. However, the Court does not accept these arguments, observing, *inter alia*, as follows:

> *"68 As regards, first, the first part of Aer Lingus' single ground of appeal, it should be noted that the only decisive factor for determining whether a tax measure is to be classified as State aid and, in particular, for ascertaining whether that*

measure gives rise to more favourable tax treatment for its beneficiaries by comparison with other taxpayers, is the effects produced by the measure….

69 …[T]*he fact that a tax measure is contrary to provisions of EU law other than Articles 107 and 108 TFEU does not mean that the exemption from that measure enjoyed by certain taxpayers cannot be classified as State aid, as long as the measure in question produces effects vis-à-vis other taxpayers and has not been either repealed or declared unlawful….*

75 Next, the second to fourth parts of Aer Lingus' single ground of appeal and the second and third parts of Ryanair's single ground of appeal are based on the premiss that the fact that ATT is totally or partially at odds with provisions of EU law other than Articles 107 and 108 TFEU is likely to have a bearing on whether the total or partial exemption from that tax enjoyed by certain operators may be described as State aid within the meaning of Article 107(1) TFEU, in so far as, in particular, the unlawfulness of that measure could give rise, in proceedings before the national courts, to the repayment of all or part of the tax in question to other operators who were not entitled to the exemption in question….

77 It follows from the considerations set out in paragraphs 68 and 69 above that the Commission was obliged to take account of those effects and could not ignore them simply on the basis that the airlines subject to less favourable tax treatment might obtain reimbursement of the excess tax which they had paid by commencing proceedings before the national courts, where appropriate on the basis of provisions of EU law other than Articles 107 and 108 TFEU….

122 …[I]*n circumstances such as those of the present cases, the Commission cannot refrain from finding that a case involves State aid on the sole ground that it is possible that the national courts with jurisdiction may order the airlines which did not have the benefit of the lower rate of ATT to repay the excess ATT. As it was under a duty to establish the existence of State aid, the Commission was also under a duty to order the recovery of that aid."*

9. In short, it is clear from the reasoning of the Court of Justice that the illegality of the air travel tax for some other reason is not a defence to the plea of State aid.

10. Second, when one looks at the authorities on equitable set-off, it is clear that in order to have equitable set-off, there must be a cross-claim. There is no such thing as equitable set-off without a cross-claim. By way of support for this assertion, if one looks, *e.g.*, to Wood, P., *English and International Set-Off* (1989), an old but still useful textbook, the learned author states as follows therein, at 107 under the heading "*Policies of transaction set off":*

"The main policy underlying transaction set-off is that a creditor should not be able to claim payment for something which he has not done in breach of his obligation to the debtor. A seller should not be able to claim the full price if he has delivered defective goods. A ship-owner should not be able to claim charter-hire where in breach of the charter-party he has wrongfully deprived the charterer of the use of the ship. A builder should not be able to claim the price of the building where the building works are defective contrary to the terms of the contract. A lawyer or other provider of services should not be able to claim fees if the services are negligently performed…".

11. It is a matter of common-sense that in order for a court to arrive at a process of set-off, it must first decide, *e.g.*, the lawyer's fees payable, and then whether the lawyer has been negligent. It is only when those two claims are run and independently adjudicated upon by the court that there can be a set-off – and what is striking here is that Aer Arann have struck out the very proceedings in which such a process would have happened.

12. Continuing with his analysis, Wood later observes as follows, at 110, under the heading "*Judicial set-off and counterclaim*":

"Where the set-off is raised in court proceedings, a transaction set-off is a defence. The plaintiff obtains judgment for the balance only, not judgment for the claim with a stay of execution pending trial of the defendant's counterclaim. It may be noted that if the defendant's cross claim does not strictly qualify as a transaction set-off, then, if the cross-claim is transactional or is related to the creditor's claim, the defendant is more likely to be able to have his cross-claim heard as a counterclaim in the same action".

13. Whether one calls it a counterclaim or a cross-claim, some court has to determine whether or not there is a good argument on the substantive issue that a defendant is praying in aid. That is wholly absent here. And the position is no different in relation to equitable set-off: there still has to be a determination of the cross-claim. That this is so is clear from Wood, who observes as follows, at 116, under the heading "*Development of equitable set-off":*

"Courts of equity…allowed…cross-claims to be raised in the same action provided that they arose out of the same transaction and went directly to impeach the plaintiff's demand."

14. There is a debate in the case-law as to the borderline between cross-claims and counterclaims; that debate is not relevant here because what presents, as is clear from the just-quoted text, is a cross-claim.

(iii) Settlement.

15. Third, even if the court is wrong in all that it has asserted in this part of its judgment, Aer Arann, try though it might (and it has tried), cannot get around the Settlement Agreement that it has agreed with the State parties wherein one sees the complete striking out of the restitution proceedings and also the striking out of the counterclaim and set-off. Three sets of proceedings are addressed by the Settlement Agreement:

(1) *Comhfhorbairt (Gaillimh) trading as Aer Arann v. The Minister for Finance, Revenue Commissioners, Ireland and the Attorney General* (No. 2014/3349P); these proceedings are agreed to be struck out;

(2) *The Minister for Finance and Ireland v. Comhfhorbairt (Gaillimh) trading as Aer Arann* (No. 2013/3285P); (i) various parts of these pleadings are struck out (the court returns to this aspect of matters hereafter), (ii) certain claims for costs for discovery are waived; and (iii) the proceedings are stayed (because of the Court of Justice ruling);

(3) *The Minister for Finance and Ireland v. Aer Lingus Limited and Comhfhorbairt (Gaillimh) trading as Aer Arann* (No. 2013/3288P); here a similar approach was adopted as regards (2). All matters were to be and were ruled on by the High Court.

16. The Settlement Agreement is a succinct agreement, the objects and provisions of which are clear. Moreover, the court recalls in this regard the clear public policy reasons that inform the need for holding parties to their settlement agreements, which reasons have lately been touched upon by the Supreme Court in *Mulrooney v. John Shee and Co. Solicitors and ors* [2013] IESC 20. There there had been Circuit Court proceedings about land in Kilkenny and a milk quota on that land. In the Circuit Court, Mr Mulrooney lost, an appeal was then brought to the High Court, but before that appeal was heard the proceedings were settled. Mr Mulrooney subsequently became unhappy about the settlement and sought to reintroduce in another set of proceedings points that the defendants said had already been settled in the first proceedings. In his judgment, Clarke J., as he then was, summarises, in the following terms, the principles applicable to settlement agreements:

> *"7.1 The starting-point of any consideration of the issues which arise has to be to note the legal effect of a settlement of proceedings. As the authors of Delany and McGrath* – Civil Procedure in the Superior Courts, *3rd ed., point out at para. 19-28 "the compromise of a cause of action will extinguish it so that it can no longer be litigated by a party to the compromise or their privies'. The authors cite as an example* Mahon v. Burke *[1991] ILRM 59 at 63.* [Here the State parties have invoked both the general rule on settlement and *Henderson v. Henderson* [1843] 67 ER 313; however that case is not so relevant here because the specific issue of set-off was raised and compromised*. i.e.* this is not a case where that issue could have been raised but was not.]
>
> *7.2 As the authors also point out, the rationale for the rule lies in two aspects of public policy, being the need for there to be an end to disputation and the desirability of parties being held to their bargains.*
>
> *7.3 The basic question is, therefore, clear. Where a party settles proceedings then whatever cause of action was raised in those proceedings can no longer be the subject of litigation. A party has, by entering into an agreement to settle, given up their right to whatever claim might have been made in the proceedings in question."*

17. In passing, the court notes for the sake of completeness that the within proceedings are not concerned with a case of *res judicata*: the High Court has never adjudicated on the restitution proceedings brought by Aer Arann because they were struck out before the court could do so.

IV. Settlement and After

18. Turning briefly to the struck-out case of C*omhfhorbairt (Gaillimh) trading as Aer Arann v. The Minister for Finance, Revenue Commissioners, Ireland and the Attorney General* (No. 2014/3349P), the court notes that following on the plenary summons, the statement of claim, the defence, *etc*., a strike-out order was obtained on consent, which order stares, *inter alia*, as follows: "[T]*he proceedings herein have been settled by consent on the terms now reduced to writing (subject to the Court)….And the Court noting said Settlement Agreement…By Consent IT IS ORDERED that the said Notices of Motion and the proceedings in the Title hereof be struck out with no further Order."* So a conscious decision was made not to continue with the restitution proceedings (and when one looks to the witness statements in the within proceedings, one can see why that decision was made: Aer Arann could not afford to continue with the proceedings). What Aer Arann is seeking to do now is to resile from its settlement agreement. However, there is an abundance of case-law, *e.g.*, the decision in *Mulrooney* referenced above, as to why public policy does not allow parties to a valid settlement agreement to resile from same.

19. In passing, it is interesting to look at the re-amended defence in *The Minister for Finance and Ireland v. Aer Lingus Limited and Comhfhorbairt (Gaillimh) trading as Aer Arann* (No. 2013/3288P) after the strike-out of *Comhfhorbairt (Gaillimh) trading as Aer Arann v. The Minister for Finance, Revenue Commissioners, Ireland and the Attorney General* (No. 2014/3349P). There, one finds struck-out the following line: *"34. Aer Arann will seek to set off so much of its claim herein as is sufficient to satisfy the Plaintiffs' claim herein (if any)"*. What does this strike-out tell the court? It shows that para.34 was struck out as part of the settlement, as was the entirety of the counterclaim. In other words, if there was a right of set-off, it was extinguished as part of the settlement – a proposition that makes perfect sense because, at the same time, the proceedings where that substantive issue would have been determined (*i.e.* the restitution proceedings) were also struck out.

V. Witness Statements

(i) Witness Statement of Mr Kenny.

20. Mr Kenny is a Principal Officer in the Department of Finance where he has responsibility for Indirect Tax policy. He has provided affidavit evidence in which he avers, *inter alia*, as follows:

> *"3. Ireland's Air Travel Tax (ATT) was considered to be an Indirect Tax. As a result I have responsibility for the recovery of the associated State Aid. This involved engagement with the airlines initially to meet the requirements of the Commission state aid decision and subsequently the initiation of legal proceedings to this end. While not directly responsible for the calculation of interest and engagement with the airlines and the Commission, I have overall responsibility within the Department of Finance for the recovery of the State aid.*
>
> *4. Ireland operated an Air Travel Tax from March 2009 until March 2014. The tax applied to departures of passengers on flights from certain Irish Airports. From March 2009 to March 2011, two rates of tax applied: €2 per passenger on flights where the destination was located not more than 300 kilometres from Dublin Airport; and €10 per passenger applied to flights to any other destination….*
>
> *5. In July 2012 the European Commission adopted a decision that the lower rate of the ATT which applied to passengers travelling within a 300km radius of Dublin Airport was an unlawful State aid. The Commission Decision was notified on or about 26th July 2012. The Department immediately began taking steps to calculate and recover the State aid, as required by the Decision. To this end, the Department entered into correspondence with Aer Lingus. By letter dated 23rd August 2012 the Department put to the airline a calculation of the total amount to be recovered from it at €4,043,496 excluding interest. In response, Aer Lingus stated that it was seeking an annulment of the Commission's decision under Article 263 TFEU and would shortly be filing an application for annulment with the EU General Court.*
>
> *6. Similarly, the Department entered into correspondence with Aer Arann. By letter dated 3rd September 2012 the Department put to the airline a calculation of the total amount to be recovered from it at €2,897,856 excluding interest (this figure was subsequently revised to the current amount of €2,897,608). After sending a holding reply dated 12th September 2012, Aer Lingus replied by letter dated 17th October 2012. In that letter the airline did not comment on the figure of €2,897,856. It noted that another airline (Aer Lingus) was intending to challenge the Commission's decision before the EU General Court, and so Aer Arann proposed to await the outcome of those proceedings.*

7. By letter dated 8th November 2012 the Department sought clarification about the arrangements for flights operated jointly between Aer Arann and Aer Lingus….Aer Arann replied by letter dated 5th December 2012. It stated that it would not reply to the Department's queries until the proceedings brought by Aer Lingus before the EU General Court were resolved. It also argued that it was not liable to pay any claim sums for periods before 26th August 2010 because it had been placed in examinership and the High Court had approved a Scheme of Arrangement in November 2010. [That is the examinership defence].

8. Finally, by letter dated 22nd January 2013 the Department warned both Aer Lingus and Aer Arann that if recovery of the state aid arising as a result of the Franchise Agreement between the airlines together with compound interest was not made within 2 weeks, proceedings would issue without further notice. The letter of 22nd January 2013 to Aer Arann also addressed that airline's claim concerning examinership. The Department also wrote an 'O'Byrne' letter to both Aer Lingus and Aer Arann dated 22nd January 2013 calling upon both airlines to accept liability for repaying the State aid in respect of the flights operated jointly under Franchise Agreement.

9. When the airlines failed to make recovery of the sums demanded, the State had no choice but to initiate legal proceedings to recover the sums claimed, These proceedings were stayed by the High Court pending an appeal against the Commission decision, which was upheld by a ruling of the Court of Justice".

(ii) Witness Statement of Mr McAteer.

21. Mr McAteer is a chartered accountant and a past interim examiner and examiner of Aer Arann. He avers, *inter alia*, as follows:

"7. I can confirm that, during the period of the Examinership, I had no knowledge whatsoever that the Differential Air Travel Tax being charged to Aer Arann up to the time of the commencement of the Examinership, and which continued through the period of Examinership and thereafter, might give rise to a State Aid liability in respect of the pre-Examinership period or at all. No such liability had been identified in the Independent Accountants Report…and such a possibility had not been mentioned to me by any of Aer Arann's Officers, Directors or Agents, nor had such a possibility been adverted to me by my own staff. In particular, no intimation of a possible State aid liability was intimated to me by anybody on behalf of the State."

22. The just-quoted text seems rather to support the argument of the State parties in these proceedings that there was no extant prospect of liability and that the State parties were not a contingent creditor at the time of the examinership.

23. Mr McAteer continues:

"8. Had such a possibility been raised, I would have ensured that the Scheme of Arrangement which I prepared would have made express provision for such a liability, and I would have required that liability to be expressly written down and addressed in the Scheme.

9. However, I took particular care that the Scheme of Arrangement made it clear that all such liabilities, whether contingent, prospective, notified, acknowledged or recognised, or otherwise, were taken into account. In this regard I beg to refer to the Order of the Court made 5 November 2010 and the final version of the Scheme of Arrangement…I refer in particular to Clause 6.3 of the Scheme which provided that:

> 'These Proposals cover all of the Company's liabilities to Creditors of a class of Creditor specified in Clause 12.3 and any person who is an Unagreed Creditor pursuant to Clause 9.4, including contingent and prospective liabilities as at the Fixed Date whether or not the liabilities have been notified, acknowledged or recognised. Without prejudice to the right of the Company to perform and seek performance of its contractual rights and entitlements existing at the Fixed Date, no Creditor, or other party claiming to be a Creditor or Member, of a class of Creditor specified in Clause 12.3 or an Unagreed Creditor shall have any right, interest or claim of any description whatsoever against the Company, irrespective of when due or payable, arising out of or connected with any contract, engagement, circumstance, event, act, obligation, liability or omission of the Company prior to the Fixed Date, save as provided in these Proposals.'

10. Had a State Aid repayment obligation been subsequently advised to the company, post examinership, but relating to a period prior to the Fixed Date, namely 26 August 2010, which was not accepted or agreed, or expressly provided for in the scheme, the Scheme of Arrangement made provision for a mechanism, in Clause 10, to determine the claims of Unagreed Creditors. That mechanism provided that Unagreed Creditors might forward to the Company a proof of claim within a 14 day specified period and if, within a further 14 days, the Company disputed the claim, it could, within a further 14 days, be submitted to a nominated Expert....In the present case, the Scheme provided, in Clause 13.4, that Agreed Unsecured Creditors would be paid 10% of their Agreed Debt."

24. There is no version of the history to these proceedings in which the State could have notified, as an agreed creditor, the State aid liability because no decision had been made by the relevant time. Indeed, if one looks to the State aid decision and its aftermath, the amount owing thereunder is not identified; it is not until down the line when Ireland has gone off and ascertained what was paid that the actual amount can be identified.

25. Continuing, Mr McAteer observes as follows:

"13. Ultimately, I was able to secure the involvement of an investor, Everdeal Limited, to invest a total of €3.5m, into the company in return for being allotted certain Subscription Shares. Everdeal Limited was, itself, a new company formed to represent the interests of three parties, namely the Stobart Group, Pádraig O'Ceidigh, a well-known Galway business man who had been instrumental in the development of Aer Arann in the decade or so prior to the Examinership, and Tim Kilroe. Mr Kilroe was willing to invest a total sum of €2.2m conditional upon Aer Arann exiting Examinership in accordance with the proposals set out in the Scheme of Arrangement. Of the sum of €3.5m, the Stobart Group provided a sum of €2.5m, and Mr O'Ceidigh provided €1m. In addition, the Stobart Group and Mr O'Ceidigh agreed to make available sums of €1.25m and €250k respectively as a total Working Capital Loan of €1.5m to the Company for a 24 month period subsequent to its exit from Examinership. In addition, the equity in certain aircraft, amounting to a sum of €2.5m, was also made available to the company under the Scheme.

14. Ultimately, value amounting to a total of €9.7m was made available to Aer Arann pursuant to the Scheme of Arrangement, by the following parties:-

(a)	*Everdeal:-*	*€3.5m*
(b)	*Stobart/O'Ceidigh Working Capital Loan:-*	*€1.5m*
(c)	*Aircraft Equity:-*	*€2.5m*
(d)	*Tim Kilroe:-*	*€2.2m*
	TOTAL	*€9.7m*

15. As part of my endeavours to secure a suitable Investor to enable Aer Arann to exit from Examinership, I solicited 17 expressions of interest from different parties. Ultimately, however, it was only Stobart Air which thoroughly went through the due diligence process, notwithstanding that I sent an information memorandum and non-disclosure agreement out to all interested parties.

16. Notwithstanding that the interest on the part of the Stobart Group, with Mr O'Ceidigh and Mr Kilroe was real and substantial, I had very great concerns throughout the Examinership process that the investment might not ultimately proceed. The requirements for Working Capital, post-Examinership, on the part of the company were very considerable, and the financial projections made available and discussed during the Examinership process indicated that the Company's prospects of survival, post-Examinership, were by no means certain.

17. It was in this context that the ultimate investment proposals made available through Everdeal were the very best that I was able to secure from the Investors. I have no doubt that no further monies would have been available, and the investment was contingent on all of the Creditors of the company being addressed within the ambit of the sum of €2.2m which was being allocated, out of the subscription from Everdeal of €3.5m, to pay such creditors. Had a State aid liability been advised prior to, or during the Examinership it would have been dealt with under the Scheme of Arrangement and accommodated within the total overall sum of €2.2m for creditors. I am satisfied that no further funding would have been available from the Investors to discharge any additional Creditor claims. In particular, I am absolutely satisfied that, had it occurred to the Investors that Aer Arann might be found exposed to a post-Examinership State aid liability deriving from the pre-Examinership period, that the Investor would have withdrawn, the Examinership would have failed, and Aer Arann would have been wound up by order of the Court.

18. To emphasise the degree to which the investment was on edge, the Revenue Commissioners objected to the Scheme of Arrangement, until the last minute, complaining that the manner in which their preferential, and super-preferential, claims were being dealt with. They were seeking payment, initially, of a sum, as I recall, of circa. €80k. However, a possible requirement to invest an additional €80k was wholly rejected by the Investor, which indicated that it was prepared to withdraw from the proposed investment unless all Creditors could be compromised within the total sum of €2.2m. In particular, I remember Mr Seán Brogan, of the Stobart Group, making this position plain to the Court when it came to consider the Scheme of Arrangement, and the objections from the Revenue Commissioners, in early November 2010."

26. This aspect of matters – the making of the investment – is a point on which Aer Arann places much reliance, viz. that it would not have invested had it known about the State aid liability. But that, as case-law makes clear, is not a reason for preventing the recovery of unlawfully executed State aid. It is difficult not to feel sympathy for the investors that matters have transpired as they have, but that is how matters have transpired.

(iii) First Witness Statement of Mr Whawell.

27. Mr Whawell, a chartered accountant by profession, is the CEO of Stobart Group Limited. He avers, *inter alia*, as follows:

"1.1 .I was Chief Financial Officer of Stobart Group Limited between 2008 and 2016, and in particular during 2010….

2.1 At the time the Stobart Group had extensive business interests in both Ireland and in the United Kingdom. It was a leading provider of multimodal logistics through its road, rail, port and Air divisions. Stobart Group had acquired Carlisle Lake District Airport and London Southend Airport. In addition, the Stobart Group had a general interest in any potential new business opportunities related to its core business, including peripheral businesses. In 2008, Stobart Group Limited acquired London Southend Airport, for developing London Southend Airport for the 2012 London Olympics."

28. In this context, Stobart made informal approaches to small regional airline companies who could bring flights into London Southend and, in doing so, came into contact with Mr. O'Ceidigh, who was the director of Aer Arann, and who asked if Stobart would be interested in investing in the Aer Arann Group. Mr Whawell continues:

"2.4. On the 20th August 2010 BDO furnished details of Aer Arann's pre-examinership balance sheet and a strategy of investment post-examinership for his consideration. Again, this was part of the group's preliminary investigation and a letter was prepared and sent to Pádraig O'Ceidigh stating that any investment will be subject to appropriate due diligence and agreement of terms between the parties….At no stage in the pre-examinership process were the Stobart Group made aware of any potential ATT liability to the State. If this were known, the company may still have invested [– an interesting averment]. *However, investment would have been on the understanding this liability would have been dealt with and removed as part of the examinership process* [– this is to aver to an impossibility: there was no decision by the European Commission, so there would not have been any way of excluding the possibility of the Commission making a subsequent decision and seeking recovery]."

(iv) Second Witness Statement of Mr Whawell.

29. In an additional witness statement provided by Mr Whawell, he avers, *inter alia*, as follows:

"iii. If Stobart Air UC loses case numbers 2013/3288P and 2013/3285P in relation to the recovery of Air Travel Tax the liabilities and consequences will accrue as follows:

a. Stobart Air UC is liable for the first €765,044 of any liability with all other liabilities in excess of this amount are

being borne by Stobart Group as Stobart Group has following a sale of its interest agreed to indemnify Stobart Air UC for all of its losses and costs incurred in excess of the sum of €765,044 so Stobart Group is in effect directly liable for any excess amount of liabilities and losses;

b. The sum of €765,044 is a significant sum for Stobart Air UC to be liable for;

c. Stobart Group as an investor through a wholly owned subsidiary acquired its interest in the Stobart Air group business in 2010 and will be directly disadvantaged if the cases are lost resulting in the indemnity to pay for any sums recovered in excess of €765,044 being called upon;

d. Although Stobart Group is a quoted company and a sizeable company the quantum of the potential loss is very significant and not one it expected as in investor back in 2010 being called upon to pay;

e. If Stobart had been aware of the contingent liability risk for unknown matters not being extinguished by the Examinership process then Stobart Group would have been very unlikely to have invested in the first place which would have meant that the Stobart Air business would not have been in operation since 2010 employing substantial numbers of employees, servicing customers and paying taxes;

f. The ex post facto imposition of a substantial liability not at all foreseen and not extinguished by the Examinership process would wholly undermine the legal certainty expressly intended by that process whilst also severely adversely affecting Stobart's legitimate expectations.

iv. In or about November 2010, Stobart Group Limited acquired rights to 32.5 % of the Shares in Everdeal Limited with the balance being held by new investor Tim Kilroe's investment company and founder Pádraig O'Ceidigh's investment company.

In or about December 2012 there was further investment and Stobart Group Limited increased its shareholding to 45% of Everdeal Limited, with Invesco acquiring 40%, Cenkos 10% and Padraig O'Ceidigh's investment company reduced to 5% and Tim Kilroe's investment company exited the business.

In or about November 2016 Stobart acquired a 36% stake from Invesco resulting in Stobart owning 81% and Padraig O'Ceidigh's investment company acquired 4% from Invesco resulting in that investment company owning 9% with Cenkos still owning 10% and with Invesco exiting the business.

In or about February 2017 Stobart acquired a further percentage from Padraig Ó Céidigh's investment company and Cenkos to achieve a 100% shareholding interest.

In or about February 2019 Stobart sold its interest down to 40% with a sale of shares to an Employee Benefit Trust and thereafter a sale of its remaining 40% shareholding to Connect Airways."

30. The significance of these averments is to make clear that there is no plea that Aer Arann will go out of business or such like if the monies sought by the State parties are paid.

(v) Witness Statement of Mr Brogan.

31. Mr. Brogan was the managing director of Stobart Limited back in 2010. He avers, *inter alia*, as follows:

"2.12 One of the liabilities of Aer Arann, on entry into its Examinership, were its arrears of Air Travel Tax in the sum of €162,397. The Stobart Group was aware that Air Travel Tax was levied on a differential basis, dependent upon whether passengers were departing for destinations more or less than 300 km from the airport in question. It never crossed our minds that this differential might be capable of giving rise to a State Aid liability, or that it might subsequently be contended by the State that Aer Arann might, post Examinership, remain liable in respect of unlawful State Aid constituted as the result of the differential tax, predating 26 August 2010, being the relevant date identified for the writing down of debts under the Scheme of Arrangement."

32. This averment suggests that the arrears of air travel tax were being used as working capital and that Stobart had a heightened awareness of air travel tax as a result of this fact.

33. Mr Brogan continues:

"3.1 Ireland and the Minister for Finance commenced their State Aid Recovery proceedings 2013/3285P and 2103/3288P against Aer Arann both in respect of Aer Arann branded flights, and Aer Lingus Regional branded flights in April 2013. The total amount claimed on foot of both proceedings amounted to almost €4m, with interest, which in the context of Aer Arann's finances following its exit from examinership, was an absolutely massive sum and which, if paid, would have essentially wiped out the entirety of the equity contribution from the Stobart Group into Aer Arann."

34. Mr. Brogan indicates that the amount sought in the State aid recovery proceedings would have wiped out the entirety of the equity contribution from the Stobart Group into Aer Arann. He next proceeds in his affidavit to say that the proceedings were "*taken very seriously*", that "*it was clear that the State Aid issues in question were very complex*", that "[h]*aving regard to our involvement with Aer Lingus…it was possible for Aer Arann's solicitors…*[to] *get an understanding as to the nature of the Defences being run by Aer Lingus in answer to the proceedings*", and that "*Given that…the finances of Aer Arann were considerably under strain, such that we wished to keep our legal costs of defence to a minimum, I caused instructions to be issued…that the Aer Arann Defences, and tactics generally, should, insofar as possible, be modelled closely on those adopted by Aer Lingus….save only that from Aer Arann's initial Defences…Aer Arann also pleaded the Examinership, contending that the State Aid Repayment claims would not succeed insofar as they related to debts barred pursuant to the Examinership*."

35. Mr Brogan continues:

"3.5 From the outset, and in accordance with the tactics devised by Aer Lingus, Aer Arann also filed counterclaims seeking repayment of the €8 differential between the higher and lower rates of taxes. By Amended Defences delivered in November 2013 the Aer Arann Counterclaims were expanded to include damages for breach of EU law (which I am

advised are referred to as 'Francovich' damages claims).

3.6 In early 2014, my attention was drawn by Aer Arann's legal team to the fact that both Aer Lingus and Ryanair had also brought separate proceedings seeking an order for the repayment of the €8 differential tax as sums wrongly paid to or received by the Revenue Commissioners, along with damages for breach of their constitutional and/or EU rights and other reliefs. Again, with a view to mirroring the approach taken by Aer Lingus and Ryanair, I instructed our legal team to initiate similar restitution proceedings, and such proceedings were duly commenced in March 2014."

36. The said proceedings were then transferred to the Competition List.

37. Mr Brogan continues:

"3.9 By August 2014, it had become clear to Aer Arann that the costs of obtaining an Expert Report to sustain and support its claim for losses, as claimed in its restitution proceedings, and as counterclaimed in the recovery actions, was going to be very considerable. Aer Arann received initial quotation costs from proposed experts, RBB Economics, of Brussels, in August 2014, of up to €250,000 approximately, and this estimate was only proffered on the limited basis of the information then to hand.

3.10 The requirement to incur costs in this order would have been, in my view, extremely onerous for Aer Arann to bear at the time. In or about November 2014, I accordingly instructed our legal team to liaise with the legal team for the State Parties to see if it were possible to agree terms for the withdrawal of the Aer Arann restitution proceedings on the basis that, as Aer Arann was a small operation, we had become concerned about the growing costs of the proceedings relative to any benefit we might get if we won. I was subsequently advised that the State's legal team had reverted to indicate that, because the restitution proceedings were linked with the recovery proceedings with regard to discovery issues concerning the counterclaims, the State Parties would not be willing to permit discontinuance of the restitution proceedings without the counterclaims in the recovery action also being withdrawn."

38. All of the air travel tax proceedings were then adjourned, initially to 27.01.2015 and then to 10.02.2015 to allow the EU-level court cases to proceed.

39. Mr Brogan continues:

"3.12 The decision of the EU General Court in February 2015 was of enormous significance to Aer Arann, because, although it agreed with the Commission decision that the Differential Air Travel Tax had a State Aid impact, and agreed that the Commission was obliged to ensure that '…the real advantage resulting from the aid is eliminated and thus to order recovery of the aid in full', it found that the Commission had erred in assessing the real advantage of the aid at the €8 differential figure, and decided that the Commission should have merely ordered the recovery of the amounts actually corresponding to the advantage resulting from the application of a lower rate of tax, which consisted '...in the improvement of the competitiveness of airlines'. As a result, it was clear from the decision of the General Court that, unless this decision was reversed on further appeal, the Commission would be required to evaluate '... in each individual case, the effects of the aid on the beneficiaries on the basis of their individual choices...'….

3.13 In practical terms, it was clear, as of February 2015, that the legal framework against which the Aer Arann Recovery proceedings and its own restitution proceedings had been issued was by now fundamentally changed. Insofar as the recovery proceedings were concerned, it was the view of our legal advisors that the recovery proceedings, as then currently framed, could not succeed if the General Court decision of February 2015 was either not appealed, or upheld on appeal, and would either have to be significantly amended, or, alternatively, struck out. I accordingly directed the Aer Arann legal team to write to the Solicitors for the State Parties involved in the recovery proceedings to seek their agreement to the actions being struck out, but they were unwilling to do so pending, initially, a decision by the Commission as to whether it would appeal the ruling of the General Court, and, when it decided to appeal, pending the outcome of the appeal.

3.14 However, in the light of the decision of the General Court, and notwithstanding the existence of a possible right of appeal on the part of the Commission [so Mr Brogan did know about the right of appeal], *it was clear to me that the justification for Aer Arann continuing its counterclaims in the recovery proceedings and the Aer Arann separate restitution proceedings was no longer of the same order as it had been prior to the decision of the General Court. In particular, it was the view of Aer Arann, and my view, at the time, that the differential tax had in fact conferred no competitive advantage whatsoever on Aer Arann vis-à-vis any other competing airline, or in any other way whatsoever. It was my view that if a State Aid evaluation, as directed by the General Court, were to be undertaken, it would result in Aer Arann having little or no liability whatsoever to the State Parties, particularly once it was appreciated that any State Aid preceding the Examinership would be barred from recovery.*

3.15 In these circumstances, and notwithstanding that the State parties were indicating, subsequent to the decision of the Commission to appeal against the decision of the General Court, that they were requiring their recovery proceedings to continue, I instructed Aer Arann's counsel to propose to the State's counsel involved in the recovery proceedings that Aer Arann would be willing to withdraw its counterclaim in the recovery proceedings and to withdraw its separate restitution proceedings on the basis of each side bearing its own costs. I understand that Aer Arann's senior counsel communicated our proposal on a without prejudice basis, to Senior Counsel on behalf of the State parties in the recovery action, who indicated he would take instructions.

3.16 Meanwhile, the Commission decided to appeal the Decision of February 2015, and, on 28 April 2015, on foot of a motion from Aer Arann seeking the striking out of the recovery proceedings, the High Court directed on consent, that the Aer Arann recovery actions were to be stayed pending the outcome of the appeal. However, the Aer Arann restitution action was not stayed. During the course of 2015, the State's applications for Orders for Discovery, and the delivery of Expert Reports, against Aer Arann, and the other airlines, in the restitution proceedings were adjourned from time to time".

40. There follows a reference to how the Settlement Agreement came about. Mr Brogan then continues:

"3.20 As of the date of the Settlement Agreement, the substantive State Aid Recovery claims had remained stayed pursuant to the Order of the Court made 28 April 2015."

41. So one can see that the Settlement Agreement was done prior to the decision of the Court of Justice in 2016. In other words, Aer Arann made a bargain when it perceived the General Court ruling to be in its favour. Aer Arann knew there was an appeal but nonetheless decided to go ahead and do as it did. Matters have changed because of the decision of the Court of Justice (something that was always a possibility) and it has changed in a way that Aer Arann does not like, with the result that Aer Arann wishes to undo its bargain. But that is something Aer Arann cannot do, nor be allowed to do.

42. Mr Brogan continues:

> *"3.21 The Recovery actions remained stayed following the Settlement Agreement until after the judgment of the Court of Justice of the European Union of 21 December 2016 which reversed the judgment of the General Court and upheld the Decision of the Commission. Thereafter, in 2017, the stay on the further prosecution of the recovery actions was lifted by the Court and the matters have since proceeded….*
>
> *3.22 By 2017 I was no longer with the Stobart Group. However, I understand that it was a matter of extreme disappointment to Aer Arann to find that it was now being pursued, again, for the recovery of the state aid in respect of the differential tax. However, in connection with the stay being lifted, I understand that Aer Arann was advised by its legal team that a further possible ground of defence would be open to it pursuant to which it would assert a right to seek to set off the amount of any tax unlawfully levied on Aer Arann in diminution and extinction of the State Aid claims, albeit that no counterclaim could be advanced seeking the recovery of unlawful tax over and above the amount of any State Aid that might be directed to be paid in the recovery proceedings, since, under the Settlement Agreement, the Aer Arann counterclaims and its separate restitution proceedings had been withdrawn".*

43. It seems clear from the foregoing that Aer Arann understood that it could not advance a claim in relation to repayment of the unlawful tax.

VI. The Scheme of Arrangement

(i) The Scheme Itself.

44. Turning next to the Scheme of Arrangement, it provides, *inter alia*, as follows:

> *"6.3 These Proposals cover all of the Company's liabilities to Creditors of a class of Creditor specified in Clause 12.3 and any person who is an Unagreed Creditor pursuant to Clause 9.4, including contingent and prospective liabilities as at the Fixed Date whether or not the liabilities have been notified, acknowledged or recognised. Without prejudice to the right of the Company to perform and seek performance of its contractual rights and entitlements existing at the Fixed Date [so everything is done to a particular date, being 26.08.2010], no Creditor, or other party claiming to be a Creditor or Member, of a class of Creditor specified in Clause 12.3 or an Unagreed Creditor shall have any right, interest or claim of any description whatsoever against the Company, irrespective of when due or payable, arising out of or connected with any contract, engagement, circumstance, event, act, obligation, liability or omission of the Company prior to the Fixed Date, save as provided in these Proposals….*
>
> *9.4 Any creditor or person claiming to be a creditor, other than those set out in clause 12.2:*
>
> - *Whose claim is not included in Appendix F;*
> - *Which appears in Appendix F without the addition of the word* 'Yes' [or a]; or
> - *Which disputes the amount of its claim*...
>
> *shall be deemed to be an Unagreed Creditor."*

45. Again, the State was not claiming to be a creditor because there was no State aid liability until the State aid decision was made.

46. The Scheme of Arrangement continues:

> *"10.3 In the event that an Unagreed Creditor does not notify the Company of its claim, in accordance with the provisions set out above, that Unagreed Creditor shall be deemed to have submitted a claim for the amount stated in the Company's records and set out in the letter accompanying the Proposals".*

47. Again, one sees the implausibility of the notion that the State could be treated as an unagreed creditor, given the state of the Commission investigation at the point in time when the Scheme of Arrangement was approved.

(ii) The Order of Confirmation.

48. The High Court's order of confirmation of 05.11.2010 reads as follows:

> *"…The further report of the Examiner prepared pursuant to Section 18 of the Companies (Amendment) Act 1990 with modified proposals for a scheme of arrangement being set down for consideration pursuant to Section 24 of the said Act and coming on for hearing on this day….*
>
> *Whereupon and on reading the said report and the modified proposals for a scheme of arrangement.*
>
> *And on hearing Counsel for the Examiner, Counsel for the Company and Counsel for the Revenue Commissioners.*
>
> *Pursuant to Section 24(3) of the Companies (Amendment) Act 1990 the Court doth confirm the proposals of the Examiner for a scheme of arrangements subject to the modifications specified in the modified proposals of the 5th day of November 2010 a copy of which is attached hereto as a schedule.*
>
> *Pursuant to Section 24(9) of the said Companies (Amendment) Act 1990 the Court doth fix Wednesday the 10th day of*

November 2010 at 5pm as the date upon which the proposals for the Scheme of Arrangement (as modified referred to in the said proposals) shall come into effect.

And the Court doth declare that the protection period mentioned in Section 5(1) of the Companies (Amendment) Act 1990 be extended up to and including Wednesday the 10th day of November 2010 at 5pm.

Liberty to the Examiner to apply under Section 29 of the Companies (Amendment) Act 1990."

49. This order was made pursuant to the old Companies Acts, with s.24 of the Companies (Amendment) Act 1990, as amended, being of particular significance in this regard, it providing, *inter alia*, as follows:

"(1) The report of the examiner under section 18 shall be set down for consideration by the court as soon as may be after receipt of the report by the court….

(3) At a hearing under subsection (1) the court may, as it thinks proper, subject to the provisions of this section and section 25 ["Objection to confirmation by court of proposals"], *confirm, confirm subject to modifications, or refuse to confirm the proposals….*

(6) Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company….

(9) A compromise or scheme of arrangement, proposals for which have been confirmed under this section shall come into effect from a date fixed by the court, which date shall be not later than 21 days from the date of their confirmation."

50. The court mentions the statutory basis for the order of confirmation as it shows that the order of confirmation gives effect to a legislative provision. The reason this is of significance is because Aer Arann has sought in these proceedings to place no little emphasis on the notions of *res judicata* and legal certainty. (In the last regard, see, *inter alia*, Barrett, G., "*Reflections on What the Rule of Law Means and How it is Enforced at European Level"* (2018) 1 *EuropaRecht* 19 and European Commission, *A new EU Framework to strengthen the Rule of Law* (COM(2014) 158 final)). However, notwithstanding the obvious and undoubted importance of these concepts, there are many decisions in relation to State aid in which one sees different provisions of national law being set aside in order to ensure that there is recovery of State aid and there is no suggestion that court decisions are in a different class. Moreover, it seems notable that the order of confirmation here was made pursuant to a statutory provision; hence the case-law which deals with setting aside national legislative provisions in order to ensure the effectiveness of State aid seems applicable, notwithstanding that examinership in Ireland ends with a court order.

VII. The Commission Notices

(i) Overview.

51. The court turns next to how the European Commission views State aid and recovery by member states of unlawful State aid, as well as the case-law in relation to impediments to recovery established by member state legislation. There are two Commission notices on this aspect of matters, *viz*. (1) a Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (O.J. C272, 15.11.2007, 4), and (2) a Commission notice on the enforcement of State aid law by national courts (O.J. C85, 09.04.2009, 1).

(ii) Notice of 2007.

52. Looking first to the Notice of 2007:

– para.2 of same states, *inter alia*, that "*In recent years, the Commission has demonstrated that it is prepared to take a strong stance against unlawful aid. Ever since the entry into force of the Council Regulation (EC) No. 659/1999* [of 22 March 2009 laying down detailed rules for the application of Article 93 of the EC Treaty] *('the Procedural Regulation')…it has systematically ordered Member States to recover any unlawful aid found to be incompatible with the common market unless this would be contrary to a principle of Community law*".

– para.3 of same states, *inter alia*, that "*It is essential for the integrity of the State aid regime that these Commission decisions ordering Member States to recover unlawful State aid… are enforced in an effective and immediate manner. The information collected by the Commission in recent years shows that there is practically not a single case in which recovery was completed within the deadline set out in the recovery decision".*

– para.13 of same states, *inter alia*, that "*The ECJ has held on several occasions that the purpose of recovery is to re-establish the situation that existed on the market prior to the granting of aid. This is necessary to ensure that the level playing-field in the internal market is maintained in accordance with Article 3(g) of the EC Treaty"*. (Notably, if Aer Arann was to be successful in the within proceedings that level playing-field would not be maintained).

– para.14 of same states, *inter alia*, that "*According to the ECJ, the 're-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid is restored".*

– paras.16 and 17 of same state, *inter alia*:

"16. Article 14(1) of the Procedural Regulation specifies that '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'.

17. The Procedural Regulation imposes two limits on the Commission's power to order recovery of unlawful and incompatible aid. Article 14(1) provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of law. The general principles of law *most often invoked in this context are the principles*

of protection of legitimate expectation and of legal certainty. It is important to note that the ECJ has given a very restrictive interpretation to these principles in the context of recovery" [emphasis in original].

– para.18 of same states, *inter alia*, that:

"Under Article 249 of the EC Treaty, decisions are binding in their entirety upon those to whom they are addressed. Therefore, the Member State to which recovery decision is addressed is obliged to execute this decision. The ECJ has recognised only exception to this obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that would make it absolutely impossible *for the Member State to execute the decision properly*" [emphasis in original].

– paras.19 and 20 of same state, *inter alia*, that

"19. According to the Community Courts, absolute impossibility can however not be merely supposed. The Member State must demonstrate that it attempted, in good faith, to recover unlawful aid and it must cooperate with the Commission in accordance with Article 10 of the EC Treaty, with a view to overcoming the difficulties encountered.

20. A review of the jurisprudence shows that the Community Courts have interpreted the concept of 'absolute impossibility' in a very restrictive manner. The Courts have confirmed on several occasions that a Member State may not plead requirements of its national law such as national prescription rules or the absence of a recovery title under national law to justify its failure to comply with a recovery decision. In the same way, the ECJ held that the obligation to recover is not affected by circumstances linked to the economic situation of the beneficiary. It clarified that a company in financial difficulties does not constitute proof that recovery was impossible. In such circumstances, the court pointed out that the absence of any recoverable assets is the only way for a Member State to show the absolute impossibility of recovering the aid. In a number of cases, the Member State argued that they had not been able to execute the recovery decision, because of the administrative or technical difficulties involved….The Court consistently refused to accept that such difficulties constitute an absolute impossibility to recover. Finally, the apprehension of even insurmountable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law".

– para.55 of same states, *inter alia*, that:

"The implementation of recovery decisions can give rise to litigation in national courts. Although there are very significant differences in the judicial traditions and systems of Member States, two main categories of recovery-related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order".

The within action is in the former category because Irish law does not recognise a self-executing order.

– para.57 of same states, *inter alia*, that:

"The ECJ has ruled that the beneficiary of an aid who could without any doubt have challenged a Commission recovery decision under Article 230 EC before a European Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful".

This observation is of significance in the within proceedings because what Aer Arann contends in its Defence is that it should not have to repay the State aid because the air travel tax is unlawful because of free movement reasons. And the European Commission has said clearly that this is not possible; more to the point there is jurisprudence of the Court of Justice to this effect, as is made clear in para.58 of the Notice.

– para.58 of same states, *inter alia*, that:

"[I]n cases where it is not self-evident that an action for annulment brought against the contested decision by the beneficiary of the aid would have been admissible, an adequate legal protection must be offered to the aid beneficiary. In the event that the aid beneficiary challenges the implementation of the decision in proceedings before the national court on the ground that such recovery decision was unlawful, the national judge must make a request for a preliminary ruling on the validity of such decision to the ECJ".

Such a preliminary ruling is not necessary here because the Court of Justice has already ruled on this matter.

– para.61 of same states, *inter alia*, that:

"In the majority of cases involving an insolvent aid beneficiary, it will not be possible to recover the full amount of unlawful and incompatible aid (including interests) as the beneficiary's assets will be insufficient to satisfy all creditors' claims. Consequently, it is not possible to fully re-establish the ex-ante situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases".

In other words, and this points to the premium placed by the Court of Justice on the need for recovery of State aid, if the playing-field cannot be made level through recovery of aid, a permitted option is to liquidate the beneficiary of the aid.

(iii) Notice of 2009.

53. Looking next to the Notice of 2009:

– para.30 of same states, *inter alia*, that:

"Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary. It is part of the national court's obligation to protect the individual rights of the claimant (such as the competitor) under Article 88(3) of the Treaty".

– para.32 of same states, *inter alia*, that:

"[T]*he national courts' recovery obligation is not absolute. According to the 'SFEI' jurisprudence, there can be exceptional circumstances in which the recovery would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Articles 14 and 15 of the Procedural Regulation. In other words, circumstances which would not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery under Article 88(3) of the Treaty. The standard which the Community courts apply in this respect is very strict.53 In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order. This is because a diligent businessman would have been able to verify whether the aid he received was notified or not.*

53 …The only case in which a Member State can refrain from implementing a recovery decision by the Commission is where such recovery would be objectively impossible".

IX. Case-Law and Commentary

(i) Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA

(Case C-119/05)

54. This is a 'supremacy of EU law' case arising in the context of State aid. What happened here was that there was a steel subsidy which was being given to steel companies by the Italian government. The European Commission was concerned and started to intervene at a point when the aid had not yet been dispersed. After the Commission decided that the subsidy breached the State aid rules, Lucchini sought disbursement of the subsidy, presumably on the basis of existing legal obligations; and it brought a case to the Italian courts which ended up in the Court of Appeal in Rome, which court declared that the subsidy had to be paid. A ministerial order was then adopted directing repayment of the aid. The key issue that eventually came before the Court of Justice was whether the principle of res judicata had the effect that the decision of the Court of Appeal in Rome could not be interfered with. In its judgment, the Court of Justice observes, *inter alia*, as follows:

"39….[S]ince the competent authorities abstained from challenging the judgment of the Corte d'appello di Roma, there is no doubt that that judgment acquired the authority of res judicata and that that authority extends to the question whether the aid is compatible with Community law, at least in so far as Community decisions taken prior to the delivery of the judgment are concerned. The fact that the judgment was final may therefore, in principle, also be relied on against Decision 90/555, which was adopted before the proceedings were concluded….

50 Proceedings concerning State aid may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 87(1) EC, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 88(3) EC ought to have been subject to this procedure (Case 78/76 Steinike & Weinlig…Case C-354/90 Federation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon…). *Similarly, in order to be able to determine whether a State measure established without taking account of the preliminary examination procedure laid down by Article 6 of the third code should or should not be made subject to that procedure, a national court may have occasion to interpret the concept of aid referred to in Article 4(c) of the ECSC Treaty and Article 1 of the third code (see, by analogy, Case C-390/98* Banks…).

51 On the other hand, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the common market….

59 According to the national court, Article 2909 of the Italian Civil Code precludes not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also precludes the examination of matters which could have been raised in earlier proceedings but were not. [Italian law is notably Henderson v. Henderson-like in this regard.] *One of the consequences of such an interpretation of that provision may be that effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of the court in question as laid down in Community law. It is clear, as the Consiglio di Stato has observed, that the effect of applying that provision, interpreted in such a manner, in the present case would be to frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law.*

60 In that context, it should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law.

61 It also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (*see*, *inter alia*, *Case 106/77* Simmenthal…Case 130/78 Salumificio di Cornuda…*and Case C-213/89* Factortame and Others…).

62 As stated at paragraph 52 above, the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law.

63 The answer to the questions referred must therefore be that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final."

55. So in *Lucchini* one sees a national law provision which incorporated a res judicata decision being set aside on the basis that it

would prevent the recovery of State aid that was unlawfully granted.

(ii) European Commission v. Slovak Republic

(Case C-507/08)

56. This case is interesting because in one way it involves facts very like those at play in the within proceedings, being concerned with the equivalent of an examinership scheme in Slovak Republic. In *Commission v. Slovak Republic* the Court of Justice held there that *res judicata* did prevent the recovery of unlawful State aid. However, there is one curiosity about *Commission v. Slovak Republic* that makes it unique to its own facts. This is that the State aid in question was the examinership scheme itself. In other words, the Commission said that the Slovak Republic's law that permitted the forgiveness of debt *itself* constituted State aid because it put the company there in an advantageous position and hence the requirement of selectivity is met. Looking to the text of the decision of the Court of Justice, it observes, *inter alia*, as follows:

> *"6 According to that decision, at the material time, Frucona was active in the sector of production of spirit and spirit-based beverages, non alcoholic beverages, canned fruit and vegetables, and vinegar. The State measure at issue consisted in the writing-off of tax liability by the Košice IV Tax Office ('the tax office') as part of an arrangement with creditors, a procedure governed by Law No 328/91 on Bankruptcy and Arrangement with Creditors. It is evident from that legislation that, like the bankruptcy procedure, an arrangement with creditors aims at settling the financial situation of an indebted company, but its objective is to enable the company to continue its business through reaching an agreement with the creditors whereby the company undertakes to pay back part of its debts and, in exchange, the remainder of the debt payable is written off. The agreement has to be approved by the court responsible for supervising the procedure."*

57. So what presents is something very like the Irish examinership process, with 65% of the debts being written off (some €11 million). The Commission then declared that by means of the write-off the Slovak Republic had unlawfully granted aid to Frucona.

58. The judgment continues:

> *"11 On 12 January 2007 Frucona brought an action before the Court of First Instance of the European Communities for the annulment of that decision, but did not seek suspension of its operation as an interim measure. The Slovak Republic brought no action against the decision, of which it had been notified on 12 June 2006.*
>
> *12 In order to execute the decision, on 4 July 2006 the tax office called on Frucona to repay the unlawful aid, together with interest, within a period of eight days. Since Frucona did not comply with that order, on 21 July 2006 the tax office brought a debt recovery action before the Košice II District Court.*
>
> *13 By judgment of 11 June 2007 that court dismissed the action, holding that Frucona was under no obligation to repay the aid. That judgment was upheld by the judgment of 21 April 2008 of the Košice Regional Court, one of the grounds being that it was not possible to review the judgment on the arrangement with creditors, which had acquired the force of res judicata.*
>
> *14 By letter of 2 July 2008 the tax office asked the Prosecutor General of the Slovak Republic to bring an extraordinary appeal against the latter judgment. The Slovak Republic has not provided any clear information on what action was taken on that request.*
>
> *15 Throughout the recovery procedure, the Commission insisted on the immediate and effective execution of Decision 2007/254, its criticism of the Slovak authorities being that they did not directly execute the decision, pursuant to national law, but thought it necessary to bring a debt recovery action before the district court….*
>
> *21 In that regard, the Slovak authorities put forward, in essence, two main arguments:*
>
> > *– There was no alternative to the bringing of legal proceedings to recover the aid, both the principal sum and interest, since Slovak tax law contains no legal basis for the recovery of money owed to a tax authority which has been written off as part of an arrangement with creditors. It was therefore necessary to obtain an enforceable order. To put it another way, under Slovak law, the tax office could not by an administrative decision 'annul' the judgment of the court responsible for supervising the arrangement between Frucona and its creditors which approved the agreement they entered into, a judgment which has acquired the force of res judicata;*
> >
> > *– Decision 2007/254 was not directly binding on Frucona, but required the Slovak Republic to take all necessary measures to recover the unlawfully granted aid. That decision, which constituted a 'foreign' administrative decision, did not create any obligation on the part of Frucona to repay that aid. It was therefore impossible to execute that decision at national level…*
>
> *41 Before examining the failure attributed to the Slovak Republic in respect of its obligation to execute Decision 2007/254, certain principles which emerge from the Court's settled case law on the subject must be borne in mind.*
>
> *42 Recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that consequence cannot depend on the form in which the aid was granted (see, in particular, Case C 183/91* Commission v Greece…*and* Commission v Portugal…).
>
> *43 Where a decision is taken declaring aid to be unlawful, the recovery of that aid, ordered by the Commission, takes place according to the conditions provided for in Article 14(3) of Regulation No 659/1999. The only defence available to a Member State in opposing an application by the Commission under Article 88(2) EC for a declaration that it has failed to fulfil its obligations is to plead that it was absolutely impossible for it properly to implement the decision (see Case C 214/07* Commission v France *[2008]…and case law cited)….*
>
> *45 In this case, it is clear at the outset that, when the Commission brought this action, namely two years and five*

months after the notification of Decision 2007/254, no sums had been recovered from Frucona. The Slovak Republic does not dispute that fact and, further, does not claim that execution of the Commission decision is absolutely impossible….

51 Accordingly, a Member State which, pursuant to a Commission decision, is obliged to recover unlawful aid is free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of European Union law (see, to that effect, Case C 209/00 Commission v Germany…*and Case C 210/09* Scott and Kimberly Clark…).

52 European Union law therefore imposes an obligation to take all appropriate measures to ensure the execution of Commission decisions on the recovery of unlawful aid but respects the specific features of the various procedures provided by Member States for that purpose. It should be stated that it is consistent with that law that, within this action, the Commission has maintained that it has no intention of dictating to the competent authorities of the Slovak Republic the precise manner in which the State aid unlawfully granted to Frucona ought to be recovered, but that it takes the view that the procedure employed for that purpose does not meet the requirement of immediate and effective recovery of that aid.

53 The fact that, following Decision 2007/254, the tax office took steps to reclaim the unlawful State aid by initiating legal proceedings cannot therefore in itself be a ground for criticism, since a Member State is free, as stated above, to choose the means by which it will implement its obligation to effect recovery.

54 However, in this case, the measures taken by the competent Slovak authorities did not lead to the recovery of the wrongful aid and normal conditions of competition were therefore not restored. The main obstacle in the way of that recovery was the refusal, first by the Košice II District Court and then by the Košice Regional Court, to uphold the recovery action brought by the tax office, in the light of the fact that the judgment of 14 July 2004 of the court with jurisdiction approving the agreement in the arrangement with creditors had acquired the force of res judicata.

55 The first issue raised therefore by this case is whether, where, as part of a procedure for arrangement with creditors under court supervision, a national court judgment decides on an arrangement which involves a debt to a public authority being partly written off, and that write-off is thereafter categorised by the Commission as State aid, the finality of that judgment can prevent the recovery of that aid."

59. What one can see from the foregoing is that *Commision v. Slovak Republic* is very fact-dependent because, as mentioned above (and what is especially apparent from para.55), what presented was a situation where the write-off of debts was the State aid.

60. The judgment continues:

"*56 In that regard, it must, first, be stated that the situation at issue here is distinguishable from that in Lucchini, relied on by the Commission, where the Court held that European Union law precludes the application of a provision of national law which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of European Union law which has been found to be incompatible with the common market in a decision of the Commission which has become final (see, to that effect, paragraph 63 of* Lucchini)."

61. So, in *Lucchini* by the time the Italian court made a decision directing the pay-out of the unlawful moneys, a Commission decision had already been adopted. In *Commission v. Slovak Republic*, at the time of the scheme of arrangement or the equivalent no Commission decision had been adopted, with the result that the Court of Justice said that *Lucchini* could not be of direct relevance.

"59 Secondly, attention should be drawn to the importance, both in the European Union legal order and in the national legal orders, of the principle of res judicata. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question (Case C 224/01 Köbler [2003]…*Case C 234/04* Kapferer…*and Case C 2/08* Fallimento Olimpiclub…).

60 Accordingly, European Union law does not in all circumstances require a national court to dis-apply domestic rules of procedure conferring the force of res judicata on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question (see, to that effect, Kapferer, *paragraph 21, and* Fallimento Olimpiclub, *paragraph 23).*

61 As stated by the Advocate General in his Opinion, it is clear both from the documents before the Court and from the observations made at the hearing by the Slovak Republic that under national law there were available to the national authorities resources which, if diligently used, could have ensured that the Slovak Republic was able to recover the aid at issue.

62 Nonetheless, the Slovak Government has not provided any precise information on the circumstances in which it used the resources which were available to it.

63 In particular, the Slovak Republic has not clearly explained what action was taken in response to the request by the tax office that an extraordinary appeal be brought against the contested judgment.

64 The Court can therefore do no other than hold that, standing the Commission's specific criticism, the information provided by the Slovak Republic is insufficient to allow the conclusion that it took, within the prescribed period, all the measures which it could have employed in order to obtain the repayment of the aid at issue.

65 In the light of the foregoing, it must be held that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Decision 2007/254, the Slovak Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Article 2 of that decision."

62. So the court recognised the principle of res judicata but nonetheless found the Slovak government to be in breach of its

obligations, it seems because it did not raise an appeal or extraordinary appeal.

(iii) Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen

(Case C-505/14)

63. The judgment in *European Commission v. Slovak Republic* is not perhaps as clear as it might have been. A later decision of the Court of Justice and one that lays down a clear (and clearer) marker as to how the law stands at this time is the relatively recent decision of the Court of Justice in *Klausner*. Here, contracts had been entered into by a German Land for the supply of large volumes of wood for commercial use. A contractual dispute arose as to whether the Land would fulfil the contracts and the persons who had contracted for the supply of wood by the Land sued on foot of the contract. A declaration was made by a German court that the contract remained in being and should be enforced. However, the Commission started to investigate the matters the subject of the contract. The question that then arose was whether the German court decision which had upheld the validity of the contracts meant that the State aid issues could not be looked into because of the principle of *res judicata*. In other words was the German decision, upholding the validity of the contracts, one which bound the national courts such that a recovery obligation could not be relied upon?

64. In its judgment, the Court sets the scene to the case before it, *inter alia*, in the following terms:

> *"6 During the first six months of that year, the Land also concluded, with six other large resinous wood purchasers, agreements for the supply of wood for periods from 2007 to, as appropriate, 2011, 2012 and, in one case, 2014. Under those agreements, the prices agreed for the wind-fallen wood supplied in 2007 and 2008 were similar to those fixed in the contracts at issue, while the prices for the fresh wood supplied from 2009 were generally higher than the prices fixed in the contracts at issue, leaving aside the possibility of adjusting those prices on certain conditions and within certain limits.*
>
> *7 In 2007 and 2008, the Land supplied wood to Klausner Holz, but the purchase amounts of wind-fallen wood provided for were never reached. During 2008, Klausner Holz had financial difficulties, sometimes involving late payments. In August 2009, the Land rescinded the 'framework sales contract' which supplemented the agreement of 20 February 2007 and, with effect from the second half of that year, it ceased to supply wood to Klausner Holz on the terms set out in the contracts at issue.*
>
> *8 By a declaratory judgment of 17 February 2012, the Landgericht Münster (Regional Court, Münster) held that the contracts at issue remained in force. That judgment was confirmed by the Oberlandesgericht Hamm (Higher Regional Court, Hamm), ruling on appeal, by a judgment of 3 December 2012, which is now* res judicata….
>
> *11 In July 2013, the Federal Republic of Germany informed the European Commission of the existence of non-notified aid, namely the contracts at issue, which, in the opinion of that Member State, is incompatible with the internal market. Furthermore, in October 2013, the Commission received complaints from a number of the competitors of Klausner Holz making the same allegations of incompatibility….*
>
> *16 In those circumstances, the Landgericht Münster (Regional Court, Münster) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:*
>
> > *'In civil proceedings concerning the performance of a civil-law contract granting aid, does EU law, in particular Articles 107 TFEU and 108 TFEU (or Articles 87 TEC and 88 TEC) and the principle of effectiveness, require that a final declaratory judgment under civil law which has been delivered in the same case and which confirms that the civil-law contract remains in force, without any consideration of the law on aid, be disregarded if under national law the performance of the contract cannot otherwise be prevented?'"*

65. The paragraphs of greatest relevance to the application at hand commence at para.30, *et seq:*

> *"30 While accepting that the principle of* res judicata, *as construed in national law, has certain objective, subjective and temporal limitations and certain exceptions, the referring court notes that that law precludes not only re-examination, in a second action, of the pleas already expressly settled definitively, but also the raising of questions which could have been raised in an earlier action and which were not so raised.*
>
> *31 In that regard, it is appropriate to recall that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law (judgment in* Lucchini*, C 119/05…)….*
>
> *34 In that regard, it must be borne in mind that the principle that national law must be interpreted in conformity with EU law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it (see, to that effect, judgment in* Dominguez, *C 282/10…and the case-law cited)….*
>
> *38 If such a measure or interpretation should, however, prove not to be possible, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of res judicata. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question (see judgments in* Fallimento Olimpiclub, *C 2/08…and Târșia, C 69/14…).*
>
> *39 Therefore, EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue (see judgments in* Kapferer, *C 234/04*…Fallimento Olimpiclub, *C 2/08*…Commission v. Slovak Republic*, C 507/08*...Impresa Pizzarotti, *C 213/13*...and Târșia*, C 69/14*."

66. Notably, *Commission v. Slovak Republic* is referred to among the authorities in para.39.

67. The Court continues:

> *"40 In the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, such procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see judgments in* Fallimento Olimpiclub, *C 2/08…and* Impresa Pizzarotti, *C 213/13…and the case-law cited).*
>
> 42 …[I]*t must be noted that an interpretation of national law, such as that described in paragraph 30 of the present judgment, can have the consequence, in particular, that effects are attributed to the decision of a national court, in the present case the* Oberlandesgericht Hamm (*Higher Regional Court, Hamm), which frustrate the application of EU law, in that they make it impossible for the national courts to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU.*
>
> *43 It follows therefrom that both the State authorities and the recipients of State aid would be able to circumvent the prohibition laid down in the third sentence of Article 108(3) TFEU by obtaining, without relying on EU law on State aid, a declaratory judgment whose effect would enable them, definitively, to continue to implement the aid in question over a number of years. Thus, in a case such as that at issue in the main proceedings, a breach of EU law would recur in respect of each new supply of wood, without it being possible to remedy it.*
>
> *44 Furthermore, such an interpretation of national law is likely to deprive of any useful effect the exclusive power of the Commission, referred to in paragraph 21 of the present judgment, to assess, subject to review by the EU Courts, the compatibility of aid measures with the internal market. If the Commission, to which the Federal Republic of Germany has in the meantime notified the aid measure constituted by the contracts at issue, should conclude that it is incompatible with the internal market and order its recovery, execution of its decision must fail if a decision of the national court could be raised against it declaring the contracts forming that aid to be 'in force'."*

68. So notably there was not even a decision of the European Commission at this point in time; and yet ultimately the Court held that the principle of *res judicata* must be set aside because of the possibility of such a decision. This is a very strong statement by the Court of Justice as to the premium placed by it on the need for recovery of State aid.

69. The Court of Justice continues:

> *"45 In those circumstances, it must be concluded that a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is res judicata, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of res judicata or by the principle of legal certainty (see, by analogy, judgments in* Fallimento Olimpiclub…*and* Ferreira da Silva e Britto, *C 160/14*…).
>
> *46 Having regard to all the foregoing considerations, the answer to the question referred is that EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force."*

70. Essentially what the Court of Justice is saying in the just-quoted text is that the court which made the declaration of effectiveness did not look at the State aid issue at all (just as the Irish High Court in its order of confirmation in the Aer Arann examinership did not consider the issue of State aid). In such circumstances the principle of *res judicata* could not be prayed in aid.

(iv) Eesti Pagar AS v. Ettevŏtluse Arendamise Sihtasutus

(Case C-349-17)

71. *Eesti Pagar* is of interest for two reasons. It shows: (1) the up-to-date law on legitimate expectations and (2) that the Court of Justice is following *Klausner* in preference to *Commission v. Slovak Republic*. A State aid decision, the facts of *Eesti Pagar* are not as relevant as in the other cases that the court has considered. In its decision, the Court observes, *inter alia*, as follows:

> *"97 In accordance with the Court's settled case-law, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances (judgment of 13 June 2013, HGA and Others v Commission, C 630/11 P to C 633/11 P…).*
>
> *98 It is also in accordance with the Court's settled case-law that, in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and furthermore, an economic operator exercising due care should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (judgments of 15 December 2005*, Unicredito Italiano, *C 148/04…and of 19 March 2015, OTP Bank, C 672/13…)."*

72. The state of the case-law on legitimate expectation is such that there really is not any opportunity for Aer Arann to rely on the

principle of legitimate expectation, as identified in the above-quoted text. Also of interest, perhaps of greater interest is the weight given, in *Eesti Pagar*, to *Klausner*, the Court of Justice observing, *inter alia*, as follows:

> *"137 That said, in accordance with the Court's settled case-law, the applicable national legislation must not be less favourable than that governing similar domestic situations (the principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (the principle of effectiveness) (judgment of 11 November 2015,* Klausner*…C 505/14…).*
>
> *138 As regards the principle of effectiveness, the Court has previously held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies (judgment of 11 November 2015*, Klausner*…C 505/14…).*
>
> *139 In that regard, it must be held that the application of national law cannot have the consequence of frustrating the application of EU law in making it impossible for the national courts or authorities to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU (see, to that effect, judgment of 11 November 2015*, Klausner*…C 505/14…).*
>
> *140 A national rule that would prevent a national judge or a national authority from taking action to respond to the consequences of an infringement of the third sentence of Article 108(3) TFEU must be regarded as being incompatible with the principle of effectiveness (see, to that effect, judgment of 11 November 2015,* Klausner*…C 505/14…).*
>
> *141 In this case, it is clear from that case-law that, while unlawful aid must be recovered in accordance with the rules of the applicable national law, the fact remains that Article 108(3) TFEU requires those rules to ensure full recovery of the unlawful aid and that, therefore, the beneficiary of that aid must be ordered to pay,* inter alia*, interest for the whole of the period over which it benefited from that aid and at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period."*

73. The invocation of the principle of effectiveness in the above-quoted text is important because that is what Klausner turned on, the Court setting up the principle of effectiveness as against *res judicata*, with effectiveness prevailing in the context of State aid.

(v) Learned Commentary

74. The court has been referred, *inter alia*, to Hancher, L. *et al, EU State Aids*, 5th ed. (2016), in which the following observations feature at 1109-10:

> *"With regard to the implementation of a recovery decision, art 16(3) provides that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision….The purpose of a recovery decision is the restoration of effective competition and that decision, therefore, according to the ECJ in Commission v Slovak Republic, requires the Member State to which it is addressed actually to obtain, without delay, repayment of the wrongful state aid."*

75. Notably, *Commission v. Slovak Republic* is relied upon in the above-quoted text to underline the importance of the obligation of recovery, not to deny it.

76. The learned authors continue, at 1110:

> *"The fact that a company is insolvent or bankrupt does not affect the obligation of repayment…..The ECJ has consistently ruled out the defense of exceptional circumstances. The ECJ has reaffirmed on many occasions the principle that, although recovery has to be effected by applying the relevant national legal provisions, a Member State cannot invoke a rule of domestic law to oppose the reimbursement of aid."*

77. Yet in truth what Aer Arann is seeking to do here is to rely ultimately upon s.24 of the Companies (Amendment) Act 1990 and the order made thereunder, to prevent the reimbursement of aid.

78. The learned authors continue, at 1110-11:

> *"In* Commission v. Belgium [(Case C-74/89)], *the Belgian government had not recovered an aid which had been declared illegal by the Commission on the grounds that following regionalisation, competence in this area had passed from the state to the regions. The ECJ nevertheless considered that it was established jurisprudence that a Member State cannot cite procedural provisions or domestic rules of order to justify the failure to respect obligations arising from EU law. In the ENI-Lanerossi case, the Italian Government also tried to oppose the restitution of aids that had already been granted, on the basis that Italian law prohibited restitution of aid illegally granted to ENI….The ECJ considered that this fact could not prevent the full application of EU law and therefore had no effect on the obligation to proceed with the recovery of the aid in question. In Commission v. France, the French authorities argued that the delay in implementing the recovery decision, due to the application of a rule providing for the suspensory effect of actions brought against demands for payment laid down by French law, was expressly authorised* [under EU law. The Court did not accept this argument]….*In the* Lucchini *case the Court ruled that Community law also 'precludes the application of a provision of national law…which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.*
>
> *If unforeseen or unforeseeable difficulties would arise in recovering aid, the ECJ has consistently held that the Commission and Member States should 'overcome difficulties whilst fully observing the Treaty provisions, and in particular the provisions on State aid', in keeping with art.4(3) TFEU* [Commission v. Germany (94/87)]. *This principle equally applies to national courts where they entertain doubts or have difficulties in recovery cases. This principle was also followed in the case of* Commission v. Germany *in which the German government argued that the obligation to recover the aid. The German government's only defence would be to plead that it was absolutely impossible to*

implement the decision properly. It is for the Member State concerned to present a proposal on how the difficulties relating to the recovery of the aid should be overcome, including those difficulties relating to the calculation of the aid. In the Commission v. Greece *judgment* [(Case C-263/12)] *the ECJ assessed whether the Greek authorities had failed to comply with a Commission decision ordering recovery of aid to Ellinikos Xrysos. The Greek government claimed that die to national legislation there was an absolute impossibility to recover the aid within the time limit set by the Commission. Moreover, the Greek government claimed that it was not able to calculate the total amount of aid. The ECJ made clear that these circumstances cannot be considered as an absolute impossibility to recover the aid."*

79. So there is, in short, a whole line of case-law in which the Court of Justice rejects diverse efforts by member states to put up national law provisions as a reason not to enforce State aid decisions. And the state of the law as it stands, if the court might observe, seems rather clear: there is an obligation to recover; the State parties here have brought proceedings to recover; and EU law says clearly that a national rule, including rules as to examinership, cannot prevail over the obligation to recover.

X. Contingent Creditors

(i) Overview.

80. Aer Arann contends that the present claims of the Minister rendered him a 'contingent unsecured creditor' within the meaning of clause 12.3 of the Scheme of Arrangement, a status that would have permitted him to make a claim against Aer Arann (for which claim, if made, provision could have been included in the Scheme). Clause 12.3 (under the heading "*Classes of Creditors affected by these Proposals*" provides that "*The rights and interests existing as at the Fixed Date of the following classes of Creditors are dealt with and determined by these Proposals…Contingent Unsecured Creditors*". So, was the Minister a "*Contingent Unsecured Creditor*"? For the examinership defence to arise at all, Aer Arann must demonstrate that the Minister was a contingent creditor within the scheme. If not (and if, through him, the State was not) then its examinership case falls away entirely and *Commission v. Slovakia, Klausner, etc.* do not require to be engaged with.

(ii) Re. O'Rourke, A Bankrupt

[2018] IEHC 176.

81. *Re O'Rourke* is a bankruptcy case, and although there are analogies to be drawn between examinership and bankruptcy, it is not necessarily a perfect analogy, though it seems to the court that *Re O'Rourke* is nonetheless a useful case when it comes to determining the within proceedings. In *Re O'Rourke*, Mr O'Rourke, who had been adjudged bankrupt, had, in 2006, made a very substantial capital gain and sought to reduce his liability by acquiring German bonds which reduced his capital gains tax liability. He filed a self-assessed return for capital gains tax and claimed a reduction in relation to the transaction in question. The Revenue Commissioners notified Mr O'Rourke that it would commence an audit and ultimately decided that what he had engaged in was a tax avoidance transaction. In the meantime, Mr O'Rourke had gone into bankruptcy and come out of it again and the question before the court was whether or not the capital gains tax due was a pre-bankruptcy provable debt within the meaning of s.75 of the Bankruptcy Act 1988, Costello J., in the High Court, observing, *inter alia*, as follows:

"11. In Nortel the Supreme Court considered the effect of r. 13.12 of the Insolvency Rules in England and Wales, which are in similar terms to s. 75 of the Act of 1988. Insofar as is relevant, the rule provides:

> '13.12.—(1) "Debt", in relation to the winding up of a company, means (subject to the next paragraph) any of the following—
>
> (a)any debt or liability to which the company is subject at the date on which it goes into liquidation;
>
> (b)any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; …
>
> (3) For the purposes of references in any provision of the Act or the Rules about winding up to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; …' (emphasis added).

12. The question for consideration was whether a particular statutory liability in issue in that case arose "by reason of any obligation incurred before" the insolvency event.

13. At para. 74 Lord Neuberger of Abbotsbury observed that the word obligation in many contexts has the same meaning as liability but it clearly cannot have the same meaning in the context of r. 13.12 as it must imply a more inchoate or imprecise meaning than liability because the liability is what can be proved for, whereas the obligation is the anterior source of that liability.

14. At para. 77 he held:

> 'I would suggest that, at least normally, in order for a company to have incurred a relevant 'obligation' under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1) (b) [*i.e.* an obligation within the meaning of the statute]."

82. So Lord Neuberger applies something of a three-part test, and if one applies that test to the facts at play in the within application it becomes apparent that the State aid liability in issue does not satisfy that test for the following reasons:

> (1) what the State was doing when it imposed the air travel tax was to impose an indirect tax, and the State every day

imposes all manner of indirect taxes. The notion that the imposition of such a tax would have been a step or combination of steps which had the legal effect of putting the State under some legal duty or into some form of legal relationship does not sit at all comfortably with the State as tax collecting authority.

(2) likewise, as to point (b) in Lord Neuberger's observations this again does not sit easily with the notion that levying a tax may result in State aid liability.

(3) as to point (c) in Lord Neuberger's observations, would it be "*consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation…* [within the meaning of the statute]?" The short answer is 'no'.

83. Turning then to the observations of Costello J. in *Re O'Rourke*, she observes, *inter alia*, as follows:

22. It follows that once an investigation is commenced [by the Revenue Commissioners as to whether or not the transaction is a tax avoidance transaction] *the Revenue Commissioners and the taxpayer are in a relationship the outcome of which is contingent on certain matters occurring. One of these is that the nominated officer may form an opinion that the taxpayer has entered into a tax avoidance transaction and that a tax benefit previously claimed is to be withdrawn resulting in a further liability to tax and to surcharge on the part of the taxpayer.*

23. Applying Lord Neuberger's test, the taxpayer in this case had taken or been subjected to some step or combination of steps which had some legal effect and which resulted in him being vulnerable to the specific liability in question such that there was a real prospect of that liability being incurred. The taxpayer had entered into a transaction giving rise to a capital gains tax liability. He also entered into the impugned transaction. He filed a capital gains tax return claiming a reduced liability to capital gains tax by reason of the impugned transaction. He therefore had taken a combination of steps which had the legal effect of declaring his liability to capital gains tax for the year 2006 to be in a certain amount when he was, in the words of Lord Neuberger, vulnerable to the Revenue Commissioners finding that the impugned transaction was in fact a tax avoidance transaction within the meaning of s. 811 if they commenced an investigation under the section. He was then subjected to a combination of steps, the investigation of the impugned transaction leading to a final and conclusive opinion that it was a tax avoidance transaction and that the tax benefit claimed should be withdrawn. These occurred prior to his adjudication as bankrupt. As the actions of the taxpayer and the Revenue Commissioners had left him vulnerable to a liability to tax under s. 811, he was also vulnerable to a liability to a surcharge pursuant to s. 811A on that tax. There was a real prospect of his liability to pay further taxes and a surcharge pursuant to ss. 811 and 811A being incurred. Thus the two requirements identified by Lord Neuberger are satisfied.

24. The liability to pay the surcharge pursuant to s.811A arose after the date of adjudication of the bankrupt but the liability to pay it arose by reason of an obligation incurred before that date. The fact that it is a contingent liability and the contingency in question is remote or might never eventuate does not alter the fact that it is a liability that is provable in the bankruptcy.

25. Lord Neuberger identified a third relevant consideration in determining the issue whether an obligation was a pre-liquidation or bankruptcy liability: whether it would be consistent with the regime under which the liability is imposed to conclude that the step or steps gave rise to an obligation under the relevant insolvency rule.

26. There can be no real debate on this question in this case. The regime under which the liability is imposed in the instant case is the Taxes Consolidation Act, 1997. The Revenue Commissioners accept that the liability to pay the additional tax in respect of capital gains tax for 2006 is a pre-adjudication debt. They accept that this is so notwithstanding the fact that the additional tax was not actually collectible by the Revenue Commissioners until the opinion of the nominated officer pursuant to s.811 became final and conclusive. The liability to pay the surcharge pursuant to s.811A is dependent upon the liability to pay the tax found due pursuant to s.811. The liability to pay the surcharge arises solely by reason of the liability to pay the charge to tax pursuant to s.811.

27. I therefore conclude that it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps which gives rise to the liability to pay tax and surcharge pursuant to ss.811 and 811A each arise by reason of obligations incurred by the bankrupt before the date of adjudication within the meaning of s.75 of the Bankruptcy Act, 1988 and thus are pre-adjudication liabilities provable in the bankruptcy.

28. It follows that the surcharged raised by the Revenue Commissioners is a pre-adjudication debt and is provable in the bankruptcy. The discharged bankrupt is not liable to pay the surcharge."

84. So insofar as the court has to look at the meaning of obligation, it is clear from the foregoing that the test identified by Lord Neuberger is just not met.

XI. To Draw Things Together

85. As the court comes to the end of what is a relatively long judgment, it is perhaps useful to draw together some of the points made in the preceding pages and to (re-) state certain conclusions:

(1) as to the contingent creditor point, the decision of the High Court in *Re O'Rourke* represents the current Irish law as to the nature of an 'obligation'. The reason this is of relevance is because Aer Arann has contended in effect that 'to be a contingent creditor, you do not have to know if I owe a debt to you or not and you do not have to know the amount of the debt'. But as the court posited at the hearing of these proceedings, if that was the case everybody could potentially be contingent creditors of everyone. There must be a nexus, and that nexus is whether or not there is an 'obligation'; no such nexus presents here.

(2) the court accepts that there is no one definition at law as to who constitutes a 'contingent creditor'. However, it seems to the court that considerable assistance is afforded in this regard by the observations of Lord Neuberger in *Nortel* (as considered in *Re O'Rourke*); when one brings what might be styled the '*Nortel* criteria' to bear, it is clear that the State aid liability in issue does not come within their embrace.

(3) as to the legal certainty point, it is important to recall that European case-law clearly indicates that the only time when it is justifiable for there not to be recovery of State aid, following issuance of a direction to a member state, is

where absolute impossibility of recovery presents. Here, there is no absolute impossibility of recovery. At its highest, what Aer Arann contends is that the court has a choice when the issue of legal certainty presents as to whether or not to order recovery. But no authority has been prayed in aid in this regard, nor does it appear that such authority exists. Of course, there can be a first time for many things; however, the Court of Justice in Klausner has very much inclined in favour of effectiveness of a State aid decision; hence this court (in the absence of absolute impossibility) must likewise incline.

(4) probing more deeply into the issue of whether the Court can choose legal certainty over effectiveness, it is possible to read *Commission v. Slovak Republic* as stating that in certain circumstances a court may do that in the State aid field. However, as counsel for the State parties noted in her closing submissions, "[T]*hat is a lot of weight for the Slovak Republic decision to bear".* Why so? Because when one looks at the *ratio* of that case, the final decision was 'Yes, we accept that there was a national decision, and we accept too that the principle of *res judicata* means that that national decision should be respected; however, we think that there were other measures that the Slovak Republic could have taken and did not and hence we are going to find that they are in breach of their obligation to recover.' The logical implication of such reasoning has to be that *res judicata* was not preventing the Slovak Republic from recovering (because if the Court of Justice had truly believed that the Slovak Republic was at the end of the road from a *res judicata* point of view, it could not have found that the Slovak Republic was in breach of its EU law obligations). So, on closer examination, one finds that the Court of Justice was not, in *Commission v. Slovak Republic*, confronted with deciding what happens when you have, on the one hand, a State aid decision that falls to be enforced and, on the other hand, a national law decision that is *res judicata* and which prevents that enforcement.

(5) on a related note, there appears to be no instance in which the Court of Justice has elected to prevent recovery of State aid because of issues of legal certainty. Yes, there are decisions, *e.g.*, Case C-234/04 *Kapferer v. Schlank & Schick GmbH* and Case C-244/01 *Köbler v. Austria*, where the Court did not insist on recovery. However, there is no such decision in the State aid context, and this it seems to the court is of significance. Why? Because State aid is a distinct area of Community law. Articles 107/108 TFEU identify State aid as a core principle of the Treaty. Thus it is an area which has Treaty status, unlike, *e.g.*, public procurement, an area in which case-law abounds but which is not addressed in the Treaty itself. This is a factor of importance when one is looking at the hierarchy of legal norms: Arts. 107/108 are there encapsulating the obligation in respect of State aid and Art.108(3) addresses the obligation to recover.

(6) there is, in *Klausner*, an endorsement given to the principle of effectiveness over the principle of *res judicata*; hence if this Court were to consider refusing to direct the recovery of State aid because of legal certainty, there is a very narrow margin where it could do that consistent with EU law, this case not being within that very narrow margin (though in truth it is difficult to say quite what that narrow margin encompasses as the only authority that has been put up to establish the margin is *Commission v. Slovak Republic* which, for the reasons identified above, is not a very solid authority on which to ground a power to refuse, on grounds of legal certainty, the recovery of State aid).

(7) notably, in *Commission v. Slovak Republic*, the Court of Justice does not talk about legal certainty in general. It talks specifically about *res judicata*. This is unsurprising, given that the whole notion of recovery of State aid to some extent undermines legal certainty. If one thinks through how State aid manifests in practical terms, one common thread running through all forms of State aid is that they are each likely to be reflected in some form of legal agreement or provision. Then along comes the European Commission and says, in effect 'You ought not to have done that, Member State X, and what you have done falls now to be unravelled.' Such an end necessarily involves some interference with legal certainty (albeit to ensure the certainty that comes with thorough-going enforcement of the State aid rules).

(8) on a related note, the examinership process too is not un-destructive of legal certainty. After all, if I am a creditor, I have a perfectly good debt due and owing to me, and I am told, following on a process of examinership, that I will get, *e.g.*, 10 per cent of what is owing to me, that is a pretty flagrant interference with legal certainty. Yet the Oireachtas has clearly decided, and was entitled to decide, that examinership, though it may bring a degree of unfairness to individual creditors, is justifiable by reference to overall societal good. So, as can be seen, the notion that legal certainty is a sacrosanct concept that can never be disturbed is defeated by the very existence of the examinership process.

(9) there was suggestion by Aer Arann that if the court decides this case as it has, this will bring such uncertainty into the law on examinership as effectively to bring examinerships to an end. The State parties have contended that this argument is alarmist, that there have been but three State aid decisions that have gone against Ireland since it joined what was then the European Economic Community in 1973. However, the court considers that this point fails for a more basic reason: the court must do as it is coerced to do by law; if that creates policy issues, that is for our elected lawmakers to resolve, not this Court.

(10) the logic of the State aid decision that is central to the within proceedings is that Aer Arann had a benefit from a lower rate of tax for about 18 months. That was a competitive advantage which to the present day has not been removed and which was in effect bought by the investors.

(11) in a liberal capitalist economy, it was for the investors to carry out due diligence and to assess the commercial and other risks presenting in their making their investment; there was no onus on the State to warn them of potential risks. One can feel sympathy for the investors if they failed to appreciate that a particular risk presented, but such sympathy cannot translate into granting them an exemption from due application of the law.

(12) there is a theme running through the case-law that if there is a decision of the national Court that is *res judicata* and wherein the relevant State aid decision of the European Commission was discussed and resolved, then it might be harder to put aside that decision. (This theme is one of the factors the Court identified in *Klausner* as a reason to recover the State aid because the *res judicata* decision there did not talk about State aid at all). Here, the High Court in confirming the scheme of arrangement made no reference to the issue of State aid. Were the opposite true, then a greater concern would present as regards the issue of *res judicata*. But this Court must deal with the case that presents before it, not the very opposite of that case.

(13) if one looks to *Klausner*, para. 39, there is no basis there for the contention that this Court has to put *res judicata* first in its considerations; it is simply an option for a Court in particular circumstances. Yes, the court does not always have to dis-apply national rules, but that is far from stating that the court always has to rank the principle of *res judicata* first and foremost.

(14) while referring to *Klausner*, it is perhaps useful to make the incidental observation that that was a case in which the European Commission had not yet given a decision that there was a breach of State aid; yet even in that situation the Court of Justice decided that the national judgment should not be given prominence, which seems to this Court to be the firmest of pointers as to the premium that the Court of Justice places on recovery.

(15) in its consideration of Klausner, the court admits to being particularly struck by the observation at para. 45 of same that "*A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of* res judicata *or by the principle of legal certainty (see, by analogy, judgments in* Fallimento Olimpiclub…*and* Ferreira da Silva e Britto, *C 160/14*…)". That it seems to the court is an observation which, taken in the context of all the other case-law to which the court has been referred, including, notably, the decision of the Court of Justice in *Lucchini*, points to the Court of Justice at this time being firmly in support of the line of argument urged upon this Court in this regard by the State parties.

(16) as to settlement and set-off, the Settlement Agreement extinguishes the claim made in the restitution proceedings, but to have equitable set-off one needs to have one claim set against another. Counsel for Aer Arann contended in this regard that, *e.g.*, if the State owes Aer Arann €1,000 and Aer Arann owes €500 to the State, set-off must follow. But the truth is that there has to some vehicle whereby it can be decided who owes what to whom. And here that vehicle falters from the very outset because the restitution proceedings were killed off in the Settlement Agreement. For there to be any prospect of set-off, there would have to be a substantive claim asserting illegality, entitlement to repayment, and the amount sought to be repaid (which would then fall to be set off). But that scenario has been extinguished by the Settlement Agreement.

XII. Conclusion

86. As can be seen from the foregoing, the court accepts the various contentions made by the State parties and, respectfully, does not accept the various contentions made by Aer Arann. The court will discuss with the parties the form of the orders to be made.