Neutral Citation [2012] IEHC 89

THE HIGH COURT

[2011 No. 239 MCA]

IN THE MATTER OF IRISH LIFE AND PERMANENT GROUP HOLDINGS PLC

AND

IN THE MATTER OF IRISH LIFE AND PERMANENT PLC

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

BETWEEN

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

APPLICANTS

AND

MINISTER FOR FINANCE

RESPONDENT

AND

HORIZON GROWTH FUND N.V.

APPLICANT

AND

MINISTER FOR FINANCE

RESPONDENT

Judgment of Mr. Justice Feeney delivered on 2nd day of March, 2012.

I. On the 26th July, 2011 the Minister for Finance (the "Minister") applied to the High Court for a direction order pursuant to s. 9 of the Credit Institutions (Stabilisation) Act 2010 (the Act). That application was made *ex parte* to the Court pursuant to s. 9(1) of the Act. The application was made for the purposes of facilitating and enabling an investment on the part of the Minister of up to €3.8 billion by way of subscription in ordinary shares in Irish Life and Permanent Group Holdings Plc. ("ILPGH"). The investment by the Minister was identified as being required to be used, in such sum as was necessary, to recapitalise a subsidiary company known as Irish Life and Permanent Plc. ("ILP").

2. On hearing the *ex parte* application on the 26th July, 2011 the High Court made a direction order pursuant to s. 9 of the Act in the terms set out in the order of that date. Paragraph D granted an order pursuant to s. 9(8) of the Act providing that certain of the reliefs granted in the order were to have an immediate effect. Section 11(1) of the Act provides that an application can be made to set aside a direction order. Section 11(1) provides that a member of a relevant institution may apply to the Court by motion on notice grounded on affidavit, not later than five working days after the making of a direction order for the setting aside of the direction order. ILPGH and ILP were and are relevant institutions for the purposes of s. 9 and s. 11 of the Act.

3. On the 3rd August, 2011, the first and second named lay applicants, Gerard Dowling and Padraig McManus filed a motion in the Central Office to set aside the direction order pursuant to s. 11 of the Act. There is no dispute but that both of those applicants are members of the relevant institution, in this case ILPGH, and that such application was brought within the five working day time limit set out in s. 11(1) of the Act.

4. In an *ex tempore* judgment of the 3rd February, 2012 in these proceedings the Court held that on the 3rd August, 2011 the third named applicant, Piotr Skoczylas, applied on his own behalf and on behalf of the fourth named applicant, Scotchstone Capital Fund Limited, within the provisions of s. 11(1) of the Act. It is claimed by the Minister that on the 3rd August, 2011,that the third named applicant, Piotr Skoczylas, was not a "member" of either ILPGH or ILP and that therefore he had no standing or entitlement to bring any application to set aside a direction order under s. 11(I) of the Act. It is accepted that Scotchstone Capital Fund Ltd. was a member as of the 3rd August, 2011 and that, therefore, pursuant to the judgment of this Court on the 3rd February, 2012, it follows that this Court is satisfied that an application has been made by the fourth named applicant, Scotch stone Capital Fund Ltd. within the time set out in s. 11(1) of the Act to set aside the direction order of the 26th July, 2011.

5. On the 2nd August, 2011 Horizon Growth Fund N.V. ("Horizon") applied to court by motion to set aside the direction order relying on the provisions of s. 11 of the Act.

6. By notice of motion dated 4th October, 2011,the Minister applied in relation to the third named applicant, Piotr Skoczylas, for an order dismissing or alternatively striking out his application on the grounds that he was not a member of ILPGH and/or ILP as of the date of his purported application of the 3rd August, 2011 or at any time within the five day working period provided for ins. 11(1) of the Act and that therefore he had-no standing or entitlement to bring any application to set aside the direction order pursuant to s. 11(1) of the Act. In another notice of motion of the 4th October, 2011 the Minister applied for an order dismissing or alternatively striking out the application of Horizon on the basis that Horizon was not a member ILPGH and/or ILP at the relevant time and therefore could not bring the application which it had sought to bring on the 2nd August, 2011 and it was claimed that as Horizon was not a

member as of the 2nd August, 2011 or at any time within the five day working period set out in paragraph 11(1) of the Act, that Horizon had no standing or entitlement to bring any application to set aside the direction order under s. 11 (1) of the Act. In the alternative, the Minister sought in the notice of motion of the 4th October, 2011 the trial of a preliminary issue, namely:

> "Whether the applicant (Horizon) is a member of Irish Life and Group Holdings Plc and/or Irish Life and Permanent Plc and, accordingly, has standing or is entitled to bring the within application dated 2nd August, 2011 pursuant to s. 11 of the Credit Institutions (Stabilisation) Act 2010."

7. The issue which this Court is asked to determine is in effect a claim by the Minister that both the third named applicant, Piotr Skoczylas, and the applicant, Horizon, have no standing to bring an application pursuant to s. 11 (1) of the Act as neither of them were a member of either of the relevant institutions within the meaning of s. 11 of the Act at either the date of the direction order on the 26th July, 2011 or at any time up to and including the 3rd August, 2011 which was the last date for bringing such an application. It is claimed that neither of those parties have any standing or are entitled to bring an application within the provisions of s. 11(1) of the Act. It is claimed on behalf of the Minister that for an application to be made pursuant to s. 11(1) of the Act, that, at the time that the application is made, the person or entity making such application must be a member of the relevant institution and that only a member has any standing or entitlement to bring an application to set aside a direction order. It is claimed on behalf of the Minister that for a person or company to be a member for the purposes of s. 11(1) of the Act that such person or company must be a member of the relevant institution, which for the purposes of this application is ILPGH within the meaning of member as set out in s. 31 of the Companies Act 1963.

8. On the 2nd August, 2011, Horizon was the beneficial owner of shares in ILPGH, which is the date of Horizon's application under s. 11(1). However, it is claimed on behalf of the Minister that the legal title to those shares was held by a trustee or custodian as of that date who was therefore in law the member of ILPGH rather than Horizon and that it was that party who had the entitlement and standing to bring an application pursuant to s. 11(1). As of the 3rd August, 2011, Piotr Skoczylas, the third named applicant, was the beneficial owner of certain shares in ILPGH. It is claimed on behalf of the Minister that on the 3rd August, 2011 that the legal title to those shares was held by a trustee or custodian who is in law the member of ILPGH rather than the third named applicant. It is claimed that it is that party who is entitled to bring an application pursuant to s. 11(1) of the Act.

9. The affidavits attest that both as of the 26th July, 2011 and at all times up to and including the 3rd August, 201 I that both Piotr Skoczylas and Horizon were beneficial owners of shares in ILPGH and that their shares were held through intermediaries in dematerialised form. Neither Piotr Skoczylas nor Horizon were entered in the register of members of ILPGH, the relevant company for this application, at any time between the 26th July, 2011 and the 3rd August, 2011. Both Piotr Skoczylas and Horizon were both entered in the register on dates subsequent to the 3rd August, 2011.

10. Piotr Skoczylas is a former investment banker and company director who is the main shareholder and person in effective control of Scotchstone Capital Fund Ltd. He was elected as a director ILPGH at an E.G.M. held on 20th July, and has been prime mover in a group of shareholders in ILPGH since April 2011. He purchased shares in ILPGH in March 2011 and has held those same shares continuously since that date. He bought his shares through Saxo Bank in March 2011 and those shares were held in Piotr Skoczylas's trading account at Saxo Bank. The name under which those shares were registered in the register of members of ILPGH was Vidacos Nominees Ltd. which was the nominee through which Saxo Bank held shares in ILPGH. On the 29th September, 2011, Piotr Skoczylas completed the transfer of the ILPGH shares of which he had been the beneficial owner• of since March 2011 and an ordinary share certificate in Piotr Skoczylas's name was registered on the 29th September, 2011.

11. Horizon is a financial investment company incorporated and registered under the laws of Curacao, an autonomous territory within the kingdom of the Netherlands. The company was established in 1993 and trades as a managed financial investment fund. Between the 17th February, 2011 and the 22nd July, 2011, Horizon acquired just over six million shares in ILPGH. Those shares were in dematerialised form and were held through intermediaries, namely, HSBC Global Custody Nominee (U.K.) Limited, which is the custodian via Credit Agricole Luxembourg, which is the nominee. As of the 26th July, 2011 and on all dates up to and including the 3rd August, 2011, Horizon shares were registered in the share register of ILPGH in the name of HSBC Global Custody Nominee (U.K.) Ltd. The 6,029,984 shares in ILPGH of which Horizon was the beneficial owner in the period from the 26th July, 2011 to the 3rd August, 2011 were later registered in the name of Horizon and an ordinary share certificate in respect of those shares was registered on the 10th October, 2011.

12. Neither Piotr Skoczylas nor Horizon were named in the register of members of either ILPGH or ILP on any date on or before the 3rd August, 2011 and only appeared in the register of shareholders on the 29th September, 2011 and the 10th October, 2011 respectively. The Minister claims that it follows that neither of them were members during the period up to and including the 3rd August, 2011 and as a result they lack the necessary standing or entitlement to bring applications under s. 11(1) of the Act. That contention is based upon a claim that a member for the purpose of s. 11(1) of the Act must be a member within the meaning of s. 31 of the Companies Act 1963 and that since neither Piotr Skoczylas nor Horizon were in the register of members at the relevant time that they are therefore not members for the purpose of s. 11(1) of the Act.

13. As part of the context to the preliminary issues, it is averred on behalf of Horizon that throughout European stock markets, including the Irish stock market, the majority of shareholdings are held in electronic form, that is in a dematerialised form. Dematerialisation is identified as a system which involves the issuance of securities without a paper certificate to constitute or evidence them. A dematerialised security is represented not by a paper certificate but is represented instead by an electronic record and is transferable by amendment of an electronic register. The affidavits attest that the majority of shareholdings in a company such as ILPGH or ILP would be held in electronic form and there would be no share certificates. Such shares are traded and cleared in electronic form in a system known as Euroclear/CREST. That is the security settlement system for dematerialised United Kingdom, Irish and international equities and public sector securities and money market instruments. The CREST system commenced in 1996 and is designed to provide real time settlement for a range of corporate and government securities. The CREST system operates differently in relation to the United Kingdom settlement system and the Irish settlement system. That arises from a difference in the legal position between the two countries. The position at law in the United Kingdom is that for U.K. companies it is the entry in the CREST register that confers legal title on the owner. For Ireland the system operates in a different manner and though settlement is through CREST, legal title is transferred when the entry is made in the issuer's register following the issuing of an instruction which is generated requiring the registrar to amend the register. Legal title passes when the register is updated following that instruction. A central securities depository is the means by which book entry transfers of dematerialised shares are given effect on the stock market. The system operates under the approval of the Minister for Enterprise and Employment, now the Minister for Jobs, Enterprise and Innovation, under the provisions of the Companies Act 1990 (Uncertified Securities) Regulations 1996 (S.I. 68/1996). That electronic share transfer system operates in circumstances where there is no written instrument and where no written document is required for the transfer of a security. Pursuant to the Statutory Instrument shares may be held in uncertified form and registration of the uncertified share is maintained by or on behalf of the relevant user. In the case of English securities, that is by means of entry on

the CREST system and in the case of Irish securities, the CREST system generates a register update request known as an RUR at the time of an electronic share transaction and the buyer thereby acquires an immediate equitable interest from the moment of settlement. The registrar of shares must respond promptly to all RURs and update the register to reflect changes of ownership.

14. The Minister contends that to have standing to bring an application under s.11(1) of the Act that Piotr Skoczylas and Horizon, not being in the register of members, would have to have had directed the nominee shareholder named in the share register to have instituted proceedings within the timeframe set out in s. 11 (1). Any proceedings which were issued on or before the 3rd August, 2011 would have to have been brought in the name of the nominee shareholder as the shareholder appearing in the register of members. Alternatively, it was argued on behalf of the Minister that it was open to beneficial shareholders who were not in the register of members, but who were beneficial owners of shares, to call for those shares to be materialised and registered. It was averred on behalf of Horizon that even if following the direction order of 26th July, 2011, that it had taken immediate steps to materialise its beneficial shareholding into a material form and to be registered in the register of members, that that process would have been unlikely to have been completed within the five day window period provided for ins. 11(1) of the Act. In support of that argument, Horizon averred that it took longer than five days to complete the steps necessary to materialise its beneficial shareholding from its dematerialised form and to be entered as members in ILPGH register of members in October 2011. It was averred on behalf of Horizon that the estimate which it received for the materialisation of its shareholding into a material and registered form was a period of ten to fifteen days. John A. Moran, on behalf of the Minister, in his affidavit sworn on the 16th December, 2011, made reference to the CREST Reference Manual and the CREST Rules of 2011 and averred from consideration of those documents that in a straightforward stock withdrawal that it should only take forty eight hours for a new certificate to be delivered and for the registration of the beneficial owner in the register of members. On that basis he averred that it would have been possible for Horizon to materialise its shareholding in ILPGH and to take it into direct ownership within five working days. That averment was based upon consideration of rules, regulations and guidelines rather than on any actual transaction or on information from CREST.

15. It was contended on behalf of the Minister that any shareholder who takes and holds dematerialised shares does so in the knowledge that there are legal consequences arising from holding shares in that manner. It was suggested that chief amongst the consequences are that the rights of shareholders that accrue to members of a company are not exercisable directly by them as beneficial owners but only by the legal owner whose name appears in the register of members. It is for that reason that it is claimed on behalf of the Minister that for either Piotr Skoczylas or Horizon to be in a position to make an application under s. 11(1) of the Act that, they would have to either have had the nominee in whose name the shares appeared in the register issue an application within the five day period, or, alternatively, materialise their shareholding within the five day period and thereafter make an application under s. 11(1) as a member. The Minister claims that all and any rights at law deriving from the shares in ILPGH had to be exercised by the legal owner of the shares which is the person or company entered as members in ILPGH's register of members.

16. It is contended on behalf of the Minister that even though a majority of shares in global financial markets are held through brokers or nominees that that does not alter or could not alter the law with regard to the definition of a "member" under the Companies Act 1963 or apply a broader meaning to the term ins. 11 of the Act.

17. On behalf of Horizon it is contended in response to the Minister's claim that for Horizon or any other shareholder who was the beneficial owner of shares but not entered in the register to be obliged to materialise its shareholding within a five day period and to also commence a s. 11(1) application within the same period is to impose an impractical time constraint. It is claimed that the likelihood is that registration would not have been completed within the five working days provided for in s. 11(1) of the Act. As regards the contention made on behalf of the Minister that nominees could have instituted proceedings, it is contended on behalf of Horizon that the terms and conditions of the agreement between Horizon and Credit Agricole Luxembourg were such that Horizon cannot compel Credit Agricole to institute legal proceedings on its behalf or to compel HSBC in turn to institute proceedings. It was claimed by Horizon that for an investor to demand that a major international bank commence litigation against the Irish Minister for Finance in respect of shareholdings in respect of which the bank has no beneficial interest is a wholly different order of request from a request to appoint a proxy to vote at a meeting of shareholders, and, it was argued that the contention by the Minister to have the nominee make a s. 11(1) application is unreal. Horizon contend that its immediate contractual relationship was with Credit Agricole Luxembourg and that it was not entitled to demand that HSBC institute legal proceedings on its behalf.

18. In an affidavit of Luciana Moretti sworn on 16th November, 2011 sworn on behalf of Horizon, it is stated that the explanation as to why Horizon did not seek to materialise its shareholding in ILPGH prior to making its application under s. 11 of the Act was that "it simply did not occur to the applicant that the respondent would take such a position". It is also apparent from the affidavit sworn by Piotr Skoczylas that when he made his application and the application on behalf of Scotchstone on the 3rd August, 2011, he did so on the basis that he presumed that he was a member within the terms of s. 11(1) of the Act.

19. The central issue for determination by this Court is the meaning of "a member" in s. 11(1) of the Act. Section 11(1) provides:

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

The Court in hearing such an application may set aside or vary the order pursuant to subss. (3) and (4) of s. 11 of the Act. The relevant institution is defined in the interpretation section (s. 2) of the Act. A "relevant institution" is defined as:

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

(e) a •subsidiary of a person or body referred to in any of paragraphs (a) to

(d), and

(f) a holding company of a person or body referred to in any of paragraphs (a) to (d);"

ILPGH is and was a public limited company incorporated under the Companies Act 1963-2009 and is a relevant institution under the Act. There is no definition of the term "member" in the Act and member is neither defined in the interpretation section nor in s. 11. The Minister contends that the term "member" has a specific and well understood meaning in the context of a company and that its meaning is contained in s. 31 of the Companies Act 1963. It is claimed that the correct meaning of a member in s. 11(1) of the Act is as defined in the Companies Act. It is claimed that the meaning of the term "member" in the context of ILPGH which is a company incorporated under the Companies Act must be the same as the meaning of that term in company Jaw and that it follows that the correct and intended meaning of the term "member" is a person who is entered in the register of members of the company. It is claimed that such meaning is wholly consistent with and required by the scheme of the Act as a whole. It is therefore claimed that the plain meaning rule or the clear and obvious meaning of the word "member" is as defined in the Companies Act and that the Court should determine that to be the meaning of the word "member" as used in s. 11(1) of the Act. It is claimed that by applying "the clear and obvious meaning" that the Court thereby arrives at the true legal meaning of the word "member" as contained ins. 11(1) of the Act.

20. It is claimed on behalf of Horizon, in an argument adopted by Piotr Skoczylas, that the meaning of member is not clear and is not defined and the Court should not define a member by reference to the Companies Act 1963 as that legislation differs markedly from the 2010 Act. The 2010 Act comprises a series "of extraordinary statutory measures" and "must be regarded as *sui generis*". Horizon argues for a construction which reconciles:

> "The extraordinary exercise of executive power with appropriate procedural protection for the rights abrogated. Necessarily, such a purposive construction could be confined to the context of this legislation and the extraordinary purposes for which it was enacted".

Piotr Skoczylas contends that since "member" is not defined in the Act there is no legal or other reason to unduly restrict the definition of the word "member" to the definition set out in the Companies Act 1963 and that the definition should and must have regard to the prevailing market practice, including the fact that shareholders hold shares through brokers or nominees and that, since it is the beneficial owners of the shares whose rights are being affected by the s. 9 order, those are the persons who are understood to be members within s. 11(1) of the Act. He claims that the correct meaning of member in s. 11(1) is that a member is the person or entity affected by a direction order. It is that person or company whose economic rights are altered by the direction order and it is that person or company as a member who has a right to apply to set aside the direction order.

21. The purpose and object of statutory interpretation is for the Court to identify the true meaning of the legislation. In carrying out that task, the Court must identify as a first step whether the word or words under consideration have a clear or obvious meaning thereby enabling the Court to apply a literal interpretation. The plain meaning rule can be adopted where the Court is satisfied that there is only one meaning and where an objective and an informed interpretation of the word or words under consideration raise no real doubt as to the true legal meaning of the enactment. In this case, the word "member" is not defined and is used in different ways within the legislation and covers a number of different institutions. This arises from the definition of relevant institution in s. 2 of the Act. The text of the Act is and must be the primary indication of the intention of the Oireachtas in enacting legislation. Where a word is not defined within an Act and where it is used in different circumstances, a situation can arise where the Court must look at the context of the Act as a whole. This is particularly so in this case given the scope and breadth of the Act and its stringent terms. In this case, the Court is satisfied that it can be said that the word "member" as used in s. 11 does not on an objective and informed interpretation have only one meaning or an obvious meaning. That being the case where there are alternative literal meanings capable of being applied to the word "member", the Court is placed in a situation where it must exercise an objective judgment as to the meaning and the starting point for that is to place the word in issue within the context of the Act as a whole.

22. When considering legislation the purpose of any construction is to identify the intention of the legislature. The language or text of the legislation is the starting point in construing an Act of the Oireachtas. This starting point is discernible in the judgment of Fennelly J. in *Crilly v. T & J Farrington Ltd*. [2001] 3 I.R. 251 when in considering the meaning of s. 2 of the Health (Amendment) Act 1986 he held that there was no ambiguity in s. 2 and that therefore there was no need for the applications of complex canons of construction in its interpretation. At p. 309 he referred to "the traditional rule that the intention of the legislature can be gathered only from the meaning of the words used in the legislation".

Denham J. had identified a similar approach in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 (at p. 163) when she stated:

> "The correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature. If there is a plain intention expressed by the words of a statute then the court should not speculate but rather construe the Act as enacted.
>
> ……Dealing with the fundamental concepts, the balancing of rights and powers under the Constitution, the primary and literal approach to the construction of the statute is appropriate."

In circumstances where the literal approach is not capable by itself of resolving all doubts as to the interpretation and meaning of a statute, there is now a statutory provision to guide the Court in interpreting and applying legislation. The Interpretation Act 2005 is an Act "respecting the interpretation and application of Acts and of Statutory Instruments". Part 2 of that Act deals with miscellaneous rules. The literal approach is recognised within the provisions of s. 5 of the Interpretation Act 2005. That section deals with circumstances where a literal approach does not conclusively determine an interpretative problem. Section 5 of the Interpretation Act 2005 provides in the relevant parts:

> "(1) In construing a provision of any Act ... –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation ... would fail to reflect the plain intention of-

(i) ... the Oireachtas ..

(ii) …

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

23. The first step in interpreting and applying legislation is to endeavour, by following the literal approach, to identify the intended meaning of a word or words used in a statute.. •The fundamental object of interpretation being to give effect to the intention of legislation, it follows that the primary and pre-eminent indicator of such intention is the text itself. It is when consideration of the word or words in legislation proves either obscure or ambiguous that it becomes necessary to go beyond the literal or texualist approach.

The literal approach requires that the primary indication of the legislature's intention is to be gleaned from the word or words of an Act. The word or words to be construed must be given their ordinary and natural meaning and having given the word or words such meaning, it is then necessary to ascertain if the provision under consideration is plain and unambiguous.

24. The ordinary meaning of words can be ascertained or considered from a number of standpoints including the dictionary meaning, the contextual meaning, the meaning understood from the perspective of the maker of the legislation with a particular purpose or objective in mind, or the audience derived meaning. In this case, the Minister seeks that the Court determines the construction of s. 11 and the meaning of "member" in s. 11(1) by reference to the Companies Act 1963. The applicants seek a different and more extensive interpretation by reference to the meaning understood from the perspective of the maker of the legislation and also from the audience derived meaning. The dictionary meaning is of no assistance in relation to the matter under consideration by this Court. The Minister relies on a literal meaning of a "legal term", that is, of the word "member". Whilst a word may have an ordinary or dictionary meaning, the same word can have a technical or legal meaning where it has been used in a particular statutory code dealing with a particular area. In those circumstances the use of that word in legislation is to be assigned its technical or legal meaning as opposed to its ordinary meaning unless the context requires otherwise. Section 11 (1) of the 2010 Act uses the word "member" to cover not only companies incorporated under the Companies Act 1963 but also to cover other entities including licensed banks, credit unions, building societies and even extending to a person or body prescribed under s. 3 of the Act. The word "member" in s. 11(1) is used in circumstances where it clearly has more than one meaning. There is no definition of member in the Act. Where "member" also refers to entities and persons other than a company incorporated under the Companies Act 1963, a court cannot approach the word "member" as if it is a legal term defined by Company Act legislation. The fact that the word "member" has a legal meaning within the Companies Act 1963 does not render its meaning in s. 11(1) plain or unambiguous where "member" in the Act of 2010 embraces members coming from entities or persons other than a company. The Act provides that a person or entity can be a member of different bodies and if member as used in relation to one of the bodies is to be solely interpreted by reference to its meaning in other legislation covering such body, then for such meaning to be clear and unambiguous it would be necessary for the Act to state so and for the word to be so defined.

25. In support of the contention made on behalf of the Minister that the word "member" should be interpreted by reference to the Companies Act 1963 and the definition contained in s. 31, it is claimed that there is no other relevant definition of the term "member" in Irish law. It is argued that it follows that the definition set out in s. 31 of the Companies Act 1963 identifies the correct meaning of the word "member", ensures certainty and interprets the word "member" by paying attention to the state of law prior to the Act being passed. It is also claimed that the provisions of another statute, namely, the Companies Act 1963, are *in pari materia* or forming part of the same statutory context as the 2010 Act. This Court does not accept these claims as not only is the word "member" used in s. 11(1) to cover a number of different institutions other than companies incorporated under the Companies Act 1963, but also the claim of lack of certainty, absent a definition based on the Companies Act, is not correct. This is dealt with later in this judgment. Also consideration of the 2010 Act results in a conclusion that that Act is not *in pari materia* with the Companies Act 1963 and cannot be taken as forming part of the same statutory context nor can it be relied upon as an aid to interpretation. The 2010 Act, due to its unique, unprecedented and stringent provisions, is to be properly regarded as *sui generis*. The 2010 Act deals with many matters outside of company law and its declared purpose includes matters which are stated as being necessary to address an unique and unprecedented economic crisis and to deal with circumstances where the common good requires permanent or temporary interference with the rights including property rights of persons who may be affected by the performance of the Act. It is the unique and unprecedented nature and scope of the 2010 Act which leads this Court to the conclusion that no assistance can be gained by interpreting the word "member" by reference to any other legislation. Similar or indeed identical words used in Acts which are not *in pari materia* cannot be taken to define, impact or control each other. In the case of *The State (Sheehan) v. The Government of Ireland* [1987] I.R. 550, Henchy J. held (at p. 561/562):

> "Counsel for the prosecutor has not relied on any other statutory provision as supporting the interpretation of s. 60, sub-s. 7 for which he contends. This is understandable because of the rule of statutory interpretation that in construing a particular statutory provision no provision of another statute may be used as an aid or a guide unless that other statutory provision is *in pari materia*, that is forming part of the same statutory context."

This Court is satisfied that the provisions of s. 31 of the Companies Act 1963 and s. 11(1) of the 2010 Act are not *in pari materia*. Nor is it a case where the meanings ascribed to the same word in one Act may be of assistance in interpreting the use of that word in another Act. That arises from the fact that the word "member" covers entities and persons as well as companies incorporated under the Companies Act 1963. The definition of member in the 1963 Act is a technical definition directly relevant and applicable to the provisions of that Act in relation to the governance of companies.

26. The Court is satisfied that the word "member" as used in s. 11(1) of the 2010 Act does not on an objective interpretation have only one potential meaning nor does it have an obvious meaning. Where, as in this case, there are alternative literal meanings capable of being applied to the word "member" it can be properly said that the word "member" as used ins. 11(1) is ambiguous.

27. Where the use of a word in a statute is ambiguous and does not have one obvious literal and plain meaning, the provisions of s. 5 of the Interpretation Act 2005 come into effect. Section 5 of that Act deals with such a situation and provides that the provision under consideration be given a construction that reflects the plain intention of the Oireachtas. In exercising an objective judgment as to what is that plain intention, the entire of the Act must be considered and the section under consideration placed in the context of the Act. Where a word or a provision in a statute is ambiguous or where a word used gives rise to two or more meanings, then in such cases, and this is such a case, the Court can evaluate the alternatives by reference to the purpose of the enactment. That is to adopt the so-called purposive interpretation. The meaning to be assigned in such circumstances is the one that best promotes the purpose of the legislative enactment and it is that meaning which is presumed to be intended by the Oireachtas. In considering the purpose of the legislation, a word or words under scrutiny may require either a narrow meaning or alternatively a broader meaning.

28. The right or entitlement provided in a section such as s. 11(1) of the Act of 2010 is given context by the whole Act and the overall provisions. The legislature provided within the 2010 Act a means, by s. 11, whereby ex parte direction orders could be reviewed by a court following an inter-party hearing This is the subject matter of s. 11 of the 2010 Act.

29. This is one of the limited cases in which it is appropriate to go beyond the literal approach and to adopt a purposive approach. The starting point of that approach is that the provision of the statute under consideration is presumed to be intended to have a purpose and effect. In the *Howard v. Commissioners of Public Works*, Blayney, J., in the Supreme Court, approved of (at p. 151) the statement of Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best. declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view'."

In *Howard*, Blayney J. identified that the courts may have regard to the object and effect of the legislation in interpreting it but did so in circumstances where emphasis was placed on the limited application of the purposive rule of statutory interpretation. When a court departs from the literal approach and applies a purposive approach then the intention of the Oireachtas must be gleaned from the actual wording of the Act itself as to do otherwise would be to speculate as to the intention of the legislature.

30. Since the judgment in the *Howard* case, reported in the 1994 reports, the Interpretation Act of 2005 has been enacted. Section 5 of the 2005 Act allows in certain situations for construing ambiguous or obscure provisions by giving such provisions a construction that reflects the plain intention of the Oireachtas or Parliament and that intention is to be ascertained from the "Act as a whole". The Interpretation Act 2005 provides further assistance in relation to the approach permitted in construing the provisions of the Acts of the Oireachtas. As pointed out by Edwards J. in *Monahan v. Legal Aid Board* [2009] 3 I.R. 458 (at p. 483 and 484):

> "Section 7 of the Interpretation Act 2005 provides that, in cases where s. 5 of the Act of 2005 applies, the courts may 'make use of all matters that accompany and are set out in' the text of the legislation. This authorises the court to consider the long title of an Act in interpreting specific statutory provisions contained in that Act, in accordance with the practice of the courts prior to the enactment of the Interpretation Act 2005."

That is the approach which this Court adopts in construing s. 11(1) of the Act of 2010.

31. The long title to the 2010 Act identifies a number of matters including that "there is a serious disturbance in the economy of the State" and "whereas measures are necessary to .address an unique and unprecedented economic crisis" and "whereas there is a continuing serious threat to the stability of certain credit institutions in the State, and to the financial system generally" and "whereas the functions and powers conferred by this Act are necessary to secure financial stability and to effect a reorganisation of certain credit institutions" and "whereas the common good requires permanent or temporary interference with the rights, including property rights, of persons who may be affected" and "whereas the urgent reorganisation of certain credit institutions is of systemic importance to the State". The long title of the Act identifies the context of the legislation and provides the rationale for the Act's unique, unprecedented and far-reaching provisions. It refers to an urgent and severe disruption to the economy of the State and a necessity to introduce legislation to maintain stability. The scheme provided for under the Act recognises the urgency of the matters by first providing that direction orders made under s. 9 can be made *ex parte* and, secondly, by allowing some or all of the directions granted in such an order to have immediate effect. Direction orders can, and do as in this case, have the effect of interfering with the rights, including property rights, of persons affected by the direction order. Section 9 direction orders have far-reaching consequences and encroach upon valuable property and contract rights. The scheme in the Act is such that a party affected by a direction order will be unaware of such order until it is made. Section 11(1) provides the only means by which an affected party can seek to challenge a direction order and such challenge must be made not later than five working days after the making of the direction order. That time limit is both stringent and absolute and there is no provision for any extension of time. It is clear that s. 9 orders can and are intended to affect the interests of others. Those persons are entitled to be dealt with in a manner consistent with the principles of natural justice. Those persons are given, under the scheme of the Act, an entitlement to apply to set aside a direction order. The entitlement for an affected party to apply to set aside a direction order as provided for in s. 11(1) of the Act of 201 0 recognises the entitlement of parties affected by an *ex parte* direction order to be heard by the Court. An entitlement of such a nature and the need for it to be available was identified by Hardiman J. in the Supreme Court in *Adam v. Minister for Justice* [2001] 3 I.R. 53 (at p. 77) where he stated:

> "In my view, any order made *ex parte* must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent."

32. Due to the urgency of the matters dealt with in the 2010 Act, the time limited for an application for an affected party to exercise the right of having a direction order reviewed by the Court is five working days. That affected party can be a person or entity either in Ireland or outside Ireland and the period for bringing a challenge to a direction order is five working days. A time limit cannot be such as to render virtually impossible or excessively difficult the entitlement of a person affected by an order to exercise the right of review provided for in s. 11. The purpose and intent of s. 11 was to provide a statutory basis for the constitutional requirement that a person or entity affected by a direction order has an entitlement to have a direction order reviewed by the Court. Section 11(1) of the 2010 Act provides an absolute time limit and it is only by availing of that section that a party affected by a direction order can apply to court. Section 63(3) of the 2010 Act provides:

> "(3) A person is not entitled to apply for the judicial review of a decision referred to in subsection (1) if he or she was entitled to apply to have the relevant order of the Court set aside but did not do so."

The scheme in the Act of 2010 is such that if an affected party does not apply within five working days that person has no entitlement to seek judicial review. The purpose of an application to set aside a direction order is so that persons affected by the direction order have a means of having the Court review the order.

33. When a company is the subject of a s. 9 order the persons affected are not limited to persons who are members for the purpose

of the Companies Act 1963 but also extend to persons who are the beneficial owners of shares in a company the subject of the s. 9 order. The intention of the Oireachtas, as gleaned from the interaction between s. 9 and s. 11 of the Act of 2010 and with due recognition being paid to the recitals in the Act and the whole of the Act leads to the conclusion that the plain intention of the Oireachtas was to authorise interference with property rights and to provide that a remedy was available under s. 11 to those whose property rights may be affected to apply to Court. Those persons are the ultimate owners of the shares and not just members as defined in s. 31 of the Companies Act 1963. The scheme under the Act as provided for in s. 9 and s. 11 demonstrates that the intention of the Oireachtas was to provide fair procedures to persons affected by s. 9 orders obtained *ex parte*. In interpreting the use of the word "member" in s. 11(1), the Court has regard to the scheme as provided for in the Act, the *ex parte* nature of a s. 9 order, the limited and absolute time restriction in which to make an application under s. 11 (1) and the fact that the purpose and intent of s. 11 as contained in the scheme within the Act is to provide that persons affected have an entitlement to challenge a direction order leads to the conclusion that the word "member" as used ins. 11(1) is to be construed as a person who has as of the making of the order and/or as of the date upon which an application is made under s. 11(1) an existing property right in the institution the subject matter of the s. 9 order. Those persons would include the ultimate owners, that is, those who hold the beneficial title to shares, in a limited liability company. It is not just a member of a company incorporated under the Companies Act 1963 as defined in that Act who is potentially affected by a direction order but also other persons who are the beneficial owners of shares of that company. The Companies Act 1963 provides a legislative basis and scheme by which limited companies are to be governed and the definition of member within the 1963 Act defines who is a member for the purposes of that Act.

34. It is clear from the judgment of Keane C.J. in *Re Via Net Works (Ireland) Ltd*. [2002] 2 I.R. 47 and his statement of the law (at p. 55) that:

> "It is undoubtedly the case that a person who has become entitled to be registered as a shareholder may be unable to exercise any of his rights as a shareholder until his name has been entered on the register."

That statement was made in the context of a s. 205 application and refers to circumstances entirely different from the circumstances of an application under s.11 (1) of the 2010 Act.

35. The analogy which the Minister seeks to draw between the entitlements of persons to bring s. 205 applications under the Companies Act 1963 and the circumstances and scheme provided for in s. 11 (1) of the 2010 Act is not a valid argument. The Minister identifies that to exercise rights under s. 205 of the Companies Act 1963 a person needs to be a member as defined in the Act and that a similar interpretation and approach should be applied in construing s. 11(1) of the 2010 Act. The fact that there are circumstances in which a beneficial owner of a share cannot exercise certain rights under the Companies Act 1963, including s. 205 rights, does not mean and cannot be taken as meaning that a similar situation is to be inferred into s. 11(1) of the 2010 Act. Prior to taking a s. 205 application a beneficial owner of shares can become a member of the company within the definition of s. 31(2) by having that person's name entered in the Register of Members and thereafter a s. 205 application can be made. Section 11(1) of the 2010 Act operates in an entirely different context whereas. 9 order has already been made *ex parte* and where that order or part of it may already have come into effect, as is the case herein, and where there is an absolute and stringent five day time limit to make an application to set aside the direction order. The cumulative effect of the unique and extraordinary statutory measures contained in the 2010 Act, the fact that those measures include the entitlement to interfere with property rights without compensation and that such interference can take place without any consultation and as a result of an *ex parte* application together with an absolute five day limitation period to apply under s. 11 requires that on a purposive approach to the entire of the 2010 Act that the word "member" must be construed in a broad manner and not in the restrictive manner contended for by the Minister. The Minister's suggested construction of the word "member" would require that persons owning the beneficial interest in the shares of a company affected by a s. 9 order both within and outside Ireland would have to take the time consuming and independent step to be entered in the register of shareholders prior to making an application under s. 11 or seek to oblige or compel the nominee to make an application. For that construction to be valid such restriction would have to be expressed with absolute clarity. To have such restriction would potentially defeat the purpose and intent of the Oireachtas in providing for a review in s. 11 of the 2010 Act.

36. This Court is satisfied that the definition of a "member" as contained in s. 31 of the Companies Act 1963 does not dictate or identify the meaning or definition to be used for the word "member" in s. 11(I) of the Act of 2010. Adopting a purposive approach to the 2010 Act and ascertaining the intention of the Oireachtas from the whole Act leads to a requirement for a broad construction of "member" being one which recognises the entitlement of holders of beneficial interest in shares to exercise rights under s. 11.

37. The Minister contended that if this Court were to construe the word "member" other than as contended for by the Minister, that is, by reference to s. 31 of the Companies Act 1963 that uncertainty would be the result. First, this Court is satisfied that that is not the case as any challenge under s. 11(1) of the 2010 Act has to have been commenced within five working days which in this case is by an application made on or before the 3rd August, 2011. Secondly, if a person or company makes an application under that section, as a person affected by the direction order and therefore a member, that person or company would have to establish that his or its economic rights were affected by the s. 9 order. A finite and certain number of parties seeking to challenge the s. 9 direction order is known within five working days and to succeed in an application under s. 11, a party would have to establish that such party was effected by the s. 9 order.

38. As all the applicants who are the subject of this judgment were the holders of a beneficial interest in shares in ILPGH both as of the date of the s. 9 order and as of the date of applications under s. 11(1), this Court does not have to determine whether either or both of those dates is the applicable date. Both Piotr Skoczylas and Horizon were the holders of the beneficial interest in shares both on the 26th July, 2011 and on the date when an application was made by them under s. 11(1), namely, the 3rd August, 2011 and the 2nd August, 2011 respectively.

39. In the light of the findings by this Court, the application by the Minister for an order dismissing the applications of Piotr Skoczylas and Horizon on the grounds that neither of them were members of Irish Life and Permanent Group Holdings Plc and/or Irish Life and Permanent Plc as of the date of their purported applications is refused. Both Piotr Skoczylas and Horizon Growth were members of ILPGH within the provisions of s. 11(1) of the 2010 Act on the relevant dates.