[2020] IEHC 184

THE HIGH COURT

[2019/2991 P.]

BETWEEN

SCOTCHSTONE CAPITAL FUND LIMITED AND PIOTR SKOCZYLAS

PLAINTIFFS

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 2nd day of April, 2020.

Introduction

1. In these proceedings, two motions are presently before the court: firstly, the plaintiffs' motion for judgment issued on the 26th of July, 2019; and secondly, the defendants' motion of the 1st of August, 2019, for an order pursuant to O.19, r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court striking out the proceedings on the grounds that that they are fraudulent or vexatious or bound to fail.

2. At the outset of the hearing, counsel for the defendants submitted that it would be appropriate for the court to hear the defendants' motion first, even though it was second in time. Counsel readily accepted that if the defendants' motion were unsuccessful, the defendants would have to deliver a defence, but that the obvious order was to consider the defendants' motion first, as if this were successful, the question of delivery of a defence would not arise.

3. The second named plaintiff ('Mr. Skoczylas'), who effectively conducted the case on behalf of the plaintiffs and whose submissions I was informed were adopted by the first named plaintiff, opposed this application and submitted that the plaintiffs' motion should proceed before what Mr. Skoczylas described throughout his submissions as 'the retaliatory motion' of the defendants. Mr. Skoczylas in fact delivered written submissions in relation to the running order, urging me to hear the plaintiffs' motion first.

4. In the event, I ruled that the defendants' motion should be heard first, on the basis that, if it were unsuccessful, an order that the defendants deliver their defence within a defined period would inevitably follow. This judgment is therefore primarily concerned with the defendants' motion, and whether the proceedings should be struck out on the grounds that they are frivolous or vexatious or bound to fail.

5. The present case is essentially a claim for damages arising out of other proceedings involving the present plaintiffs. They allege that the claim arises from what they allege are "manifest infringements of EU law" by a court of last resort in this jurisdiction. The nature of the present case is examined at paras 35-40 below.

6. In order to comprehend the issues in relation to the defendants' motion, it is necessary to understand the background to the matter, and in particular the history of the related litigation. Specifically, it is necessary to consider a course of litigation which led to three High Court judgments, a preliminary reference under Article 267 TFEU and the

subsequent judgment of the CJEU, and subsequently the judgment of the Court of Appeal. There was in addition a determination by the Supreme Court in which that court refused an application made by a number of parties including the parties in the present proceedings for leave to appeal to the Supreme Court from the judgment of the Court of Appeal.

7. It will be necessary to consider these judgments and how they are related to the current proceedings. For ease of reference, those judgments are as follows:

(1) *Dowling & Ors. v. The Minister for Finance* [2014] IEHC 418 ('the first High Court judgment');

(2) *Dowling v. Minister for Finance* C – 41/15, 8th November 2016, ('the CJEU Ruling');

(3) *Dowling v. Minister for Finance* [2017] IEHC 520, ('the second High Court judgment');

(4) *Dowling v. Minister for Finance* [2017] IEHC 832 ('the third High Court judgment');

(5) Dowling v. Minister for Finance [2018] IECA 300, ('the Court of Appeal judgment');

(6) *Dowling v. Minister for Finance* [2019] IESC DET 55, ('the Supreme Court determination').

Dowling & Ors. v. the Minister for Finance & Ors.

8. In order to understand the factual context of the present proceedings and in particular the applications before me, it is necessary to revisit and summarise the course of litigation set out above, and the decisions to which they gave rise. The summary which follows is for this purpose only, and a full account of the circumstances of this litigation may be found in the judgments set out above.

9. The four applicants in the cases above (to which I will refer collectively as 'the Dowling Litigation') were Gerard Dowling, Padraig McManus, and the two plaintiffs in the current proceedings, Mr. Skoczylas and Scotchstone Capital Fund Limited ('Scotchstone'). The plaintiffs were all shareholders of Irish Life and Permanent Group Holdings plc ('ILPGH') which operated as a holding company and was the owner of Irish Life and Permanent plc ('ILP'), a bank which now trades in this jurisdiction as Permanent TSB.

10. The litigation arose as a result of the making of a direction order in respect of ILPGH by the High Court in July 2011, pursuant to the Credit Institutions (Stabilisation) Act 2010 ('CISA' or 'the Act'). The Act was intended to address the "serious disturbance" in the economy of the State. The recitals to the Act referred to measures being necessary "…to address a unique and unprecedented economic crisis which has led to difficult economic circumstances and severe disruption to the economy". They referred to the "continuing serious threat to the stability of certain credit institutions in the State, and to the financial system generally" and stated that it was "…necessary, in the public interest, to maintain the stability of those credit institutions and the financial system in the State". The recitals

also refer to the functions and powers conferred by the Act being "necessary to secure financial stability and to effect a reorganisation of certain credit institutions…".

11. Section 7 of the Act conferred on the Minister the power to make a "proposed direction order", which would propose that a "relevant institution be directed to take (within a specified period) or refrain from taking (during a specified period) any action, or series of actions", including, "in particular", but not limited to, certain actions set out in the section itself. On the completion of certain notification procedures set out in the Act, in which the institution had a short period in which to make written submissions, the Minister could apply *ex parte* to this Court under s.9 of the Act for a direction order. Section 11 of the Act permitted the relevant institution or a member of that institution to apply to the court for the setting aside of the direction order. The court could set aside the order "only if it is of the opinion that there has been non-compliance with any of the requirements of section 7 or that the opinion of the Minister under section 7(2) ['that the making of a direction order in the terms of the proposed direction order is necessary to achieve a purpose of this Act specified in the proposed direction order'] was unreasonable or vitiated by an error of law."

12. An order was made on 26th July, 2011 in this Court by McGovern J. under s.9 of CISA in relation to ILPGH. O'Malley J. summarised the effect of this order in the first High Court judgment as follows:

> "In summary, the effect of the order was to enable the Minister to acquire 99.2% of the company. This was done by compelling it to issue a very large number of new shares to him, at a share price dictated by him, (being just under 6.5 cents per share), in return for the sum of €2.7 billion. For this purpose control of the company was taken from its organs and shareholders; the Memorandum and Articles of Association were altered; the decisions taken at the EGM were nullified and the company was delisted from the London and Irish Stock Exchanges. Further, various relevant legal rules, whether deriving from statute, common law, equity, codes of practice or contract were in effect disapplied insofar as the company was concerned." [para. 1.8]

13. The applicants in the *Dowling* litigation applied to this Court to set aside the direction order. As O'Malley J. put it at para. 1.10 of the first High Court judgment, the task of the court was "…not…to embark upon a review of, or an appeal from, the order of 26th July, but to determine whether it is legally undermined by errors on the part of the Minister in seeking to obtain it".

14. It is not necessary, for the purpose of this judgment, to analyse the basis upon which the applicants in the *Dowling* litigation sought to impugn the direction order. The applicant's case is summarised by O'Malley J. at Section O (pp. 72-74) of her judgment. It is worthwhile however, in order to demonstrate the context in which the various courts subsequently dealt with the matter, to set out the findings of law and fact made by O'Malley J. at para. 41.2 of her judgment:

"(1) From 2008 onwards, ILP along with other Irish banks became increasingly reliant upon State and EU financial support. As time went by and the financial turmoil of those years did not resolve, the efforts of the Irish Government to support the banks did not succeed in convincing the markets of either the banks' viability or the State's capacity to continue supporting them.

(2) By late 2010 it was apparent that there was a serious threat to the financial stability of the State, in significant part due to the State's commitments to the banks.

(3) The State's guarantees in respect of ILP amounted to c. €26 billion.

(4) In entering into the Programme for Support in November 2010, the Irish State entered into binding legal commitments to the European Commission, the European Central Bank and the International Monetary Fund, including a commitment to recapitalise viable Irish banks.

(5) As part of the Programme, the Central Bank of Ireland committed itself to carry out a Prudential Capital Assessment Review and a Prudential Liquidity Review and to determine the capital needs of the banks on the basis of the results.

(6) The PCAR and PLAR results were published on 31st March, 2011.

(7) The State was legally committed to ensure recapitalisation in line with the reviews by the 31st July, 2011.

(8) The Governor of the Central Bank then directed ILP to raise regulatory capital in the sum of €4 billion. This direction was binding on ILP and was not the subject of any legal challenge. The direction was made by the Central Bank in its capacity as independent regulator.

(9) On the balance of probabilities, the required capital could not have been raised from private investors.

(10) On the balance of probabilities, the required capital could not have been raised from existing shareholders.

(11) On the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the bank, whether by reason of a run on the bank by depositors, revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities.

(12) The failure of ILP would, as a matter of probability, have resulted in a complete loss of value to the shareholders.

(13) The failure of ILP would, as a matter of probability, have had extreme, adverse consequences for the Irish State, whether by reason of a run on the bank and

subsequent calls on the State guarantee of up to c. €26 billion, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme of Support for non-compliance with its terms, sanctions imposed under the Treaty, or a combination of some or all of these possibilities.

(14) The adverse consequences for the State would, as a matter of probability, have worsened the threat to the financial stability of other Member States and of the European Union.

(15) The decisions by the State to invest in the recapitalisation was made in fulfilment of its legal obligations and in the interests of the State's financial system, the citizens of the State and the citizens of the European Union.

(16) The State decided to recapitalise ILP by way of a subscription by the Minister for Finance for ordinary shares in the sum of €2.3 billion, contingent capital in the sum of €0.4 billion, and a 'standby' investment of €1.1 billion. The price to be paid per share was €0.06453, a discount of 10% to the middle market price on the 23rd June, 2011. The calculation of the number of shares required to be issued in return for the €2.3 billion resulted in the acquisition by the Minister of 99.2% of the Company.

(17) The share price on that date was not the result of a false market. The share price had been falling in any event over the previous number of years, and fell dramatically on publication of the PLAR/ PCAR results. As a matter of probability, this was because the market doubted the ability of the Bank to achieve the required recapitalisation in a way that would be attractive to investors.

(18) Part of the plan for the recapitalisation of the bank involved the sale of its asset Irish Life. This asset belonged to ILP, and not to the shareholders of ILPGH. Its value could not, accordingly, be attributed to those shareholders anymore than the liabilities of ILP could have been attributed to them.

(19) To attribute the value of Irish Life to the shareholders would be to make an unlawful return of capital to the shareholders.

(20) The paid in share capital of the company was not counted as part of the recapitalisation and has not been taken out of the company by the Minister.

(21) The Liability Management Exercise resulted in a significant loss to the subordinated debt holders and contributed significantly to the recapitalisation.

(22) The European Commission gave approval under State aid rules for the recapitalisation of ILP by means of the State investment in the same manner, at the same price and to the same extent as that ultimately carried out on foot of the Direction Order made by the High Court.

(23) The Irish Takeover Panel granted a waiver of Rule 9 for the purposes of the State investment on the basis of the same proposal. This did not involve any breach of the Takeover Directive.

(24) The Minister's proposal was supported, albeit reluctantly, by the board of ILP. The board considered that the company had no other option available to it in terms of achieving the required recapitalisation. An EGM was called with a view to passing the necessary resolutions.

(25) The State's proposal was not accepted by the shareholders voting at the EGM on 20th July [2011], who wished to explore other potential avenues for the raising of the required capital. The Board was instructed to seek an extension of time for the recapitalisation.

(26) Neither the Minister for Finance nor the Governor of the Central Bank was minded to seek such an extension. Having regard to the source of the deadline, an extension would have required the consent of the External Partners and the members of the European Council.

(27) The Minister decided to make a proposed Direction Order pursuant to the provisions of the Credit Institutions (Stabilisation) Act, 2010.

(28) He informed the Governor of the Central Bank of his intentions and complied with the procedural requirements of the Act in so doing.

(29) He informed the Board of ILP of his intentions and complied with the procedural requirements of the Act in so doing.

(30) The Governor communicated his views, which were supportive of the proposed direction order as being likely to achieve the statutory purposes of the Act.

(31) The chairman of the board referred the Minister to the letter he had written after the EGM, outlining the views of the dissenting shareholders.

(32) The application for a direction order was made and granted, in accordance with the procedure prescribed by the Act, on 26th July [2011].

(33) There was no want of candour and no breach of duty to the Court on the part of the Minister or his legal representative in the making of the application.

(34) One result of the order was (as it would have been under the proposal put to the EGM) that the Minister obtained 99.2% of the issued shares of ILPGH. It was therefore necessary to remove the company's shares from the official lists in Ireland and the United Kingdom. This did not involve any breach of the MiFID Directive.

(35) The Credit Institutions (Stabilisation), Act 2010 permits the action taken by the Minister. The direction order cannot be set aside or varied unless the court finds that his opinion that it was necessary was unreasonable or vitiated by legal error."

15. It will be clear from the foregoing that O'Malley J. was satisfied that the application for the direction order was made and granted in accordance with the procedure set out in the Act, that there was no lack of candour or breach of duty to the court by the Minister in the making of the application, and that CISA permitted the action taken by the Minister. The court therefore found that the direction order could not be set aside unless the Minister's opinion was unreasonable or vitiated by legal error. O'Malley J. took the view that there was little purpose in considering whether or not the opinion was reasonable if it were in fact vitiated by legal error. For the reasons set out in the judgment, O'Malley J. took the view that a preliminary reference to the Court of Justice of the European Union (CJEU) would be necessary to determine this latter issue.

CJEU Ruling

16. Accordingly, an order was made on 2nd December, 2014 for a preliminary reference under Article 267 of the Treaty for the Functioning of the European Union (TFEU). The CJEU delivered its ruling on 8th November, 2016. As the court stated at para. 1 of its ruling:

> "This request for a preliminary ruling concerns the interpretation of Articles 8, 25 and 29 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent '(OJ 1977 L 26, p.1; the Second Directive)."

17. The questions referred were, having regard to relevant EU legislation set out in the terms of the reference, as follows:

> "(1) Does the Second Directive preclude in all circumstances, including the circumstances of this case, the making of a Direction Order pursuant to Section 9 of the 2010 Act, on foot of the opinion of the Minister that it is necessary, where such an order has the effect of increasing a company's capital without the consent of the general meeting; allotting new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's memorandum and articles of association without the consent of the general meeting?
>
> (2) Was the Direction Order made by the High Court pursuant to Section 9 of the 2010 Act in relation to ILPGH and ILP in breach of European Union Law?" [para. 32]

18. The CJEU gave its ruling in the following terms:

> "Article 8(1) and Articles 25 and 29 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription right."

19. Of particular note are the following passages from the CJEU ruling:

> "50. However, as is clear from paragraphs 44 to 48 of this judgment, the Direction Order is not a measure taken by a governing body of a public limited liability company as part of its normal operation, but is an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of the referring court, would threaten the financial stability of the European Union. The protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned.
>
> 51. The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see, by analogy, judgment of 19 July 2016, *Kotnik and Others*, C – 526/14, EU:C:2016:570, paragraphs 88 to 90).
>
> 52. That conclusion cannot be called into question by the fact that the Direction Order could be classified, as claimed by the applicants in the main proceedings, not as a 'judicial measure', but a 'provisional administrative act'. It follows from the two preceding paragraphs that the Second Directive does not preclude, in circumstances such as those at issue in the main proceedings, the adoption of a

measure such as the Direction Order, the nature of the national authority which issued that order being of no relevance in that regard.

53. The above interpretation is in no way irreconcilable with the interpretation adopted by the court in the judgment of 12 March 1996*, Pafitis and Others* (C – 441/93, EU:C:1996:92), contrary to what is claimed by the applicants in the main proceedings. The factors set out in paragraphs 44 to 48 of this judgment distinguish the situation at issue in the main proceedings from the case that gave rise to the judgment of 12 March 1996, *Pafitis and Others* (C – 441/93, EU:C:1996:92), the feature of that case being that it concerned the insolvency of a single bank. While the Court held that the Second Directive continues to apply in the case of 'ordinary reorganisation measures' (judgment of 12 March 1996, *Pafitis & Others* (C – 441/93, EU:C:1996:92 paragraph 57) the Court did not, however, give a ruling, as the Advocate General observed in point 45 of his Opinion, on extraordinary reorganisation measures, such as a direction order designed to avoid, in a situation where there is a serious disturbance of the national economy and of the financial system of a Member State, the failure of a bank and thereby to maintain the financial stability of the European Union.

54. Further, as ILPGH and ILP and also Ireland have stated in their observations submitted to the Court, the national measures contested in the *Pafitis and Others* case (C – 441/93, EU:C:1996:92) had been adopted in the late 1986-1990 period and the Court delivered its judgment on 12 March 1996, thus well before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of shareholders and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system established by those amendments (see, to that effect, judgment of 19 July 2016, *Kotnik & Others*, C – 526/14, EU:C:2016:570, paragraph 91).

55. In the light of the foregoing, the answer to the questions referred is that Article 8(1) and Articles 25 and 29 of the Second Directive must be interpreted as not precluding a measure, such as the Direction Order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied a pre-emptive right to subscribe."

The Second High Court Judgment

20. The second High Court judgment concerned the application of the ruling given by the CJEU and the resolution of certain arguments not dealt with in the first judgment. The applicants made submissions on a number of grounds, but primarily on the basis that the

CJEU had erred in the manner in which it interpreted the findings made in the first High Court judgment. A particular focus of these arguments was para. 48 of the CJEU ruling, which was as follows:

> "Further, as stated in paragraphs 30 and 31 of this judgment, the referring court, after weighing the competing interests, came to the conclusion that, once the decision of ILPGH's extraordinary general meeting of 20 July 2011 was made to reject the Minister's proposed recapitalisation, the Direction Order was the only means of ensuring, within the time limit laid down by implementing decision 2011/77, the recapitalisation of ILP that was necessary to prevent the failure of that financial institution and thereby to forestall a serious threat to the financial stability of the European Union."

21. O'Malley J. analysed the contentions of the applicants with respect to this paragraph, and set out her conclusions on them, as follows:

> **"Submissions on the CJEU judgment**
>
> 48. As noted above, the applicants contend for the proposition that the CJEU incorrectly interpreted the first judgment of this Court, and/or erroneously purported to make a finding of fact itself. This argument focuses on paragraph 48 of the CJEU judgment, and the contention that the Court understood the situation to be that this Court had found that the Direction Order was *'the only means'* of effecting the recapitalisation of ILP. It follows, according to the applicants, that the ultimate ruling of the Court that a measure *'such as the Direction Order at issue in the main proceedings'* is not precluded by the relevant Articles of the Second Directive can be taken only as relating to a direction order found to be 'the only means' of effecting recapitalisation.
>
> 49. The applicants therefore contend that all of the earlier jurisprudence in relation to the Second Directive (dealt with in detail in the first judgment) is applicable to this case, and that the judgment of the CJEU in fact affirms their rights in circumstances where, on their case, the method adopted by the Minister was not 'the only means' possible. They say that the Court has simply clarified its earlier case law, and has provided for a limited derogation from the relevant Articles of the Directive where a measure such as the Direction Order is 'the only means' available. Apart from the reference to *Pafitis*, the Court did not explicitly deal with any of the other judgments in that series of cases and therefore must be taken to have confirmed them. The judgment does not, on this argument, determine that the Second Directive did not preclude measures such as the one in issue where there existed less onerous alternatives.
>
> **Discussion**
>
> 50. In my view this argument is based on a misreading of the CJEU judgment. The paragraph encompassing the formal ruling of the Court does not refer back to and is not conditional upon any findings of fact made by this Court, other than those relating to the threat to the stability of the financial system of this State and, as a

consequence, to the financial stability of the European Union. The references throughout are to measures such as the Direction Order, 'adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union' and that is intended to prevent the failure of the financial institution concerned and thereby to forestall such a threat. The Court was not purporting to find some form of derogation or discretion to permit a course of action to be taken if it was the only course possible – it stated clearly that the protection conferred by the Second Directive does not extend to and does not preclude a measure taken by the State in the circumstances and for the purpose stated. That this is the proper reading of the judgment is apparent from the analysis of the CJEU of the circumstances of the case, its reference to the terms upon which the decision had been made to grant financial aid to the State, and its references to *Kotnik*." [Emphasis in original]

22. Other arguments made did not find favour with the court. O'Malley J. concluded, in all the circumstances, that the applicants "have not succeeded in demonstrating that the opinion of the Minister that the Direction Order was necessary to achieve the statutory purposes for which it was sought was unreasonable or vitiated by legal error…" and dismissed the application.

The Third High Court Judgment

23. O'Malley J. then had to consider in the third High Court judgment whether leave to appeal to the Court of Appeal should be granted. The court held that the right of appeal against a refusal to set aside a direction order was not limited by s.64 of CISA, and that the applicants did not require the leave of the court. However, having invited the applicants to indicate the grounds in respect of which they would wish to have leave should leave be required, the court proceeded to grant leave to appeal in relation to certain grounds "on the basis that it may subsequently be found to be necessary" [para. 34]. Accordingly, leave to appeal was granted as to whether the High Court "correctly applied the ruling of the Court of Justice in this case and in *Kotnik [Kotnik & Ors. v. Slovenia* (C – 526/14)], and as to whether the High Court correctly interpreted and applied the terms of s.11 of CISA.

The Court of Appeal Judgment

24. The applicants made a "leap-frog" application to have its appeal considered by the Supreme Court rather than the Court of Appeal. This application was unsuccessful – see the determination of the Supreme Court at [2018] IESC DET 72 – and the appeal duly proceeded in the Court of Appeal. The judgment of the Court of Appeal, given by Hogan J. (Irvine and Baker JJ. concurring), commenced by framing the primary issue in the appeal as follows:

> "Where the State makes an enormous investment in the public interest in a failing institution on a compulsory basis and where these actions have been found by the Court of Justice not to contravene EU law, in what circumstances (if any) can this decision be challenged as unreasonable on domestic administrative law grounds?"

25. In relation to the important question as to whether the case was governed by EU law or by national law, Hogan J. stated as follows:

> "103. During the course of the hearing there was much debate as to whether the present case was governed by EU Law or by national law or, perhaps, by a mixture of both. There are certainly aspects of the case that are clearly governed by EU law. Thus, for example, the question of whether the direction order infringed the terms of the Second Company Law Directive (Directive 79/91 EEC) was certainly an issue of EU law which was ultimately determined by the Court of Justice. Contrary, moreover, to the submissions of the applicants, there was equally an obligation imposed by EU law to recapitalise ILP by 31st July 2011: see Article 1(g) of Council Decision 2011/326/EU (as amended).
>
> 104. At the same time EU law, broadly speaking, deferred to national law as to the manner in which the recapitalisation was to be achieved. The 2010 Act was an autochthonous item of legislation enacted by the Oireachtas. Since, moreover, the appellants' main complaints centred on the manner in which the recapitalisation was effected by the provisions of the 2010 Act and the direction order, I consider that the issues which fall to be determined on this appeal are substantially governed by domestic law. [Emphasis in original]
>
> 105. As it happens, nothing really greatly turns on whether domestic or EU law provides governs [sic] this aspect of the application because the essential challenge in this case is to the proportionality of the direction order and the manner in which the recapitalisation of ILP was carried out. As I hope to show, the scope of review of administrative action on proportionality grounds is essentially no different irrespective of whether the matter is governed by Irish or by EU law. But, as I will also explain below this Court is bound by the judgment of the Court of Justice in the Art. 267 reference made by O'Malley J."

26. The court went on to examine the terms of the CJEU ruling, with particular reference to paras. 50-55 of that ruling, as set out above. As Hogan J. stated at para. 116, those paragraphs "…made it clear…that the making of the direction order was essentially outside the scope of the Second Company Law Directive so that the direction order could not be held unlawful on that account…".

27. Hogan J. held that earlier decisions of the CJEU on which the applicants relied could not be deemed to apply to the present circumstances:

> "126. While the European Court does not, as such, adhere to a formal system of precedent and even if, admittedly, earlier decisions such as *Pafitis* might have been regarded as providing some support for the appellants' case, it is nonetheless clear from the judgments in both *Kotnik* and *Dowling* that these earlier Greek cases must be taken as having been distinguished and held not to be applicable to the very different recapitalisations at issue in the present case. One way or another, however, as this Court has recently pointed out, we cannot look behind the decision

of the Court of Justice given pursuant to an Article 267 TFEU reference in these very proceedings: see *Danqua v. Minister for Justice* (No. 2) [2017] IECA 20, [2017] 3 IR 192.

127. We must accordingly take the judgment of the Court of Justice as we find it. That Court has clearly ruled that the directions order did not amount to a violation of either Article 8, Article 25 or Article 29 of the Second Directive even if it provided for an increase in the provision of share capital to the company without the express consent of the shareholders. Irrespective of what might have been said earlier in *Pafitis* or the other Greek bank cases dating from this period, the Court of Justice has now given an authoritative and final determination on this issue of EU law which is averse to the contentions of the appellants. As it is that decision which binds this Court, it follows that the appellant's endeavours in this appeal to re-open or to re-interpret the decision of the Court of Justice must accordingly fail".

28. The Court of Appeal was unequivocal in its assertion that the High Court was bound by the ruling of the CJEU:

"169. this Court cannot look behind the judgment of the Court of Justice in *Dowling* insofar as it was concluded that the making of the direction order was essentially outside the scope of the Second Company Law Directive, so that the direction order could not be held unlawful on that account. Irrespective of what might have been said earlier in *Pafitis* or the other Greek bank cases dating from this pre-Euro period, the Court of Justice has now given an authoritative and final determination on this issue of EU law in the present case which is averse to the contentions of the appellants. As it is that decision which binds this Court, it follows that the appellants endeavours in this appeal to re-open or to re-interpret the decision of the Court of Justice must fail."

29. The court held that the proportionality and reasonableness of the measures taken by the respondent were governed by domestic law rather than EU law, and that those measures were not disproportionate or unreasonable in all the circumstances.

The Supreme Court Determination

30. The applicants subsequently applied to the Supreme Court for leave to appeal from the judgment of the Court of Appeal. In a determination of 1st March, 2019, the Supreme Court refused this application. I am conscious of the statement of the Supreme Court at para. 3 of the determination that "It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case". However, some of the comments made by the court in the determination, while not creating a precedent or binding this Court in the conduct of the present case, are of note in relation to the present application.

31. In its determination, the Supreme Court referred to the general approach taken by the Court of Appeal as follows:

"34. In his judgment, when speaking for the court, Hogan J. set out and referred to the findings made by the trial court: *inter alia*, on such a basis he concluded and ruled upon the domestic law points at issue between the parties. Such findings, the arguments made, the submissions advanced and the conclusions reached are clearly evident from his comprehensive judgment. Moreover, as that Court was obliged to, it proceeded to determine the issues in controversy on the basis of being bound by the judgment of the Court of Justice: that judgment could not be re-opened by the appellate court."

32. The Supreme Court also commented on the applicant's approach to the application for leave to appeal as follows:

> "As is the case with other aspects of the application, there has been a failure to recognise the status of the findings previously made, to engage with the substance of the judgment of the Court of Appeal, or to acknowledge the overall approach which that court took." [para. 37]

33. The Supreme Court, in addressing certain of the issues raised by the applicants, went on to comment as follows:

"40. However, as these suggested questions are phrased, lurking within them, if not inherently intrinsic, is a desire to challenge the ruling of the CJ: not simply the application of that decision but the validity (correctness) of the decision itself. This Court can see no basis to entertain such argument."

34. The applicants also raised the prospect of a preliminary reference by the Supreme Court. In this regard, the determination stated:

> "The making of a second reference based on the questions submitted by the applicants would be to misapply the criteria of Article 267 TFEU. The procedure is not based on hypothetical questions based in a factual vacuum and as such the questions proposed by the applicants could not be referred seeing as they contradict the findings of fact made by the High Court. The procedure could not be effective if it was permitted to be used in such a way as to create new fact findings at the highest appellate level." [para. 46]

The Present Proceedings

35. The necessity to set out at some length the course of events in the Dowling proceedings will, I think, be evident when one considers the nature of the present proceedings as prosecuted by the plaintiffs, and of the application of the defendants before me.

36. The general indorsement of claim in the plenary summons in the present proceedings runs to five closely-typed pages. It will be necessary to consider its terms later in this judgment, but for the moment it is sufficient to say that the plaintiffs seek a declaration "that Ireland is obliged to make good damages caused to the Plaintiffs by infringements of EU law for which Ireland is responsible, where the alleged infringements stem from a decision of a court adjudicating at last instance following the High Court proceedings [in

Dowling] …". There is a claim for damages, and a request for a reference to the CJEU pursuant to Article 267 of the TFEU.

37. A statement of claim of 14th May, 2019 has been delivered by the plaintiffs. A statement of claim will normally set out succinctly the facts giving rise to the cause of action, details of the allegations against the defendant and the causes of action which arise as a result. It will generally conclude with a brief statement of the reliefs sought.

38. In the present case, the statement of claim is sixty-six pages long. The text consists largely of exhaustive analysis of the background to the matter, and in particular the "base proceedings and the decision the subject of those proceedings". It is replete with commentary and legal analysis, much of which is the subject of extensive footnotes.

39. Notwithstanding the apparent complexity of the pleadings, and the extraordinary level of effort and expertise which has been expended in compiling sixty-six pages of densely-typed material, the court must decide whether the defendants are justified in their contention that, when the issues are examined in the context of all that occurred in the Dowling litigation, this complexity falls away to reveal a case that is either frivolous or vexatious or bound to fail.

40. The text of the general indorsement of claim on the plenary summons is repeated at the end of the statement of claim. As it represents a summary of the reliefs sought by the plaintiffs, and the rationale for those reliefs, it is necessary to set out the text of it below. To facilitate reproduction, footnotes contained within the document are set out within square brackets.

> "1. Declaration, in accordance with the principles established by the Court of Justice of the European Union (the "CJEU") in, *inter alia*, the case C-214/01 *Köbler v. Österreich* (ECLI:EU:C:2003:513) and in the case C-173/03 *Traghetti del Mediterraneo SpA v Italy* (ECLI:EU:C:2006:391) and in the case C-160/14 *João Filipe Ferreira v Portugal* (ECLI:EU:C:2015:565), that Ireland is obliged to make good damages caused to the Plaintiffs by infringements of EU law for which Ireland is responsible, where the alleged infringements stem from a decision of a court adjudicating at last instance following the High Court proceedings rec. no. 2011/239 MCA, in respect of any and/or a combination of the following infringements of EU law:
>
> A. Manifest infringements of Art. 267 TFEU:
>
> (i) The decision of the court adjudicating at last instance manifestly infringed EU law in failing to make a reference to the CJEU under Art. 267 TFEU and in failing to adequately consider and engage with the questions duly raised before that court for a reference to the CJEU under Art. 267 TFEU, which was in breach of the applicable case law of the CJEU and of the European Court of Human Rights (the "ECtHR"), including, *inter alia*, the CJEU judgments in the case C-283/81 *CILFIT*

and in the case C-416/17 *European Commission v France*, as well as the ECtHR ruling in *Ullens De Schooten*. By its decision, the court adjudicating at last instance, firstly, arbitrarily refused, in breach of the relevant CJEU case law, to duly fulfil its legal obligation to refer to the CJEU under Art. 267 TFEU the specific distinct questions raised before it, which were decisive for vindicating the Plaintiffs' civil rights under EU law; and, secondly, failed to duly to fulfil its legal obligation to justify its refusal in accordance inter *inter alia* the relevant ECtHR case-law;

(ii) The decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to an *invented novel interpretation* of EU law, according to which the CJEU, by means of its preliminary ruling under Art. 267 TFEU in the case C-41/15 *Dowling e.a.*: (a) applied EU law to the facts in the national case; and (b) determined that the *ex parte* direction order effected by Ireland on 26 July 2011 (the "July 2011 Ex Parte Direction Order") was lawful and compatible with EU;

B. Manifest infringement of the fundamental principle of proportionality of EU law conferring rights on individuals — and, in particular, of the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law — which infringement stems from the decision of the court adjudicating at last instance. The decision of the court adjudicating at last instance manifestly infringed EU law by failing to fulfil the court's duty to give full effect to the fundamental principle of proportionality of EU law, and, in particular, the "least restrictive alternative" test thereunder as pertaining to actions of Member States applying EU law, which the court was called upon to apply within the exercise of its jurisdiction. [Cf. in this regard in respect of this paragraph and other paragraphs herein, the CJEU judgment in the case C-136/12 *Consiglio nazionale dei geologi and Autorita garante della concorrenza e del mercato,* EU:C:2013:489, paragraph 33 and the case-law cited].

C. Manifest infringements of: Article 17 of the Charter of Fundamental Rights of the European Union and of Article 1 of Protocol No. 1 ECHR, combined with the fundamental principle of proportionality of EU law including the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law, which the decision of the court adjudicating at last instance failed to give full effect to within the exercise of the court's jurisdiction;

D. Manifest infringement of: Art. 25(1) of Directive 77/91/EEC [The Second Company Law Directive 77/91/EEC was recast as Directive 2012/30/EU. The respective provisions of the Directives 77/91/EEC and 2013/30/EU are now incorporated in Directive (EU) 2017/1132], combined with the fundamental principle of proportionality of EU law including the 'least restrictive alternative' test thereunder as pertaining to actions of Member States

applying EU law, which the decision of the court adjudicating at last instance failed to give full effect to within the exercise of the court's jurisdiction;

E. Manifest infringement of: Art. 29(1) of Directive 77/91/EEC combined with the fundamental principle of proportionality of EU law including the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law, which the decision of the court adjudicating at last instance failed to give full effect to within the exercise of the court's jurisdiction;

F. Manifest infringement of: Art. 8(1) of Directive 77/91/EEC combined with the fundamental principle of proportionality of EU law including the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law, which the decision of the court adjudicating at last instance failed to give full effect to within the exercise of the court's jurisdiction;

G. Manifest infringement of the rules of EU law regarding the fundamental principle of legal certainty conferring rights on individuals in respect of the notion that the more recent CJEU case law on a Directive, such as 77/91/EEC, is not capable of 'superseding' the less recent CJEU case law on the Directive, unless that less recent case law has been explicitly resiled from by the CJEU. Specifically, the decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to an *invented novel interpretation* of EU law, according to which, allegedly, in respect of the case law on the Second Company Law Directive, the more-recent CJEU case law retroactively '*superseded'* the less recent CJEU case law that the CJEU has never resiled from. Consequently, the decision of the court adjudicating at last instance manifestly infringed EU law in partly disregarding - and in failing to reconcile - all the highly relevant and applicable CJEU case law on the Second Company Law Directive, including seven CJEU judgments that were a basis for the reference to the CJEU under Art, 267 TFEU by the High Court in the case rec. no. 2011/239 MCA;

H. Manifest infringement of Art. 6(1) ECHR and the ECtHR case law that mandates that the '*tribunal' has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties* [Cf. *Van de Hurk v. The Netherlands* (the ECtHR no. 16034/90): '59. The effect of Article 6 para. 1 (art. 6 1) is, *inter* alia, to place the "*tribunal*" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision"]; the decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to a manifest failure to fulfil that duty and to ensure that the right to a fair trial was effective, i.e. that '*the observations [of the non-State parties] [we]re actually "heard", that is to say duly considered'* [Cf. the 'Guide on Article 6 of the ECHR to a fair trial (December 2017)': '229. An

effective right: the parties to the proceedings have the right to present the observations which they regards as relevant to their case. This right can only be seen to be effective if the observations are actually "heard", that is to say duly considered by the trail court (Donadze v. Georgia, 35).]:

I. Manifest infringement of the rules of EU law conferring rights on individuals regarding burden-sharing in light of State aid, considering that the European Commission's decision regarding State aid is not capable of determining a legality of a national measure affecting individual rights, or a compatibility of such a measure with the principle of proportionality of EU law as pertaining to actions of Member States applying EU law, even though such a measure is funded by that State aid. The decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to an *invented novel interpretation* of EU Law, according to which the European Commission's decision regarding State aid was allegedly determinative — having regard to the burden-sharing rules in light of State aid — for the legality and proportionality of the July 2011 *Ex Parte* Direction Order;

J. Manifest infringement of Art. 42 of Directive 77/91/EEC combined with the fundamental principle of proportionality of EU law including the "least restrictive alternative" test thereunder as pertaining to actions of Member States applying EU law, which the decision of the court adjudicating at last instance failed to give full effect to within the exercise of the court's jurisdiction. Specifically, the decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to an *invented novel interpretation* of EU law, according to which, in a situation of a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, Article 42 of Directive 77/91/EEC could be interpreted as meaning that:

(i) a Member State that imposes exceptionally oppressive terms of a recapitalisation of a viable holding company of a viable bank need not ensure as part of the recapitalisation an equal treatment of all the holding company's shareholders who are in the same position, including the Minister for Finance who was a shareholder prior to the recapitalisation and who acts on behalf of the Member State to impose the said recapitalisation terms; and

(ii) a Member State that is a shareholder in a viable holding company of a viable bank is not precluded from forcibly recapitalising that holding company in the following manner:

- the State, being a minority shareholder whose shares rank pari passu with other shares, forcing a proposal to be put to shareholders at the EGM, with disregard for the legal requirements of Directive 2007/36 regarding the requisitioning of an EGM or adding agenda items to an EGM; then

- the State having access ahead of time to non-public information regarding the outcome of the EGM, based on proxy votes sent for the purpose of the EGM; then
- the State forcibly issuing shares to itself, while diluting the other shareholders from a 100% stake to less than a 0.8% stake in the holding company, against the decisions of the EGM; while - forcibly issuing the shares below the nominal value, against the decisions of the EGM; and while - forcibly depriving the other shareholders of pre-emption rights, against the decisions of the EGM,

  when less restrictive, practical and equally effective alternative recapitalisation means were explicitly formally recommended by the holding company's Board;

recognising that the above-mentioned infringed rules of EU law raised in points "A" through "J" are intended to confer rights on individuals, the breaches are sufficiently serious — i.e. the infringements are manifest, given that the decisions concerned of the court adjudicating at last instance allowed and/or endorsed and/or gave effect to breaches of the jurisprudence of EU law on the matters — and there is a direct causal link between those breaches and the loss or damage sustained by the Plaintiffs.

2. Reparation of damages caused to the Plaintiffs, which Ireland is liable to afford, in accordance with the principles established by the Court of Justice of the European Union (the "CJEU") in, *inter alia*, the case C-224/01 *Köbler Österreich* (ECLI:EU:C:2003:513) and in the case C-173/03 *Traghetti del Mediterraneo SpA v Italy* (ECLI:EU:2006:391) and in the case C-160/14 *João Filipe Ferreira v Portugal* (ECLI:EU:C:2015:565), as a result of any and/or a combination of the infringements of EU law, for which Ireland is responsible, raised in points "A" through "J" above, given that the alleged infringements from a decision of a court adjudicating at last instance following the High Court proceedings rec. no. 2011/239 MCA, and given that the infringed rules of EU law are intended to confer rights on individuals, the breaches are sufficiently serious — i.e. the infringements are manifest, given that the decisions concerned of the court adjudicating at last instance allowed and/or endorsed and/or gave effect to breaches of the jurisprudence of EU law on the matters - and there is a direct causal link between those breaches and the loss or damage sustained by the Plaintiffs.

3. In respect of matters relating to provisions of European Union law raised by the Plaintiffs in the within proceedings if the Honourable Court is uncertain regarding the interpretation of those provisions of European Union law and if the Honourable Court considers that a decision on the relevant matters raised by the Plaintiffs is necessary to enable the Honourable Court to give judgment in the within proceedings — an order pursuant to Article 267 of the Treaty on the Functioning of the European Union that the questions, or some of the questions, raised in by the

Plaintiffs in course of the proceedings be referred to the Court of Justice of the European Union for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union.

4 Costs.

5. Such further or other Order as is required or as this Honourable Court deems fit for an effectual adjudication of the proceedings."

The Defendants' Motion

41. By notice of motion issued on the 1st August, 2019, the defendants seek an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court striking out the proceedings on the grounds that they are "frivolous or vexatious or bound to fail". The grounding affidavit of Joanna O'Connor, a solicitor in the Chief State Solicitor's Office, is brief, asserting that:

"3. It is evident from the Statement of Claim that these proceedings are in substance an attempt to reopen arguments already made and lost by the plaintiffs concerning the correct interpretation of the Second Companies Directive…

5. The issues that lie at the heart of the statement of claim have already been decided by the CJEU, and have been applied by the Court of Appeal and the Supreme Court."

42. Mr. Skoczylas swore a replying affidavit on 22nd October, 2019. The affidavit emphasised the plaintiffs' reliance on what Mr. Skoczylas called the "Köbler Doctrine" of EU law, and criticised what he saw as the failure on the part of the defendants to comprehend the applicability of the doctrine. Mr. Skoczylas criticised the failure of the defendants to deliver a defence, and what he called the "ill-conceived retaliatory motion to strike out these proceedings". The affidavit reiterated the terms of a lengthy letter of 26th July, 2019 written by Mr. Skoczylas to the defendants, analysing what he termed the "[v]exatious abuse of process on the part of the Defendants unwilling to accept the CJEU jurisprudence in *Köbler* C-224/01, *Traghetti* C-173/03 and Ferreira C-160/14".

43. In addition to the affidavit opposing the defendants' motion, Mr. Skoczylas also swore an affidavit in support of his motion for judgment. This affidavit was 76 pages long, and reference was made to the affidavit in the course of Mr. Skoczylas's oral submissions on the defendants' motion.

44. At para. 100 of this affidavit, Mr. Skoczylas averred that this Court should refer ten questions to the CJEU under Article 267 TFEU, and set those questions out in that paragraph. On the second day of the hearing – 20th December, 2019 – Mr. Skoczylas submitted a further two questions which he asserted should be referred under Article 267 "…should the High Court, being itself an organ of the State, be inclined to make an order to grant the State's retaliatory and oppressive application to strike out the proceedings…". I will deal with the question of whether the foregoing or indeed any questions are required to be referred to the CJEU by this Court later in this judgment.

45. The applications of the parties came before me on 19th December, 2019. As I have indicated, I ruled that the defendants' application should be heard first, and the hearing days of 19th and 20th December, 2019 were taken up with this motion. Both sides proffered very detailed written submissions with accompanying volumes of case law, and spoke to those submissions at the hearing, at the conclusion of which I reserved my decision.

46. On 23rd December, 2019, Mr. Skoczylas, with the agreement of the defendants, sent an email to the Registrar of this Court for my perusal. The text of the email was as follows:

> "Dear [Registrar], I refer to the above hearing. Could you please bring urgently the following to the attention of Mr. Justice Sanfey.
>
> Upon reading the transcripts, it has come to my attention that the following was said on the second day of the hearing (as per the transcript from 20th December; starting on p. 27 at line line [sic] 11):
>
> MR. JUSTICE SANFEY: So, Mr. Skoczylas, can I ask you, are you saying that the High Court made an erroneous finding in relation to the facts?
>
> MR. SKOCZYLAS: Correct.
>
> MR. JUSTICE SANFEY: And that the Court of Appeal also made an erroneous finding in relation to the facts and that you are entitled in these proceedings, which are not *res judicata*, to re-litigate those facts in order to demonstrate the manifest breach of EU law?
>
> MR. SKOCZYLAS: As per what I just read to you [from the *Traghetti* judgment], yes.
>
> MR. JUSTICE SANFEY: That's your case?
>
> MR. SKOCZYLAS: That is my case."
>
> I just wish to clarify (in order to avoid a misunderstanding) that, when saying '[t]hat is my case', I meant 'that is a part of my submissions' in the context of the Traghetti judgment and of all my other submissions.
>
> My whole, case cannot, of course, be confined to the above summary. My whole case relates to both *fact-driven* and *non-fact-driven* manifest infringements of EU law, as per the 66-page Statement of Claim. My submissions, including what I said above, were in the context of the Court's own determination at the outset of the hearing that, in considering the question of depriving me of access to trial, the court has 'no jurisdiction on foot of this motion to enter into a determination, or even a detailed consideration of the merits of the action as a whole.' (Sanfey J; page 9 of the transcript from 19 December 2019, lines 22 to 25).

Thank you for your kind assistance.

Yours sincerely,
Piotr Skoczylas

PS: This email does not refer to various typos/stenographical inaccuracies in the transcripts." [Emphasis in original]

47. It was not of course intended by me to suggest, in the extract from the transcript quoted by Mr. Skoczylas, that Mr. Skoczylas's case was confined to this one point. I note the clarification of Mr. Skoczylas, and I have considered carefully all of the very detailed and lengthy submissions of both sides in coming to the conclusions set out in this judgment.

The Law Relating to the Defendants' Motion

48. There was little dispute between the parties as to the principles which govern the defendants' application although, as we shall see, there was complete disagreement as to the application of those principles.

49. The defendants submitted that the proceedings ought to be struck out pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court "on the basis that they are frivolous and vexatious and/or disclose no reasonable cause of action." [Paragraph 30, Defendants' Submissions].

50. The defendants made the well-established point that the court, in considering an application under O. 19, r. 28, must have regard to the pleadings only, but where considering the power to strike out pursuant to its inherent jurisdiction, the court could take a broader view and hear evidence, citing the leading authority of *Barry v. Buckley* [1981] IR 306 in this regard. The defendants however submitted that there is no necessity to hear evidence "…because the factual assertions made by the Plaintiffs in the Statement of Claim and affidavit have already been assessed and ruled on by the High Court and upheld on appeal. There is thus no dispute about the facts – all of the factual issues here have been determined, albeit the plaintiffs have persisted in taking issue with them." [Paragraph 31, Defendants' Submissions].

51. The plaintiffs referred to numerous cases concerning the court's jurisdiction to entertain the present motion. Mr. Skoczylas emphasised the well-established principles that the jurisdiction is to be "exercised sparingly and only in clear cases" [Costello J. in *Barry v. Buckley*], and that "generally the High Court should be slow to entertain an application of this kind" [McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 IR 425].

52. Mr. Skoczylas then cited a number of authorities to the effect that the jurisdiction cannot be exercised where there is a dispute between the parties as to facts, and that, to the extent that there is a conflict of fact, this must be resolved in favour of the party against whom the application to strike out has been brought. Mr. Skoczylas laid particular emphasis on the statement of Clarke J. (as he then was) in *McCourt v. Tiernan* [2005] IEHC 268 that the court "must treat the plaintiff's claim at its high water mark".

53. Mr. Skoczylas also stressed the dicta of Clarke J. (as he then was) in *Salthill Properties Limited v. Royal Bank of Scotland plc*. [2009] IEHC 207 at para. 3.14:

> "It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect."

54. Mr. Skoczylas urged the court to consider the dicta of O'Sullivan J. in *O'Keeffe v. Kilcullen* [1998] IEHC 101, in which the learned judge referred to the dicta of Kelly J. (as he then was) in *Ennis v. Butterly* [1996] 1 IR 426 to the effect that the court must assume that "every fact pleaded by the Plaintiff in her Statement of Claim is correct and can be proved at trial", and "that every fact attested by her on Affidavit is likewise correct and can be proved at trial", and went on to state as follows:

> "This means that I must accept fully all averments pleaded and all assertions deposed to on the Plaintiff's behalf even where these are traversed in opposing pleadings or are contested on Affidavit."

55. Mr. Skoczylas went on to submit that:

> "…in my affidavit…I am making a lot of assertions which are a combination of factual and legal assertions because that's the nature of the case. This is not a simple case of a personal injury. This is a case that where the base case was a public law case. So of course there's mixture of facts and law, which I assert, and, yes, I do submit to you that you have to take both the facts and the other averments and pleadings." [Day 2 p.87 line 26 – p.88 line 6]

and further went on to say that, following on from the dicta in *O'Keeffe* and *Salthill Properties* quoted above:

> "But even if you [i.e. the court] said 'look, I want to resile from what Judge Clarke said in *McCourt*, I want to resile from what the High Court said in *O'Keeffe'*, even if you were to say that, I would still say that it wouldn't make a big difference, because the facts are so interwoven in this case with legal assertions." [Day 2, p. 91 lines 4-9]

56. Mr. Skoczylas was therefore adopting the position that, even where the assertions in the plaintiffs' pleadings were "a combination of factual and legal assertions", these would have to be accepted as correct by this Court for the purpose of the defendants' motion.

57. Mr. Skoczylas also submitted that "where there are questions of fact and of controversial legal arguments to be resolved, the matter cannot be said to be so clear and unassailable that the plaintiff's claim should be struck out: *DK v. AK and Givernors* [sic] of *Rotunda Hospital* [1993] HC ILRM 710." [Paragraph 24 B, written submissions]

The *Köbler* Doctrine

58. As is apparent from para. 1 of the general endorsement of claim on the plenary summons set out at para. 40 above, the plaintiffs base their case on what they contend are the principles set out in *Köbler v. Österreich, Traghetti del Mediterraneo SpA v. Italy and João Filipe Ferreira v. Portugal,* to the effect that Ireland "is obliged to make good damages caused to the Plaintiffs by infringements of EU law for which Ireland is responsible, where the alleged infringements stem from a decision of a court adjudicating at last instance following the High Court proceedings rec. number 2011/239 MCA, in respect of any and/or a combination of [the various alleged infringements of EU law set out in the plenary summons]".

59. It is necessary therefore to consider the principles set out in those cases in order to understand the nature of the plaintiffs' case, and how it is connected to what Mr. Skoczylas calls "the base case".

60. In *Köbler*, an Austrian professor applied for a special length of service increment for university professors. This required him to have completed 15 years' service as a professor at Austrian universities. Mr. Köbler contended that he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. He claimed that the condition of completion of 15 years' service solely in Austrian universities, with no account being taken of periods of service in universities in other member states, amounted to indirect discrimination unjustified under community law.

61. The Austrian Court hearing the matter – the Verwaltungsgerichtshof - requested a preliminary ruling from the CJEU in relation to the dispute. However, the Verwaltungsgerichtshof, having consulted the parties, withdrew its request for a preliminary ruling and, by a judgment of the same date, dismissed Mr. Köbler's application on the grounds that the length of service increment was a loyalty bonus which justified a derogation from community law. Mr. Köbler then brought an action for damages against the Republic of Austria for reparation of the loss which he allegedly suffered as a result of the non-payment to him of the increment on the basis that the judgment of the Verwaltungsgerichtshof infringed directly applicable provisions of community law as interpreted by the court in judgments in which it held that a special length of service increment did not constitute a loyalty bonus.

62. The Austrian Court hearing those proceedings then made a reference to the CJEU seeking a ruling as to whether State liability for a breach of community law was applicable "when the conduct of an institution purportedly contrary to community law is a decision of a Supreme Court of a member state, such as, as in this case, the Verwaltungsgerichtshof…".

63. The CJEU held that damages could be sought in such a situation:

> "32. In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which

gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pecheur and Factortame*…)

33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance…"

64. The CJEU went on to make it clear that … "recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. …[T]he applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage" [para. 39].

65. In the section of its judgment concerning, "Conditions governing State Liability", the CJEU stated as follows:

"51. As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties…

52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur* and *Factortame*…)."

66. *Traghetti* concerned a reference by an Italian Court which was made prior to the ruling of the CJEU in *Köbler*. It was accepted by the Italian Court that its question as to whether a member state was "liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234 EC" was answered comprehensively by the *Köbler* judgment. It is authority therefore for the proposition that a failure to make a reference due to an error in interpretation of EU law is actionable under the *Köbler* principle.

67. In *Ferreira*, the CJEU held, in accordance with *Köbler*, that neither the principle of *res judicata* nor the principle of legal certainty could prevent the State being liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it.

The Submissions of the Parties

68. As I have mentioned above, both plaintiffs and defendants gave written submissions as to their respective positions, together with extensive volumes of case law. As I had had the opportunity to read the motion papers prior to the hearing, the parties had the whole of the two days of the hearing to expand on the written submissions. The affidavit of Mr. Skoczylas in support of the motion for judgment and the statement of claim contained much legal submission in addition to averments and statements of fact respectively.

69. I set out briefly below the general thrust of the submissions of both parties. It would not be possible or appropriate to set out in this judgment every last point or contention made by the parties, and I have not attempted to do so. I have however considered carefully all of the written material – pleadings, affidavits, submissions and case law – in the case, and have had the benefit of being able to consider transcripts of the two days of hearing, during the course of which much clarity was brought to the matter by Mr. Eoin McCullough SC for the defendant, and by Mr. Skoczylas for the plaintiffs.

The Defendants' Submissions

70. The central contention by the defendants in support of the motion is that "these proceedings are an attempt to reopen the arguments already made and lost by the Plaintiffs concerning the correct interpretation of the Second Companies Directive" [written submissions, para. 3]. The defendants submit that the plaintiffs' claim that there has been a violation of EU law by the National Court is based on two contentions, "each wholly without merit":

> "The first is that the Court of Appeal erred in its application of the Ruling in *Dowling*. The second seems to be an argument to the effect that the CJEU itself was incorrect in its Ruling on the Second Companies Directive. That argument is of course not justiciable before this Honourable Court and represents a fundamental misconception of the role of the CJEU which is the final arbiter of the meaning of provisions of EU law such as the Second Companies Directive. It is simply not open to this Court to reopen questions of law arising under the Second Companies Directive when these have been the subject of a clear and definitive Ruling by the CJEU". [para. 7, written submissions]

71. The defendants submit "that there is simply no basis for the assertion that the Supreme Court has violated EU law and/or failed to make a reference where this was merited" [para. 12]. They refer to the passages from *Köbler* set out in this judgment, and in particular to para. 53 of the ruling of the CJEU where it states that "...State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law."

72. In analysing the course of events in *Dowling*, the defendants referred to the findings of fact by O'Malley J. (as set out at para. 14 above) and the text of the questions referred by her to the CJEU. They then analysed the CJEU ruling, with particular reference to paragraphs 52-55 of that ruling as set out at para. 19 above, and placed particular emphasis on para. 53, in which the CJEU states that the factors in the present case "…distinguish the situation at issue in the main proceedings from [*Pafitis*]…".

73. Having analysed the CJEU ruling, the defendants summarise as follows:

> "28. It is clear from the above that the CJEU rejected completely the submissions of the Applicants concerning the Second Directive, and upheld the position taken by the Minister in respect of same. To the extent that the Appellants seek to re litigate these issues in these proceedings, they are simply not entitled to do so. This is not a case in which there is any confusion about the position under EU law. The position has been the subject of a definitive and clear Ruling in *Dowling*. In truth, the Plaintiffs' complaint is that the CJEU was in some way incorrect to develop the law in a manner which they believe to be inconsistent with previous authorities from that Court. While the defendants do not accept that there has been any such inconsistency, it is in fact not a matter to which this Court may have regard. Nothing in *Kobler* or the other authorities cited by the Plaintiffs permits or requires national courts to seek a reference because of a perceived mistake on the part of the CJEU. Yet that is exactly the case being made by the Plaintiffs here. As the Supreme Court noted at paragraph 40 of the Determination (considering the Appellant's proposed questions for reference to the CJEU): 'as these suggested questions are phrased, lurking within them, if not inherently intrinsic, is a desire to challenge the ruling of the CJ: not simply the application of that decision but the validity (correctness) of the decision itself'.
>
> 29. This approach has been replicated in the within proceedings where the plaintiffs persist in their submission that the CJEU ought to have adopted the approach taken in earlier authorities such as *Pafitis* to the interpretation of the Second Companies Directive."

74. As regards the jurisdiction of this Court in relation to the reliefs sought in the present motion, the defendants assert that there is no necessity to hear evidence

> "…because the factual assertions made by the Plaintiffs in the Statement of Claim and affidavit have already been assessed and ruled on by the High Court and upheld on appeal. There is thus no dispute about the facts – all of the factual issues here have been determined, albeit the Plaintiffs have persisted in taking issue with them. This is significant because the Plaintiffs have requested a further reference to the CJEU. Any such reference would, however, be based on the facts as already determined. Being a repetition of the questions already referred, albeit with the legal issue reframed in terms of liability pursuant to *Köbler*, they are otiose and in breach of the principle that where questions of law are settled, a reference ought not to be made. (The *acte clair* Doctrine, set out in case 283/81, CILFIT)."

75. The defendants conclude their written submissions by stating that:

> "42. There is, on the face of their pleadings, no reasonable cause of action pursuant to *Kobler et al*. This is not a case where there is any basis for a further reference to the CJEU because the CJEU has clearly ruled on the issues. The Plaintiffs' true complaint is with the merits of that Ruling and that is not a matter which can properly be litigated before this Court.
>
> 43. Finally, it is submitted that the manner in which these matters have been presented and in particular the insistence on attempting to reopen factual disputes that have been long since resolved further supports the Defendants' position that these proceedings ought to be struck out as they are frivolous and vexatious."

76. In his oral submissions, Mr. McCullough spent some time discussing the *Acte Clair* Doctrine as set out by the CJEU in *CILFIT*, setting out the circumstances in which a court of last instance does not have a duty to refer questions for preliminary ruling to the CJEU. After analysing the decision of O'Malley J. in the first High Court judgment, and the decision of the CJEU on the reference by this Court, Mr. McCullough stated as follows:

> "To sum up what the Court of Justice said, this is the central part of the case. I say, Judge, that their question of compatibility of the Direction Order with the Second Company Law Directive and *Pafitis* and the other cases that interpret it, has been decided by the Court of Justice. And that it is an abuse of process to continue to question that as if they hadn't decided it. That that is *acte clair* or *acte éclairé,* more precise. The Court of Justice has not just decided on a similar question, the Court of Justice has decided on this question. But it is this question, this very question, that the Plaintiffs continue to agitate, as you will see when I come to their pleadings. And it is for that reason, Judge, that the Plaintiffs could never establish that the Irish Courts are in manifest breach of European Law, by recognising that the Court of Justice has decided what it clearly did decide." [Day 1, p.63 line 29 - p.64 line 16]

77. The oral submissions went on to deal with the application of the ruling of the CJEU by O'Malley J. in the second High Court judgment, and the appeal to the Court of Appeal and its findings. Essentially, it was argued that, in view of the ruling of the CJEU, the High Court and Court of Appeal could not have decided the questions of EU law in any way other than the way in which they did. Reference was also made to various passages from the determination of the Supreme Court although, as we have seen, that court did not give the plaintiffs leave to appeal.

78. Mr. McCullough then went through the heads of claim in the plenary summons and statement of claim in order to demonstrate that, given the terms of the CJEU ruling and the manner in which it was applied by the High Court and Court of Appeal, those heads of claim were "each…based on a fundamental misunderstanding of the position" [day 1, p.99 lines 20-21]. I will deal with those submissions and the replying submissions of Mr. Skoczylas in relation to the pleadings later in this judgment.

The Plaintiffs' Submissions

79. The plaintiffs written submissions begin with a recitation of para. 11 of the statement of claim, which sets out Mr. Skoczylas's pedigree as a "lead litigant [in] complex cases" and reference to acknowledgements in judgments of the Irish courts of his "professionalism and effectiveness". Indeed, I am happy to acknowledge that Mr. Skoczylas, although a lay litigant, was extremely professional and effective in his conduct of the application before me.

80. Mr. Skoczylas then referred to a letter of 12th February, 2014 exhibited by him to his affidavit of 26th July, 2019 from the Private Secretary to the Minister for Justice and Equality, acknowledging the existence of the *Köbler* principle and stating that the High Court was the appropriate court to hear the application, given its full original jurisdiction pursuant to Article 34.3.1 of the Constitution. Mr. Skoczylas asserted that this letter confirmed "the legitimacy of the proceedings", and that the present application was "completely incongruous and wrong and [sic] in fact and in law, having regard to the applicable CJEU Caselaw referred to in detail below…" [para. 8, written submissions].

81. The position of the defendants is clear. They recognise the *Köbler* principle, and accept that it may apply in an appropriate case, and do not dispute the plaintiffs' *locus standi* to initiate such a case. Rather, they argue that the case actually made by the plaintiffs is fundamentally misconceived and, when properly viewed, has no prospect of success at trial.

82. The plaintiffs embark in their written submissions on an analysis of "the Defendants' failure to recognise the well-established *Köbler* doctrine of EU law". As I have said in the preceding paragraph, the defendants do recognise the *Köbler* Doctrine. However, they do not – as the plaintiffs put it – recognise "…the applicability of that doctrine herein".

83. The plaintiffs rely heavily on the decisions in *Köbler, Traghetti* and *Ferreira*, and much of the written submissions is taken up with quoting passages from those cases. They argue that, in the light of these cases, the defendants' assertions that "the proceedings are an attempt to re-litigate matters that have already been dealt with by the Courts" and that "[t]he Statement of Claim is essentially an attempt to appeal this matter further in circumstances where there are no available avenues for further appeals" [averments in the defendants' grounding affidavit] are "pure nonsense, with no support in law".

84. The plaintiffs' written submissions then proceed with a section entitled "the Defendants' plea of estoppel by *res judicata* is manifestly ill-conceived". In this section, it is submitted that the plaintiffs are not entitled to rely on *res judicata* or issue estoppel for a number of reasons.

85. It became clear during the course of the hearing that the defendants were not in fact relying on *res judicata* or issue estoppel, a position made clear by Mr. McCullough from the outset. The defendants' position was that the *Köbler* principle simply did not apply to the present case, as no manifest or otherwise breach of EU law could have occurred in circumstances where the High Court simply applied what they said was the clear ruling of

the CJEU that the Second Company Law Directive did not apply to the direction order, and that the Court of Appeal held that it was correct to do so and indeed was bound by the CJEU ruling.

86. In his oral submissions, Mr. Skoczylas asserted that the acknowledgement by the defendants that they were not relying on *res judicata* was determinative of the motion:

> "…the only way for [the court] to rule in Mr. McCullough's favour is if I abuse process, i.e. if I issue proceedings which are subject to *res judicata*. That's the only way. And so because there is no *res judicata* there cannot be an abuse of process". [Day 1, p. 144, lines 19-24]

87. The plaintiffs' written submissions then address what is termed the "the Defendants' failure to recognise that CJEU did not decide upon any national case". In essence, the plaintiffs argue that the CJEU did not decide the issues at the heart of the *Dowling* litigation, as this is not the function of the CJEU:

> "…the CJEU did not (and could not) decide upon any national case (this case or any other case before any national court). It is a matter of a fundamental principle that the CJEU's role under Article 267 TFEU is *not* to determine a legality/compatibility with EU law of a national measure (e.g., a Direction Order) or to apply EU law to the main action's facts. Indeed, the matter is one of the issues to be adjudicated upon in this case." [Written submissions, para. 21] [Emphasis in original]

88. The plaintiffs cited *inter alia* the decisions of *Ascafor and Asidac* (C – 484/10) and *Patriciello* (C – 163/10) as authority for the proposition that the CJEU is not entitled to rule on the compatibility of provisions of national law with European law, or to apply rules of EU law to a particular case.

89. The question of whether the High Court was obliged to accept the CJEU ruling as determining issues of EU law and, in particular, the applicability or otherwise of the Second Company Law Directive, was aired extensively by both sides in oral submissions. Mr. McCullough nailed the defendants' colours to the mast in this regard in the following extract from the transcript:

> "Let me just pause, Judge, and say, that the Court of Justice clearly decided – and there can be no real dispute about this – that the Direction Order was not incompatible with the Second Company Law Directive. The Court doesn't have to take my word for that, that's what Judge O'Malley has found, that's what the Court of Appeal has found. So the question of the compatibility of the Direction Order with European law has been decided by the Court of Justice. In this case, Judge, the net issue that the Plaintiffs raise is the contention that the Irish courts are in manifest breach of European law by deciding that that is so. That's a fair net summary of the case that the Plaintiffs are making. And that's why what is crucial to this case, Judge, is to look essentially at what the Court of Justice has said because if this Court is satisfied, in the same way as Judge O'Malley was and the

> Court of Appeal was, that the Court of Justice has clearly decided that there is no incompatibility between the Direction Order and the Second Company Law Directive, well then there is no question of a manifest breach of European Law on the part of any of the courts. There would be no question either of a failure on the part of the Court of Appeal or the Supreme Court to refer questions being a breach of European Law because they don't have to refer questions where the answer is clear. If it is clearly the case that the Court of Justice has decided that there's no incompatibility between the Direction Order and the Second Company Law Directive, no obligation to refer questions in that regard arises. And the central contention made by the Plaintiffs here is that the failure to refer questions of that nature constituted a breach of European law. That's just wrong, Judge, and it's clearly wrong from the decision of the Court of Justice to which we'll turn". [Day 1, p. 51, line 13 – p. 52, line 19].

90. There followed a close examination by counsel of the way in which the High Court dealt with the CJEU ruling, and the judgment of the Court of Appeal. At para. 123 of his judgment, Hogan J., having referred extensively to the judgment of the CJEU in *Kotnik* C – 526/14, concluded that "…the judgments in *Kotnik* and *Dowling* have essentially superseded what have been termed as the earlier Greek bank cases. Those bank cases – which dated from the 1990s – all concerned various attempts to provide State aid to a variety of ailing Greek banks and, in essence, the Court of Justice ruled that all such attempts were unlawful". Hogan J. then made it clear that the Court of Appeal was bound by the CJEU ruling in *Dowling* as set out at paras. 126 and 127 of the judgment quoted at para. 27 above.

91. Mr. Skoczylas in his oral submissions maintained the position that the CJEU

> "…never stated that they in any way endorsed the Direction Order. They said, when you read it carefully and this is what they always say in all the judgments, a measure such as, a measure such as the Direction Order in the main proceedings. So not the Direction Order but the measure such as." [Day one, p.139 lines 9-15]

92. Mr. Skoczylas's point may be illustrated by a perusal of the ruling given by the CJEU as set out at para. 18 above. The ruling refers to the relevant Articles of the Second Company Law Directive, which "must be interpreted as not precluding a measure, *such as* the Direction Order…" [Emphasis added]. Mr. Skoczylas submits that the CJEU could not – and did not – rule on the compatibility of the Direction Order itself with the Second Company Law Directive; it merely ruled on whether the Directive precluded measures "such as" the Direction Order.

93. The implications of this are set out at para. 24 of the statement of claim as follows:

> "Importantly, the CJEU has not resiled in *Dowling* from its earlier jurisprudence on the Second Company Law Directive referred to below, or determined that Member States are unrestrained by the principles of proportionality and legal certainty when forcing measures such as the July 2011 *Ex Parte* Direction Order. Thus, the earlier

case law on the Directive now harmoniously co-exists with *Dowling*. Consequently, *Dowling* must be reconciled with the CJEU judgments in the so-called Greek cases and in the case – C – 338/06 *Commission v. Spain*, as outlined below. In Dowling, in sync with its earlier case law, the CJEU has established an additional limited derogation from Articles 8(1), 25(1) and 29(1) of Directive 77/91/EEC for certain State measures, where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union."

94. These contentions may be contrasted with the views of the High Court, and particularly the Court of Appeal as set out in the paragraphs from the judgment of Hogan J. set out above. The plaintiffs' position is set out exhaustively in the statement of claim, and in particular at paragraphs 50-52.

95. The written submissions go on to deal with the standard applicable under Irish law to the present motion, and suggest that the defendants' motion is itself an abuse of process, given that it is what the plaintiffs call a "retaliation" after the plaintiffs' motion for judgment. The plaintiffs go on to suggest that the motion is barred by the doctrine of *laches*.

96. Mr. Skoczylas eloquently developed these themes in his oral submissions. In particular, Mr. Skoczylas had a difficulty with the approach of Mr. McCullough in relation to the motion. As he put it:

"Mr. McCullough is trying to prevent me from seeking the reliefs and, in consequence, he is heightening the bar for me to meet the conditions. Because I have now to go through an additional hurdle, which is a mini hearing, as it has turned out to my surprise, where I have to convince [the court] that this case is stateable, which I shouldn't have to be doing, because that's not for this court to adjudicate". [Day two, p. 17 lines 18-25]

97. On being reminded by me that … "the onus of proof is entirely on the State to prove that this comes within the established criteria in the jurisprudence for dismissing a case as having no prospect of success" [day two, p. 19 lines 12-15], Mr. Skoczylas persisted in his view that "unfortunately I have to show you that he's wrong" [day two, p.19 lines 16-17].

98. Mr. Skoczylas went on to claim that the refusal of successive courts in the *Dowling* litigation to reopen the factual findings of O'Malley J. as set out at para. 14 above was "a huge miscarriage of justice and cannot be allowed" [day 2, p.26 lines 1-2]. This led on to the exchange between the court and Mr. Skoczylas which was the subject of the email from Mr. Skoczylas to the Registrar of this Court set out at para. 47 above.

99. In the course of argument, I asked Mr. Skoczylas to clarify whether, for the purposes of the plaintiffs' argument, the "court of last resort" was the Court of Appeal or the Supreme Court, given that the Court of Appeal was the last court to rule on the substantive issues in the *Dowling* litigation, whereas the Supreme Court considered the issues only to the

extent of deciding whether or not to grant leave to appeal. Mr. Skoczylas indicated that para. 38 of the statement of claim represented the plaintiffs' position on this point:

> "…while the Supreme Court Determination was a decision of a court of last resort / 'a decision of a court adjudicating at last instance', the Court of Appeal judgment in *Dowling v. Minister for Finance* [2018] IECA 300 was 'final and conclusive' pursuant to Article 34.4.3 of the Constitution, as far as the base case was concerned. Hence, the infringements of EU law the subject of these proceedings stem from the Supreme Court determination that – by virtue of not granting an appeal from the Court of Appeal judgment in *Dowling v. Minister for Finance* [2018] IECA 300 – gave effect to that Court of Appeal judgment as 'final and conclusive' pursuant to Article 34.4.3 of the Constitution, as far as the base case is concerned."[Emphasis in original]

Preliminary Issues

100. As a preliminary remark, it is appropriate to say that the determination by me of this motion does not require an adjudication of the plaintiffs' case. However, the court, in assessing whether or not the plaintiffs' case is frivolous or vexatious or bound to fail, must in accordance with the established jurisprudence engage with the case that is being made as revealed in the pleadings.

101. It is of course the case that, as Mr. Skoczylas contends, contested facts must be assumed in the plaintiffs' favour. This does not mean that the copious assertions in the plenary summons and the statement of claim as to the legal position as contended for by the plaintiffs must be taken as correct. The plaintiffs say that the State is liable to the plaintiffs in respect of what it alleges are manifest breaches of EU Law pursuant to the *Köbler* principle. *Köbler* itself holds that "…the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties".

102. It is clear from the plaintiffs' submissions that they regard the High Court and the Court of Appeal as having made erroneous findings of fact, so much so that the alleged failure to reopen the factual findings of the High Court was "…a huge miscarriage of justice and cannot be allowed". However, the factual context of how the present proceedings came to be initiated by the plaintiffs is not disputed. The judgments of the High Court and the Court of Appeal, the ruling of the CJEU, and the determination of the Supreme Court all speak for themselves, and their terms are not in dispute. The plenary summons, statement of claim and affidavits sworn on behalf of the plaintiffs' in the present proceedings set out in extraordinary detail the case being made by the plaintiffs.

103. In all of the circumstances, I consider that I have more than sufficient material before me to assess the merits of the defendants' motion according to the established principles set out in the case law. It is not necessary for me to enter upon a consideration of matters which would properly be the subject of a hearing, should I be of the view that the defendants' motion should not succeed.

104. In relation to the question of the defendants' motion being barred as an abuse of process or by the doctrine of *laches*, I do not find either of these submissions well founded. The mere fact that the defendants' motion was issued after the plaintiffs' motion for judgment, and is thus seen by the plaintiffs as a "retaliatory" motion, does not render it an abuse of process. The defendants were entitled to issue the motion; whether or not it succeeds is another matter. In relation to the question of laches, the proceedings issued on 11th April, 2019. The defendants' motion issued on 1st August, 2019, some three and a half months later. While the defendants were in default of defence at the time, neither this nor the relatively short period of time since the proceedings were initiated warrant the application of the doctrine of *laches*.

The Central Issues

105. I propose to examine below the issues with particular reference to the reliefs sought by the plaintiff in the plenary summons and statement of claim. These reliefs are set out at para. 40 above. For ease of reference I will refer primarily to the reliefs as set out in the plenary summons, which are replicated in the statement of claim.

106. Paragraph 1 of the general indorsement of claim seeks a declaration pursuant to principles established by *Köbler*, *Traghetti*, and *Ferreira*, "…that Ireland is obliged to make good damages caused to the Plaintiffs by infringements of EU law for which Ireland is responsible, where the alleged infringements stem from a decision of a court adjudicating at last instance following the High Court proceedings rec. no. 2011/239MCA…" in respect of any or a combination of infringements of EU law set out in the remainder of the plenary summons. There follow details of alleged infringements set out over ten paragraphs.

107. There can be no doubt that the central issue for determination in this motion is whether, as the defendants contend, the ruling of the CJEU answered the questions of EU law referred to it in such a way as to make it clear beyond argument that the direction order made by the High Court pursuant to s.9 of CISA was not in breach of EU law, or whether, as the plaintiffs contend, the CJEU did not apply EU law to the facts of the national case or determine that the direction order was lawful and compatible with EU law. The assertion that the CJEU did in fact do so is repeatedly characterised by the plaintiffs in the pleadings as "an erroneous invented novel interpretation of EU law…". In this regard, see for instance para. 1(A)(ii) of the general indorsement of claim as set out at para. 40 above.

108. In the statement of claim, this issue fed into the contention of the plaintiffs that the principle of proportionality under EU law had not been observed by the Irish courts. At para. 54 of the statement of claim, the plaintiffs referred to the submissions made by ILPGH under s.7(4)(b) of CISA prior to the making of the direction order to the effect that "…the extreme State measures – resulting in an appropriation without a valuation or compensation – were forced in the circumstances where *less restrictive, practical* and *equally effective* recapitalisation means existed". [Paragraph 54Q – emphasis in original]. The plaintiffs concluded that:

"T. In the entire context above, having regard to the fundamental principle of proportionality of EU law including the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law (as per paragraph 53 above), as well as in the context of the totality of the case law on the Second Company Law Directive referred to in paragraph 55 below, it is clear that, under EU law, the CJEU in its preliminary ruling in the case C-41/15 *Dowling e.a*. did not determine – and plainly could not have determined under its jurisdiction pursuant to Art. 267 TFEU (as per paragraph 52 above) – that the July 2011 *Ex Parte* Direction Order was compatible with Articles 25(1), 29(1) and 8(1) of Directive 77/91/EEC. Drawing such a conclusion was a manifest error in law committed by the Court of Appeal, whose judgment was allowed and/or endorsed and/or given effect to as final and conclusive in respect of the base case by the Supreme Court Determination."

109. It will be recalled that these points were raised before O'Malley J. in the second High Court judgment. The plaintiffs had been critical of para. 48 of the CJEU ruling, and contended that the CJEU had incorrectly interpreted the first High Court judgment and, according to the plaintiffs, erroneously purported to make a finding of fact that the High Court had come to the conclusion that the direction order was the only means of recapitalising ILP. This contention is repeated at para. 54(R) of the statement of claim.

110. As we have seen, these very points were considered and rejected by O'Malley J. in the second High Court judgment at paragraphs 48-50 as set out above at para. 21 of this judgment. Having received the ruling of the CJEU to the effect that Articles 8(1), 25 and 29 of the Second Company Law Directive did not preclude a measure "such as the Direction Order at issue in the main proceedings", the High Court's judgment was primarily concerned with whether the opinion of the Minister that the direction order was necessary to achieve the statutory purposes for which it was sought was "unreasonable or vitiated by legal error". The High Court examined the arguments made by the applicants in that regard and concluded that they had not succeeded in demonstrating that the opinion of the Minister was rendered invalid according to these criteria.

111. It should be noted that, as O'Malley J. remarked at para. 54 of the Second High Court judgment: "While the State had to achieve recapitalisation, neither the Implementing Decision nor any other rule of EU law directed it to do so in a particular fashion". The method of effecting the recapitalisation was the direction order, made under the newly enacted CISA. The challenge of the applicants, in the words of Hogan J. in the Court of Appeal judgment, "…centred on the manner in which the recapitalisation was effected by the provisions of the 2010 Act and the Direction Order made thereunder". Hogan J. concluded that it followed "…that the proportionality and reasonableness of these measures is in essence governed by domestic law rather than EU law". Having examined the issues from this perspective, the Court of Appeal came to the same conclusion as the High Court as to the Minister's opinion.

112. It will be apparent from a perusal of the terms of the general indorsement of claim on the plenary summons as set out at para. 40 above, that the issues of the effect of the CJEU ruling and the application of EU principles of proportionality dominate the reliefs sought by the plaintiffs. In the latter regard, sub-paragraphs B, C, D, E, F and J of para. 1 directly concern what the plaintiffs allege are manifest infringements of the principle of proportionality of EU law, and in particular "…the 'least restrictive alternative' test thereunder as pertaining to actions of Member States applying EU law…". The necessity to consider EU law principles of proportionality, according to the plaintiffs, derives from the necessity on the part of the courts to consider and apply what they consider to be appropriate principles deriving from EU case law, and in particular the "*Greek bank cases"* and *Commission v. Spain*, in circumstances where the CJEU must be deemed not to have made a binding or prescriptive ruling in relation to the specific facts of the *Dowling* case, and in particular not to have decided that the direction order was not in breach of EU law.

113. The issue for this Court is whether, given the way in which the plaintiffs have formulated their claim, it must be said, having applied the principles set out at paras. 48-57 above, that the plaintiffs' proceedings are frivolous or vexatious or bound to fail. In order to deal with this issue, it is necessary to reach some conclusions about the two issues identified above.

114. As we have seen, the Court of Appeal took the view that it could not "look behind" the CJEU ruling, and indeed was bound by what it considered to be "an authoritative and final determination on this issue of EU law…". In this regard, see the extracts from the judgments cited at paras. 27 and 28 above. At para. 34 of its determination, cited at para. 31 above, the Supreme Court referred to the Court of Appeal being "obliged…to determine the issues in controversy on the basis of being bound by the judgment of the Court of Justice; that judgment could not be reopened by the appellate court".

115. The plaintiffs contend that it was not open to the CJEU to give a ruling in relation to the facts of the national case, and that it did not do so; rather, they contend that the CJEU established "an additional limited derogation from Articles 8(1), 25(1) and 29(1)" of the Second Company Law Directive in certain circumstances. They assert that "the earlier case law on the Directive now harmoniously co-exists with *Dowling*", which "…must be reconciled with the CJEU judgments in the so-called Greek cases and … *Commission v. Spain…*" [para. 24 statement of claim]. The plaintiffs take particular issue with the contention in the Court of Appeal judgment that *Dowling* has "superseded" those cases, or that they have been "distinguished" by the CJEU ruling.

116. In order to address this issue, one must have regard to the questions referred to the CJEU (recited at para. 17 above) and the ruling of that court (recited at para.18 above). It is clear, when one considers the first of the questions referred, that the High Court did not express its question in terms devoid of context. The CJEU was asked whether the Second Directive precludes "in all circumstances, including the circumstances of this case"… "the making of a Direction Order pursuant to section 9 of the 2010 Act, on foot of the opinion of the Minister that it is necessary…", and sets out the effect of the order

made by the court: "…where such an order has the effect of increasing a company's capital without the consent of the general meeting; allotting new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; lowering the nominal value of the company's shares without the consent of the general meeting and, to that end, altering the company's memorandum and articles of association without the consent of the general meeting…".

117. Lest there be any doubt that the High Court was not raising an academic issue which did not address the facts of the situation before it, the second question asked bluntly: "Was the Direction Order made by the High Court pursuant to section 9 of the 2010 Act in relation to ILPGH and ILP in breach of European Union Law?"

118. It is notable that para. 55 of the CJEU ruling [para. 20 above] sets out "the answers to the questions referred…". In other words, the matters set out in that paragraph, which are formally set out in the ruling of the court, comprise the court's answer to both questions referred by the Irish court. In particular, there can be no doubt that the CJEU was answering the second question in the negative, i.e. that the direction order made by the High Court was not in breach of EU law.

119. Mr. Skoczylas argues that the CJEU is not entitled, in giving a preliminary ruling, to "…[adjudicate] on the national case or apply EU law to the factual situation underlying the national proceedings…" [para. 24 statement of claim]. He says that to hold that it did is to give effect to "an invented novel interpretation of EU law…" [para. 1(a)(ii) of plenary summons].

120. Mr. McCullough however argues that a "prescriptive" approach is not uncommon in rulings under Article 267. He referred to a number of cases in this regard. In *Hogan* C-398/11, a referral was made in proceedings involving employees of Waterford Crystal Limited regarding the transposition by Ireland of Directive 2008/94/EU on the protection of employees in the event of the insolvency of their employer. The ruling addressed the facts in the main proceedings and the way in which Ireland had addressed the transposition issue, and answered the seven questions referred in a manner which made it clear that the measures adopted by Ireland had not fulfilled the obligations imposed by the Directive.

121. Mr. McCullough also referred to *Asociatia ACCEPT v. Combaterea Discriminarii*, C – 81/12 reported at [2013] ICR 939, in which the CJEU gave a similarly prescriptive and, it would seem, decisive ruling. A shareholder of the well-known football club Steaua Bucharest, who was prominently and publicly associated with the club, made public statements ruling out recruitment by the club of any player "presented as being a homosexual". The claimant, an organisation which promoted gay rights, made a complaint to the respondent council. Proceedings ensued due to the dissatisfaction of the claimant with the decision of the council, and in the course of those proceedings, the national court referred a number of questions to the CJEU as to whether the facts of the case and in particular the findings of the council satisfied the requirements of certain Articles of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and

occupation. It is clear from the terms of the ruling that the CJEU addressed the compatibility of the factual situation in the case with the Articles of the Directive in question, producing a prescriptive ruling which left the parties in no doubt as to the application of EU law to the facts of the case.

122. In relation to the approach to be taken by the CJEU, the court in *Asociatia ACCEPT* said as follows at para. 43:

> "That said, the court may provide the national court with all guidance on the interpretation of European Union Law that could be useful for its decision: see, in particular, *Feryn* [2008] ICR 1390, para 19 and the case law cited, as well as *Criminal proceedings against Patriciello* (case C-163/10) [2012] 1 CMLR 274, para 21."

123. The court followed on from that expression of its approach to address the first and second questions referred to it in the following way:

> "53. In light of the foregoing, the answer to the first and second questions is that articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to "facts from which it may be presumed that there has been … discrimination" as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters".

124. Mr. McCullough also referred to Köbler itself in this regard. The ruling of the CJEU in that case states, at paras. 2 and 3:

> "2. Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 7(1) of Regulation (EEC) no. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the Gehaltsgesetz 1956 (law on salaries of 1956), as amended in 1997, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof (Austria) in its judgment of 24 June 1998, constitutes a loyalty bonus.
>
> 3. An infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance."

125. It appears that the CJEU, in addressing a referral from a national court, examines the context in which the referral is made and addresses the issue presented to it by clarifying the correct position under EU law. While leaving it to the referring court to decide questions of national law, the effect of clarifying the applicability of EU law may have the effect of giving a prescriptive reply which makes it clear how the referring court is to regard a national measure.

126. In my view, this is what occurred in the present case. The terms of the ruling made it clear that the CJEU, in the context of "a serious disturbance of the economy and the financial system of a member state threatening the financial stability of the EU…", ruled that the Second Company Law Directive did not preclude a measure "such as the Direction Order in the present proceedings…" . This was a ruling by the CJEU, in answer to the direct question raised by the High Court, that the direction order was not in breach of EU law. It seems to me that this interpretation of the ruling is clear and incontrovertible, and that a contrary inference such as that drawn by the plaintiffs is bordering on the perverse.

127. The position of Mr. Skoczylas is that, as the CJEU does not rule on national measures, the ruling must be deemed not to have pronounced on the validity of the direction order, but merely to have established "an additional limited derogation from Articles 8(1), 25(1) and 29(1) of Directive 77/91/EEC for certain state measures…". His complaint is that "…the Court of Appeal disregarded – and failed to reconcile with *Dowling* - the highly relevant and applicable case law comprising seven CJEU judgments on the Second Company Law Directive…". [Paragraph 35.6.3 of the statement of claim]

128. In view of the very clear questions referred to the CJEU by the High Court, and the equally clear ruling of the CJEU, I consider that the plaintiffs' arguments in this regard are utterly erroneous and bound to fail. The observations of O'Malley J. at para. 50 of the second High Court judgment (see para. 21 above) in relation to these arguments are apposite and, in my view, unarguably correct.

129. The ruling of the CJEU was unequivocal and completely clear as to its meaning, and in those circumstances – as the Court of Appeal and the Supreme Court have pointed out – the High Court was bound to apply it to the facts of the instant case. Given the findings of law and fact by the High Court in the first judgment at sub-paragraphs 32-35 (see para. 14 above) and the ruling by the CJEU which made it clear that the direction order was not in breach of EU law, it was clear that the Minister's opinion was not "vitiated by legal error". The court dealt with contentions directed towards the supposed unreasonableness of the Minister's opinion, rejecting all such arguments.

130. In addition, as the Court of Appeal pointed out:

> "…the proportionality and reasonableness of these measures is in essence governed by domestic law rather than by EU law. I would regard that the power to set aside a direction order on grounds of reasonableness or error of law contained in s.11 of the 2010 Act in effect provides in statutory form for judicial review of an

administrative decision such as the High Court ordinarily enjoys in a standard Order 84 proceedings." [para. 170]

Accordingly, matters of proportionality or reasonableness were dealt with on the basis that they were governed by Irish law. As Hogan J. put it at para. 136:

> "…s. 11 provides for a form of statutory judicial review akin to what might be termed the standard common law Ord. 84 style judicial review. I propose, therefore, to deal with the present case in the light of the principles established and developed in common law judicial review and the test of reasonableness found there in respect of this s.11 application."

131. This is the basis upon which the Court of Appeal proceeded, and given the terms of the CJEU ruling, it is hard to see how it could have adopted any other approach. At para.147 of the judgment, the court set out the basis upon which the applicants challenged the proportionality of the direction order:

> "The appellants maintain that the Minister could have:
>
> (i) provided for a pre-emptive offer by shareholders;
> (ii) provided for a 'B' shares option by which in the event that it transpired that ILP was overcapitalised as market conditions recovered, these shares could have been bought back by the company and,
> (iii) purchased the shares at the pre-PCAR/PLAR review price of March 2011. It is said that because the Minister failed to do some or all of these things, the appellants' constitutional rights qua shareholders were impaired to a greater extent than was necessary, thereby failing the second limb of the *Heaney* proportionality test."

132. In the event, and applying domestic law in relation to issues of reasonableness and proportionality, the Court of Appeal took the view that "…that neither the Minister's opinion as reflected in the directions order or the actions which he took by virtue of that order has been shown to be unreasonable in law" [para. 180].

133. It is against this background that we consider the reliefs in the general indorsement of claim on the plenary summons, which are repeated in the statement of claim. As we have seen, *Köbler* requires that "the rule of law must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties…" [para. 51].

134. A perusal of the ten instances of "manifest infringements" set out in the plenary summons makes it clear that most of them concern either the issue regarding the alleged misinterpretation by the Irish courts of the CJEU ruling, or the issue regarding the alleged infringement of "the fundamental principle of proportionality of EU law".

135. As I am of the view that the Court of Appeal did not misinterpret the CJEU ruling and correctly held that it could not look behind that ruling "insofar as it was concluded that the making of the direction order was essentially outside the scope of the Second Company Law Directive, so that the direction order could not be held unlawful on that account" [para 169], it follows that there cannot have been any infringement of EU law by a court of last resort in this regard, much less a "manifest infringement". Accordingly, there can have been no infringement of EU law as alleged at paras. A(ii) and G of the plenary summons.

136. Manifest infringements of "the fundamental principle of proportionality of EU law" are alleged at paras. B, C, D, E, F, and J of the plenary summons. As we have seen, the CJEU ruled that, as the Court of Appeal put it, "…the making of the direction order was essentially outside the scope of the Second Company Law Directive…". In those circumstances, the standard by which the opinion of the Minister was to be judged was that contained in the Act, i.e. whether it was unreasonable or vitiated by legal error. Whether or not the opinion was unreasonable or disproportionate was therefore to be judged by domestic law rather than EU law. The question of an infringement of the principle of proportionality of EU law, as alleged in these paragraphs accordingly did not arise.

Other Allegations of "Manifest Infringement"

137. At para.1(I) of the plenary summons, the plaintiffs complain of "manifest infringements of the rules of EU law conferring rights on individuals regarding burden-sharing in light of State aid...". It complained that:

> " The decision of the court adjudicating at last instance manifestly infringed EU law in allowing and/or endorsing and/or giving effect to an *invented novel interpretation* of EU law, according to which the European Commission's decision regarding State aid was allegedly determinative – having regard to the burden-sharing rules in light of State aid – for the legality and proportionality of the July 2011 *Ex Parte* Direction Order…."

138. The text above refers to the "European Commission's decision regarding State aid…". In July 2011, the Irish authorities applied pursuant to Article 107 TFEU for the approval of the European Commission for the proposed recapitalisation. On 20th July, 2011, the European Commission granted temporary approval to a recapitalisation of ILP up to a sum of €3.8bn by the Irish authorities. The details of this application and the decision of the European Commission are set out at para. 21 (pp. 26-31) of the first High Court judgment.

139. The Commission assessed the compatibility of the measure with the internal market according to the criteria set out by the communications previously issued by the Commission on the subject of state aid to banks, i.e. "appropriateness", "necessity" and "proportionality". In its decision, the Commission found that the proposed measures satisfied these criteria. However, O'Malley J. stated as follows:

"22.22 Mr. Skoczylas says, and it is accepted by the Minister, that this decision turned on the applicable criteria for State aid only and should not be taken as an assessment of the overall legality of the measure. Further, it must not be seen as amounting to a derogation from the provisions of the Second Company Law Directive."

140. The Court of Appeal addressed the Commission's decision at paras. 45-54 of its judgment. The court then went on to consider the "Banking Communication" – one of a series of communications issued during the financial crisis by the Commission on 1st August, 2013 to provide guidance on the state aid rules for the financial sector – in the context of the *Kotnik* decision. In carrying out its proportionality analysis, the court considered the alternative options to the direction order presented by the appellants and set out at para. 131 above. Hogan J., having discussed aspects of the banking communication, stated that "…I accept of course that the Banking Communication was, as the Court of Justice observed in *Kotnik*, simply non-binding guidance so far as the State aid rules were concerned". He then went on to say:

> "It is also true to say that simply because a particular administrative decision was found not to violate the State aid rules, this does not mean that the validity of the underlying decision cannot be examined by the domestic courts by reference to national law principles." [Para. 156]

There is no indication, in the analysis carried out by the Court of Appeal, that it interpreted EU law in such a way as to find that the European Commission's decision on state aid was determinative of the legality and the proportionality of the direction order. As the foregoing quotations show, both the High Court and the Court of Appeal accepted that the Commission's decision did not determine the legality of the direction order.

141. The plaintiffs also argue at some length at para. 57 of the statement of claim that there was no basis in EU law to impose burden sharing on the shareholders in ILPGH as opposed to the shareholders in ILP, and that accordingly there was "no basis for using the burden-sharing provisions under EU law to justify the …Direction Order" [para. 57D]. Once again, this misses the point; the review by the Court of Appeal of the legality and proportionality of the direction order was conducted according to principles of domestic law. The question of a "manifest infringement of the rules of EU law conferring rights on individuals regarding burden-sharing" simply does not arise.

Failure to Refer Questions to the CJEU

142. At para. 1A(i), set out at para. 40 above, it is alleged that a "manifest infringement" of Article 267 TFEU was perpetrated by "the court adjudicating at last instance" in "failing to adequately consider and engage with the questions duly raised before that court for a reference to the CJEU…". Complaint is made in relation to the alleged failure to refer the questions "which were decisive or vindicating the plaintiff's civil rights under EU law…", and the alleged failure to justify its failure to refer the questions.

143. While the plenary summons does not identify the "court adjudicating at last instance", it is clear from para. 51 et seq. of the statement of claim that it is the Supreme Court which is the subject of complaint. As para. 51(A) puts it:

> "…in failing to make a reference to the CJEU and in failing to adequately consider and engage with the questions duly raised before it pursuant to Art. 267 TFEU regarding an interpretation of EU law – where the respective interpretation of EU law was decisive for the adjudication of the base case – the Supreme Court as a result of its Determination gave effect, in respect of the essential parts of the case, to the *novel interpretations* of EU law *invented* in the judgment of the Court of Appeal, which were incompatible with the CJEU jurisprudence and which were decisive for the adjudication on the vindication of the rights of the Plaintiffs."

144. Paragraph 26 of the determination of the Supreme Court refers to the request of the plaintiffs in the *Dowling* litigation that the Supreme Court:

> "…make a second preliminary reference to the CJEU with a view to asking new questions in order to clarify issues of EU law which have arisen. These include:
>
> (i) Whether the Second Company Law Directive is to be interpreted as meaning that more recent CJEU case law on the Directive is not capable of superseding the less recent CJEU case law on the Directive, unless explicitly stated to do so by the CJEU.
> (ii) They ask whether, in a situation of serious disturbance to the economy of a Member State, having regard to the principles of legal certainty and proportionality (including the 'least restrictive alternative test') of EU law as pertaining to the actions of Member States, must any of the Articles 25(1), 29(1), 8(1) and 42 of Directive 77/91 be interpreted as precluding the Member State from imposing on shareholders of a viable holding company or a viable bank oppressive recapitalisation terms, while less restrictive but equally efficient terms are being formally recommended by the company's Board?
> (iii) Whether Article 107 TFEU must be interpreted as meaning that the European Commission's decision regarding State aid is not capable of being determinative for the legality of a national measure funded by that State aid or for the compatibility of such a measure with the principle of proportionality of EU law as pertaining to actions of Member States applying EU law?
> (iv) Must Article 122(2) TFEU which was the legal basis for Regulation (EU) No 407/2010, be interpreted as limiting the power of the Council to grant financial assistance to making such assistance subject to certain conditions and not to autonomous legal obligations on the recipient Member State as regards its economic policy?
>
> There were certain other questions raised which the applicants wish to include in the potential second reference, however these related to their contention that the CJEU had misinterpreted certain findings of fact in the High Court and had

exceeded their jurisdiction. These are both issues which were raised, discussed and ultimately rejected by O'Malley J. in the second High Court judgment."

145. At paragraph 46 of its determination, the Supreme Court concluded as follows:

"46. Finally, in terms of any possible further reference, the questions suggested to [sic] not readily appear to arise out of the decision of the Court of Appeal: furthermore, it does not appear to the court to be necessary for it to consider such a reference before being able to determine this application. The making of a second reference based on the questions submitted by the applicants would be to misapply the criteria of Article 267 TFEU. The procedure is not based on hypothetical questions based in a factual vacuum and as such the questions proposed by the applicants could not be referred seeing as they contradict the findings of fact made by the High Court. The procedure could not be effective if it was permitted to be used in such a way as to create new fact findings at the highest appellate level."

146. Trenchant criticisms of the Supreme Court's decision in this regard are made at length at pp. 24-33 of the statement of claim. The ten questions which the Supreme Court was requested to refer are set out in that section of the statement of claim, each subject to an analysis purporting to demonstrate how the questions referred arose out of the decision of the Court of Appeal. The tenth "question" states:

> "Furthermore, the relevant questions for a reference to the CJEU under Art. 267 TFEU regarding other the alleged breaches of EU law have been listed in Schedule 2 of the Applicant's Points of Claim."

This "Schedule 2" lists 34 further questions which the plaintiffs in *Dowling* requested to be referred to the CJEU by the Supreme Court.

147. It must be remembered that the Supreme Court was not embarking on a determination of the issues in the proposed appeal. The only matter which the Supreme Court had to determine was whether or not to grant leave to appeal. The context of the Supreme Court's decision in this regard is set out in the determination, which engages with the criteria for such an application set out in Article 34.5.3 of the Constitution, i.e. whether the decision sought to be appealed involves a matter of general public importance or that it is otherwise necessary in the interests of justice that there be an appeal to the Supreme Court.

148. This context included the fact that the CJEU had already been requested to give its ruling as to whether the direction order was "in breach of European Law". The Supreme Court took the view that it was clear from the ruling given by the CJEU that, in the particular circumstances in which the direction order was made, the CJEU was of the view that the direction order was not in breach of EU law. As the Supreme Court put it:

"44. In its conclusion, the court made it clear that the Second Company Law Directive did not preclude a measure such as the Direction Order where 'there is a serious

disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription rights'. These matters formed the substantive part of the first question asked of it.

45. Furthermore, it must be accepted that in answering both questions in a combined way, the court was not of the view that the Direction Order was incompatible with any rule of European law. It is therefore difficult to see how it could be said that the issues raised by the referring questions were not dealt with, and appropriately so by the Court of Justice."

149. The Supreme Court accordingly stated its view that "…it does not appear to the court to be necessary for it to consider such a reference before being able to determine this application". Given my view – and the view of the High Court, Court of Appeal, and Supreme Court in the *Dowling* litigation – as to the clear import of the CJEU ruling, it would be difficult to infer that the Supreme Court could have come to any other conclusion, much less that it had been responsible for a "manifest infringement of EU law".

150. In any event, it is evident from a perusal of the questions sought to be referred that, for the most part, they seek to reargue matters already decided by the CJEU, the High Court or the Court of Appeal. For instance, questions 5 and 6 are as follows:

"5. Must Art. 267 TFEU be interpreted as meaning that it is not the CJEU task [sic] thereunder to rule on the compatibility of measure of national law with EU law or to apply EU law to the main actions facts?

6. Must Art. 267 TFEU be interpreted as meaning that the CJEU is precluded from extending facts of a case referred to the CJEU under Article 267 TFEU beyond the facts that the referring court has actually established, or from imputing facts the referring court has not in fact established? If yes, then:

- is the national court in such a case not bound by such facts that have been so imputed by the CJEU?
- is the national court precluded from disregarding in its judgment the fact that the CJEU exceeded its jurisdiction and based its preliminary ruling on a finding of fact not made by the referring court?"

151. These questions simply refuse to accept the reality that the CJEU ruled that the direction order was not in breach of EU law. Implicit in the questions is a denial of the legitimacy of the CJEU ruling, such that, if the questions were referred, the CJEU would in effect be asked to countermand its previous ruling. Question 6 above suggests that the Court of Justice would be invited to accept that a national court could disregard in its judgment

"…the fact that the CJEU exceeded its jurisdiction…" notwithstanding the clear findings of the Court of Appeal and Supreme Court that the High Court, as the referring court, was bound by the CJEU ruling. In effect, it is suggested that it was a manifest infringement of EU law by the Supreme Court not to refer a question to the CJEU inviting that court to hold that it had breached EU law itself.

152. By way of further example, questions 7-9 at pp. 30-32 of the statement of claim are all directed towards whether the recapitalisation by means of the direction order was proportionate and compatible with various provisions of EU law. These arguments simply ignore the clear ruling that the direction order was not in breach of EU law. Once that ruling is accepted, the only question is whether the opinion of the Minister that the direction order was necessary was "unreasonable", and this is clearly an issue of domestic law, decided by the Court of Appeal on that basis.

153. As the ruling of the CJEU in *CILFIT v.. Ministry of Health* (C – 283/81) states:

> "Article 177 of the EEC Treaty [the forerunner of Article 267 TFEU] is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community." [para. 21]

154. In questions 7 to 9 above, the plaintiffs sought to circumvent the ruling in *Dowling* and the strictures in *CILFIT* by inviting the Supreme Court to refer questions which suggested that the direction order fell foul of other provisions of EU law not specifically addressed in the original ruling. Once again, this ignored the fact that, as the Supreme Court put it at para. 45: "…the [CJEU] was not of the view that the Direction Order was incompatible with any other rule of European law".

155. At para. 100 of Mr. Skoczylas's affidavit grounding the plaintiff's motion for judgment, Mr. Skoczylas set out ten questions which he said should be referred by this Court to the CJEU. Questions 2-10 of these correspond to questions 1-9 of the questions set out at para. 51 of the statement of claim which the Supreme Court had been requested to refer to the CJEU. For reasons which will be evident from the foregoing pages of this judgment, I do not consider that I should refer these questions to the Court of Justice.

156. The remaining question of which the plaintiffs seek referral to the CJEU is as follows:

> "A. In the circumstances such as the circumstances of this case, does seeking a declaration and related damages, in accordance with the principles established by

the Court of Justice of the European Union in*, inter alia*, [*Köbler, Traghetti* and *Ferreira*], that a Member State is obliged to make good damages caused to the plaintiffs by infringements of EU law for which the Member State is responsible, where the alleged infringements stem from a decision of the court adjudicating at last instance,

- have the consequence of calling in question that decision as *res judicata*? or
- call into question an independence of the judiciary of the Member State? or
- diminish the authority of the court adjudicating at last instance?"

157. As regards *res judicata*, the CJEU in *Köbler* made it clear that the status of *res judicata* of the judicial decision which caused the damage would not normally be challenged or revoked. In this regard, see the dicta set out at para. 64 above. In the present case, the defendants accept the jurisdiction established by *Köbler*, and that this Court is the appropriate court to hear such a claim. The defendants acknowledge that they do not argue that the questions agitated by the plaintiffs in the present proceedings are res judicata.

158. I did not understand Mr. Skoczylas to argue before me that the independence of myself or any members of the judiciary in this jurisdiction was called into question by the invocation of the *Köbler* jurisdiction. Given the provisions of Article 34 of the Constitution which requires justice to be administered in courts established by law by judges appointed in the manner provided by the Constitution, and the terms of the declaration under Article 34.5.1 which requires to be made by every judge of the Superior Courts, I would be very surprised at any suggestion that consideration or application of principles laid down by the CJEU would call into question the independence of the judiciary in this State.

159. Neither do I consider that there is any question of the authority of a court adjudicating at last instance being diminished. Such a court is required to bring before the CJEU the questions contemplated by Article 267, save in certain circumstances such as those set out in *CILFIT. Köbler* makes it clear that an individual must have the possibility of obtaining redress for an infringement of rights under EU law by a court of last instance, and *Traghetti* establishes that such redress would extend to an erroneous failure to refer questions in accordance with Article 267. These are established principles of EU law which Irish Courts are bound to apply, and the question of the authority of a court being diminished by the invocation of the *Köbler* principle does not arise.

160. I do not consider therefore that I should refer to the CJEU any of the ten questions raised at para. 100 of the affidavit of Mr. Skoczylas grounding the motion for judgment. However, Mr. Skoczylas requests the referral of two further questions, expressed as follows:

> "Should the High Court, being itself an organ of the State, be inclined to make an order to grant the State's *retaliatory* and *oppressive* application to strike out these proceedings, the following two questions should be referred to the CJEU under Art. 267 TFEU, before the High Court makes such an order:

(1) Should the *Köbler* doctrine be interpreted as precluding an organ of a Member State, i.e. a national court of the first instance before whom the *Köbler*–type proceedings have been brought, such as the Irish High Court in this case, from striking out the proceedings, such as these proceedings, on the grounds that the proceedings are allegedly an abuse of process and/or are bound to fail, in the circumstances where the proceedings are not *res judicata* and have been brought for a legitimate purpose as claimed?

(2) Should the *Köbler* doctrine be interpreted as precluding an organ of a Member State, i.e. a national court of the first instance before whom the *Köbler*-type proceedings have been brought, such as the Irish High Court in this case, from striking out the proceedings, such as these proceedings, on the grounds that the proceedings are allegedly an abuse of process and/or are bound to fail, in the circumstances where the state's application to strike out the proceedings rests on a claim that it was under the CJEU's jurisdiction in the base case – i.e. in the case in which the CJEU has already made a first preliminary ruling under Art. 267 TFEU and in respect of which the *Köbler*–type proceedings have been then initiated – to apply rules of EU law to a particular national case or to rule upon a compatibility of a national State measure with EU law (which claim made by the state is incompatible with EU law as expressed in the CJEU judgments *inter alia* in the cases C-484/10 *Ascafor and Asidac* and C-163/10 *Patriciello*)?"

161. In relation to the first of these questions, the court has an inherent jurisdiction to strike out proceedings if they are frivolous or vexatious or bound to fail. In *Barry v. Buckley, Costello* J. explained that the jurisdiction "…exists to ensure that an abuse of process of the courts does not take place". As Clarke J. (as he then was) stated in *Keohane v. Hynes* [2014] IESC 66 at para. 6.5:

> "the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings."

162. If, therefore, this Court decides that the plaintiffs' case is frivolous or vexatious or bound to fail, the proceedings are an abuse of process and will be struck out. The jurisdiction to do so arises from the court's right to control its own processes to ensure that justice is done, and applies to all cases regardless of whether or not they involve consideration of rights under EU law. The proposition that the Irish Courts could in some way be precluded from preventing an abuse of process in cases concerning application of *Köbler* principles is in my view unstatable, and accordingly I do not consider referral of this question to be appropriate.

163. As regards the second question, while the wording is somewhat unclear, the premise of the question appears to be that the jurisdiction to strike out cannot apply where the state is contending that the CJEU was applying EU law to a national case. As we have seen, the

plaintiffs contend that the CJEU cannot do this, and did not in fact do it in the present case.

164. As such, the question as formulated is in reality an invitation to the CJEU to acknowledge that it was in error and exceeded its jurisdiction, or to gainsay what all of the Irish Courts who have considered its ruling infer is the clear import of what the court actually says.

165. I am equally of the view that the ruling of the CJEU in Dowling was clear, and that the High Court in that case was bound to apply the ruling and did so appropriately. Accordingly, I do not consider the second question appropriate for referral.

"Manifest Infringement" under the European Convention on Human Rights

166. At para. 1(H) of the plenary summons, it is alleged that there was "…manifest infringement of Article 6(1) ECHR and the ECtHR case law that mandates that "*the 'tribunal' has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties*…" [Emphasis in original]. The basis for this ground of complaint is set out in detail at para. 56 of the statement of claim.

167. The first thing to be said about this ground is that there does not seem to me to be anything in *Köbler* or the other cases on which the plaintiffs rely which would suggest that the *Köbler* doctrine extends to infringements by a national court of last instance of legal principles which do not emanate from EU law. The *Köbler* doctrine takes account of the obligation in Article 267 on a "court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" to bring matters of the interpretation of the treaties or "the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union" before the CJEU, and holds that, where such a court either avails of this power and yet commits a manifest infringement of EU law, or does so having referred the matter to the CJEU, this may result in a party injured by the infringement having a remedy against the member state. This doctrine is specifically and exclusively concerned with the misapplication of EU law – not the sort of procedural imperative contained in Article 6(1) of the ECHR.

168. Even if I am wrong about that, it is evident from the statement of claim that the complaint of the plaintiffs arises from what it considers to be an alleged failure by the Court of Appeal to engage with and properly consider evidence, facts and provisions of EU law:

> "C. The above-mentioned manifest non-engagement by the courts with crucial facts and evidence, which went to the core of the adjudication of the case, has been coupled with a manifest non-engagement by the courts with the most fundamental provisions of EU law referred to in this Statement of Claim, which were decisive for the adjudication of the case. That combination of the non-engagement with facts, evidence and provisions of EU law have been allowed and/or endorsed and/or given effect to by the Supreme Court determination."

169. A failure to engage with the facts or evidence, even if it were established, is not an infringement of EU law, manifest or otherwise. The statement of claim ignores the fact that the Court of Appeal is not a fact-finding body at all. While the Court of Appeal judgment does go into some detail about the facts, this is by way of providing context for the discussion of the legal issues which that court had to determine. This is made clear by the Court of Appeal at para. 100 of its judgment, in which Hogan J., having set out at length the factual context of the matter, states that "…all of this evidence was exhaustively examined and considered by O'Malley J. in her first (and, indeed, the second) judgment…", and then sets out the detailed findings of the High Court at para. 41.2 of the first High Court judgment (and set out above at para 14).

170. In the circumstances, any alleged failure to consider facts or evidence does not give rise to a cause of action as envisaged by *Köbler*. As regards alleged failure to engage with provisions of EU law, the Court of Appeal came to the view that the CJEU ruling had resolved any questions of EU law relevant to the matter, and that the only remaining issue was the reasonableness of the Minister's opinion, which was a question of domestic law. If the Court of Appeal was correct in this conclusion – and I am of the view that it clearly was – the question of an infringement of EU law does not arise.

"Manifest Infringement" of EU Law

171. In *Köbler*, the CJEU considered that "State liability for an infringement of Community Law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law". [Paragraph 53, set out at para. 65 above].

172. This makes it clear that the *Köbler* jurisdiction is regarded by the CJEU as "exceptional", and applicable only where the national court has "manifestly" infringed EU law. This begs the question of what is a "manifest" infringement.

173. I was referred by Mr. McCullough to the helpful decision of the Court of Appeal in the UK in *Cooper v. Attorney General* [2011] QB 976. In that case, an applicant relied on the Köbler principle to recover costs previously ordered against him by the Court of Appeal in a complex planning matter. The court considered what was meant by "manifest" as follows:

> "69. It is clear that for a breach to be manifest it must be evident that there is a breach. It may be evident that it is a breach because the Court of Justice has already decided the point or it may follow from the case law of the Court of Justice that a particular set of circumstances constitutes a breach. However, in our judgment, when, in para 56 of its judgment, the Court of Justice refers to a breach of community law being sufficiently serious if it is in 'manifest breach' of its own case law, the courts did not intend to exclude from consideration the other factors 'which characterise the situation'… in determining whether *Köbler* liability arose from the national court's failure to apply some evident principle of the Court of Justice's case law, the national court should have regard to all the factors which characterise the situation, including those listed in *Köbler* …

70. It is helpful to consider what is not a manifest breach. In our judgment, a breach is not manifest if the answer to the question before the court is not evident in the sense just given. It will also not be manifest if it represents the answer to which the court has come through undertaking a normal judicial function. Interpretation of Community legislation is part of the normal judicial function and liability would no longer be exceptional if it could arise whenever the interpretation was shown to be wrong – if only because the Court of Justice often adopts an innovative interpretation or one motivated by policy insights that would not necessarily be available to the national court. There is in our judgment no member state liability simply because the national court arrives at the wrong answer: this is because 'regard is [required to be] had to be specific nature of the judicial function'.

71. This point is shown by the facts of the *Köbler* case itself. The Supreme Administrative Court of Austria reached what it thought was the correct result in Professor Köbler's case as to a matter of Community law by interpreting a decision of the Court of Justice. It had an even better than usual opportunity to obtain a ruling from the Court of Justice since it had already lodged a request for a ruling. However, it wrongly persuaded itself that a subsequent ruling of the Court of Justice in another case provided the answer when it had not. None the less *Köbler* liability was not established. The Court of Justice did not ask whether its interpretation was reasonable or not…The evaluation that a national court makes of a point of interpretation which it determines is acte clair is, moreover, an integral part of the normal judicial function of identifying the meaning of legislation."

174. The plaintiffs in the present action contend that the Court of Appeal and/or the Supreme Court committed manifest infringements of EU law. They do so in circumstances where the High Court, on being called upon to consider whether the direction order was compatible with the Second Company Law Directive, actually referred that question to the CJEU, which gave an unequivocal ruling. The ruling was accepted and applied by the High Court, and the Court of Appeal found that it was correct and indeed bound to do so. It is difficult to see, in these circumstances, how it could be said that there was any infringement of EU law; it is yet more difficult to see how it could be said that any such infringement was "manifest".

175. The plaintiffs' case depends on this Court accepting that the CJEU ruling did not in fact determine the compatibility of the direction order with EU law. The plaintiffs argue that other principles of EU law render the direction order unlawful, particularly the principle of proportionality under EU law. However, such arguments only get off the ground if successive Irish Courts were manifestly infringing EU law by holding, pursuant to the CJEU ruling, that the direction order was not in breach of EU law. Given the clear and unequivocal nature of the ruling, I do not consider that the contentions of the plaintiffs in this regard have any prospect of success.

176. In summary, my conclusions are as follows:

(1) The motion of the defendants herein is not an abuse of process;

(2) any delay by the defendants in issuing its motions is not sufficient to warrant the application of the doctrine of *laches*;

(3) for the reasons set out in this judgment, I find that the plaintiffs' proceedings are frivolous, vexatious and bound to fail;

(4) I do not consider it appropriate to refer any of the questions suggested by the plaintiffs, or any other questions, to the CJEU pursuant to Article 267 TFEU.

177. Having set out these conclusions, it is appropriate to make a few points. Firstly, although I have found that the proceedings are frivolous and vexatious, the import of those terms was made clear by Barron J. in *Farley v. Ireland*, unreported, Supreme Court, 1st May 1997 as follows:

> "If [a plaintiff] has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

178. As Birmingham J. commented on the term "frivolous or vexatious" used in the Data Protection Act 1988 as amended … "frivolous, in this context does not mean only foolish or silly, but rather a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome" [*Nowak v. Data Protection Commissioner* [2012] IEHC 449, at para. 20]. I do not doubt the seriousness and commitment with which the plaintiffs and Mr. Skoczylas in particular have approached this litigation. I do however consider that the present proceedings are frivolous and vexatious in the sense intended in the foregoing cases, as I consider the proceedings to be fundamentally misconceived and bound to fail.

179. Secondly, I have been very conscious of the "high bar" which any defendant must surmount in order to have proceedings struck out on the basis sought. It is unusual to have to consider such a motion at such length in order to determine whether the proceedings had no prospect of success. The conventional view would be that, the more complex the proceedings, the less likely it can be said with certainty that they are bound to fail. There can be no doubt as to the complexity of the plaintiffs' proceedings as set out in the plenary summons and statement of claim, and of the affidavits and submissions in relation to the defendants' motion.

180. However, it seems to me that this complexity is more apparent than real. While Mr. Skoczylas emphasised the jurisprudence which establishes that, for the purposes of the motion, any factual conflict must be resolved in the plaintiffs' failure, the facts relevant to the proceedings are not in issue. The judgments of the various courts all speak for themselves. While the plaintiffs fundamentally disagree with the findings of fact by the High Court, the Köbler doctrine is not concerned with erroneous or unwarranted findings of fact by a national court; it is concerned only with a manifestly erroneous application of EU law.

181. I am of the view that it is very clear, notwithstanding all the apparent complexity, that the defendants are correct when they contend that the ruling of the CJEU was *acte clair,* that it was appropriately considered and applied by each Irish Court thereafter, and that the question of an infringement of EU law, manifest or otherwise, by the Court of Appeal or the Supreme Court did not arise, and that being so, the plaintiffs' claim is frivolous, vexatious and bound to fail.

182. I will hear the parties as to the exact terms of the order.