THE COURT OF APPEAL
CIVIL

NO REDACTION NEEDED

Haughton J.
Ní Raifeartaigh J.
Murray J.

Court of Appeal Record No. 2019/528
High Court Record No. 2013/3285P
[2021] IECA 264

BETWEEN

THE MINISTER FOR FINANCE AND IRELAND

PLAINTIFFS/RESPONDENTS

- AND -

COMHFHORBAIRT (GAILLIMH) TRADING AS AER ARANN

DEFENDANT/APPELLANT

Court of Appeal Record No. 2019/530
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DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 15th day of October 2021

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Introduction

1. An interim examiner was appointed to Comhfhorbairt (Gaillimh) ('Aer Arann' or 'AA') on 26 August 2010. The ensuing examinership concluded almost three months later upon the coming into effect of a scheme of arrangement ('the scheme'). One of the effects of the scheme – which was confirmed by an order of the High Court made pursuant to s. 24 of the Companies (Amendment) Act 1990 ('CAA 90') - was to limit the ability of certain creditors of the company (including its contingent creditors) to recover their debts.

2. To the knowledge of the State - but not of AA or those making the investment underpinning the scheme - the European Commission ('the Commission') was at the time of the examinership in the process of considering a complaint that *inter alia* AA had been in receipt of unlawful State aid. The unlawful State aid (as it was subsequently found by the Commission to be) comprised a reduction by law in a '*travel tax'* applied to airline journeys originating in the State. The reduction applied to flights to destinations less than 300 km from Dublin, thereby favouring airlines (such as AA) operating short haul journeys.

3. The question in these proceedings (in which Ireland and the Minister for Finance seek to recover that State aid together with compound interest) is whether the terms of the scheme when viewed in the light of the information available to the State at the time it was sanctioned, operates to prevent recovery of this unlawful aid from AA.

4. As the proceedings have developed, the answer to this question has been presented by the parties as reducing itself to two issues. The first is whether the State was a '*contingent creditor'* in respect of the State aid. If it was not, then AA accepts that that the State aid is recoverable from AA. If the State *was* a contingent creditor in respect of this liability, with the result that the provisions of the scheme on their face preclude repayment of the unlawful State aid, a second question is said to arise as to whether there is any principle of law that would enable AA to rely on the scheme so as to displace the obligation otherwise arising under EU law to obtain recovery of that aid. AA says that the principles of *res judicata* and of legal certainty, in particular when viewed in the light of the State's knowledge of the State aid complaint at the time of the approval of the scheme of arrangement and its failure to advise AA, the investors or the court thereof, have this effect.

5. In a careful, comprehensive and detailed judgment ([2019] IEHC 545), Barrett J. found *inter alia* that the State was not, at the time of the approval of the scheme of arrangement, a contingent creditor of AA in respect of this aid but that, if it was, that fact could not as a matter of European law preclude recovery from AA of the unlawful State aid. He also held, on the facts, that AA was not entitled to maintain a set off of the amount of any such aid against sums due on foot of a claim that the tax was unlawfully levied on AA. This latter finding not having been appealed, this Court is solely concerned with the correctness of the trial Judge's conclusions on the first and second of these issues.

The travel tax, the complaint and the examinership

6. AA was incorporated in 1969, originally providing a passenger air service between Galway and the Aran Islands. In 1994 it expanded its operation and fleet, running flights

to a number of regional airports. In 2002 it introduced services to the United Kingdom and Jersey and, in 2004, to France. By 2010, its focus was on what it described as '*the short haul commuter market place'* with typical commute times of between 30 and 90 minutes. Commencing in March 2010, it undertook short haul flights between Ireland and the UK on behalf of Aer Lingus trading as '*Aer Lingus Regional'*, the tickets for these flights being sold and distributed though Aer Lingus' website.

7. Section 55(2)(b) of the Finance (No. 2) Act 2008 came into effect on 30 March 2009. It imposed an air travel tax ('ATT') on all passengers departing from an Irish airport. The tax was collected from the relevant airline which was free to pass the ATT on to its customers. The amount of the tax varied according to the distance travelled by the passenger in question, being €2 if their destination was within 300 km of Dublin airport, and €10 if it was not. The tax was collected by the airline and paid to the Revenue Commissioners.

8. Prior to the introduction of the tax, Ryanair (by letter dated 31 October 2008) advised the Minister for Transport of its view that the then proposed differentiated rates of ATT constituted an illegal State aid. In July 2009, Ryanair made a formal complaint to the European Commission to that effect. Both the complaint to the European Commission and a press release publicising it issued by Ryanair on 21 July 2009 specifically named AA as a beneficiary of the allegedly unlawful State aid, the latter referring to Ryanair having made *inter alia* :

> '*A state aid complaint to challenge the illegal aid provided to Aer Arann through the Irish Government's reduction of the tourist tax from €10 to €2 on short routes (destinations less than 300 km from Dublin).'*

9. The European Commission forwarded a copy of the complaint to the authorities in this jurisdiction on 29 July 2009. The first full response from Ireland issued on 15 October 2009. By letter dated 13 July 2011 the Commission officially informed the State that it was initiating the formal investigation procedure under Article 108(2) TFEU. The Commission requested the State to forward a copy of that decision to the beneficiaries of the aid. The Commission decision to initiate the procedure was publicly announced in the Official Journal of the European Union on 18 October 2011.

10. At the same time, the Commission advised the State of its view that the differentiated rates of ATT breached Article 56 TFEU on the freedom to provide services and Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on the common rules for the operation of air services in the Community. A formal notice to this effect was sent by the Commission on 18 March 2010. This was followed by a decision by the Government to seek to replace the differentiated rates with a single €3 rate as of 1 March 2011. This change was announced by the Minister for Finance on 7 December 2010 and was effected by s. 48 of the Finance Act 2011.

11. The timing of the complaint (July 2009), the initiation of the formal investigation (13 July 2011) and the final Commission decision (25 July 2012) are important. By August 2010 (at which point AA was the only regional airline in the country, employing 315 staff and indirectly supporting in excess of 200 jobs in the regional airports throughout the State) AA was in acute financial difficulty, suffering losses in the region of €6M in the periods ending 31 December 2009 and 31 July 2010. The application issued by AA on 26 August 2010 seeking protection pursuant to the provisions of CAA 90 was grounded upon *inter alia* a report of an independent accountant, in which he expressed the view that AA would have a reasonable prospect of survival subject to the acceptance

of an appropriate scheme of arrangement by the creditors of the Company and the approval of such a scheme by the High Court. The High Court having duly made an order pursuant to the provisions of CAA 90 appointing Michael McAteer as interim examiner of the company, on 8 September a further order was made appointing him as examiner.

12. The Revenue Commissioners were a creditor of AA (including in respect of monies due on foot of the ATT). They actively participated in the examinership process. At no point in the course of that process did they or any other agency of the State advise the company, the examiner, the investors or the Court, of the fact that a complaint was being considered by the European Commission that the ATT had operated as an unlawful State aid. While there was no evidence that the Revenue Commissioners personnel involved in the examinership were aware of the complaint, obviously other agencies of the State did know of it. The witness statements delivered on behalf of AA in these proceedings were to the effect that neither it, the investors nor the examiner was aware of any issue around the compatibility of the ATT with State aid rules. The witnesses tendering that evidence were not cross examined. It is clear that the fact that AA had entered court protection was well known and widely publicised.

13. On 5 November 2010 a hearing took place before the High Court (Finlay Geoghegan J.) for the purposes of determining whether to approve a scheme of arrangement for AA proposed by the examiner. Submissions were made on behalf of the company, the examiner and the Revenue Commissioners. The Court thereafter made an order pursuant to s. 24(3) of CAA 90 approving (subject to modification) the scheme as proposed. The scheme took effect at 5.00 pm on November 10 2010. The order approving the scheme was not appealed. Pursuant to s. 24(6) of CAA 90, the effect of the confirmation of the

proposals contained in the scheme of arrangement was that those proposals were binding on all creditors, or the classes of creditors, thereby affected.

The scheme of arrangement

14. The scheme depended on the commitment of a third party, Everdeal Ltd. (a vehicle for Padraig O'Ceidigh, an original shareholder in and founder of AA, and the Stobart Group). Everdeal Ltd. agreed to invest a sum of €3.5M in AA, also providing a working capital loan of €1.5M. In addition another party, Tim Kilroe, agreed to provide a sum of €2.2M (of which €2M was to be used solely for working capital purposes) subject to AA successfully exiting examinership. Together with aircraft equity of €2.5M, the total value introduced into AA as a result of the scheme totalled €9.7M. The evidence before the High Court was that none of the investors were aware of the European Commission's investigation or the complaint that initiated it, that had they been so aware the they would not have invested, and that the company would in that event have been wound up by the Court.

15. The modified proposals for a scheme of arrangement approved by the Court are stated to be between AA and its members and creditors. Appendix F of the proposals contained a listing of the names of the creditors of AA as at 26 August 2010. That list had been provided by AA. Within this list two relevant distinctions were drawn. The first was between creditors whose claims were not affected by proposals (i.e whose claims would be paid in full), and those whose claims were so affected. Within the category of persons whose claims were affected there was a further distinction between those whose claims were agreed as to quantum and liability, and those whose claims were not so agreed.

16. There were eight classes whose claims were so affected by the proposals– a retention of title creditor, agreed unsecured creditors, unagreed unsecured creditors, contingent unsecured creditors, preferential creditors, contingent preferential creditors, super-preferential creditors and contingent guarantor creditors. Where the claims of these creditors were agreed by the examiner as to both liability and quantum, the amount had been identified in correspondence between the examiner and the creditor. The scheme provided that each of these agreed creditors would be paid 10% of their agreed debt where they were unsecured creditors and 12.5% of their debt in the case of the preferential creditors, with separate provision for super-preferential creditors (who obtained 22% shortly after the effective date and a further 78% over the following 18 months).

17. The creditors whose claims were not so agreed fell within a general category of '*unagreed creditors'*. This category was defined by clause 9.4 as also including creditors or '*persons claiming to be a creditor'* whose claims were not included in Appendix F, or who were so included and whose claims were accepted by the company as to quantum but who disputed the amount of the claim as accepted by the company and examiner. The scheme then made provision for these '*unagreed creditors'* to submit proof of their claims within fourteen days of the effective date of the scheme. If there was a dispute between the alleged creditor and the company this could be submitted for independent expert determination and (if not settled by negotiation) payment would be made to the creditor in accordance with the determination of the independent expert. Such a payment was to be in line with the provisions governing payment to the class to which the unagreed creditor would have belonged had their claim been agreed (that is 10%, 12.5% or the super-preferential rate as the case might be). In the case of contingent creditors, the obligation to make any payment due to them arose 29 days after the date on which their claim ceased to be contingent (clause 13.6).

18. If the creditor was listed in Appendix F and failed to submit such proof within this fourteen day period, it would be deemed to have submitted a claim for the amount attributed to it by the examiner as notified to each creditor. If the unagreed creditor was *not* listed in Appendix F and failed to submit proof, clause 10.3 provided that that creditor '*shall be deemed not to be due any sum by the Company, whether at present, prospectively or contingently'*. This was repeated throughout the scheme : clause 16.1 provided that persons who were unagreed creditors pursuant to clause 9.4 (which included persons not listed in Appendix F who claimed to be creditors) should have no '*right or claim of any description whatsoever against the Company arising out of or connected with any contract engagement, circumstance, event, act or omission of the Company prior to the Fixed Date …'*

19. Clause 6.3 of the Scheme provided as follows :

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

liability or omission of the Company prior to the Fixed Date, save as provided in these Proposals.'

(Emphasis added).

20. It is clear from the foregoing that if the State was a creditor, a contingent creditor or a prospective creditor of AA in respect of the unlawful State aid at the time of confirmation of these proposals, the effect of the scheme was, in theory, as follows. If it had submitted a claim and had that claim been accepted by the company or upon independent expert determination, the State would have received 10% of the value of that claim as so determined. In the event that no such claim was submitted (and, obviously insofar as the State aid liability was concerned, none was) the liability was extinguished. This is the consequence of s. 24(6) CAA 90 (the provisions of which have since been repealed and replaced by Part 10 of the Companies Act 2014) which provided :

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

(Emphasis added).

21. There is no question but that the State was not at that point in time a '*creditor'* in the sense of a person to whom there was a debt then due, nor was it a '*prospective creditor'*

insofar as this refers to a person to whom a sum will definitely become due in the future. Hence the focus by the parties was upon whether it was a '*contingent creditor'*: if it was such a creditor the effect of the scheme *and* its approval by the Court was to *prima facie* extinguish the claim for recovery of the unlawful State aid.

22. Even if the State was a contingent creditor at the time of the approval of the scheme, neither the write down nor the extinction of the company's liability to it was inevitable. The State could have simply notified the examiner that such a liability might in the future arise. In that event the examiner could have made provision in the scheme for the full recovery of that liability if it should transpire. This seems the only possible means of dealing with the liability within the scheme, as the State could not (as I explain shortly) consent to a write down of the liability, and the Court could not (again for reasons I will elaborate upon) compel such a reduction. However, the reality is that matters would never have come to that. The evidence is that had that potential liability been disclosed, the investment would not have proceeded unless (as the CEO of the Energy Division of Stobart Group Limited, Mr. Whawell, explained in his witness statement) any potential ATT liability to the State was '*dealt with and removed'.* Given the constraints on so dealing with a liability for unlawful State aid, a scheme would not therefore have been presented. AA would have been wound up.

The Commission Decision

23. On 25 July 2012 the Commission adopted a decision finding that the two tier travel tax constituted an unlawful State aid to Irish airlines. It found that the lower tax rate provided an advantage to airline operators serving the routes to which that rate applied. It said that

the lower cost that those airlines had to pass on to their customers or to assume directly improved their situation *vis a vis* other airline operators competing in the air transport market. It noted, in particular, that the flights to which the lower rate applied were mainly operated by airlines with a strong connection with Ireland so that, *de facto*, the reduced rate provided an advantage to Irish airline operators compared to other European Union undertakings.

24. Article 4 of the decision stated '*Ireland shall recover the incompatible aid … from the beneficiaries'*. The aid to be thus recovered was quantified by the Commission as the difference between the €2 and the €10 rates. It specifically identified Ryanair, Aer Lingus and AA as beneficiaries of the State aid. The State was allowed four months from notification of the decision to effect this recovery.

25. While AA returned to the State a sum reflecting that aid in respect of periods post-dating the confirmation of the scheme of arrangement, it refused to do so in relation to the pre-examinership period, contending that the scheme had operated to extinguish any liability for such debts. In April 2013, and on foot of the Commission decision, proceedings were instituted by Ireland and the Minister for Finance against each of the airlines found by the Commission to have benefitted from the unlawful aid. These included the two sets of proceedings the subject hereof, the first against AA alone and the second against it and Aer Lingus. The latter action arose from the joint flights operated on a contract basis between these parties to which I have earlier referred. As of the trial, the total sum sought by the State from AA in respect of the unlawful State aid was (before interest) €2,897,608 (in the first action) and €1,093,640 (in the second), of which AA had paid a sum of €743,872 in respect of post examinership liabilities. The total sums outstanding (again, before interest) were €3,247,386.

26. Thereafter, the Commission decision was challenged by Aer Lingus and Ryanair before the EU Courts. By decision of 5 February 2015 the General Court annulled the Commission decision but, on appeal and by judgment of 21 December 2016, the Commission determination was upheld by the CJEU (*Joined Cases C-164/15P and C-156/15P Commission v. Aer Lingus and Ryanair* ECLI: EU: C: 2016:990). No annulment proceedings were brought by AA and, in particular, it never sought to contend before the European Courts that the requirement that the Minister recover the unlawful State aid was contrary to any principle of European law.

27. Claims were also brought by Aer Lingus and Ryanair for restitution and damages against the State. These proceedings were based on the contention that the ATT was contrary to the Constitution and EU law. AA conceded its claims in 2015 as part of a partial settlement with the State. Aer Lingus and Ryanair subsequently compromised their claims. In these proceedings AA has asserted that the net effect of that settlement was to balance out the repayment of unlawful ATT State aid received by those companies. AA says in its submissions that it '*was not financially in a position to pursue its initial comparable damages claim against the State'*.

The decision of the trial Judge

28. The two actions against AA, for all intents and purposes, proceeded as one and a number of issues common to both were set down for trial before Barrett J. Insofar as the claim advanced by AA to the effect that the examinership and adoption of the scheme of arrangement operated to preclude recovery of the State aid, the trial Judge based his rejection of that contention on two propositions. First, he stressed that the Commission

State aid decision was not taken until July 2012 with the result that there was no liability and no contingent liability *vis a vis* the State at the time of the examinership. Second, he concluded that were the Court wrong and if the State *was* a contingent creditor, this was a situation established by national law and, under the principle of supremacy of EU law, that national law could not stand in the way of recovery on foot of a State aid decision.

29. While the trial Judge in one sense treated these two questions separately, he proceeded on the basis that the first issue to be determined arose from the characterisation, as a matter of EU law, of the obligation to recover the State aid. In particular he based in part his conclusion that the State aid liability did not render the State a '*contingent creditor'* at the time of the examinership upon the obligation imposed upon the State by EU law in general, and the Commission decision in particular, to recover the unlawful State aid. In that regard he considered two Commission notices – a Notice from the Commission towards an effective implementation of State aid (OJ C272, 15.11.2007, 4) and a Commission notice on the enforcement of State aid law by national courts (OJ C85, 09.04.2009, 1) ('the first and second Commission notices' respectively) and carefully analysed four decisions of the CJEU – *Ministero dell 'Industria, del Commercio e dell 'Artigianato v. Lucchini SpA*, Case C-119/05, ECLI:EU:C:2007:434, *European Commission v. Slovak Republic*, Case C-507/08, ECLI:EU:C:2010:802, *Klausner Holz Nideersachsen GmbH v. Land Nordrhein-Westfalen,* Case C-505/14, ECLI:EU:C:2015:742, *Eesti Pagar AS v. Ettevotluse Arendamise Sihtasutus*, Case C-349/17, ECLI:EU:C:2019:172 ('*Lucchini'*, '*Slovak Republic', 'Klausner Holz'* and '*Eesti Pagar AS'*). These decisions, together with the consideration of the relevant principles in Hancher *et al, 'EU State Aids'* (5th Ed. 2016) ('*Hancher'*), led the Court to the following conclusion (para. 79) :

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

30. From there, the trial Judge proceeded to examine the claim advanced by AA to the effect that the claims by the State to recover the unlawful aid rendered it a '*contingent unsecured creditor'* within the meaning of clause 12.3 of the scheme of arrangement. If the State was not such a creditor, the Judge said, AA's examinership case '*falls away entirely'* and the various decisions of the CJEU addressed by the Court did not require to be engaged with. In this regard, the Judge referred to the decision in *Re O'Rourke, a Bankrupt* [2018] IEHC 176 ('*O'Rourke'*), in which Costello J. in determining whether the Revenue Commissioners were a '*contingent creditor'* of a bankrupt at the time of his adjudication in respect of a surcharge under s.811A of the Taxes Consolidation Act 1997 on a pre-adjudication capital gains tax liability, relied heavily upon the judgment delivered by Lord Neuberger in *Re Nortel Gmbh (in administration)* [2013] UKSC 52, [2014] AC 209 ('*Nortel'*). There, Lord Neuberger had postulated a test framed by reference to whether the debtor had taken or been subjected to a step or combination of steps which (a) had some legal effect, (b) which resulted in its being vulnerable to the specific liability in question such that there would be a real prospect of that liability being incurred and (c) whether it would be consistent with the regime under which the liability

was imposed to conclude that the step or combination of those steps gave rise to an obligation within the meaning of the relevant statutory provision (at para. 77). Applying that test, Barrett J. explained his conclusion as follows (at para. 82) :

> *'(1) what the State was doing when it imposed the air travel tax was to impose an indirect tax, and the State every day imposes all manner of indirect taxes. The notion that the imposition of such a tax would have been a step or combination of steps which had the legal effect of putting the State under some legal duty or into some form of legal relationship does not sit at all comfortably with the State as tax collecting authority.*
>
> *(2) likewise, as to point (b) in Lord Neuberger's observations this again does not sit easily with the notion that levying a tax may result in State aid liability.*
>
> *(3) as to point (c) in Lord Neuberger's observations, would it be 'consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation ... [within the meaning of the statute]? The short answer is 'no'.*

31. In the concluding section of his judgment (at para. 85), Barrett J. gathered together a number of propositions he had deduced from the applicable authorities. Included in his summary are the following :

(i) The European case law clearly indicates that the only time when it is justifiable for a State *not* to recover unlawful State aid following a direction by the Commission

to that end, is where '*absolute impossibility of recovery presents'*. In this case there was no absolute impossibility of recovery. At its highest AA contended that the Court had a choice when the issue of legal certainty presents as to whether or not to order recovery. No authority existed to support this conclusion.

(ii) Moreover, such authority as was cited by AA in support of its contention that legal certainty presented a basis on which recovery of the State aid could be precluded (and in particular the decision in *Slovak Republic*) did not support that contention. Legal certainty, the Court said, was to some extent undermined by both the recovery of State aid and the examinership process itself.

(iii) The Court stressed that the logic of the State aid decision was that AA had a benefit from a lower rate of tax for approximately 18 months. That was a competitive advantage which had not been removed and which was, in effect, bought by the investors. It was for the investors to carry out due diligence and to assess the commercial and other risks of the investment. There was no onus on the State to warn them of potential risks.

AA's appeal

32. While I will return later to some of the detail of AA's legal argument, its essential case was this. It contends that the State was a contingent unsecured creditor of AA at the time of the confirmation hearing because it was a creditor in respect of a debt which would only become due on the happening of an event which may or may not occur, and (it says) the scheme of arrangement was intended to apply to such future creditor claims. That being so, it says, the State ought, having regard to the terms of the scheme of

arrangement, to have ensured that the investors, the Court and AA were aware of the complaint and of the fact that in the event of it being determined that the tax was State aid, the State would be seeking to recover it. AA says that the State should have insisted that the scheme of arrangement preserve the right of the State to pursue in full any pre-examinership State aid liability subsequently established. Had this happened, AA says, the investors would have withdrawn. It asserts that in consequence of the failure of the State to thus disclose the prospect of this liability *bona fide* investors are being asked to bear the financial consequences of the State's lack of candour during the examinership process in 2010. That, it says, cannot be either right or fair.

33. Insofar as EU law requires recovery of State aid, AA says that Barrett J. erred by treating the objection raised by AA to recovery of the State aid as being based solely upon the implications of the principle of *res judicata* in Irish law. In fact, AA contends, its case was broader and was rooted in the effect and import of the general EU law principle of legal certainty. Thus, it is contended, Barrett J. fell into error in assuming that AA's defence questioned the principle of supremacy of EU law. It is its argument that in what it describes as '*very exceptional (if not sui generis) circumstances'* the principle of legal certainty prevails over the otherwise generally applicable obligation on a Member State which has granted unlawful State aid, to pursue its recovery. Those '*circumstances'* have three elements :

(a) the legal effect in Irish law of the confirmation order as precluding recovery of any pre-examinership liabilities other than as provided for in and in accordance with the terms of the scheme of arrangement together with the reliance placed upon that effect;

(b) the fact that the State was aware of the potential ATT liability at the time the scheme was confirmed but failed to disclose same;

(c) the fact that the State (through the Revenue Commissioners) was actively involved in the examinership process.

34. The combination of these factors, it says, results in a situation in which the normal principle that unlawful State aid must be recovered is defeated because (as it puts the argument) '*of the absolute impossibility of recovering the aid due to the inevitable infringement of the EU law general principle of legal certainty same would involve'.* That '*absolute impossibility'* is the end consequence of the asserted obligation on the part of the State to warn potential investors identified by the examiner of the risk of an adverse State aid determination. The failure of the State to discharge that obligation generates what AA describes as '*an absolute impossibility to the State's … recovery claim'.* This (it is argued) '*required the High Court to balance the conflicting EU law-based rights involved and to determine which prevailed.'* This, AA says, is what the High Court failed to do.

35. While (as I have earlier noted) the parties defined the questions to be resolved before the High Court by reference to two issues – essentially whether the unlawful State aid was a '*contingent liability'* and whether EU law precluded reliance upon the scheme of arrangement to defeat the claim for recovery of that aid – the State in its written submissions and Barrett J. in his judgment prioritise the EU law issues. This, in my view, was the correct approach. Ultimately, the State's case is that EU law does not permit the preclusion by a scheme of arrangement of the kind in issue here of the obligation to

recover unlawful State aid. At the risk of over-simplifying the analysis, if this is correct the scheme of arrangement cannot have that prohibited effect. The question of which legal mechanism achieves that outcome is, in my view, ancillary.

36. If, on the other hand, EU law does permit the extinguishment of a liability for unlawful State aid by means of a scheme of arrangement and if this is the appropriate outcome in this case, the question of whether this has in fact been achieved by the legislation should not be a complicated matter. The entire purpose of the examinership procedure is to enable the survival of insolvent companies through the formulation of a scheme of arrangement and the conferral (through court approval) of legal effect on that scheme. This requires the drawing of as clear a line under pre-petition liabilities of the company in examinership as is practically and legally possible. The point is cogently and simply made by Clarke J. in the course of his judgment in *Re Michael McLoughlin (Pharmacy) Ltd* [211] IEHC 28 at para. 4.7 : a scheme of arrangement will inevitably require further investment, and it is unlikely that that investment will be forthcoming while there remains significant doubt about the company's financial position into the future. It seems to me to follow, that being so, that there must – at the very least - be a strong presumption that all actual and potential liabilities of the company have been captured by the court approved restructuring of this kind. The first question to address, therefore, is whether this scheme could lawfully have that effect in respect of this State aid liability.

II THE RECOVERY OF UNLAWFUL STATE AID

The relevant legal provisions

37. The core legal prohibition is expressed in Article 107(1) TFEU. This posits a general – and fundamental - principle that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market. The prohibition captures all measures likely to directly or indirectly favour certain firms or grant them a benefit that they would not have secured under normal market conditions. From there, Articles 107(2) and (3) proceed, respectively, to identify species of aid which shall be, and which may be considered to be, compatible with the internal market.

38. Article 108 prescribes the procedure for the control of State aid, vesting that control in the Commission. Article 108(1) imposes a general obligation on the Commission to keep all systems of aid existing in the Member States under constant review, Article 108(2) stating :

> '*If, after giving notice to the parties concerned to submit their observations, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market …. It shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'*

39. Article 108(3) then provides :

> *'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall*

without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

40. Although since replaced by Regulation 2015/1589, at the times relevant to these proceedings the obligation to recover unlawful State aid was expressed in Article 14(1) of Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ('the Procedural Regulation') :

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

(Emphasis added)

41. Article 14(3) of the Procedural Regulation required that recovery be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that these allowed the immediate and effective execution of the Commission's decision. It continued :

'To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in

their respective legal systems, including provisional measures, without prejudice to Community law.'

The governing principles

42. Four particular features of this legislative scheme as it has been interpreted by CJEU are important here. First, if the Commission does direct recovery, the recipient of aid which has been declared unlawful has the right to bring an action for annulment of that decision. The case law holds that this being so, it is not possible for a recipient of such aid who could without any doubt have challenged the relevant Commission decision to call that decision into question before the national courts in an action taken by the national authorities (*Commission v. France* at para. 59). To decide otherwise, the Court has said, would enable the person concerned to overcome the definitive nature assumed by the decision once the time limit for bringing an action for annulment has expired (*id*.). In cases where it was not self-evident that an action for annulment brought against the contested decision would have been admissible, the beneficiary may challenge the implementation of the decision before the national courts, in which event the national court judge must make a request for a preliminary ruling on the validity of that decision.

43. Second, where recovery has been directed, a Member State may be excused from the obligation thus imposed where it is '*absolutely impossible'* to implement the recovery decision. This is the only situation in which CJEU has to date held a failure to effect such recovery to be justifiable. The requirement is strictly applied. Such an impossibility may arise where it is established that the undertaking in question has been liquidated and has no assets (*Commission v. Spain* Case C-499/99 [2002] ECR I-06031 at para. 37). It

will *not* arise where national law imposes a requirement which hinders implementation of the Commission decision, as a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under EU law (*Commission v. Germany* Case C-5/89 [1990] ECR I-03437 at para. 17). This follows from the principle of effectiveness. Indeed, it appears that it will be only in truly exceptional circumstances that absolute impossibility in this sense may arise from a legal rather than factual impediment - such as a national court decision imposing interim measures (see the opinion of Advocate General Wahl in *Commission v. Germany* Case C-527/12 ECLI:EU:C:2014:2193 at para. 92).

44. Third, while the Commission may not impose an obligation of recovery where to do so would breach a principle of EU law, and while the protection of legitimate expectations is a principle of EU law derived from, and a corollary of, the more general mandate of legal certainty, it is clear (and was indeed accepted by counsel for AA in the course of his submissions to the Court) that the circumstances in which such expectations will operate to release a beneficiary of unlawful State aid from the obligation to repay it, are also wholly exceptional. In *Commission v. Germany* Case C-5/89 [1990] ECR I-03437 the Court explained that because of the mandatory nature of the supervision of State aid by the Commission under the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108 : a diligent businessman, it explained, should normally be able to determine whether that procedure has been followed (at para. 14). It is significant that the Court has expressed this view in terms applicable both to legitimate expectations and legal certainty, and that in the operation of both closely aligned principles the mandatory nature of the Commission's

role in the supervision of State aid is of decisive importance (see *Land Rheinland-Pfalz v. Alcan Deutschland Gmbh* Case C-24/95 EU:C:1997:163 at para. 25) :

45. More fundamentally, the acts or omissions of a Member State itself may not give rise to a legitimate expectation so as to either avoid, or render unlawful, a requirement to recover the aid. The requirement that the assurances must derive from an institution of the European Union applies whether it is the Member State or the beneficiary that invokes the expectation (see the formulation of principle in *CSTP Azienda della Mobilita SpA v. European Commission* Case C-587/18P at para. 99 '*CSTP'*). The Court has, in particular, stated that it would not permit a Member State whose authorities have granted aid contrary to the relevant provisions to rely upon the expectations of beneficiaries, where to do so would enable the States to deploy their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness (*Commission v. Germany* Case C-5/89 at para. 17)).

46. The fourth relevant aspect of the law arises from the relationship between national insolvency procedures and the obligation of recovery imposed by a Commission decision. Central to that relationship is the rationale for the obligation of recovery in the first place. The objective is not to penalise the beneficiary undertaking, but instead to ensure that the illegality arising from the grant of the aid and the distortion of the market it entailed, is reversed. Recovery, in other words, is directed to ensuring restoration of the *status quo ante*. By requiring repayment of the aid, the recipient forfeits the advantage it enjoyed over its competitors on the market and the situation as it prevailed prior to payment of the aid is reinstated (Case C-277/00 *Germany v. Commission* [2004] ECR I-03925 at para. 75).

47. As I have noted, an absolute impossibility such as to excuse a Member State from the obligation of recovery may arise where the beneficiary undertaking has no assets. However, in this circumstance the CJEU has been quite clear that the Member State must proceed to bring about the winding up of that company, to have its claim registered as one of that company's liabilities or to take any other measure enabling the aid to be recovered (*Commission v. Greece* Case C-363/16 ELCI:EU:C:2018:12 at para. 36). In this situation even though the aid may not be recovered, the aim of abolishing the aid is achieved by liquidation (*Commission v. Spain* at paras. 37 and 38). For these reasons, the Commission in its first notice adopts the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in the case of partial recovery, when the company is liquidated and its assets are sold under market conditions (at para. 61).

48. It follows that a Member State may not acquiesce in an arrangement whereby, as part of a corporate rescue package to which effect is given by national law, it agrees to the reduction of its claim for the repayment of the unlawful State aid together with interest and, therefore, national law may not consistent with these principles impose such a reduction on the Member State. To facilitate either of these outcomes would undermine the obligation of the Member State to obtain recovery in full of the unlawful State aid and would bring about a situation in which the undertaking benefitting from that State aid is permitted to continue to reap some of that advantage by remaining in the relevant market without repaying the aid and the required interest. This is why the Commission in its 2019 Notice on the recovery of unlawful and incompatible State aid, 2019/C 247/01 ('the 2019 Notice), says this (at paras. 131 to 132) :

> '*... certain Member States provide for proceedings aimed at the restructuring or temporary continuation of some or all of the activities of insolvent undertakings. However,* ***such proceedings must be left unapplied insofar as, in the absence of timely recovery of the full recovery amount, they prevent the winding up and cessation of the activities of the said beneficiary.***
>
> *Thus, where a plan providing for the continuation of the activity of the aid beneficiary is proposed to the creditors committee, the authorities of the Member State concerned can support that plan only if it ensures recovery of the full recovery amount within the recovery deadline.* ***A Member State cannot waive part of its recovery claim if the aid beneficiary continues its activity after the recovery deadline'.***
>
> (Emphasis added)

49. This approach is not consistent with the policy of rescuing ailing enterprises, it may in some cases mean the Member State recovers less of the unlawful aid than it would do if it co-operated in the rescue, and it has been the subject of some criticism (see Paulus '*Competition Law versus Insolvency Law: When Legal Doctrines Clash'* (2013) Unif. L. Rev 1). However, it is a position that follows inevitably from the theory underlying recovery which, as I have noted, is directed primarily to the elimination of the competitive advantage arising from the aid. The purpose is not to maximise a return to the Member State, but to restore the market to the situation it was in prior to the grant of the aid. That objective is attained by full recovery and it is attained by liquidation, but it is not realised by partial recovery and the survival of the beneficiary undertaking. While AA referred in the course of its submissions to the Insolvency Regulation, Regulation

1346/2000, with a view to impressing upon the Court that the insolvency of AA was as a matter of EU law governed by Irish law and that this included the examinership procedure, it was not suggested at any point in argument in this case that the Commission notice fails, in this respect, to accurately reflect the law.

50. What AA did submit was that these comments were directed to cases in which the recovery decision pre-dated the examinership. This, I think, misses the point. If a Member State is precluded after a recovery decision is made from compromising the liability for unlawful State aid as part of an insolvency procedure, it must follow that it is also precluded from allowing such a procedure to fetter recovery on foot of a future decision. Because the underlying objective is the restoration of the *status quo ante*, the same rule must govern the second situation as applies to the first.

51. Before leaving the Commission notices, AA submitted in the course of its oral argument that these made it clear that the State ought to have advised the Court seised with the examinership of the fact of the potential claim for recovery of unlawful State aid. Whether or not this is so, nothing in the Notices suggests that a failure on the part of a Member State to draw the attention of the beneficiary or others to the potential liability justifies the conclusion that the State has thereby prevented recovery of the aid thereafter. This would involve a very significant modification of the view adopted by CJEU of a claim of legitimate expectation arising from the representation of that State. Indeed, in *CETM v. Commission* Case T-55/99 EU:T:2000:223 at paras. 126 and 127 the General Court found that the fact that beneficiaries of aid were not informed by the relevant Member State of a Commission investigation into the lawfulness of aid granted to them could not in itself ground a basis for resisting recovery.

Application of provisions and recovery principles

52. These principles bring into focus two related difficulties facing AA in contending that the effect of the scheme and of the Court order approving it was to generate - whether by virtue of legal certainty in general, or some theory of *res judicata* in particular – a basis on which the obligation of the State to recover the unlawful aid yields to the finality of the insolvency procedure.

53. To begin with, it appears to me that the State is correct in suggesting that – irrespective of whether legal certainty or *res judicata* constitute a general principle of EU law that could justify in an appropriate case the Commission in not directing recovery of unlawful State aid - a beneficiary of such aid may not raise an issue of *res judicata* or legal certainty before a national court as a basis for resisting enforcement of a Commission decision when they could have agitated, but failed to advance, that ground by way of annulment action. As the State urges in its written submissions, it is not open to AA to call into question any aspect of the Commission decision before the Irish courts : it is simply no longer open to challenge.

54. In the course of oral argument Mr. Travers SC, while accepting that the Commission had an exclusive jurisdiction to determine whether State aid was compatible with the internal market, contended that it did not have exclusive jurisdiction to determine matters in relation to the applicability of the general principles of EU law. Because the Commission did not have such exclusive jurisdiction (he said) a beneficiary was entitled to rely upon legal certainty before a national court, and a national court decision was capable of generating the basis for such a claim. The requirement to bring an annulment action

before the General Court, he secondly contended, did not arise because his argument was based not upon an asserted illegality in the Commission decision, but upon the absolute impossibility of obtaining recovery, that impossibility in turn arising from the principle of legal certainty.

55. Both of these arguments skilfully glide over the substance of the case AA makes. While I will return to the first presently, the infirmity of the second is itself decisive. No matter how it is formulated, the case made by AA – if well placed – is that the Commission in directing recovery of the aid failed to comply with the general principles of EU law and Article 14 of the Procedural Regulation. Its claim, necessarily, is that recovery ought not to have been directed because of the breach of the principle of legal certainty of which it complains. That was a matter that AA could have agitated by way of annulment action, and indeed this is precisely what happened in *CSTP* (to which I will return further below). There, part of the case advanced by the appellant was based upon an alleged lack of competence on the part of the Commission to adopt a decision where this was directed against a judgment of a national court which had the force of *res judicata*. In fact, as it happens, a somewhat different case based upon legal certainty was agitated in the annulment proceedings that were brought by Ryanair and Aer Lingus, it being contended that the directing of recovery would breach that principle in circumstances in which the airlines subject to the higher rate of ATT were entitled to reimbursement of the excess tax (see para. 110 of the judgment of CJEU). The point is that the ground could have been raised in an annulment action and, indeed, I did not understand counsel for AA to suggest otherwise. Nor was any reason tendered to the Court as to why this was not done.

56. The argument also ignores the rationale for the requirement that a challenge be brought by way of annulment action. This, in fact, is because of the requirements of legal

certainty itself (see *TWD Textilwerke Deggendorf Gmbh v. Germany* Case C-188/92 [1994] ECR I-00833 at paras. 17 and 18). It is therefore as applicable to a claim that the Commission erred in its assessment of the impact of the aid on the internal market as it is to the decision of the Commission to direct, or not to direct, recovery. Where the objection to recovery could not have been made at the relevant time the position will be different, but where it could the obligation is on the beneficiary to make it before the European Courts. In *Commission v. France*, the Court explained (at paras. 59 and 60) :

> '*... it is not possible for a recipient of aid which has been declared incompatible,* ***who could have challenged the Commission's decision,*** *to call into question the decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision. To accept that in such circumstances the person concerned could challenge the implementation of the Community decision in proceedings before the national court on the ground that the decision was unlawful* ***would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person*** *once the time limit for bringing an action laid down in the fifth paragraph of Article 230 has expired.*
>
> ***It follows that the Commission's decision concerning the recovery of sums owed cannot be called into question before a national court.*** *That question is reserved for the Court of First Instance of the European Communities ...'*
>
> (Emphasis added).

57. This leads to a second issue with AA's case which is in itself both fatal to the argument it advances, and also follows from the substance as opposed to the form of its claim. Although framed as a case based upon legal certainty and *res judicata,* AA's claim in reality arises from its asserted entitlement to deploy the failure of the State to advise it of the State aid complaint as a basis for resisting recovery. It is that failure to disclose in combination with the reliance placed by AA - or more accurately those who invested in it (giving rise an issue of its own) - on its understanding of its own financial circumstances. AA's formulation of the '*exceptional circumstances'* that trigger its entitlement to resist recovery thus depends entirely on the conduct of the State.

58. This presents exactly the same issue as is raised by the legitimate expectation cases. Those cases are ultimately concerned with whether an allegedly well-founded expectation based upon the actions of the national authorities who acted unlawfully in granting the aid in the first place, can negate an obligation to make recovery and thus remove the competitive advantage arising from the aid. Indeed, in the course of his oral argument counsel for AA acknowledged both that one could characterise the contention he urged as one of legitimate expectation, and that there was no legitimate expectation unless it was in some way created by the European institutions themselves. As I have noted there are two reasons this is so, (a) it is not appropriate that recovery be barred by the actions of the Member State whose own unlawful conduct gave rise to the aid in the first place and (b) generally, the fact that there may have been a grant of unlawful aid will generally be discoverable with reasonable diligence.

59. The same principles must apply to AA's case. While EU law requires a legitimate expectation to be based upon a precise assurance, and while here the root of the claim lies in silence rather than misrepresentation, it is impossible to my mind to see how such

silence could generate a basis for resisting enforcement in circumstances in which an affirmative representation from the State could not do so. The doctrine of legitimate expectation, it must be recalled, is itself but a corollary of the principle of legal certainty by reference to which AA frames its case. A claim that could not be validly presented under one of these headings, cannot succeed simply by expressing it under the other.

60. Although in the course of oral submissions counsel said that his case would also stand even if the State had not been aware of the State aid complaint at the time of the confirmation hearing, this was not the claim emphasised in the High Court or in written submissions in this Court. These were focussed upon the cocktail of exceptional circumstances to which I have earlier referred. Central to these was the failure of the State to advise the parties and Court of the possibility of a State aid liability of which it was aware. The proposition that a State aid liability could be defeated irrespective of the State's knowledge (and AA's ignorance) of the prospect of such a liability could not be sustained on any version of the law. To do so would allow national insolvency proceedings to trump the principle of recovery in all such cases. This would be inconsistent with the fourth principle I have considered in the preceding section. The proposition that the knowledge of the State changed this could only be correct if the firmly established case law of the CJEU in relation to the role of legitimate expectation as a ground for resisting recovery of unlawful State aid was wrong (which AA has not suggested) or distinguishable (and I can neither see that it is nor discern from the written and oral submissions of AA any basis on which such distinction is asserted).

III LEGAL CERTAINTY, THE SCHEME OF ARRANGEMENT AND THE COMMISSION DECISION

Context and definition

61. To recap, it appears to me that viewing the matter solely as one of European law AA's case is flawed in two critical respects. First, it was incumbent on it to make the case it seeks to agitate in these proceedings by way annulment action before the General Court and CJEU. The case law of the CJEU is clear that its failure to do so precludes it from advancing that case now before the national court. Second, the substance of the case it makes – however it is described by AA in its argument – is based upon a failure on the part of the State to advise AA, the investors, the Court and/or the examiner of the possible State aid liability. It is both firmly established and accepted by AA that such a case cannot be made absent a representation of the European institutions.

62. If I am mistaken in relation to both of these matters, the question presents itself as to the legal effect at the level of European law of the approval by the High Court of the scheme of arrangement. While AA's case in this regard was agitated before the High Court and this Court as being based upon the effect of *res judicata* as a constituent of the general principle of legal certainty, the issue benefits from more considered definition. The term *res judicata* as used in the law of other Member States and appearing in that context in some of the decisions of CJEU is not necessarily fully aligned with the concept in Irish law and insofar as the term has a meaning at the level of European law it may be different again. Moreover, in the specific context in which the issue arises here, the State suggested in the course of its oral submissions (in my view correctly) that as a matter of Irish law the argument advanced by AA was not, strictly speaking, correctly characterised as one of *res judicata* at all.

63. In this case the decision of the Court approving the scheme did no more than determine substantively that the scheme was likely to enable the survival of the company as a going concern and that the proposals were fair and equitable to any party which has not accepted the proposal and not unfairly prejudicial to the interests of any of the members or creditors. These are the only substantive matters decided by the Court. Underlying that determination was certainly the assumption that the creditors had been completely identified and correctly categorised. However, the Court made no adjudication of any kind on any question related to State aid nor as to whether the State was or was not a contingent creditor in respect of any liability arising from such aid. Insofar as conventional principles of *res judicata* are concerned the preclusion on the determination of any fresh issue relating to these matters would arise not from the sharp principles of cause of action or issue estoppel, but from the '*rule'* in *Henderson v. Henderson* (see *Re McInerney Homes Ltd.* [2011] IEHC 25, [2011] IESC 31). That, however, is a discretionary principle which is to be '*applied flexibly and not in a rigid or mechanical manner'* (*Kennedy v. DPP* [2020] IECA 360 at para. 72 per Collins J.), and which should be applied based upon '*a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case'* (*Johnson v. Gore Wood and Co.* [2002] 2 AC 1, at page 31 per Lord Bingham, cited with approval in *Kennedy v. DPP* at para. 73).

64. Critically, the real issue here derives not as much from these common law rules, as from the provisions of CAA 90. Under s. 24(5) when the High Court confirmed the examiner's proposals they became binding on all affected members and on the company, and under s. 24(6) they were similarly binding on the affected creditors. As I have earlier explained, the terms of the scheme were such that this meant it was binding on all creditors of the company (including contingent and prospective creditors) as of the date of approval of

the scheme. The confirmation decision could be appealed, and indeed could be set aside on the grounds of fraud within 180 days of its making (s. 27 CAA 90). In the absence of either of these events, the proposals were binding not as much because of any effect attributed by the general law to a Court order, but because that is what CAA 90 said. While s. 24 requires a Court order before the scheme takes effect it seems to me that the issue is in reality more one of the finality of the scheme and the entitlement of the parties to rely upon it, than one it is of *res judicata* properly so called. Given that the statutory provision is triggered by a court order the *res judicata* analysis urged by AA is certainly relevant and the underlying principles analogous, and for that reason I will examine in some detail the CJEU cases addressing *res judicata* to which the parties have referred. However as these are considered it is important that the proper legal characterisation of the issue is borne in mind. That is whether the consequence of confirmation by the Court of the proposed scheme was, or was not, to preclude the recovery thereafter of unlawful State aid having regard to the terms of the scheme and the provisions of s.24(6) CAA 90.

Final orders, European law and the obligation to recover State aid

65. The CJEU has recently re-affirmed the particular importance of the principle of *res judicata* both in the legal order of the European Union and in national legal systems (*Klohn v. An Bord Pleanála* Case C-167/17 ECLI:EU:C:2018:833 (‘*Klohn’* at para. 63). In *Klohn* it explained that to ensure stability of the law and legal relations as well as the sound administration of justice, it is important that judicial decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question (*id.* at para. 64).

66. The relevant CJEU case law has been considered and summarised recently by Baker J. (with whose judgment MacMenamin and O'Malley JJ. agreed) in *Kenny v. Trinity College* [2021] IESC 57. There, one of the issues was whether final costs orders made in domestic proceedings could be re-visited in the light of principles of EU law precluding the recovery of prohibitively expensive costs in certain environmental cases. Holding that they could not, and referring to the decisions in *Kapferer v. Schlank* Case C-234/04 ECLI:EU:C:2006:178, *Lucchini* and *Pizzarotti v. Comune do Bari* Case C-213/13 ECLI:EU:C:2014:2067 ('*Pizzarotti*') Baker J. concluded that '*EU law is clear that a final decision at national level may not be re-opened'* (at para. 108).

67. This, however, is subject to two important provisos. First, in *Klohn* the Court was emphatic that '*according to the Court's case law, the force of res judicata extends only to the legal claims on which the court has ruled'* (at para. 69). It does not operate to prevent a court from determining points of law on which there is no ruling in that definitive decision (*id.*). Thus, in that case, in providing guidance to the national court as to the assessment it should undertake in applying the principle of *res judicata* in respect of a final order for costs in the light of the principle that costs not be prohibitively expensive, CJEU stressed that it followed from the scope of *res judicata* recognised in EU law, that the domestic court was not precluded by the former order from determining the *amount* of the costs in a manner consistent with the relevant EU law.

68. In that respect the Court in *Klohn* referred, in particular, to the decision in *Klausner Holz*. There, the Court was concerned with unlawful State aid arising from the favourable terms on which the Land Nordrhein-Wesfallen undertook to sell wood to Klausner Holz. A dispute having arisen from the purported rescission by the Land of the agreement, Klausner Holz instituted proceedings in a German Regional Court from which it obtained

a judgment (which was subsequently affirmed on appeal) declaring that the contracts in question remained in force. While no issue was raised in those proceedings that the contracts represented unlawful State aid, the judgment was *res judicata* under German law and, under that law, this prevented not only re-examination in a second action of the pleas already expressly settled in the first, but also the raising of questions which could have been raised in an earlier action and which were not so raised.

69. This was followed by a second action in which Klausner Holz sought damages against the Land arising from non-performance of the agreements and orders requiring the delivery of supplies in accordance with the agreement. In that action, the Land did contend that EU law precluded the enforcement of the contracts because they constituted unlawful State aid, and the German government proceeded to notify the Commission of the contracts. The Court in the second action thereupon referred to the CJEU a question which, the Court of Justice said, essentially inquired as to whether EU law precludes in these circumstances the application of a rule of national law enshrining the principle of *res judicata* preventing a national court which has held that contracts forming the subject-matter of the dispute before it constituted State aid from '*drawing all the consequences of that breach because of a national judicial decision which has become definitive which the court,* ***without examining whether those contracts constituted State aid,*** *has held that the contracts remain in force'* (emphasis added).

70. In answering this question in the negative, the CJEU stressed that the national court had not considered the issue of State aid at all. It said (at para. 45) :

> *'... a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because*

of a decision of a national court, which is res judicata, given ***in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts in issue*** *must be regarded as incompatible with the principle of effectiveneness.'*

(Emphasis added)

71. Transposing that logic to the facts of this case, it is clear that the decision of the High Court to approve the scheme of arrangement cannot, as a matter of European law, prevent recovery of the State aid because the Court gave no consideration of any kind to the issue of State aid, and because the State aid liability was not before it. The consequence of s.24(6) CAA 90 is that the scheme is binding on all creditors, but *Klausner Holz* suggests that insofar as principles analogous to *res judicata* have any role in this context, that the finality posited by that provision and the court under triggering it cannot, as a matter of European law, displace an otherwise applicable obligation to recover unlawful State aid where there is no underlying assessment of the State aid in the first place. Whatever the role of *res judicata* in the context of State aid recovery actions may be, it is absolutely clear that it is only properly engaged where the national court has rendered an adjudication on the State aid issue in dispute.

72. It might be said that this case differs from *Klausner Holz* because by confirming the scheme of arrangement the Court has indirectly addressed the issue of recovery of State aid insofar as the effect of its decision is that all creditors – including contingent creditors – are bound by the scheme. AA would say that what is relevant is not whether the national court has considered State aid, but that AA (or more accurately its investors)

relied upon the relevant legal framework (including the court decision) as providing an assurance of the true financial position of the company at the time of the confirmation. AA's point is that it was deprived of the opportunity to obtain any consideration of the possible State aid liability because it was not told of the prospect that such a liability might arise. While acknowledging the distinctions, the unavoidable conclusion from the case law is that CJEU has emphatically out-ruled the prospect that any expectation of finality around the recovery of State aid can be built on a court ruling that does not address State aid issues at all.

73. More fundamentally, even if this is mistaken, AA's argument can only present a valid counterpoint if the Court was empowered to make such an order in respect of a State aid liability in the first place. If a Member State cannot accept a reduction or negation of the State aid liability as part of a corporate reorganisation of the kind in issue and if the national Court cannot force such a reduction upon it (and, as I have explained the law is clear that it cannot), then the question arises as how through either a rule of *res judicata* or of statutory finality the order of the national court can obtain the same result by default.

74. In many ways this reduces itself to a stark choice between the conclusion that the importance of the recovery of State aid and manner in which the law consigns it to the competence of the Commission trumps any expectation of certainty parties may derive from the triggering Court Order on the one hand, and on the other the proposition that the reliance placed by the parties in general (but the investors in particular) upon the finality of scheme of arrangement should prevail over the requirement to recover the unlawful aid - at least where the State could have advised those parties of the potential for such a liability.

Competence

75. This leads to a second relevant limitation on the operation of *res judicata*. Baker J. in *Kenny v. Trinity College Dublin* noted that in *Lucchini* the CJEU had held that the primacy of EU law may, in certain cases in which the Commission had exclusive competence, require that unlawful State aid could be recovered even if in so doing the national court would be setting aside or not applying a final order of a domestic court. She also observed that in *Pizarrotti* the Court described *Lucchini* as '*a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of State aid'* (at para. 61). Baker J. concluded that *Lucchini* should be viewed as thus limited.

76. The question of competence was, indeed, central to the decision in *Lucchini*. Its application there reflects the fact that the structure of the EU State aid rules is based on an obligation of sincere co-operation between the national courts, on the one hand, and the EU Courts on the other in the context of which each acts on the basis of the role assigned to it by the Treaty (Case 284/12 *Deutsche Lufthansa* EU:C::2013:755 para. 41). In *Lucchini,* a party which had been promised a subsidy by the relevant national authority successfully sued in the Italian Courts for an order declaring its entitlement to that support. While the Italian authorities had notified the aid, and while that notification was pending at the time of the first instance decision, the Court conducted no examination as to whether Article 88(3) EC had been complied with. By the time the appeal in those proceedings came to be heard the Commission had delivered its decision and refused to sanction the aid. Remarkably, while the Italian authorities advised the appeal court that the aid could not be disbursed before the Commission had declared it to be compatible with the common market, they did not advert to the fact that the Commission had adopted

a decision in which the aid was expressly declared to be incompatible with the common market. Lucchini made no attempt to appeal that decision. Under the relevant Italian law this did not prevent the decision of the national court from creating a seemingly absolute *res judicata* precluding the re-opening of the decision on a ground that could have been, but was not, raised in the relevant proceedings.

77. The Italian authorities issued a decree revoking the subsidy and the promisee sued to declare that decree invalid relying upon the final judgment of the appellate court. That claim prevailed at first instance, an appeal court then referring two questions to the CJEU. These were characterised by the CJEU as asking whether Community law '*precludes the application of a provision of national law … which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision which has become final.'*

78. The answer to that question was in the affirmative and (save for a reference to the provision of national law in issue), unqualified. Central to that conclusion was the view of CJEU that because the national court did not enjoy jurisdiction to determine whether the State aid was compatible with the common market and could not therefore have invalidated the Commission decision declaring the aid to be incompatible with that market (at para. 57), the national court was required to disapply a provision of national law which would otherwise prevent it from giving full effect to its obligations under Community law (at para. 61).

79. The failure of any of the parties to the first proceedings in *Lucchini* to properly address the State aid implications of the subsidy rendered that case highly exceptional, and indeed

that is precisely how Advocate General Geelhoed in his opinion in the proceedings characterised it (at para. 16). He said that in their interpretation of national law, national courts may not deliver any rulings which set aside the fundamental division of powers between the Community and the Member States and, he added, this was true even of decisions which had become final (para. 72). He said that the finality of a judgment based solely on the interpretation of national law, with relevant Community law '*blatantly ignored'* could not obstruct the exercise of the powers conferred on the Commission by the provisions of community law concerned (at para. 74). However, while AA seeks to suggest that the rationale of the decision in *Lucchini* is thus limited, the Advocate General also explained that the proper resolution of the case depended on a broader issue of competence, and this is reflected in the CJEU decision. The judgement of a national court in a horizontal private law relationship even if declared final, he explained, cannot affect the Commission's power to take decisions, and the same is true of the vertical relationship between a Member State and an individual in respect of the granting of aid : judgments delivered in that connection by a national court could not affect the Commission's exclusive powers either (at para. 80). Moreover, he emphasised, individuals had appropriate legal protection against Commission decisions on State aid and therefore could not challenge the validity of those decisions before a national court where they had not availed of the power to appeal to the Community Courts (para. 82).

80. This takes me back to a point I made earlier. In the course of his oral submissions counsel for AA said in the context of both this decision and *Klausner Holz* that while the Commission has, subject to the relevant remedies before the CJEU, exclusive competence to determine the compatibility of State aid with the internal market it does not enjoy such an exclusive competence to determine matters regarding the applicability

of the general principles of EU law. Stated at this level of generality, that is of course true.

81. What the Commission does enjoy, however, is competence to determine whether the recovery of aid should be directed, and to that extent it must determine – subject to the jurisdiction of the relevant EU Courts – whether the general principles of EU law require disapplication of the normal principle of recovery. Here, the decision of the Commission to direct recovery of the aid necessarily entailed a decision that to do so would not breach a general principle of law. This is why the appropriate vehicle for challenging that conclusion – albeit a negative one - was an annulment action. The principle applied in *Lucchini* would suggest that a decision of national courts cannot operate to prevent the Commission from exercising that jurisdiction. Subsequent decisions of CJEU, in my view, put that beyond doubt. Indeed, at paragraph 61 of *Pizzarotti* (to which Baker J. referred in the course of her judgment in *Kenny*) the CJEU said of *Lucchini* :

> *'the Court found, in essence, that EU law precludes the application of a provision of national law … which seeks to lay down the principle of res judicata, in so far as the application of that provision would prevent the recovery of State aid which was granted in breach of EU law and which has been found to be incompatible with the common market in a decision of the European Community which has become final …'*

The subsequent case law

82. Subject to the decision in *Slovak Republic* (to which I will return), every decision of the CJEU to have addressed the relationship between principles of *res judicata* and/or legal certainty and the obligation to recover State aid has emphatically concluded that the

former must yield to the latter and there is no decision (including *Slovak Republic*) in which a principle of *res judicata* has been found to take precedence. This is why the Commission in its 2019 Notice declares (by reference to *Lucchini* and *Klausner Holz*) that '*the principle of res judicata cannot be used to justify an infringement of European Union law and to preclude recovery of State aid'.* That conclusion is unsurprising : there is no version of the claim advanced by AA that does not both undermine the rationale of the case law addressing the operation of legitimate expectation in this context, and at the same time operate to confer on a national court, or legislature, a function in preventing recovery of unlawful State aid which all of the cases make clear they do not enjoy.

83. I have outlined the facts of *Klausner Holz* earlier. There the Court (a) restated the obligation of national courts to interpret domestic law so as to ensure that EU law is fully effective, (b) noted the importance of the principle of *res judicata* in ensuring the stability of the law and legal relations, (c) re-iterated that EU law '*does not always'* require a national court to disapply domestic rules of procedure conferring finality on a judgment even if to do so would make it possible to remedy a breach of EU law by the decision in question, and (d) observed the interpretation of national law suggested by the application of *res judicata* as formulated by the referring court would '*make it impossible for the national courts to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU'* (at para. 42). Critically, at para. 45 of its judgment the Court said :

> '*...A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of res judicata or by the principle of legal certainty.'*

84. It followed that the question as reformulated by the Court should be answered thus :

> *'EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule in national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force.'*

85. The underlying reason for this approach was restated in *Estee Prager*. There, the claimant had obtained a grant from Estonian authorities for the purposes of acquiring and installing a bread production line acquired by it, those authorities subsequently determining that the grant comprised unlawful State aid and seeking its return together with interest. The claimant brought proceedings seeking to annul that decision contending, *inter alia*, that had it been advised at the time of the grant that it was unlawful State aid it could, and would, have terminated the agreements whereby it acquired the production line. Those proceedings were unsuccessful at first instance but, eventually, the Estonian Supreme Court allowed an appeal in part against that decision. In its judgment the Supreme Court reached certain findings of law, including that there was no legal basis for claiming interest on the aid having regard to the relevant national rules.

86. Upon the matter being referred back to the Court of First Instance by the Supreme Court, the trial Court referred a number of questions to CJEU, including questions directed to the alleged legitimate expectations relied upon by the claimant, and the applicability of the obligation to recover interest on aid pursuant to a decision of the national authority (rather than of the Commission). Having confirmed the principle that legitimate expectations could not be relied upon against an unambiguous provision of EU law and that the conduct of a national authority responsible for applying EU law which acts in breach of that law could not give rise to such an expectation (at para. 104), the Court – citing *Klausner Holz* – said (at para. 139 and 140) :

> *'... the application of national law cannot have the consequence of frustrating the application of EU law in making it impossible for the national courts or authorities to satisfy their obligations to ensure compliance with the third sentence of Article 108(3) TFEU ...*
>
> *A national rule that would prevent a national judge or a national authority from taking action to respond to the consequences of an infringement of the third sentence of Article 108(3) TFEU must be regarded as being incompatible with principle of effectiveness ...'*

87. *CSTP* was the most recent authority opened to this Court. There, the Consiglio de Stato determined that the appellant was entitled to compensation for the economic costs incurred in discharging certain public service obligations arising from bus services provided by it pursuant to various municipal and regional concessions. It subsequently fixed the amount due in respect of these obligations, that sum being paid by the relevant authorities. The Italian government (following the final decision of the Consiglio de

Stato but before the making of payment) notified the Commission of State aid consisting of that compensation, the Commission thereafter deciding that the measure at issue constituted State aid incompatible with the internal market and ordering its recovery. The appellant brought an action for the annulment of the decision, subsequently appealing the rejection of that application to the CJEU. One of the arguments was based on the proposition that the decision of the Consiglio di Stato was *res judicata*, it being contended that there was a connection between the principle of *res judicata* and the principle of legal certainty which constituted a limitation on the obligation of recovery pursuant to Article 14 of the Procedural Regulation.

88. In rejecting this claim, the CJEU noted that the division of competence in the field of State aid between national courts and the Commission implies that national courts must refrain from taking decisions running counter to a Commission decision (at para. 91). However, it explained, the converse was not the case : the fact that a national court has ruled on a matter engaging that area of the Commission's competence '*cannot prevent the Commission from exercising the exclusive jurisdiction conferred on it by the FEU Treaty as regards the assessment of the compatibility of aid measures with the internal market'* (at para. 92). Therefore, it found, the Commission may examine under Article 108 whether a measure constitutes State aid which should have been notified to it even though a national court had taken a different view (at para. 93). It continued (at para. 94 and 95) :

> '*That conclusion cannot be invalidated by the fact that that court has adopted a decision having the force of res judicata. It should be emphasised that the rule of exclusive competence of the Commission is necessary in the internal legal order as a consequence of the principle of the primacy of Union law.*

On the basis of the exclusive competence of the Commission, EU law precludes the application of the principle of res judicata from preventing the recovery of State aid granted in infringement of that law, the incompatibility of which has been established by a Commission decision which has become final.'

89. AA advanced a range of grounds on which it said these cases can be distinguished counselling (correctly of course) against the application of an unduly common law based analysis of these various judgments or the statements appearing in them, and urging the Court to look closely at the specific facts of each. *Lucchini*, it is said, was different because there the Commission decision *pre-dated* the relevant national law judgment and the Italian Courts, in rendering the decisions in question, acted in disregard of the Commission State aid determination. *Klausner Holz*, it was said, was a case in which had the principle of *res judicata* been allowed to prevail, the contracts for the supply of the wood at issue, which were otherwise potentially in breach of EU State aid law, could have continued into the future to be enforced. In that case, it is stressed by AA, the CJEU confirmed that EU law does not always require a national court to disapply domestic rules of procedure that confer finality on a judgment. AA refers to paragraph 39 of the judgment in that case, contending that the Court said '*that EU State Aid law will not always require a national court to disregard legal certainty when considering an application for recovery of unlawfully granted aid'*. *Eesti Prager*, it is argued, merely restates the principle of effectiveness and the duty of national judges to set aside national procedural or other rules preventing unlawful State Aid from continuing to be granted. *CSTP* is distinguished on the basis that there the national court had purported to determine issues relating to the State aid in question and in particular to hold that the aid

was compatible with the internal market. None of these cases, it is said, preclude the exceptional application of an impossibility defence based on the legal certainty created by the confirmation order in issue here regarding a period that it predates it.

90. While – with one exception – the factual assumptions underlying these submissions are not wrong, it is my view that they do not affect the applicable principle. While in *Lucchini* the Commission decision predated the national court decision, this was not the case in *Klausner Holz* nor in *CSTP* and it is clear from those decisions that that fact was not, therefore, material to the issue. This is not surprising : until such time as unlawful State aid is recovered there is an ongoing breach of EU law, so there is no principled difference between a case in which the effect of the national rule of *res judicata* is to allow further aid to be given, and a case in which the effect of that rule is to prevent its recovery. While *Eesti Prager* was concerned with quite a different issue –the critical question arose from national rules on interest rates for State aid recovery – the principle it restates is not consistent with *res judicata* or legal certainty arising from either a national court decision nor domestic law provision permissibly intruding so as to prevent recovery of unlawful aid. The point of distinction urged in relation to *CSTP* ignores both the rule as formulated by the Court there, and the essential similarity of that case and this one in principle : each depends on the proposition that reliance on a national rule affording finality to a court decision could operate to prevent the recovery of unlawful State aid. *CSTP* states in terms that it cannot.

91. There is one point at which AA errs in fact in this aspect of its submission. It is not correct to say that at paragraph 39 of its judgment in *Klausner Holz* the Court said that EU ***State aid*** law will not always require a court to disregard legal certainty when

considering an application for recovery of unlawfully granted aid. What the paragraph says (citations omitted) is – I think importantly - more general :

> '*Therefore, EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue …'*

Slovak Republic

92. One of the authorities cited by CJEU in *Klausner Holz* in support of this proposition was the decision in *Slovak Republic*, and it was upon this case that AA built a significant part of its argument on the EU law issue. There, the unlawful State aid comprised a write off of part of a liability for alcohol excise duty owing by an insolvent company (Frucona). The write off was accepted by the Slovak authorities as part of an arrangement voted upon and accepted by the creditors of that company, and approved by order of a regional Court which, under Slovakian law, obtained the status of *res judicata.* Thereafter, the Commission declared that by reason of the tax write off, Slovakia had unlawfully granted State aid to Frucona and it duly directed the State to take all necessary measures to recover that aid.

93. The relevant authorities proceeded to institute proceedings in Slovakia to that end, the Court in which recovery of that debt was sought deciding that the sums were not recoverable on account of the creditor's arrangement, which had acquired the force of *res judicata*. The aid not having been recovered some two years and four months after the Commission decision, the Commission proceeded with an action against the State

under Article 249 EC. At that time, Frucona had instituted an annulment action in respect of the State aid decision which, as of the decision of the Court of Justice in the Article 249 proceedings, was pending.

94. While the facts differ from those in the instant proceedings in an important respect (the aid was the write down of the debt) part of the case advanced by the Slovakian authorities mirrors the argument advanced by AA here. They said that the decision of the Slovakian Court approving the scheme had the force of *res judicata* and that it was not possible for the administrative authority which granted the aid to annul that final judicial decision. Having regard to the importance to the principle of legal certainty of the inalterability of final judgments, the Slovak authorities contended that they could only have proceeded to seek the recovery of the unlawful aid by legal proceedings and that the *res judicata* effect of the national court decision under national law did not violate the principle of equivalence having regard to that of the procedural autonomy of Member States. Unlike AA, however, the Slovak authorities did not assert that recovery of the aid was *absolutely impossible* (although it is to be noted that the Advocate General at paragraph 1 of his Opinion described their case as being, essentially, to that effect).

95. This argument ultimately failed because of another feature of the case which is not present here : Slovakian law afforded a possible further 'extraordinary' appeal mechanism of which the Slovakian authorities had not availed. This arose from the provisions of Article 228(1) of the Code of Civil Procedure of the Slovak Republic, which provided that a final decision of a court could be reviewed on the basis that it was incompatible with a decision of the CJEU or another body of the European Union. Therefore, the Court of Justice concluded that the information provided by the Slovak

Republic was insufficient to allow the conclusion that it took all the measures which it could have employed in order to obtain the repayment of the aid in question.

96. AA relies upon three specific paragraphs in the judgment of the CJEU. First, the Court noted that in *Lucchini* it had said that European Union law precludes the application of a provision of national law which seeks to lay down a principle of *res judicata* in so far as the application of that provision prevents recovery of State aid granted in breach of European Union law. It then (at para. 58) makes the point I have earlier addressed that *Lucchini* could not be of direct relevance to the case because in *Slovak Republic* the court decision *preceded* the Commission decision. From there AA notes the following comments of the Court (at paras. 59 and 60) :

> *'... attention should be drawn to the importance, both in the European Union legal order and the national legal orders, of the principle of res judicata. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question ...*
>
> *Accordingly, European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of res judicata on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question.'*

97. This, it is said, shows that principles of *res judicata* continue to function in the area of State aid, the suggestion being made that but for the exceptional appeal, the fact that national law prevented the re-opening of the confirmation of the reorganisation would have provided a proper justification for not recovering the unlawful State aid.

98. In this regard, particular stress was placed by AA upon the opinion of the Advocate General. He noted (at para. 46) that the Court of Justice has always regarded due respect for the force of *res judicata* as a principle characteristic of a State governed by the rule of law and which, for that reason, has been adopted by the European Union. Thus, he explained, the Court has gone so far as to accept that Member States are not, in principle, required to disregard final judicial decisions – even where doing so would make it possible to rectify an infringement of European Union law (at para. 47). Instead of re-opening such decisions, he explained, the Court has opted for compensation in cases where the national court has manifestly infringed the applicable law. All of this was a consequence of treating legal certainty as one of the general principles of European law (at para. 48).

99. *Lucchini*, the Advocate General said, could be explained as a decision in which the final judicial decision of the national courts was delivered *after* the Community act which it infringed and, to that extent, one in which there was no conflict between certainty and effectiveness, but instead between certainty as to the relationship between European Union law and the law of the Member States and what he termed '*an unlawful attempt to consolidate in domestic law a national decision with no jurisdictional basis at all'* (at para. 48). However, looking to the circumstances in which the first of these conflicts

did arise for consideration, Advocate General Cruz Villalon explained as follows (at para. 50) :

> '*Clearly, the Member State to which a decision is addressed requiring it to recover aid unlawfully granted is obliged … to take all measures necessary to execute that decision in order to recover the aid wrongfully paid without delay …. However, other than in exceptional cases such as that described above, that duty cannot go so far as to entail sacrificing the principle of legal certainty and the requirement that the law should be clearly defined, which the principle of res judicata supports, except through procedures laid down with the usual formalities and conditions of procedural law, which comply, therefore, with the requirement that the law should be clearly defined, with the principle of legal certainty and with the precautionary principle all of which underpin the inviolability of final judicial decisions.*

100. He continued :

> '*… the European Union has never been able to claim that the recovery of unlawful aid may be achieved through the infringement by the Member State concerned of its procedural provisions, since doing so would require it to breach a principle that is fundamental to a State governed by the rule of law'*

101. The argument based upon these statements and this interpretation of the decisions in *Lucchini* and *Slovak Republic* is, it appears to me, misconceived. While *Lucchini* was an exceptional case, the answer given by the Court to the question presented to it was clear, unequivocal and unqualified. More importantly, that response was based not solely upon

the failure of the parties and/or the Italian Courts to take account of the potential application of the State aid provisions, but instead upon an understanding of the respective competences of the Commission and (in any appeal or application for annulment) the European Courts on the one hand, and the national courts on the other. The passage from the judgment of the Court in *Slovak Republic* relied upon by AA and cited earlier certainly confirms the vitality of *res judicata* as a principle of EU law, and the opinion of the Advocate General roots that conclusion in the general concept of legal certainty. However, neither assert that these rules will operate in the manner contended for by AA in this case, that is to provide a justification for not giving effect to an unchallenged direction in decision of the Commission that unlawful State aid be recovered based upon a legislative provision or triggering judicial order which took no account of its State aid implications.

102. This is particularly evident from one feature of the Advocate General's opinion in *Slovak Republic*. The provision for extraordinary appeals and the failure to exhaust those appeals which resulted in the decision against the State in that case enabled, it will be recalled, such an appeal where a final decision of a court was said to be incompatible with a decision of the CJEU or another body of the European Union. The Advocate General said that in cases such as that before the Court, Member States must have included in their legislation amongst what he described as '*the provisions usually laid down in their respective legal systems for the revocation of the authority of res judicata'* a provision which addressed the unlawfulness under Community law of judicial acts or decisions which have become final (at para. 52). In other words, there *should* be no finality in domestic law in respect of such decisions where finality was not consistent with a decision of the Commission directing recovery of unlawful State aid. It appears to

me that it is a short step from that conclusion to the position adopted in the later CJEU cases that this same imperative dictates that where provisions of national law have purported to impose such finality, it is the obligation of the national courts to either interpret the provisions so as to qualify them or, if this is not possible, to disapply same.

103. In the course of his oral submissions, counsel for AA contended that the comments at paragraphs 59 and 60 of the judgment in *Slovak Republic* could only be construed as meaning that if there had been an extraordinary appeal in that case and had it failed, that there was nothing more that could be done about the matter. However, even before the CJEU decided *Klausner Holz* the proposition that where there was no extraordinary appeal of the kind available in *Slovak Republic*, *res judicata* would have excluded recovery of a claim for the recovery of unlawful State aid was (as it was expressed by one commentator) '*far from being likely'* (see Birnstiel '*Recovery of Unlawful State Aid: The Role of Member State Courts in State Aid Recovery Scenarios* (2012) 3 EStAL 645, at p. 647). The subsequent decisions of the court to which I have referred in the previous section of this judgment put this beyond doubt. *Slovak Republic* establishes that where domestic law allows a further appeal which might enable recovery of unlawful State aid to occur, the Member State required to effect recovery must exhaust that appeal. It also says that legal certainty is an important principle of EU law, and that in some circumstances *res judicata* may operate to prevent the re-opening of a national court decision even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question. It does *not* say that one of the circumstances in which this will happen is where the operation of such a national court judgment or legislative provision prevents a decision of the Commission directing recovery of State aid to be given effect. *Klausner Holz* and *CSTP* state precisely the opposite, and that

conclusion is rooted not merely in the facts of those cases but in an immediately recognisable and firmly established consideration, namely the division of competence between the Commission and national courts viewed in the light of the primacy of EU law and the critical importance in that law of correcting the imbalance to the market caused by the unlawful grant of State aid.

104. In this regard, it appears to me to be clear from the principles I have earlier outlined that if the State had accepted, or the Court had sought to impose, a scheme of arrangement which purported to reduce or extinguish the State aid liability, it would not have been effective irrespective of any principle of *res judicata* or of legal certainty. If that is so, it becomes extremely difficult to see how a national court could obtain such competence either by an assumption of such jurisdiction or by default through a failure to advert in any way to a potential State aid implication of its decision. This is the effect of the cases to which I have referred which decide that principles of *res judicata* and legal certainty can not expand the competence of national courts in this arena at the expense of the function of the Commission in the operation of the State aid rules. There is, it appears to me, a clear line of sight from the four principles I have outlined at paragraphs 42-51 of this judgment, to that conclusion.

Conclusion on the EU law issue

105. The high point of AA's legal case on this issue is that the CJEU has suggested that *res judicata* and legal certainty *may* have *a* role in State aid cases, and the high point of its request for a reference is that the CJEU has never actually explained what that role is. Moreover, on the facts, it is hard not to have some initial sympathy with investors whose

commitment enabled a company to survive, where that commitment was given on the basis that all liabilities of the company were captured by and catered for in the scheme of arrangement, in which they were not aware of any potential State aid liability, and in which the State itself *was* aware of this possibility but never advised the Court of it.

106. However, I have no doubt that neither any applicable domestic law doctrine of *res judicata* (nor a statutory provision having the same effect) nor the more general principle of legal certainty can operate so as to preclude recovery of the unlawful State aid in issue in these proceedings. This is so for five reasons:

(i) At a general level it is clear that a Member State could neither waive recovery of aid the subject of a Commission direction, nor accept a reduced amount of that aid as part of a corporate rescue. Given that a national court cannot mandate the State to do either of these, it would be wrong in logic and inappropriate in principle to hold that an omission on the part of the State in the course of a Court supervised corporate restructuring to advise the beneficiary of the possibility that a recovery obligation could arise generated – by default – this same consequence.

(ii) Moreover, an argument of this kind - although grounded in legal certainty and/or *res judicata* - cannot succeed when based upon the failure of the State to advise AA, the investors or the Court of the complaint being considered by the Commission having regard to the decisions of CJEU confirming that legitimate expectation based upon the conduct of the authorities of the Member State may not be raised as a barrier to recovery of State aid. The principle underlying both contentions is exactly the same.

(iii) Whatever the precise role of *res judicata* in this general legal context may be, the case law is absolutely clear that it may not operate to preclude recovery of unlawful State aid where (as here) the decision relied upon as generating the *res judicata* arose in proceedings in which the national court did not actually address itself to the State aid provisions. This follows from *Klausner Holz* as re-stated in *Klohn*.

(iv) The decision in *CSTP* confirms that a decision as to whether an aid measure is compatible with the internal market is within the exclusive competence of the Commission and that that jurisdiction cannot be displaced by the *res judicata* effect of a national court decision. The same logic must apply to a decision adopted by the Commission ordering the Member State to recover the aid which, negatively, determines that no principle of EU law is breached by directing recovery based on the facts or circumstances known at that time. The following emphatic statement in that decision bears repetition :

> *On the basis of the exclusive competence of the Commission, EU law precludes the application of the principle of res judicata from preventing the recovery of State aid granted in infringement of that law, the incompatibility of which has been established by a Commission decision which has become final.'*

(v) Even had it been possible on the facts of this case to invoke legal certainty as a general principle so as to preclude recovery notwithstanding all of the foregoing, the appropriate vehicle for the agitation of such a complaint is, in circumstances in which all relevant facts were known at the time of the Commission decision, by

way of an annulment action. *CSTP* shows this to be the case and, in any event, this must be the consequence of the consignment to the Commission of the power to determine whether the normal obligation of recovery should, exceptionally, be subordinated to a general principle of EU law.

107. Once the combined effect of these propositions is appreciated, it is clear not merely that AA's case on the issue of European law must fail, but that it does so by a distance that mandates refusal of its request for a reference. Each of the propositions I have outlined is established by recent authority of CJEU. The issue is absolutely clear.

IV THE CONTINGENT CREDITOR ISSUE

Contingent creditors and the Companies Acts

108. As I have earlier explained, the State's claim is captured by the scheme of arrangement and therefore by s. 24 only if it was, at the time of the approval of the scheme, a '*contingent creditor'* of AA in respect of the State aid liability. If it was not a '*contingent creditor'* it was not a '*creditor'* of any kind, and the confirmation of the scheme has no effect on its right of recovery.

109. The question as to whether it was such a creditor arises in the context of the construction of the scheme, which falls to be interpreted according to the principles expressed in *Law Society v. Motor Insurers Bureau of Ireland* [2017] IESC 31. Given that the scheme is promulgated under the authority of and is intended to take effect according to the terms

of CAA 90, the strong presumption must be that the term *contingent creditor* in the scheme is intended to have the same meaning there as in the Act. Indeed, it seems to me to be inconceivable that the Court when it confirmed the scheme intended that any term therein which would bear anything other than its meaning under the governing legislation.

110. A number of the provisions of CAA 90 expressly extend to liabilities to which a company is subject, but which are contingent (in the sense that while not presently due they may upon the happening of a future event become due) or prospective (in the sense that the liabilities will as a matter of certainty become due in the future). Express provision to this end was made in s. 3(1)(c) (in defining the categories of person who may petition for the appointment of an examiner), s.3(3B) (in identifying the liabilities that must be included in the report of the independent accountant required before an examiner will be appointed), s. 19(e) (in specifying the liabilities to be included in the examiner's report to the Court and referring to contingent liabilities) and s. 22(2) (in describing the statement of assets and liabilities to be attached to the proposals submitted to meetings of members and creditors under s. 23 and also referring in that connection to contingent liabilities). The provisions of the Companies Act 1963 in force at the relevant time also made specific provision for contingent and prospective creditors in certain circumstances – s. 215 included such persons within the general definition of a creditor entitled to petition for winding up of a company.

111. While the provisions of CAA 90 dealing with the examiner's proposals and schemes of arrangement (ss. 19, 22, 23 and 24) used the term '*creditor'* without expressly extending it to include '*contingent creditors'*, the Supreme Court has held that where it appears in at least some provisions of the Companies Acts, the term '*creditor'* should be interpreted

as including prospective and contingent creditors even though not expressly so stating (*Re Deauville Communications Worldwide Ltd.* [2002] 2 IR 32). Finlay Geoghegan J. reached the same conclusion when she came to consider the definition of '*creditor'* in CAA 90 in *Re Eylewood Limited and the Companies Acts* [2010] IEHC 57, [2011] 1 ILRM 5.

112. There, one of the questions was whether the term '*creditor'* included, in the context of the formulation of proposals for a scheme of arrangement under the CAA 90, a guarantor with a contingent right of indemnity against a company in respect of which the guarantor had guaranteed its debts to a creditor. Deciding that it did, Finlay Geoghegan J. explained that if this were not the case '*it would set at naught the purposes of the Act'*. Concluding that references to creditors in ss. 19, 22, 23 and 24 of the Act are intended to refer to both contingent and prospective creditors, and noting in particular in that regard the reference to '*contingent liabilities'* in ss.19(1)(e) and 22(2), Finlay Geoghegan J. said that the inclusion of liabilities of the kind in issue in that case in a scheme of arrangement would enable '*the type of certainty which is clearly envisaged by confirmation of a scheme of arrangement'* (at para. 87). In point of fact, this reflects the long-standing approach adopted by the courts to the term '*creditor'* as it appeared in those provisions in earlier iterations of the Companies code providing for the original incarnation of the scheme of arrangement (see *Re Midland Coal, Coke and Iron Company* [1895] 1 Ch. 267 and *Re T&N Ltd.* [2005] EWHC 2870, [2006] 3 All ER 697 at para. 40).

Definition

113. Needless to say, the meaning of the term '*contingent creditor'* where it is referred to in the Companies Acts expressly or by implication must be determined having regard to the

legislative context as a whole. The first comprehensive consideration of the meaning of the term in English law appears in *Winter v. Inland Revenue Commissioners* [1961] 3 All ER 855, where Lord Reid defined a contingent liability as a sum '*which will only become payable if certain things happen'* (at p. 859), with the result that the liability '*may never become an existing legal liability because the event on which it depends may never happen'* (at p. 860). There, the liability was to Revenue in respect of balancing charges by way of recoupment of capital allowances and was contingent on a future sale of the taxpayer's assets. The legal position of the taxpayer was found to be that by applying for and accepting allowances in respect of the assets, it became bound by statute to pay tax under a balancing charge when it ceased to use those assets *provided* the monies it received upon a sale exceeded any expenditure on the assets that was still unallowed and, to that extent, the liability was a contingent one for the purposes of the relevant statutory scheme. This was the case even though the assets might never have been sold, and if they were they might not have realised a price that triggered the liability.

114. While *Winter v. IRC* arose from provisions of the tax code (indeed one of the important conclusions reached by the majority was that a contingent liability could arise under statute as well as contract) the definition was thereafter applied to the Companies Acts in *Re SBA Properties Ltd.* [1967] 2 All ER 615, at p. 618 (winding up by a contingent creditor), and in *Stonegate Securities Ltd. v. Gregory* [1980] 1 Ch. 576 where Buckley LJ. defined the term '*contingent creditor'* as '*a creditor in respect of a debt which will only become due in an event which may or may not occur'* (at p. 579). In *Re William Hockley Ltd.* [1962] 1 WLR 555, Pennycuick J. had suggested a similar formulation in the same context (and indeed this was the test applied by Finlay Geoghegan J. in *Re Eylewood*) :

'*The expression 'contingent creditor' is not defined in the Companies Act 1948, but it must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of a future event or at some future date …'*

115. As I have noted earlier, the trial judge had three reasons for concluding that the State aid liability in issue here was not, at the time of the confirmation of the proposals, a contingent liability. These were based on the judgment of Lord Neuberger in *Nortel* (to which I shall shortly return). There (at para. 77) Lord Neuberger framed the test for an obligation similar to a *contingent liability* as follows :

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

116. Having regard to that test Barrett J. concluded first that the proposition that the actions of the State in imposing an indirect tax put it in any kind of a relationship with AA did not sit comfortably with the State as tax collecting authority. Second, referring to the requirement that there be a real prospect of that liability being incurred he felt that this did not easily fit sit with the notion that levying a tax might result in State aid liability. Third, he felt that it would not be consistent with the legal regime under which the State

aid liability was imposed to conclude that it was a contingent liability. I agree with Barrett J.'s conclusions as to the third of these requirements.

117. However, but for this third requirement it seems me that the essential characteristics of a State aid liability are such as to bring it within the description '*contingent liability'* as that term is ordinarily understood and indeed as it is described in the pre-existing case law. Here, the liability is one which at the time of confirmation of the scheme might have become due on foot of a future event that might or might not have happened (an adverse Commission decision directing recovery) and it derives from a breach of the law which predates the scheme of arrangement.

118. The test formulated by Lord Neuberger should be viewed in the light of the more general statements in the case law to which I have referred and should be applied flexibly in the light of those statements and taking account of the specific context under consideration. Even if one treats what he said literally, while it is true that the liability in issue here does not arise from direct dealings between the recipient of the aid and the State, it is the immediate consequence of a competitive advantage conferred on the recipient by the State through its tax laws. By taking that advantage (and as it happens in this case, by collecting and remitting the tax to the State) AA had put itself in a position where it was as a matter of European Law liable to repay the aid that gave rise to it. This, indeed, is the very reason the CJEU case law holds that a diligent businessman should be able to ascertain the prospect of such a liability in the first place. Thus understood, AA did take '*some step or combination of steps'* which had a distinct legal effect.

119. Moreover, in this case the making by Ryanair of a complaint to the Commission, and the fact that that complaint was at the relevant time under consideration by the Commission

meant that the prospect of an obligation of recovery arising was more than fanciful. This created a vulnerability to the liability, that vulnerability was a consequence of receipt of the State aid, and the fact of the complaint and consideration meant that there was a '*real prospect'* of a liability being incurred.

120. The decision of Costello J. in *O'Rourke* supports that conclusion. There, in 2007 the bankrupt claimed a reduction in his capital gains tax liability on account of a transaction undertaken in 2006. In April 2010, shortly before he was adjudicated a bankrupt, Revenue commenced an audit of the underlying transaction, one of its officers subsequently (and after commencement of the bankruptcy) determining to withdraw the tax advantage pursuant to the anti-avoidance provisions in s.811 of the Taxes Consolidation Act 1997 and to require payment of a surcharge under s.811A. Revenue accepted that the liability for capital gains tax arising from the withdrawal of the tax advantage was a pre-bankruptcy debt. The issue was whether the obligation to pay the surcharge was a pre-adjudication debt for the purposes of s.75 of the Bankruptcy Act and this, in turn, depended on whether it was a contingent liability '*by reason of any obligation incurred by the bankrupt … before the date of adjudication'*.

121. Applying the test suggested by Lord Neuberger in *Nortel*, Costello J. focussed on the fact that the liability for the surcharge arose from the transaction entered into by the taxpayer in 2006 and the reliance by the taxpayer upon that scheme when submitting his capital gains tax return. Further, from the point at which the Revenue Commissioners began their investigation they were in a relationship with the bankrupt the outcome of which was contingent upon *inter alia* the formation of an opinion by the relevant officer under s. 811. Thus, both his actions and those of Revenue before the bankruptcy left the taxpayer vulnerable to a liability to tax under s.811 and to a surcharge under s.811A.

This resulted in a real prospect of a liability to pay the surcharge. Costello J. said (at para. 24) :

> *'The fact that it is a contingent liability and the contingency in question is remote or might never eventuate does not alter the fact that it is a liability that is provable in bankruptcy'*

122. It appears to me that, but for the conclusion I have reached on the issue of EU law to which I have earlier referred, the same logic would apply here. Once AA became subject to the reduced rate of ATT it was in a situation in which, if there was an adverse finding by the Commission under Article 108(3) TFEU, it would face a liability to repay the unlawful State aid it thereby received. This contingency materialised after the confirmation of the scheme of arrangement, but there can be no serious doubt that the potential for the liability pre-dated the scheme, arose from an obligation incurred before the confirmation of the scheme and that, at the very least, upon the making of a complaint by Ryanair and while that complaint was under consideration by the Commission, AA was vulnerable to an adverse finding and recovery decision.

123. In that regard I should say that the requirement suggested by Lord Neuberger that there be a '*real prospect of such liability being incurred'* while correct, must also be approached cautiously. While this requirement is readily applicable to the question of whether, as a matter of fact, there was a reality to the relevant contingencies occurring (see for example *Joint Liquidators of Doonin Plant Co.* [2018] CSOH 29) it can be confusing when pitched against a question such as arises in this case, where the liability depends on a legal assessment undertaken by a third party of a set of facts which, at the time of the relevant event (here the adoption of the scheme of arrangement) were static.

To that extent, the approach adopted by Costello J. in *O'Rourke* is apposite and in my view correct : once AA obtained the benefit of the reduced rate of ATT and (at least) once the Commission was seized of the matter by way of complaint the Court must operate on the basis that there was a real prospect of this liability being imposed, if only because it was eventually imposed pursuant to a decision which must be presumed to have been lawful and valid. Indeed, it is for a not dissimilar reason that Lord Sumption in *Nortel* decided that earlier cases holding that a liability for costs in proceedings that had been instituted at the relevant time were not a contingent liability, were wrongly decided. The order for costs, he said, is made against someone who is subject to a scheme of rules under which that was a contingent outcome (at para. 136).

Statutory contingent liabilities

124. In all of the company law cases, the liability alleged to be contingent derived from the private law contractual obligations of the company in question to the alleged creditor. *Winter* was different, in that the obligation derived from statute. While the Court in *Winter* did not conduct an analysis of the statutory regime giving rise to the liability in issue there, in the extract from his judgment in *Nortel* to which I have earlier referred, Lord Neuberger said that in determining whether an obligation was akin to a contingent liability regard must also be had to the legislative scheme under which the liability arose.

125. There, the Court was concerned not with the meaning in a statute of the term '*contingent liability'* but with whether a sum due under statute was a '*debt or liability to which the company may become subject'* after the commencement of an insolvency procedure in the United Kingdom similar to examinership. In order to come within this definition, the debt or liability had to be '*by reason of any obligation incurred before that date'*.

However, Lord Neuberger was of the view that the issue of whether a liability was contingent and the inquiry in that case were '*closely related'*, so that his consideration of the latter is apt to an analysis of the former (see para. 81 of his judgment).

126. In *Nortel* the issue arose from notices served on a company pursuant to the provisions of pensions legislation, the effect of which was to require the company to pay contributions to the pensions of employees of other entities. The notices were served *after* the commencement of the administration but, on the basis of the threefold test derived in part from *Winter v. IRC* and the company law cases to which I have referred, were held referable to an obligation arising before the commencement of the insolvency procedure. The first and second of the criteria identified by Lord Neuberger were present because the statutory criteria for issuing such a notice were met in the case of the company in question as it was a member of a group of companies which included either a service company with a pension scheme or an insufficiently resourced company with a pension scheme.

127. The third limb required consideration not merely of the legislation enabling the imposition of the liability, but also the relationship it bore to the legislation in which the reference to a contingent liability (or allied concept) appeared. In *Nortel*, the question presented itself because of the order of priorities within the administration – if the liability was *not* an obligation of the kind in question the effect would be that it took priority over the general body of unsecured creditors but if it *was* such an obligation it would fall to be treated *parri passu* with them. An examination of the relevant pensions legislation (at paras. 58 to 63) led to the conclusion that there was no particular reason that the rights of pension scheme trustees should result in an obligation which would have any greater or

lesser priority than the rights of any other unsecured creditor. Moreover, were it to be concluded that they did enjoy greater priority, this would result in anomalies with such debts being treated differently depending on whether the notices giving rise to them were served before the insolvency event (in which case it was clear that they did come within the relevant definition and would rank *parri passu*) or afterwards (in which case, if they were not within that definition they would take priority). There was no reason for creation of that distinction which would moreover grant the regulator issuing the direction a '*significantly valuable and somewhat arbitrary power'* (at para. 61).

Is the State aid liability 'contingent' within the meaning of CAA 90 ?

128. While it was suggested in the course of argument in this case that the third component of Lord Neuberger's test was in the nature of a '*sense check'* and while it was questioned whether it should be part of the analysis at all, in my view it is both important and unexceptional. Where a liability arises pursuant to a particular legal regime the question of whether that liability is properly viewed as '*contingent'* for the purposes of distinct legislation of more general application is unavoidably dependant on the purpose and context of both statutes. That question arises in this case with particular force. The EU provision must prevail to the extent that if the legislation operates in a manner that is inconsistent with the obligations of the State under Article 108 TFEU it must be either interpreted so that it conforms with EU law or, if this cannot be done, it must be disapplied. This is clear from the case law to which I have referred. That conclusion is not affected by the decision in *Impact* [2008] ECR I-2483 (upon which AA relied) and which was concerned with the proper interpretation of legislation implementing a Directive.

129. However, I do not think it necessary to disapply the legislation so as to obtain that outcome. Rather, it follows from the proper the interpretation of the term '*contingent creditor'* as impliedly wound into the term '*creditor'* as it appears in ss. 19, 22, 23 and 24. The fact that the State cannot compromise an obligation to recover State aid as part of a corporate insolvency procedure points strongly to the conclusion that, even if otherwise enjoying the indicia of a contingent liability, a potential obligation to recover State aid could not in a manner consistent with TFEU Article 108 and Article 14 of the Procedural Regulation come within the definition of '*contingent creditor'* as it is read into the term '*creditor'* in (at least) ss. 19, 22, 23 and 24 of that Act. To conclude otherwise is to ignore a central feature of the legal source of the liability.

130. The sole concern of the State – the law makes clear – is to either recover the aid with interest or to liquidate the company. The companies code allows it to achieve those objectives once a Commission decision issues requiring recovery of unlawful State aid as the State is, at that point, a creditor of the company in respect of that aid and is free to petition for winding up or prove in the liquidation accordingly. However, if the legal basis for the State aid liability (the EU provisions to which I have referred) *prevents* the State from agreeing to reduce that liability, then it must follow that the provisions which enable that reduction to take effect (and indeed allow such a reduction to be forced on the creditors) do not apply to that liability. The obvious mechanism by which that objective is achieved is the exclusion of the liability from the concept of *contingent creditor* as it has been held to be embraced by these provisions. That this can be achieved without doing violence to the language of the sections follows from the third part of Lord Neuberger's test : it is entirely inconsistent with the provisions enabling imposition of the liability for it to be '*contingent'* within the deemed meaning of these sections. I thus

agree with Mr. Toland SC for the State as he put the matter in the course of his oral submissions : the third step in *Nortel* is not met by reason of the different and inconsistent nature of the EU State aid regime as compared with the examinership regime under Irish law.

131. This is primarily because of the legal regime that gives rise to the liability in the first place – Article 108 TFEU and Article 14 of the Procedural Regulation. However, it also follows from the intent and purpose of CAA 90. The object of that Act is to enable the survival of an insolvent company *via* an arrangement in which the claims of at least some of the creditors will be impaired. The process will often be driven by their realisation that they may recover more from the company if it survives than they could expect to obtain if it is wound up. It is hard to see how it can be that the State, which is prevented by law from compromising an actual or potential State aid liability and which has thus no interest in making the calculation whether it will secure more from survival than from liquidation has any role to play arising from that liability in the procedures put in place by those provisions dealing with the examiner's proposals.

132. In that regard, AA strongly argued that the exclusion of an uncrystallised State aid liability from the examiner's report (s.19) or proposals (s.22) would greatly undermine the examinership procedure, as neither the examiner, the other creditors, any relevant investors or the Court would in fact have a complete picture of the company's financial position and all would be operating in a context in which any investment made, any write down of debt accepted, or any approval of the scheme effected would be subject to the prospect that the State would emerge as a creditor at a later stage. That, it was said, would significantly compromise the finality the process was intended to achieve. The examiner, Mr. McAteer, put the matter thus in his witness statement :

> *'If the Court were to accede to the Plaintiff's claims in these proceedings, I have absolutely no doubt that the potential impact on future Examinerships will be absolutely enormous. The possibility that any claim, whether deriving from an EU State Aid repayment obligation or otherwise, applicable to a pre-Examinership period, might be capable of surviving the Examinership and being brought subsequently against the Company will utterly destroy the guarantee which investors require as a pre-condition of their investing into companies in Examinership.'*

133. This, he explained in his statement, would '*render it extremely difficult, if not impossible, to source investors to rescue companies in future Examinerships, and would thus effectively render it impossible for Examinerships to succeed in the future'.* A decision adverse to AA in this case, he said, would render '*the prospects for the success of future Examinerships … very poor indeed.'*

134. While these arguments can be (and in this case were) forcefully and convincingly presented, they are ultimately *nihil ad rem*. This – rightly or wrongly – is the conclusion mandated by EU law and if not achieved by this interpretation of the legislation, must be obtained by its disapplication. I have already observed the tension between the enforcement of this aspect of competition law, and the policy of rescuing ailing enterprises. However, I do not think that the fact that classifying a possible State aid liability as *'contingent'* would result in that liability being brought to the attention of all involved justifies the conclusion that it must be thus categorised.

135. First, the legal principles formulated by CJEU proceed on the basis that those involved in an enterprise in receipt of aid should be in a position to appreciate the attendant risk.

In this case it will be observed that Ryanair quite rapidly reached the conclusion that the differential tax rates did comprise State aid requiring notification and, of course, that was an assessment with which the Commission and the CJEU ultimately agreed. Ryanair publicised its opinion in that regard a year and half before the examinership began. This case proceeded on the basis of evidence that neither the company, the investors nor the examiner were aware of the potential for that liability, just as it proceeded on the basis that while the State was aware of the complaint the agents of the Revenue Commissioners involved in the examinership were not. However, it is not self-evidently unreasonable that the relevant rules should operate on the basis that the risk of such a liability is capable of being identified and, if so identified, there is no reason why the examinership process or those involved in it, should proceed ignorant of that risk. If such a risk *is* identified, it cannot be affected one way or another by the examinership process although, clearly, it may impact upon the attitude the interested parties have to that procedure.

136. Second, no concluded examinership or scheme of arrangement provides an assurance that past acts of the company will never transpire as liabilities in the future. As was observed in the due diligence report prepared for the Stobart Group in the course of the examinership (and exhibited in the witness statement of Mr. Whawell) there remains '*a great deal of increased risk in comparison to traditional corporate transactions still involving solvent asset sellers and the commercial terms (including price) therefore need to reflect the increased risk arising from purchasing from an examiner'.* Those risks include the fact that it is not possible to obtain contractual comfort about the accuracy of the due diligence information provided, and (as also noted in that report) the traditional form warranties one might expect to obtain from the seller of a solvent business or company are not provided by examiners. The fact that the legislation extends to contingent creditors will provide a considerable degree of comfort in respect of

obligations that have arisen prior to the insolvency event, but no matter how broadly that term is defined, it has its own limitations.

137. The test for whether a liability is contingent has built into it the requirement that the prospect of a liability being incurred is '*real'.* A liability the prospect of which is not '*real'* at the time of the confirmation but which nonetheless eventuates, is excluded. While I have explained that that requirement must be approached with caution, it will inevitably exclude from a scheme of arrangement some liabilities arising from pre-examinership events. To take an example cited by David Richards J. in *Re T&N Ltd.,* (at para. 67) while a company that negligently manufactures a product that causes damage to a third party before the appointment of an examiner may have a contingent liability to that third party, the same negligent manufacture could cause damage years later to a person who, at the time of the examinership, has neither acquired or used the product. In that situation the proposition that the victims are as of the confirmation hearing contingent creditors of the company would (without conclusively deciding the issue here) be challenging. In some such cases the prospect of damage ever arising (and therefore a liability occurring) may well be said not to be '*real'* and the absence of any relationship between the company and the victim at the time of the confirmation hearing would appear to remove the claim from the first of the *Nortel* requirements. That consequence may be reduced by the due diligence undertaken and it may be mitigated by the price paid, or indeed by appropriate insurance. But the very fact that it exists means that there is not and cannot be absolute certainty.

138. It follows that I cannot accept the dire consequences for the examinership process predicted by AA and its witnesses if the position adopted by the State in these

proceedings is found correct (as it is). EU law operates on the basis that it should be possible for those involved in a business to ascertain with reasonable diligence if a company has operated in a zone in which the prospect of a State aid liability might arise (whether by reason of the nature of the business it conducts, grants or financial assistance it has received from the State, or the taxation regime to which it has been subject) and it is not difficult to conceive of a process of due diligence taking account of these matters or indeed raising straightforward queries of the relevant State authorities.

V CONCLUSION

139. Therefore, it is my view the trial Judge was correct in the conclusion he reached and that he did so for reasons with which, generally, I agree. A direction to recover unlawful State aid arising from a Commission decision under Article 108 TFEU and Article 14 of the Procedural Regulation is mandatory. In this case, for the reasons summarised by me at paragraph 106 of this judgment, that obligation is not displaced by the principle of legal certainty. It follows that while an uncrystallised liability for unlawful State aid may present some of the indicia of a '*contingent liability'*, and may be such a liability for the purposes of some legislative regimes, the provisions of ss. 19, 22, 23 and 24 CAA 90 must be interpreted in such a manner that the State is not, prior to a Commission decision directing recovery of unlawful State aid, a '*contingent creditor'* in respect of that aid for the purposes of these provisions. The position in this regard is, as a matter of EU law, clear and I see no basis for a reference to CJEU.

140. The State having prevailed on both issues in this appeal has been entirely successful within the meaning of s. 169 of the Legal Services Regulation Act 2015 and in normal

circumstances would be entitled to its costs. If AA wishes to contend that there are circumstances which justify the disapplication of that principle it should advise the Court within seven days of this judgment, whereupon the Court will fix a further hearing to address the issue of costs.