Neutral Citation [2015] IEHC 500

THE HIGH COURT

[2015/224COS]
[2015/60/COM]

IN THE MATTER OF
PERMANENT TSB GROUP HOLDINGS PLC
AND
IN THE MATTER OF
THE PROPOSED CAPITAL REDUCTION PURSUANT TO SECTIONS 72 AND 74 OF THE COMPANIES ACT 1963
AND
IN THE MATTER OF
THE COMPANIES ACT 1963–2013

BETWEEN/

PERMANENT TSB GROUP HOLDINGS PLC

Petitioner

AND
PADRAIG McMANUS, GERARD DOWLING AND PIOTR SKOCZYLAS

Notice Parties

JUDGMENT of Mr Justice Max Barrett delivered on 28th July, 2015.

PART I

INTRODUCTION

1. By petition dated 29th May, 2015, Permanent TSB Group Holdings plc (the "Company") sought an order of the High Court confirming a cancellation and reduction of the amount of €1,490m standing to the credit of the Company's share premium account. The application was heard last Wednesday. The court indicated at the end of that hearing that it considered the legal criteria for the issuance of the confirmation were satisfied and made the requisite orders. It indicated too that it would give written reasons for its conclusions at a later stage. These are set out below.

PART II

BACKGROUND FACTS

2. As mentioned, the Company came to court seeking an order confirming the cancellation and reduction of the amount standing to the credit of the Company's share premium account. The application was brought pursuant to s.72 of the Companies Act, 1963. A change in legislation meant that the orders made last Wednesday fell to be issued under s.85 of the Companies Act, 2014.

3. At the time of the swearing of the grounding affidavit, the share premium stood at €1,817,163,780. It had been €1,491,688,408 at the date of the passing resolution to which the petition relates. The proposed capital reduction, as approved by the court, created reserves that can be used to reduce the negative reserve on the Company's balance sheet, as set out in the Company's most recent audited financial statements as at 31st December, 2014 (the "Audited Balance Sheet Date"). As at the Audited Balance Sheet Date, the Company's audited balance sheet indicated a negative reserve in the amount of €1,622m. The unaudited balance sheet prepared as of 31st March last included a negative reserve in the same amount. The confirmation of the proposed capital reduction by the court has the result that there will now remain a negative balance sheet reserve of approximately €132m.

4. The Company is a holding company for Permanent TSB plc (the "Bank") and its subsidiaries (together the "Group"). The Company sought confirmation of the proposed capital reduction in the context of the Group's Capital Raise programme which has been undertaken to meet various regulatory requirements. The additional capital was required by the Group as a result of 'stress testing' undertaken by the European Central Bank ("ECB") as part of the Single Supervisory Mechanism Comprehensive Assessment ("SSMCA") and also in the context of the capital plans submitted by the Group to the ECB (the "Capital Plan"), and a restructuring plan for the Group which was submitted by the Department of Finance to, and approved by, the European Commission (the "Restructuring Plan").

5. The reduction of the Company's negative reserves is seen by the Company and its financial advisors as a fundamental element of the Capital Package. In addition, the proposed capital reduction and the consequent reduction of the Company's negative reserve is viewed as being of central importance by investors under the Capital Package following the passing by those shareholders of the special resolution to which the petition before the court related (the "Reduction Resolution"), as passed at the Company's most recent AGM on 8th April last.

6. The key features of the proposed capital reduction were as follows. First, the Company is not a trading company and has no trade creditors. Its total liabilities were only €3m as at the Audited Balance Sheet Date, all of which was owed to the Bank. Second, in essence, the Company sought confirmation of the proposed capital reduction to reorganise its balance sheet by way of a reduction of its share premium account which has had the effect of reducing, but not eliminating, accumulated negative reserves arising in the Company due to impairments in the books and accounts of the Company of the carrying value of the Bank. These impairments arose due to historical trading losses of the bank brought about as a result of the negative impact of the recent financial crises on banks in Ireland. Third, the proposed capital reduction was therefore an adjustment of accounting entries within the Company to reflect historic losses at the Bank. Fourth, at the AGM 99.95% of the Company's ordinary shares which were voted were voted in favour of the Reduction Resolution, with only 0.05% of the votes voting against. Fifth, the proposed capital reduction, as confirmed, has been in no way prejudicial to any shareholder. On the contrary, by reducing the company's negative reserves, the Company is seeking, to the maximum extent possible, to allow all shareholders, new and existing, to participate in future profits generated after a €402m placing and open offer which completed in May 2015 (the "May Equity Raise") and also to minimise the restrictions on the distribution of those future profits due to historic losses that arose before the May Equity Raise.

7. The Notice Parties objected, unsuccessfully, to the proposed capital reduction for the reasons identified hereafter. They were joined in their objections by Mr Keohane and Mr Neugebauer who adopted the Notice Parties' arguments and also sought various reliefs akin to those sought by the Notice Parties and adjudicated upon by the court in respect of the Notice Parties in its judgment in *Permanent TSB Group Holdings plc v McManus and ors* (Unreported, High Court, (Barrett J.) 13th July, 2015).

PART III

SOME APPLICABLE LEGISLATION

i. The Companies Act, 1963.

8. Making something of a last farewell in the within proceedings are certain provisions of the Act of 1963. They are relevant because the within petition was commenced before the new Companies Act, 2014, came into force.

9. Section 72 of the Act of 1963, before its recent repeal, provided as follows:

> *"(1) Except in so far as this Act expressly permits, it shall not be lawful for a company limited by shares or a company limited by guarantee and having a share capital…to reduce its share capital in any way.*
>
> *(2) Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles by special resolution reduce its share capital in any way and, in particular, without prejudice to the generality of the foregoing power, may –*
>
> > *(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or*
> >
> > *(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by available assets; or*
> >
> > *(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company;*
>
> *and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.*
>
> *(3) A special resolution under this section is, in this Act, referred to as 'a resolution for reducing share capital."*

10. Applications to court for orders confirming capital reductions and for objections by creditors appeared in s.73 of the Act of 1963 which, before its recent repeal, provided as follows:

> *"(1) Where a company has passed a resolution for reducing share capital, it may apply to the court for an order confirming the reduction.*
>
> *(2) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital, and in any other case if the court so directs, the following provisions shall have effect, subject nevertheless to subsection (3):*
>
> *(a) in the case of a public limited company –*
>
> > *(i) every creditor of the company who –*
> > > *(I) at the date fixed by the court, is entitled to a debt or claim that, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, and*
> > >
> > > *(II) can credibly demonstrate that the proposed reduction in the share capital would be likely to put the satisfaction of that debt or claim at risk, and that no adequate safeguards have been obtained from the company, is entitled to object to the reduction, and*
> >
> > *(ii) the court shall settle a list of creditors entitled to object, and for that purpose may publish notices fixing a day or days within which creditors are to claim to be entered on the list or are to be excluded from the right of objecting to the reduction of capital;*
>
> *(b) in the case of any other company –*
>
> > *(i) every creditor of the company who, at the date fixed by the court, is entitled to any debt or claim that, if that date were the commencement of the winding up of the company, would be admissible in proof against the company is entitled to object to the reduction;*
> >
> > *(ii) the court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction;*
>
> *(c) in either case, where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the court may direct, the following amount:-*
>
> > *(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;*
> >
> > *(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or, if the amount is contingent or not ascertained, then an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.*
>
> *(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital, the court may, if having regard to any special*

circumstances of the case, it thinks proper so to do, direct that subsection (2) shall not apply as regards any class or any classes of creditors."

ii. The Companies Act 2014.

11. Sections 72 and 73 have been replaced, effective 1st June, 2015, by ss.84 and 85 of the Act of 2014. So far as relevant, these provide as follows:

"84.- (1) Save to the extent that its constitution otherwise provides, a company may, subject to the provisions of this section and sections 85 to 87, reduce its company capital in any way it thinks expedient and, without prejudice to the generality of the foregoing, may thereby –

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up company capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up company capital which is in excess of the wants of the company.

(2) A reduction of company capital under this section shall be effected either by the company –

(a) employing the Summary Approval Procedure; or

(b) passing a special resolution that is confirmed by the court.

(3) Where the reduction has been approved by the Summary Approval Procedure, the reduction shall take effect –

(a) if no date is specified in that behalf in the special resolution referred to in section 202(1)(a)(i), on the expiry of 12 months after the date of the passing of the special resolution; or

(b) if such a date is so specified, on that date.

(4) A company shall not purport to reduce its company capital otherwise than as provided for by this section.

…

85.- (1) Where a company has passed a special resolution under section 84(2)(b) for reducing its company capital it may apply to the court for an order confirming the resolution.

(2) A company which proposes to apply to the court for such an order shall cause notice of the passing of the resolution –

(a) to be advertised once at least in one daily newspaper circulating in the district where the registered office or principal place of business of the company is situated; and

(b) to be notified by ordinary post to all creditors of the company who are resident, or have their principal place of business, outside, the State,

and no further advertisement of the passing of the resolution shall be required.

(3) In determining any preliminary application for directions as to the hearing of an application under this section, the court shall have regard to compliance by the company with the requirements of subsection (2).

(4) Where the proposed reduction of the company's company capital involves either diminution of liability in respect of unpaid company capital, or the payment to any shareholder of any paid up company capital, and in any other case if the court so directs, the following provisions shall have effect (but subject to subsection (5)) –

(a) every creditor of the company who –

(i) at the date fixed by the court is entitled to a debt or claim that, if that date were the commencement of the winding up of the company, would be admissible in proof against the company; and

(ii) can credibly demonstrate that the proposed reduction in company capital would be likely to put the satisfaction of that debt or claim at risk, and that no adequate safeguards have been obtained from the company, is entitled to object to the reduction,

(b) the court shall settle a list of creditors entitled to object, and for that purpose may publish notices fixing a day or days within which creditors are to claim to be entered on the list or are to be excluded from the right of objecting to the reduction of company capital, and

(c) where a creditor entered on the list whose debt or claim is not discharged or has not terminated does not consent

to the confirmation, the court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his or her debt or claim by appropriating, as the court may direct, the following amount –

(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or, if the amount is contingent or not ascertained, then an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.

(5) Where a proposed reduction of company capital involves either the diminution of any liability in respect of unpaid company capital or the payment to any shareholder of any paid up company capital, the court may, if having regard to any special circumstances of the case, it thinks proper so to do, direct that subsection (4) shall not apply as regards any class or classes of creditors.

(6) If satisfied that the following requirement is satisfied, the court may make an order confirming the resolution on such terms and conditions as it thinks fit.

(7) That requirement is that, in relation to every creditor of the company who, under this section is entitled to object to the confirmation, either –

(a) the creditor's consent to the confirmation has been obtained, or

(b) the creditor's debt or claim has been discharged or has terminated, or has been secured.

(8) Where the court makes an order confirming the resolution, it may make an order requiring the company to publish, as the court directs, the reasons for reduction of its company capital or such other information in regard thereto as the court may think expedient, with a view to giving proper information to the public, and if the court thinks fit, the causes which led to that reduction.

(9) References in this section to a debt or claim having terminated are references to the debt or claim ceasing to be enforceable or to its otherwise determining.

12. Notably, the Company is a public limited company. In this respect, regard must be had also to s.1084 of the Act of 2014; this, in addition to the above requirements, provides that *"A PLC may not reduce its company capital below the authorised minimum and section 84 shall be read accordingly."* Happily, in the present case the "*company capital*" has exceeded the authorised minimum at all times, *i.e.* before and after the proposed capital reduction.

iii. Share Premium.

a. The Act of 1963

13. The petition sought the reduction of the share premium. The need to recognise share premium arose from s.62 of the Act of 1963. Prior to its recent repeal, this provided as follows:

"(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called the 'share premium account', and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section and section 207(2) of the Companies Act, 1990, apply as if the share premium account were paid up share capital of the company.

(2) The share premium account may, notwithstanding anything in subsection (1) be applied by the company in paying up unissued shares of the company (other than redeemable…shares) to be allotted to members of the company as fully paid bonus shares, in writing off

(a) the preliminary expenses of the company, or

(b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

or in providing for the premium payable on any redemption of any redeemable preference shares in pursuance of section 220 of the Companies Act, 1990, or of any debentures of the company.

(3) Where a company has before the operative date issued any shares at a premium, this section shall apply as if the shares had been issued after the operative date, so however that any part of the premiums which has been so applied that it does not at the operative date form an identifiable part of the company's reserves within the meaning of the Sixth Schedule shall be disregarded in determining the sum to be included in the share premium account."

14. Before the adoption of s.62, there was no statutory provision preventing the distribution of share premiums as dividends. Following the adoption of s.62, share premium was assimilated into the capital protection regime.

15. It is clear from the judgment of Lord Wright in *Lowry v. Consolidated African Selection Trust* [1940] A.C. 648 that directors are normally under an obligation to obtain a premium if they can; they can, of course, issue shares at par but their duty to the company is not to do so unless for good reason. *Lowry* was a case in which there was an employee share allotment at face value; if the shares had been issued in the market they would have issued at a significant premium. The company sought to deduct the full value for

income tax purposes. The House of Lords held that as the company had transferred neither money nor money's worth, the full market value of the shares could not be treated as a disbursement or expense for tax purposes. In the course of his speech, Lord Wright noted as follows, at p.679:

> *"The power to issue further capital is only a potentiality. But the fact of issue makes it actual capital, and creates the fasciculus [fibre] of rights and liabilities between the company and the shareholder which flow from the share when issued. If the share stands at a premium, the directors prima facie owe a duty to the company to obtain for it the full value which they are able to get. It is true that it is within their powers under the Companies Acts to issue it at par, even in such a case, but their duty to the company is not to do so unless for good reason."*

16. Given that the *prima facie* duty is to obtain full value, a prudent board would, as a matter of good corporate governance, likely seek to minute expressly any decision by the board to issue at par value a share that stands at a premium.

17. That s.62 was ever enacted stems ultimately from a recommendation in the Cohen Report that issued in the United Kingdom in 1945. (See *Report of the Committee on Company Law Amendment* (1945) Cm 6659). In section 108 of the Cohen Report, it was stated that share premium was in essence capital, and it was noted that there was no legal obligation, apart from any provision in a company's articles, to prevent the distribution thereof by way of dividend. This, in the view of the Committee, was undesirable. So the recommendation was made that a section be added to the then corpus of United Kingdom company law that the provisions of same relating to the reduction of share capital should apply to any premiums received on the issuance of shares of a company as if the share premium were paid-up share capital. This led to the enactment s.72 of the United Kingdom's Companies Act 1947, and, following a recodification of United Kingdom company law, the enactment of s.56 of the United Kingdom's Companies Act 1948. A decade-and-a-half later, Ireland followed suit with its enactment of s.62 of the Act of 1963. Following the enactment of s.62, a reduction on share capital required confirmation of the court under s.72 of the Act of 1963; this confirmation is now required under s.84 of the Act of 2014.

18. The court notes in passing that, subject to such conditions as may be laid down by the court, and notwithstanding the *fons et origio* of s.62, it remains possible to convert share premium into distributable profit. The court, via s.72 (now s.84) is a bulwark against potential for abuse. In this regard, the court notes, by way of example, that in *Quayle Monro Limited* [1994] 1 BCLC 410, the Scottish Court of Session approved the cancellation of the share premium account and the transfer of an amount to a special reserve which could in turn be transferred to the profit and loss account to meet future losses, subject to the (significant) proviso that all creditors at the date of the cancellation of the share premium of the share premium account had been satisfied and that there remained within the special reserve sufficient funds to cover the capital repayable on the company's issued preference shares. In effect, therefore, subject to the conditions laid down by the court, the share premium was converted into distributable profit. Per Lord Hope, at pp.413-414 of his judgment:

> *"[W]e see no reason to doubt that the funds held in the special reserve which it is proposed to create may be treated by the company as profits available for distribution, and thus as distributable profits….*
>
> *The point which has troubled the reporter is whether it is appropriate to give this treatment to funds which have been released from the statutory share premium account. He does not doubt that when the funds have been released from the share premium account by virtue of the order of the court they may be treated as realised profits....Nor does he question the position which obtained prior to the coming into effect of s72 of the Companies Act 1947…for the application of share premiums to a share premium account. Before the coming into operation of that legislation, premiums received on the issue of shares were available to be treated as profits and distributed by way of dividend and thus to be treated as profits of the company irrespective of the state of its profit and loss account. His point is that it may not be appropriate to look to the common law position in this matter in view of the detailed provisions [of statute law]….*
>
> *We do not share the reporter's difficulty on this point….The statutory restrictions which apply to the share premium account prevent sums held at credit of that account from being distributed as distributable profits of the company. But once they have been released from the share premium account following upon its cancellation, they are available to be distributed, in accordance with the principles described in* Drown v. Gaumont British Picture Corp *[1937] Ch 402, as profits distributable by way of dividend….In our opinion, therefore, once the statutory requirements for the cancellation of share premium account have been satisfied, the funds transferred to the special reserve will be available for all purposes to which distributable profits may be applied…".*

b. The Act of 2014.

19. The Act of 2014 continues the treatment of share premium as a protected capital reserve. Thus s.71(5) of the Act of 2014 provides as follows:

> *"Subject to sections 72, 73 and 75, any value received in respect of the allotment of a share in excess of its nominal value shall be credited to and form part of the undenominated capital of the company and, for that purpose, shall be transferred to an account which shall be known, and in this Act is referred to, as the 'share premium account'."*

20. Pursuant to s.64(1) of the Act of 2014, the share premium forms part of the "*company capital*", with (as was noted above) s.84 of the Act preventing the reduction of "*company capital*" except by the adoption, where applicable, of the Summary Approval Procedure or, in the alternative, by the confirmation by the High Court of a special resolution of the company. The terms "*undenominated capital*" and "*company capital*" are defined in s.64 of the Act of 2014.

PART IV

AN ASIDE ON SOME PROCEDURAL ISSUES

i. Introduction.

21. The Notice Parties contend that the Company has failed to comply with s.85(2) of the Act of 2014 and so no confirmation can now issue in the within proceedings. To understand the issue arising, it is necessary to consider s.85 and certain issues of timing a little further. Thus s.85(2) and (3) of the Act of 2014 provide as follows:

> *"(2) A company which proposes to apply to the court for such an order shall cause notice of the passing of the*

resolution –

> *(a) to be advertised once at least in one daily newspaper circulating in the district where the registered office or principal place of business of the company is situated; and*
>
> *(b) to be notified by ordinary post to all creditors of the company who are resident, or have their principal place of business, outside the State,*

and no further advertisement of the passing of the resolution shall be required.

(3) In determining any preliminary application for directions as to the hearing of an application under this section, the court shall have regard to compliance by the company with the requirements of subsection (2)."

22. By way of general observation, before exploring matters in more detail, the court would make the following general observations as to why the reliance by the Notice Parties on s.85(2) appears to it to have been misplaced.

23. First, the petition that came before the court was presented before the coming into force of the Act of 2014. It would be a nonsense to read s.85(2) as meaning that petitions duly presented to the court prior to the commencement date of 1st June 2015 became infirm by virtue of a failure to comply with an obligation which did not exist before that date.

24. Second, s.85(3) of the Act of 2014 makes clear that non-compliance with s.85(2) is merely a matter to be considered by the court in setting the directions for a confirmation; imperfect compliance does not have the necessary consequence that a particular procedure or steps taken thereafter are necessarily invalid. To borrow from Oliver Wendell Holmes, the life of the law has not been logic, it has been experience; the law cannot be dealt with as if it contains only the axioms and corollaries of a book of mathematics. Experience teaches that perfection is rarely to be found; and the courts are ever, and rightly, cognisant of this experiential reality.

25. Third, it is clear that s.85(2) is primarily intended to alert creditors of the passing of a resolution and the intention to apply for confirmation of the resolution; it is not intended for members who have been notified of the proposal to adopt the resolution and who were or could have been present at the meeting which adopted the resolution containing the detail of what was intended.

26. Fourth, the court notes in passing that there is an element of 'in-built' non-compliance that seems almost necessarily to be engendered by s.85(2)(b). By this the court means the following: creditors move and the post fails. So, it must be the case that the law expects good-faith, substantive compliance with this requirement and not demonstrable proof that every single creditor to whom a letter was sent continued to reside at the relevant address and in fact received the letter sent. *Lex non cogit ad impossibilia*. The law does not compel the doing of impossibilities.

ii. The commencement of the Act of 2014.

27. The petition underpinning the within proceedings was presented to the Central Office on 29th May, 2015, *i.e.* prior to the coming into effect of s.85(2) of the Act of 2014. So it is clear that any obligation arising under s.85(2) does not apply to the present proceedings.

28. The Act of 2014 came into effect, for all material purposes in relation to these proceedings, on 1st June, 2015. (Cf. the Companies Act 2014 (Commencement) Order 2015 (S.I. No. 169 of 2015)). The provisions in respect of the repeal of the previous corpus of companies legislation, and the transitional regime to apply between the old and the new, are found in ss.4 and 5 of the Act of 2014, along with the Sixth Schedule thereto. Notably, s.4(1) of the Act of 2014 repeals, *inter alia,* ss.72 to 77 of the Act of 1963.

29. With regard to the Sixth Schedule, paras.1 and 8(1) of same are of particular note in the within context, providing as follows:

> *"1. The continuity of the operation of the law relating to companies shall not be affected by the substitution of this Act for the prior Companies Acts…*
>
> *8.(1) Any thing commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act."*

30. Paragraph 8.(1) applied in the circumstances that presented before the court at the hearing of the within petition in that the petition presented on 29th May "*was a thing commenced under the provision of the prior Companies Acts before the repeal by this Act"* and it "*was not completed before that repeal*". Notably, para.8.(1) is permissive, rather than mandatory. Thus it provides that the "*thing*", here the petition, "*may be*" continued/completed under the corresponding provision of the Act of 2014. Thus para.8.(1) of the Sixth Schedule to the Act of 2014, which is without prejudice to s.27 of the Interpretation Act 2005 (considered below), has the effect that the petition commenced under s.72 of the Act of 1963 could be continued under the corresponding provision of the Act of 2014, i.e. s.85.

31. Returning to the main body of the Act of 2014, s.5(8) provides that s.5 is without prejudice, *inter alia*, to the generality of the Interpretation Act 2005 and, in particular, s.27 thereof. Section 27 of the Act of 2005 states as follows:

> *"(1) Where an enactment is repealed, the repeal does not –*
>
> *(a) revive anything not in force or not existing immediately before the repeal,*
>
> *(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or*
>
> *(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.*

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

32. In effect, s.27 copper-fastens the Company's position under para.8(1) of the Sixth Schedule.

33. Thus, at the risk of repeating itself, the court notes that by reason of the manner in which it is drafted, s.85(2) of the Act of 2014 cannot apply to the petition. No obligation existed prior to 1st June, 2015 for the advertisement of the passage of a resolution and/or the intention to apply for a sanction of the court, nor did any obligation exist for the sending of letters to any creditor by ordinary prepaid post. As at 1st June, the petition stood presented and was capable of being continued and completed under the corresponding provisions of the Act of 2014. This is what occurred on the hearing of the motion for directions pursuant to that petition. The petition, having been duly presented, directions were given under applicable rules of court as to the appropriate steps to be taken. The imposition of a fresh obligation or burden of advertisement prior to presentation *ex hypothesi* cannot apply in the present case. For the Notice Parties to contend otherwise runs contrary to (a) the continuity of the operation of the company law code, as recognised by para.1 of the Sixth Schedule to the Act of 2014, and (b) the spirit and letter of s.27 of the Interpretation Act 2005.

iii. The focus of s.85(2).
34. By way of separate and supplementary observation to the foregoing, the court considers that, as mentioned elsewhere above, the Notice Parties have misconstrued s.85(2) of the Act of 2014 and its purpose. The purpose of s.85(2) of the Act of 2014 is to give creditors notice of the passing of a capital reduction resolution. In that regard, it is creditors who are required to be notified by ordinary pre-paid post and it follows that it is creditors who are to be made aware of the passing of the resolution by the advertisement in at least one daily newspaper circulating in the district where the registered office of the relevant company is situate.

35. That it is creditors who fall to be given notice of the passage of the resolution makes perfect sense. Members will have received notice of the proposal of the capital reduction resolution in the normal way, in that a special resolution under s.84 of the Act of 2014 will require the prior notification of all members of the meeting and the resolution proposed. In the present case, the Notice Parties were made aware of the intention of the Company to pass the Reduction Resolution by means of circular and had the right to attend and participate at the meeting so convened. Creditors, of course, do not have the same privileged information in relation to the operation of a company. Thus while it is open to shareholders to point to any, if any non-compliance with s.85(2), that provision is not in truth aimed at their protection, and thus they cannot themselves claim to have suffered adverse consequences by virtue of any such non-compliance.

iv. Section 85(3) of the Act of 2014.
36. It is clear from s.85(3) of the Act of 2014 that any failure of compliance with s.85(2) is a matter which does not invalidate the procedure followed. Any such failure merely informs the court with regard to the manner in which directions are to be given as to the conduct and/or hearing of the petition. In the present case, the court (McGovern J.), in an order of 8th June, determined that any party seeking to appear at the court hearing to which this judgment relates had three weeks from the giving of directions within which to file notice of intention to appear and any evidence, by way of Affidavit, on which it was intended to rely. Thereafter such parties had the right to appear at the court's hearing on 22nd July, 2015. No notice of intention to appear was filed in the within proceedings.

37. The purpose of ss.85(2) and (3) of the Act of 2014 is to ensure that parties affected by the proceedings for confirmation are duly informed of the procedure and have a fair right to participate in those proceedings. It is clear that the court's order of 8th June as to the conduct and/or hearing of the petition fully and fairly fulfilled that statutory purpose.

PART V

THE NATURE AND EXERCISE OF THE COURT'S DISCRETION

i. Existence of discretion.
38. Where a reduction of capital requires to be confirmed by the court, the court enjoys a discretion to approve or not to approve the reduction of capital. That this is so is clear from long-ago cases such as *British American Trustee and Finance Corporation v. Couper* [1894] A.C. 399 and *Thomas de la Rue & Co.* [1911] 2 Ch. 361. So, for example, Lord Macnaghten notes as follows, at p.411 of his speech in Couper.

"The Companies Act 1867 declares that any company limited by shares may by special resolution so far modify the conditions contained in its memorandum, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital. The power is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholders, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect, though all creditors have been satisfied."

39. Likewise in the *de La Rue* case, Eve J. refers, at p.365 of his judgment, to the power conferred on the court to confirm a scheme for the reduction of share capital as a *"discretion with which it [the court] is charged"*. Obviously, both *Couper* and *de la Rue* were decided in the context of earlier legislation. Even so, there is no reason to doubt that the discretion which they recognised as arising under such legislation does not continue to subsist under the now-pertaining legislation.

ii. Proper exercise of discretion.
40. The principles that arise when it comes to exercising the discretion whether or not to sanction a reduction of share capital/share premium account are apparent in the decision of the High Court of England and Wales in *Re Ratners Group plc* [1988] BCLC 685, in which Harman J. notes as follows at p.687:

"The principles on which the court will sanction a reduction of share premium account, in my judgment, are similar in all respects to those on which the court will sanction the reduction of share capital. The Companies Act 1985 provides in s135(1) that share capital can be reduced 'in any way'. Those words are extremely wide and general. There are then

given three particular instances of ways, but they are expressly given without prejudice to the generality of the foregoing in any way.

The court has over the years established…three principles on which the court will require to be satisfied. Those principles are, first, that all shareholders are treated equitably in any reduction. That usually means that they are treated equally, but may mean that they are treated equally save as to some who have consented to their being treated unequally, so that counsel's word 'equitably' is the correct word, which I adopt and accept. The second principle to be applied is that the shareholders at the general meeting had the proposals properly explained to them so that they could exercise an informed judgment on them. And the third principle is that creditors of the company are safeguarded so that money cannot be applied in any way which would be detrimental to creditors.

Those are, in my judgment, the relevant principles which the court has always applied and does apply in these matters and they can be seen clearly set out in the judgment of Nourse J. in Re Grosvenor Press plc [1985] BCLC 286 at 289-292….The judge was then good enough to express his agreement with my own decision in Re Jupiter House Investments (Cambridge) Ltd [1985] BCLC 222…".

41. A useful summary of factors that the courts of England and Wales appear to consider relevant when reaching a decision as to whether to approve a reduction in share capital is identified by the editors of *Palmer's Company Law* (25th ed., 2011), Vol.1, at para.4.335, which states as follows:

"Factors that the court will consider in reaching its decision whether to approve a reduction of capital include the following:

whether the shareholders have been treated equitably;

whether the reduction proposals have been properly explained;

whether creditors or third party interests have been prejudiced; and

whether the reduction has a discernible purpose."

iii. Six factors that underpin the court's discretion.

42. Based upon the foregoing it appears to the court that the following six factors require to be satisfied when a party comes to court, as happened here, seeking a confirmation of a proposed capital reduction:

That:

(1) in a case to which the Act of 1963 applies, the company is authorised by its articles of association to resolve to reduce its capital.

(2) the company duly resolved by special resolution to reduce its share capital.

(3) the reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment;

(4) the reduction of share capital is for a discernible purpose;

(5) all shareholders are treated equitably; and

(6) the creditors of the company are safeguarded.

43. The first factor identified derives from s.72 of the Act of 1963. The second to fifth factors derive from the above-quoted synthesis of principle in *Palmer's Company Law*. The sixth arises from a consideration of s.73 of the Act of 1963 and/or s.85 of the Act of 2014. The court proceeds hereafter to address each of these factors in turn, having due regard to the arguments advanced by the Notice Parties.

PART VI

FACTOR 1: THAT THE COMPANY IS AUTHORISED BY ITS ARTICLES TO RESOLVE TO REDUCE ITS CAPITAL

44. Before its repeal, s.72 of the Act of 1963 required that a company be authorised by its articles of association to reduce its capital. This requirement no longer pertains under ss.84 and 85 of the Act of 2014. Section 84 of the Act of 2014 permits all companies to reduce their capital except to the extent that their constitutions provide otherwise. Be that as it may, the court notes that a reduction of the share capital of the Company is expressly permitted by Art.47 of the Company's articles which provide as follows:

"The Company, by special resolution, may reduce its share capital, any share redemption reserve and/or any capital conversion reserve fund and/or any share premium account in any manner subject to the procedures and restrictions set out in the Acts. Unless otherwise provided by the terms of issue and without prejudice to the rights attached to any share to participate in any return of capital, the rights, privileges, limitations and restrictions attaching to a new share shall be deemed not to be varied, altered or abrogated by a reduction in any share capital ranking as regards participation in the profits and assets of the Company pari passu with or after that share."

45. When it comes to Factor 1, the capacity of the Company to undertake the proposed capital reduction is and was beyond doubt.

PART VII

FACTOR 2: THAT THE COMPANY DULY RESOLVED BY SPECIAL RESOLUTION TO REDUCE ITS SHARE CAPITAL

i. The Reduction Resolution.

46. At the AGM of 8th April last, the Reduction Resolution was passed as Resolution No.7. That Resolution resolved as follows:

> *"That, subject to and with the confirmation of the High Court in accordance with sections 72 and 74 of the Companies Act 1963 (or from their commencement, sections 84 and 85 of the Companies Act 2014), the share capital of the Company be reduced in the following manner:-*
>
> *(a) subject to (b) below, the entire of the amount standing to the credit of the share premium account of the Company immediately preceding the passing of this resolution or such lesser amount as the High Court may determine, be cancelled and extinguished such that the reserve resulting from such cancellation be treated as profits available for distribution as defined by section 45 of the Companies (Amendment) Act 1983; and*
>
> *(b) The Directors of the Company (or any duly authorised committee thereof) be and they are hereby authorised to determine, on behalf of the Company, to proceed to seek the confirmation of the High Court to a reduction of the share premium account for such lesser amount or number as the Directors of the Company (or any duly authorised committee thereof) may approve in their absolute discretion, or to determine not to proceed to seek confirmation of the High Court at all in pursuance of paragraph (a) above."*

47. As mentioned above, the Reduction Resolution was passed overwhelmingly, 99.95% of the shares voting to pass the resolution, 0.05% voting against.

48. Pursuant to the discretion granted to the directors under sub-para.(b) of the above-quoted resolution, at a meeting of the board held on 26th May, 2015, the board, after full and proper consideration of the implications of the proposed capital reduction, determined to seek confirmation by the High Court of the proposed capital reduction. It appears from the evidence that not least among the board's considerations in this regardwas their view that the proposed capital reduction was important to (i) the success of the Capital Package, (ii) the reduction of the Company's reliance on the State, (iii) the return of the Company to private ownership, and (iv) the fulfilment of the objectives of the Capital Plan submitted by the Group to the ECB and the Restructuring Plan approved by the European Commission. The court notes that the Group was required to address the capital shortfall identified under the SSMCA within nine months from the date of publication of the SSMCA results, being 26th July, 2015.

ii. Criticisms proffered by the Notice Parties.

49. In his affidavit of opposition to the petition brought by the Company (the "29th June Affidavit"), Mr Skoczylas sought to query the adoption of the Reduction Resolution under the heading "*AGM's outcome – Minister's provisional votes used to overrule majority votes of other shareholder*". This criticism was repeated in submissions provided by Mr Skoczylas, as adopted, *inter alia*, by the other Notice Parties (the "Notice Parties' Submissions"). The contentions of Mr Skoczylas in this regard are wrong and in defiance of repeated determinations by the court in proceedings brought by Mr Skoczylas and the other notice parties. The court considers, and dismisses, these contentions hereafter.

50. The Minister for Finance is the largest shareholder in the Company. It appears to the court that at the AGM of 8th April last he duly and properly exercised the votes attaching to the ordinary shares held by him. Those shares were issued to the Minister following an order of O'Malley J. (the "2011 Direction Order") made in 2011 under the Credit Institutions (Stabilisation) Act 2010. Following the making of the 2011 Direction Order, proceedings were commenced (*Dowling v. Minister for Finance and Others* 2011/239 MCA (the "2011 Direction Order Proceedings") in which some or all of the Notice Parties and Scotchstone Capital Limited (a company of which Mr Skoczylas is managing director) sought to set aside the direction order made in 2011.

51. The background to the last-mentioned proceedings, and no fewer than ten other related sets of proceedings in which some or all of the Notice Parties are involved, were summarised in the grounding affidavit sworn in support of the within application; however, the court does not consider it necessary to recount all of that detail in the within judgment. Suffice it for now to note that a judgment was delivered last August by O'Malley J. in which, having made certain findings of fact, she made a reference to the CJEU as to whether the order of 2011 was and is in compliance with European Union law. The findings of fact made by the court appear at para.41.2 of O'Malley J.'s judgment and include the following:

> *"9. On the balance of probabilities, the required capital could not have been raised from private investors.*
>
> *10. On the balance of probabilities, the required capital could not have been raised from existing shareholders.*
>
> *11. On the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the bank, whether by reason of a run on the bank by depositors, revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities.*
>
> *12. The failure of ILP would, as a matter of probability, have resulted in a complete loss of value to the shareholders.*
>
> *13. The failure of ILP would, as a matter of probability, have had extreme adverse consequences for the Irish State, whether by reason of a run on the bank and subsequent calls on the State guarantee of up to c.€26 billion, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme of Support for non compliance with its terms, sanctions imposed under the Treaty, or a combination of some or all of these possibilities.*
>
> *14. The adverse consequences for the State would, as a matter of probability, have worsened the threat to the financial stability of other Member States and of the European Union.*
>
> *15. The decision by the State to invest in the recapitalisation was made in fulfilment of its legal obligations and in the interests of the State's financial system, the citizens of the State and the citizens of the European Union.*
>
> *16. The State decided to recapitalise ILP by way of a subscription by the Minister for Finance for ordinary shares in the sum of Eur2.3 billion, contingent capital in the sum of Eur 0.4 billion, and a 'standby' investment of Eur. 1.1 billion. The price to be paid per share was Eur0.06453, a discount of 10% to the middle market price on 23 June 2011. The calculation of the number of shares required to be issued in return for the Eur2.3 billion resulted in the acquisition by the Minister of 99.2% of the company.*
>
> *17. The share price on that date was not the result of a false market. The share price had been falling in any event over the previous number of years, and fell dramatically on publication of the PLAR/PCAR results. As a matter of probability,*

this was because the market doubted the ability of the bank to achieve the required recapitalisation in a way that would be attractive to investors.

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

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

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

52. Following the above-mentioned judgment, some or all of the Notice Parties brought an application for interlocutory relief (*Dowling & Ors v. Minister for Finance* [2014] IEHC 595) in which it was sought to restrain the Minister for Finance from disposing of his shareholding and/or seeking to restrain the Minister from exercising his voting rights. The Company and the Bank were joined as notice parties to the proceedings. O'Malley J. delivered judgment on 18th December, 2014, and refused the reliefs sought, finding that in the event the notice parties had suffered any damage as a result of a breach of European Union law rights, damages were an appropriate remedy, if damage can be established.

53. In that later case, it was contended that the voting rights of the Minister for Finance should be treated as provisional, pending the determination by the CJEU of the preliminary reference. This argument has been repeated in some of the affidavits and submissions filed in the within proceedings. This contention too was rejected by O'Malley J. at paras.72 to 74 of her judgment in which she stated as follows:

"72. In the first instance, it is important to make it clear that the belief of the plaintiffs that the decision to request a preliminary ruling from the CJEU somehow alters the legal status of the direction order is misconceived. That status remains as it was – the direction order was made by the High Court under the terms of a statute carrying the benefit of the presumption of constitutionality, and is legally valid unless set aside or varied by a court which comes to the conclusion that the underlying opinion of the Minister was unreasonable or vitiated by legal error. The fact that the court decided to refer certain issues to the CJEU does not of itself change that – it is simply a reflection of the fact that the court considers a ruling to be necessary to its decision. Nor does it in any way undermine the legal standing of the ex parte order, which was found in the earlier judgment to have been made in compliance with the procedural requirements of the Act. To speak, therefore, of the order as being "provisional," or as having no prima facie validity, is not correct. If one were to take that approach, it would be more logical to say that the request for a ruling demonstrated that the plaintiffs had not discharged the burden of proof – but the fact is that that would be equally misconceived. The case has not concluded.

73. The principle enunciated by Hardiman J. in Adam, which was a case concerned with the jurisdiction of the court to set aside a grant of leave to seek judicial review, does not in my view cover an order made under the terms of a statutory procedure. This Act, as has been said before, is unique, but its provisions must be accepted by the court unless a finding is made in other proceedings that it lacks Constitutional validity.

74. Secondly, the court does not accept that the only basis upon which the defendant can succeed before the CJEU is if that court retrospectively alters the jurisprudence on the Second Company Law Directive. As detailed in the earlier judgment, the defendant has put forward a number of different arguments: - that the scope of ECJ authorities relied upon by the plaintiffs is not, on their true interpretation, as contended for by the plaintiffs; that the authorities are inapplicable to the factual situation which pertained at the time the direction order was made and that new legal obligations, imposed upon this State as a result of the economic crisis and the "bailout" by the External Partners changed the legal landscape in ways not anticipated in the Greek cases of the 1990s. The only comment I wish to make on the merits of these arguments is that, had I been persuaded that the situation was indeed fully covered by the Greek cases, as submitted by the plaintiffs, I would not have found it necessary to request an Article 267 ruling."

54. The court notes that it has been suggested by the Notice Parties that were it to confirm the proposed capital reduction, it would engender a misuse of the Art.267 procedure in that the issues referred to the CJEU by O'Malley J. will have been rendered moot. Reference has been made in this regard, inter alia, to the decisions of the European Court of Justice in *Foglia v. Novello* (104/79) [1980] E.C.R. 745; and(244/80) [1981] E.C.R. 3045. However, those were cases that involved an apparently contrived dispute. The proceedings in which O'Malley J. made an Art.267 reference involve a real and live dispute; the issues arising are substantive; following whatever ruling emanates from the CJEU, the Notice Parties may be able to recover damages for any wrong that they can prove themselves to have suffered, if wrong there has been. Notably, the adequacy of damages as a remedy for the Notice Parties in the eventuality just described has been expressly confirmed by the judge (O'Malley J.) who made the preliminary reference (See *Dowling & Ors v. Minister for Finance* [2014] IEHC 595). For the reasons just stated, the court does not consider that the effect of the within judgment will be to engender some kind of *Foglia*-style misuse of the Art.267 procedure.

55. Moving on, following the above-quoted judgment of O'Malley J., some or all of the Notice Parties issued proceedings seeking interlocutory relief to restrain the implementation of resolutions passed at the AGM of 8th April (Dowling and Others v. Permanent TSB Group Holdings plc and Ors (Record No.2015/2869P)). In an ex tempore judgment of 25th April last, O'Malley J. refused the reliefs sought, holding that the applicants had failed to establish any fair issue to be tried, that damages were an adequate remedy and that the balance of convenience manifestly favoured refusing the reliefs. Notably, among the reliefs sought in those proceedings was an injunction restraining the Company from reducing its share premium. In rejecting that relief, O'Malley J. stated as follows:

"The reduction in share premium, this can only occur if it is confirmed by the High Court on application being made. There is no such application before me. There is no basis for determining that it cannot properly made and no basis for assuming that it will not properly be determined."

56. A part of the contentions made by the Notice Parties is that 'judicial chaos' would ensue if the within application was heard because of the overlap with two appeals that have been brought in respect of the above injunction applications. However, having regard to the nature of the applications as set out above, the court sees no basis for this contention. If anything, O'Malley J. expressly envisioned that the within petition would proceed by way of separate application.

57. A theme of the contentions made by the Notice Parties is that if they succeed in the 2011 Direction Order Proceedings, the

shareholding of the Minister for Finance would have to be reversed or cancelled. This submission appears to the court to be entirely wrong for at least three reasons:

> - first, as O'Malley J. indicated in her judgment in *Dowling & Ors v. Minister for Finance* [2014] IEHC 595, in the event that the Notice Parties can establish that their rights under European Union law have been breached and that, on foot of same, they have suffered damage, then damages are an adequate remedy;
>
> - second, the Notice Parties' arguments in this regard appear to ignore the wording of the Act of 2010. Section 11(5) of that Act provides that an order to set aside the direction order made thereunder in 2011 *"is effective, from the date of its making, to set aside the direction order [but] without prejudice to the validity of anything previously done or taken to have been done under the direction order."*
>
> - third, in the 2011 Direction Order Proceedings, the minority shareholders asserted that the 2011 Direction Order is vitiated by an error of law, by reason of alleged failure to comply with certain provisions of the Second Company Law Directive(*i.e*. Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Recast) (O.J. L315/74, 14.11.2012)). It seems to the court that if the minority shareholders can establish that their rights under European Union law have indeed been breached in this regard, then they would, as a matter of principle, have a remedy for such loss – but it is clear that any such loss would be financial in nature and thus compensable in damages.

58. In the within application, the Notice Parties have again sought to argue that the 2011 Direction Order should be treated as provisional or non-permanent. They have made reference in this regard to the reliance placed by Feeney J. in *Dowling and Others v. Minister for Finance* [2012] IEHC 89, yet another case that involved some or all of the Notice Parties, on the observation by Hardiman J. in *Adam v. Minister for Justice* [2001] 3 I.R. 53 at p.77 that:

> *"In my view, any order made ex parte must be regarded as an order of a provisional nature only."*

59. The direction order made in 2011 was an *ex parte* order and thus, the Notice Parties contend, is possessed of a provisional character. Lest there be any doubt in this regard, a High Court order made *ex parte* has precisely the same force and effect as any High Court order. To contravene, during the period that it subsists, an order that the High Court has made *ex parte*, is to commit a wrong that is every bit as serious as arises when any order of the High Court is contravened. Of course, any *ex parte* order has the potential to work a degree of injustice because the court may not have received a rounded view of all the issues arising. It is for this reason that *ex parte* orders are typically substituted or superseded by another order following an interlocutory hearing. Hardiman J.'s particular concern in the section of his judgment just quoted was that in judicial review proceedings the period between an *ex parte* order and an interlocutory hearing could be more protracted than, say, in an application for injunctive relief. This is clear from a fuller reading of the surrounding text than the limited extract just quoted. Thus, per Hardiman J., again at pp.77 of his judgment:

> *"In my view, any order made ex parte must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases."*

60. The Notice Parties have also made reference to a passage of a judgment given by Charleton J. in still another case in which the Notice Parties were involved, this time *Dowling v. Minister for Finance* [2013] IEHC 75. That judgment concerned an application by the Company and the Bank to be joined as notice parties to those proceedings. Charleton J. joined them as notice parties for a limited purpose only. The Company and the Bank appealed his judgment; the Supreme Court overturned the judgment of Charleton J. and held that the Company and the Bank should be joined as notice parties. In the course of his judgment, Charleton J. noted as follows:

> *"There is one respect, however, in which the participation of the bank and the holding company is necessary. If the applicants show an error of procedure such as to vitiate the direction order, an unreasonably held opinion by the Minister or an error of law in the sense needed to overturn that order under s.11(3) [of the Act of 2010], the High Court has two choices; the order may be overturned or another order may be substituted for it. In effect, it is possible for the Court to be faced with substituting a new order."*

61. It is quite clear that Charleton J. in the just-quoted text was not undertaking an exhaustive excursus on the remedies available under the Act of 2010 to the applicants in the case before him. Rather, he was explaining why he considered it was appropriate that the Company and the Bank should have a limited and specific role in the litigation presenting. Indeed, as mentioned above, the only judge who has fully considered the issue of remedies, O'Malley J.,has (in *Dowling & Ors v. Minister for Finance* [2014] IEHC 595)made it perfectly clear to the Notice Parties that damages will be an adequate remedy if a breach of European Union law rights had occurred. This is a conclusion in which this Court respectfully concurs.

iii. Conclusions as to Factor 2.

62. The Act of 2010 is clear in its terms. A direction order made under that Act is effective until it is set aside. Indeed, the setting aside of such a direction order is without prejudice to the validity of anything done or taken to have been done under the relevant direction order. It follows inexorably that, regardless of the challenge made to the direction order of 2011 in the 2011 Direction Order Proceedings, (a) the votes held by the Minister must be regarded as being properly held by him, and (b) the votes cast by him must be regarded as properly cast, having regard to the scheme and provisions of the Act of 2010. Moreover, as noted by O'Malley J. in *Dowling & Ors v. Minister for Finance* [2014] IEHC 595 and for the reasons stated by the court elsewhere above, there is nothing provisional about that order; accordingly, there is no warrant for the Notice Parties to question the votes cast by the Minister. When it comes to Factor 2, the court considers that the Company duly resolved by special resolution to reduce its share capital.

PART VIII

FACTOR 3: THAT THE REDUCTION PROPOSALS WERE PROPERLY EXPLAINED TO THE SHAREHOLDERS SO THAT THEY COULD EXERCISE AN INFORMED JUDGMENT

i. The Circular.
63. The shareholders of the Company were informed of the proposed special business, *inter alia*, to reduce the Company's share capital, by circular (the "Circular") containing the notice of the AGM. The Circular included a detailed letter from the Company chairman dated 13th March, 2015 (the "Chairman's Letter") which set out the background to the various proposals tabled at the AGM. These included details of the Company's capital requirements under the SSMCA, the response of the Company to capital requirements under the SSMCA, as well as the rationale for and the key benefits of the Capital Package.

64. It was identified, at section 3 of the Chairman's Letter, that the board of directors believed that the successful implementation of the Capital Package would have a number of benefits. These perceived benefits included the following: (1) the strengthening of the Group in the implementation of its strategy and in the delivery of key strategic objectives; (2) increasing common equity tier one capital; (3) the strengthening of the Group's financial capability; (4) that the proposed capital reduction would constitute a significant step towards the objective of transitioning ownership of the Group from state ownership to private sector ownership; and (5) the repurchase of certain notes issued in 2011 would have cash-flow and profitability benefits for the Group and would enable the Group to reimburse fully the State for its €400m investment in those notes.

65. The Chairman's Letter set out the shareholder approvals necessary for the implementation of the Capital Package and further information in relation to the proposed share re-organization. At section 6 of the Chairman's Letter, the proposal was explained in some detail. At section 8 of the Chairman's Letter each of the proposed resolutions at the AGM was further explained. At section 10, the importance of the approval of the Capital Package resolutions was set out.

ii. Analysis.
66. The court has considered above the passage from the decision of the High Court of England and Wales in *Re Ratners* in which Harmon J. indicates, *inter alia*, that a court in deciding whether or not to approve a capital reduction, will look to the question of whether the approval of the shareholders of the relevant resolution has been obtained in circumstances where the members have been properly informed of all relevant information. In this regard, it seems to the court that the Circular fully and properly set out the economic circumstances of the Company as its board of directors, in association with its financial advisors, saw them. On any assessment, there can be no doubt but that when the shareholders of the Company came to vote on the proposed capital reduction they came to that vote armed, thanks to the Company and its board of directors, with a full and fair account of the issues presenting and the consequences of the vote. When it comes to Factor 3, the court considers therefore that the reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment as to whether or not they favoured the proposed capital reduction.

PART IX

FACTOR 4: THAT THE REDUCTION OF THE SHARE CAPITAL IS FOR A DISCERNIBLE PURPOSE

i. Overview.
67. The Court has noted above the contents of the Circular which issued to members of the Company and set out the background to, and purposes of, the various resolutions, including the Reduction Resolution put before the AGM by means of special business. A number of useful points might perhaps be made when it comes to looking for a discernible purpose.

68. First, as with many companies which have significant negative reserves arising from historical losses, the Company seeks the confirmation of the court in the within application so that it can reorganise its balance sheet in setting off the share premium (as of the date of the Reduction Resolution) against *pro tanto* losses in the negative reserves. The losses arise from impairments to the carrying value of the Bank due to historical trading losses in the Bank, which in turn arose from the recent banking crisis.

69. Second, s.72 of the Act of 1963 and s.84 of the Act of 2014 expressly recognise the fact that companies may wish to cancel any paid-up share capital which is lost or unrepresented by available assets, as is the case here.

70. Third, the proposed capital reduction appears from the affidavit evidence properly before the court to represent an important aspect of the attempts by the company (which have thus far proved successful) to raise the additional capital necessary to meet the results of the SSMCA and to provide capital for the purchase of certain notes issued in 2011.

71. There has been some suggestion from the Notice Parties that the proposed reduction of the share premium account in fact has nothing to do with the capital requirements of the Company. The court does not accept this contention. It is clear to the court that the Company's board of directors, having taken appropriate advice, held the view that the proposed capital reduction formed and forms an important part in the seeking of additional capital and in the process of transitioning the ownership of the Company from the public to the private sector. The Company's proposals with respect to the proposed capital reduction were made known to potential investors in a prospectus, in which a letter from the Chairman dated 28th April featured, stating *inter alia*:

> *"The Company is also proposing to undertake the Capital Reduction. This is a proposed balance sheet reorganisation of the Company by way of a reduction of its share premium under section 72 and 74 of the Companies Act 1963 (as amended) or from their commencement, sections 84 and 85 of the Companies Act 2014 (to eliminate accumulated negative reserves in respect of historical trading losses of the Group and to allow for future trading losses and losses which may arise from the intended deleveraging of the Group's balance sheet. Under Irish Companies Acts, such a reallocation of share premium can only be undertaken with shareholder approval with the confirmation of the High Court of Ireland. In the absence of sufficient distributable reserves, Irish company law (in addition to any regulatory restrictions) places restrictions on the payments of dividends on issued shares such as the Ordinary Shares, otherwise than out of proceeds of a new share issue. This requirement is independent of whether or not the Group has sufficient cash to pay a dividend. The shareholders of the Company (have approved the Capital Reduction at the AGM) but the Capital reduction remains subject to confirmation by the High Court of Ireland. It is expected that the approval of the High Court of Ireland would be sought in 2015."*

72. It seems patently obvious from the just-quoted text that the Company's Chairman and board genuinely held the view that the proposed capital reduction had everything to do with the capital requirements of the Company.

ii. Regard to directors.
73. As is apparent from the phraseology of Factor 3, *viz*. that the reduction of share capital be for a discernible purpose, the function of the court in this regard is to ensure that the Company does not act arbitrarily or otherwise in some unmeritorious fashion. It is not the court's function to ensure that the Company acts for some objectively ascertainable correct purpose; it need merely determine that the Company is acting for a 'discernible' purpose. In this regard, it has never been the function of the court to second-guess the

business judgment of those who come to court seeking a confirmation of a capital reduction, not least because the court proceeds mindful of the duty that directors owe to a company to act in good faith in what they consider to be the best interests of the company. A brief divagation on this duty is merited, given the fact that its existence informs the 'hands off' approach that the court typically adopts when it comes to assessing business judgment in the context of a capital reduction application.

74. By way of starter, s.228 (1)(a) of the Act of 2014 now codifies what had long been enunciated by the courts, namely that a director shall act "in good faith in what the director considers to be the best interests of the company." Reference might also be made in this regard to the following observations of the editors of Palmer's Company Law (25th ed., 2011), Vol.1, at para.8.2608:

> *"The essential principle is that it is for directors to make decisions, in good faith, as to how to promote the success of the company for the benefit of the members as a whole. This test repeats the common law rule from which it is derived….A court will not inquire whether, objectively, the decision was actually the best decision for the company, nor whether the director's honestly held belief was a reasonable one."*

75. The classic enunciation of the applicable principle appears in *Re Smith and Fawcett Ltd.* [1942] Ch. 304. Acting pursuant to the articles of association of a private company, the directors in that case refused to register a transfer of shares. The Court of Appeal found there was nothing to show that the powers of the directors had been exercised in this regard other than in the interests of the company. Of note in the present context are the opening comments in the judgment of Greene M.R., at p.306 of the case-report, to the effect that:

> *"The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose."*

76. Another, more recent, enunciation of the applicable principle is offered by the decision of the Privy Council in *Howard Smith Ltd. v. Ampol Petroleum Ltd.*[1974] A.C. 821. That was a case concerned with the proper discharge by company directors of their fiduciary duty in the context of an allotment of shares. Per Lord Wilberforce, at p.832 of his judgment:

> *"Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."*

77. A still more recent example is offered by the decision of the High Court of England and Wales in *Regentcrest plc (in liquidation) v. Cohen* [2001] 2 BCLC 80. That was a case concerning whether a breach of fiduciary duty arose where a director voted in favour of a resolution to waive a claim by a company against vendors of shares under a share sale agreement. Of especial interest in the context of the within judgment are the following observations of Jonathan Parker J., at p.105 of his judgment:

> *"The duty imposed on directors to act bona fide in the interests of the company is a subjective one….The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."*

78. None of the above judgments stake out the boundaries of what might be styled a 'business judgment realm', within whose territory the courts must fear to stray. All they point to is that the courts should be alive to the probability that judges are better at dealing with conflicts of interest than with the assessment of business risks, and that courts ought not to substitute the glorious Technicolor of judicial hindsight for a director's necessarily more limited foresight.

iii. Regard to shareholders.

79. Specifically, in the context of capital reductions, it is useful to have regard to the observations of the editors of Pennington's Company Law (8th ed., 2001), at p.219. After noting the qualification that where a reduction involves the alteration of class rights, the consent of the relevant class is required, they observe as follows:

> *"Subject to that qualification, the court leaves it to the shareholders in general meeting to decide whether the reduction is necessary or desirable, and if so, what form it shall take."*

80. The court notes in passing that:

> - when considering whether to approve a scheme of arrangement, the touchstone of fairness is, to borrow the words of Maugham J. in *Re Dorman Long & Co. Ltd.* [1934] Ch. 635 at p.657, "*whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve*."
>
> - when it comes to whether or not to sanction a scheme of arrangement, the prevailing approach adopted has been that taken by the Court of Appeal in the long-ago case of *Re English, Scottish, and Australian Chartered Bank*[1893] 3 Ch. 385, in which Lindley L.J. noted as follows, at pp.408 to 409:
>
> > *"Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the Court does not simply register the resolution come to by the creditors or the shareholders as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which has passed that had been unobserved and which was pointed out later.*
> >
> > *While, therefore, I protest that we are not to register their decisions, but to see that they have been properly*

convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage."

- when it comes to a consideration of the objections made by dissenting shareholders to a compulsory acquisition under s.204 of the Act of 1963, the Supreme Court noted in *Duggan v. Stoneworth Investment Ltd.* [2000] 1 I.R. 503 at p.575 that *"[I]t is reasonable as a matter of fact and established as a matter of law…that the court should pay great attention to the views of the majority who have accepted the bid."*

81. The above-mentioned judgments point to the conclusion that when it comes to an application for confirmation of a proposed capital reduction, a general but not absolute judicial deference to the duly expressed preferences of properly informed shareholders voting in general meeting is appropriate. Abject judicial proskynesis *vis-à-vis* shareholders is not required; absent "*material oversight or miscarriage*", great attentiveness to the views of the majority is.

iv. Some conclusions.
82. In the present case, based on the evidence before it, the court can be and is satisfied that the Company has acted in a considered manner and for what appear to the court to be a clear discernible purpose informed by ostensibly good commercial reasons. There is nothing in the facts presenting which suggests that the court should not have due regard to the business judgment and commercial sense of the Company's board of directors and its shareholders. When it comes to Factor 4, the court concludes that the reduction of the share capital is for a discernible purpose that appears to the court to be ostensibly sensible and untainted by any oversight or miscarriage.

PART X

FACTOR 5: THAT ALL SHAREHOLDERS ARE TREATED EQUITABLY

i. Overview.
83. The editors of *Palmer's Company Law* (25th ed., 2011), Vol.1, note as follows, at para.4.318:

"A company may wish to cancel capital which has been lost or is unrepresented by available assets. This is a common mode of reduction and it is a very useful means of reintroducing reality into the balance-sheet position of the company.

Where a company has lost a large part of its capital so that its profit and loss account is heavily in debit, the effect is to prevent the distribution of dividends until the loss has been eradicated by subsequent profits. It is desirable for the company to be able to write off the loss and put itself with a clear balance-sheet in a position to resume the payment of dividends out of subsequent profits."

84. This, it seems to the court, is precisely the position that the Company finds itself in. The Company, to use the language of the editors of Palmer's, is adopting "*a common mode of reduction*" as a "*useful means of reintroducing reality into the balance sheet position of the company*."

85. The equitable treatment of shareholders typically arises in respect of companies whose share capital is divided into different classes. In that context, proposed capital reductions must be in accordance with the special rights attaching to the different classes, or necessary class consent must be obtained. In particular, a reduction of capital must be carried out in accordance with the capital rights attached to the various classes of shares unless consent has been obtained. So, for example, when a company proposes to repay capital, it must do so by repaying capital to the class to which the capital would be returned first in the winding-up of a company. (Cf. *Prudential Assurance Co. Ld v. Chatterley-Whitfield Collieries Ld* [1949] A.C. 512, a decision of the House of Lords in which a proposed reduction of capital was approved over the objection of preference shareholders who stood to get repayment in full of their preference capital, as there was no ground to suppose that they would receive more than they would in a liquidation). Similarly, if a company is proposing to cancel capital which has been lost, it should first cancel shares which rank last on a winding-up. (Cf. *Re Floating Dock Company of St. Thomas, Limited* [1895] 1 Ch.691, a decision of the High Court of England and Wales, in which Chitty J. observes, at p.699 of his judgment that *"Where there is a loss of capital, and there are classes of shareholders as here, the loss should be made to fall upon that class which, according to the constitution of the company, has to bear it".).* The court notes in passing that while the Company has two classes of shares, being ordinary and deferred shares, no question arises in the within application as to the equity of treatment of the deferred shares.

ii. Onus on objectors.
86. It is well established that the onus lies on the opponents of a petition for confirmation of a proposed capital reduction. So, for example, in *Scottish Insurance Corpn v. Wilsons and Clyde Coal* [1949] A.C. 462, a case concerned with a proposed reduction of capital in the context of an impending liquidation, Lord Normand noted as follows, at p.498 of his judgment:

"The company is not bound to satisfy the court that its proposals are not unfair. It has brought forward proposals which are intra vires, regular on the face of them, and in conformity with the usual practice....If the objectors can find in the provisions of s.25 or of the regulations anything which should stand in the way of the court's approval, it is for them to disclose it. If they fail to do this, the court has no material before it which would warrant a finding that the proposed reduction is unfair."

87. This is consistent with the approach taken by the Supreme Court in Duggan v. Stoneworth Investment Limited, as cited above, to an objection to compulsory acquisition under s.204 of the Act of 1963, Murray J. stating, at p.575 of his judgment (Barrington and Keane JJ. concurring), that "*In general, the onus falls on a dissenting shareholder in making such an application to satisfy the court that it is an appropriate case in which to make such an order".*

iii. Contentions of Notice Parties.

a. Overview.
88. A central argument advanced by the Notice Parties as to alleged inequitable treatment of the ordinary shareholders of the Company is that prior to the investment by the Minister, following the making of the 2011 Direction Order, the shareholders had a personal right to share premium in the amount of €364m. It is argued that the effect of the direction order of 2011 was to remove

from the pre-existing ordinary shareholders share premium in the sum of €353m (*i.e.* €364m - €11m) which was attributable to the pre-existing shareholders. The court, for reasons that are elaborated upon in greater detail hereafter, considers that the notion that the original shareholders have personal rights to share capital that is unfairly prejudiced by a confirmation of the proposed capital reduction is fundamentally flawed and represents a misconception of the nature of shareholder rights in the Company, and of the nature of share premium as an accounting entry.

89. The Notice Parties, as the court understands their argument, also contend that the proposed capital reduction is inequitable on grounds of a breach of Art.46 of the (recast) Second Company Directive and/or on the basis that the losses giving rise to the deficit in the Company's distributable reserves lack reality.

90. Finally, it has been argued that €364m might be allocated to an undistributable reserve for the time being until the various disputes arising are resolved, a contention which indicates clearly that hard cash is ultimately what the Notice Parties are after and thus implicitly supports the finding by O'Malley J. in her ex tempore judgment of 25th April last in *Dowling and Others v. Permanent TSB Group Holdings plc and Ors* (Record No.2015/2869P), that damages are an adequate remedy for the perceived wrongs that they consider themselves to have suffered.

91. The court proceeds below to deal with each of these arguments.

b. The nature of shares and associated rights.
92. The classic definition of a share was offered by the High Court of England and Wales in *Borland's Trustee v. Steel Brothers & Co., Ltd.* [1901] 1 Ch. 279, a case concerning the right of a company to require the transfer of certain shares held by a bankrupt. Farwell J. stated as follows in his judgment, at p.288:

> *"A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with [applicable companies legislation]. The contract contained in the articles of association is one of the original incidents of the share."*

93. In *Provincial Bank of Ireland Limited v. O'Connor* (23rd July, 1973, Unreported, High Court), Kenny J. noted, at p.5 of his judgment, that "*The nature of a share in a company is easier to describe than to define*" but referred with approval to the above-quoted remarks of Farwell J., noting that they had subsequently been approved by the House of Lords in *Commissioners of Inland Revenue v. Crossman* [1937] A.C. 26.

94. Farwell J.'s definition recognises that shares have a par or nominal value which identifies the liability of a member and determines the proportionate interest of the member in the company and its governance. It might with some confidence be asserted that the principal rights of shares revolve around the following: (a) the right to a dividend if, while the company is a going concern, a dividend is declared; (b) the right to attend and vote at meetings of the company; and (c) the right, in the winding-up of a company, after the payment of the company's debts, to receive a portion of the the capital and to participate in the distribution of the assets of the company.

95. On this last point (c), the court's attention has been drawn to the following helpful observations by Dr Courtney in his learned text, *The Law of Companies* (3rd ed., 2012), at para.8.085:

> *"When a company is being wound up, once the creditors and the expenses of the Liquidator have been paid, shareholders are returned to their capital investment in the shares and any remaining property of the Company is distributed among the shareholders in proportion to their rights and interests in the Company, unless the Articles otherwise provide. Where the memorandum (as opposed to the Articles) provides that no part of the assets is to be distributed to the members, the surplus assets are still distributable on the members. Where however, the memorandum further provides that the surplus assets are to be distributed in a special manner, such as to a charity, the Courts have given effect to the provision notwithstanding the absence of an equivalent provision in the Articles.*
>
> *Prima facie, the distribution of surplus assets is to be in proportion to the nominal value of each share, and…sums due to a member which are not treated as creditors' claims in the liquidation (e.g. dividends etc.) are to be taken into account when adjusting the rights of shareholders to participate in the surplus."*

96. The articles of association of the Company provide as follows for the division of assets upon winding-up:

> *"If the Company shall be wound up and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid up or credited paid up share capital, such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up or credited as paid up at the commencement of the winding up on the shares held by them respectively."*

97. As can be seen from the above-quoted extract from the articles of association of the Company, and as indeed is the case in legal theory, the rights of the ordinary shareholders in a winding up, are to the surplus assets, *i.e.* to the assets as realised, minus the liabilities of the company and the costs of winding-up. While it is possible, in theory, that articles of association might provide that share premium paid or contributed in the issuance of particular shares was to be repaid to the holder of the relevant shares in a winding-up, such treatment does not fall to be inferred by the courts absent explicit provision in this regard. The Company's articles of association certainly do not so provide. If anything, they run directly counter to the contention that members, prior to the investment of the Minister for Finance, have a right to the return of share premium existing at that time.

98. The guiding principle in the interpretation of shareholder rights, as enunciated by the House of Lords in *Birch v. Cropper* (1889) 14 App. Cas. 525, is that of equality, save to the extent that equality is displaced by the articles of association or otherwise by the terms of issue of shares. It is thus to be presumed that all holders of ordinary shares will be treated equally in the distribution of surplus assets, except to the extent that the articles of association otherwise provide. It is nowhere contemplated in the articles of association of the Company, not least in the extract therefrom quoted above, that the holder of a share issued at a premium (or an assignee thereof) is entitled to the repayment of the premium. All this being so, it follows that on a winding-up of the Company, all shareholders, be they pre-2011 shareholders or the Minister for Finance (or any assignee of the Minister), share equally in any surplus assets of the Company upon a winding-up, regardless of the premium attached to any such shares or tranches of shares.

c. The nature of share premium.
99. The court has considered elsewhere above the statutory origin of the protection of share premium, first in s.62 of the Act of 1963

and now in s.71 of the Act of 2014. Prior to the Act of 1963, share premium could, subject to contrary provision in a company's articles of association, be distributable among the members having a right to a dividend. Following the Act of 1963, that portion of the value provided by a subscribing member in excess of par value went into a single fungible account, viz. the Share Premium Account. While a member (and/or any assignee) would remain liable for any unpaid premium, such a member did not have any right to repayment of that premium on winding-up, unless the articles of association otherwise provided. It is noteworthy that share premium may be used in a number of ways which tell against the proprietorship of that premium by any individual. Share premium may, for example, be used in paying out bonus shares which are issued as fully paid.

100. It appears to the court that the contentions of the Notice Parties fundamentally misunderstand the nature of company capital, including share premium, and/or of shareholder funds. Capital and reserves represent a balancing item as between assets on the one hand and liabilities to creditors and other accruals on the other hand. Capital in that sense arises from double-entry book-keeping, insofar as for every asset of the company there are contra-entries represented by debts due to creditors and/or capital (which represents the interest of the members in the net assets). Capital is not, however, an asset. Neither, to use a colloquialism, is it a 'pot of money'. It is a false belief that paid-in capital is a thing to which particular members, at a particular time, have any specific rights. As noted above, the rights of members are measured by the number of shares held, and are determined by the articles of association. The rights of members of the Company are to the net assets of the Company: if the assets of the Company are worthless, the shares are likewise worthless.

d. Equality of treatment.

101. The proposed capital reduction, as confirmed, has treated all shareholders equally. Nothing in the proposed capital reduction provided any benefit to any individual member that has been withheld from another. In truth, in reducing any block to the distributability of future profits, the proposed capital reduction brought forward for all members, including the Notice Parties, the possibility of distributions from future profits which would otherwise be blocked by negative reserves.

102. An argument has been made that the consultation that takes place between the Company and the Minister for Finance under a Relationship Framework that has been agreed between the two is incompatible with Article 46 of the Second Company Law Directive. Article 46 of that Directive provides that *"For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position."* Equality of members is also referred to in the 11th Recital to the Directive which provides as follows:

> *"It is necessary, having regard to the objectives of point (g) of Article 50(2) of the Treaty, that the Member States' laws relating to the increase or reduction of capital ensure that the principles of equal treatment of shareholders in the same position and of protection of creditors whose claims exist prior to the decision on reduction are observed and harmonised."*

103. A number of points require to be made in this regard.

104. First, the Art.46 argument was argued and decided upon by O'Malley J. in her *ex tempore* judgment of 25th April last in *Dowling and Others v. Permanent TSB Group Holdings plc and Ors* (Record No.2015/2869P)). It is not open to Mr Skoczylas, Mr Dowling or Mr McManus to raise again an issue that has already been the subject of determination in proceedings to which they were party. The court, in any event, respectfully agrees with the pertinent conclusions of O'Malley J. which are quoted below:

> *"A complaint is made with reference to the provisions of Article 46 on the basis that the Minister was not treated on an equal footing with other shareholders. Article 46 requires that the laws of a member state should ensure equal treatment to all shareholders who are in the same position. This has been implemented in the Companies Act and no complaint can lie under that Article. The Minister's shares were for the purpose of the AGM treated on the same basis as those of other shareholders. It has been submitted that the Minister was accorded a status in relation to the proposed share issue in terms of oversight, control and decision making, capacity not accorded to other shareholders.*
>
> *The Minister's working relationship with the Company is governed by the relationship framework document entered into in March 2012. The circumstances where he is the majority shareholder on foot of a very large injection of public money, I can see no objection to accord him in involvement in the capital raise process. He has an obvious interest in it and indeed it could be said he has obligations to ensure the proper implementation [of] that process. It is true that the Minister has an interest in the repurchase of the contingent convertible notes; so does the Company in that it will save a significant amount of money by making the repurchase earlier rather than later.*
>
> *Ultimately, the directions in question were made by the general meeting on foot of the Minister's voting rights. Having already dealt with his entitlement to exercise those rights, I don't see that any further complaint can be made in that respect and this is not a question of treating shareholders unequally."*

105. Second, the obligation in Art.46 is upon the State, as the addressee of the Directive, to provide for the equal treatment of shareholders in the same position. It is not at all clear to the court what exactly it is that the State has failed to do as regards the implementation of this requirement. It is trite, but perhaps necessary, to observe that the principle of equality of equal members is a pervasive principle of Irish company law.

106. Third, all shareholders of the Company have been treated equally in the circumstances presented to the court. All shareholders are equally affected by the proposed capital reduction and all shareholders were entitled to vote their shares equally on the Reduction Resolution tabled for consideration at the AGM.

107. Fourth, the proposed capital reduction, in its substance, does not differentiate between and/or does not confer any rights, benefits or other interests upon one group of shareholders. All shareholders have an equal interest in the revenue reserves of the Company, and all shareholders benefit rateably to their shareholding, in the reduction of the deficit on those reserves.

108. Fifth, the Notice Parties appear to contend for the absurd commercial position that a company cannot or should not consult with its 99% shareholder in the context of a restructuring proposal that requires to be implemented by shareholder resolution. The court rejects this contention.

109. Sixth, there is nothing in Irish company law, and still less in the Second Company Directive, that prevents a company from entering into an arrangement providing, in certain instances, for consultation with significant shareholders. In this case, the Relationship Framework, dated 29th March, 2012, amended on 23rd April, 2012, and entered into by the Company and the Minister, and which provides for consultation with the Minister, e.g. in respect of material reorganization, restructuring and other transactions,

does not amount to unequal treatment within the meaning of the Directive or indeed general company law.

e. Conclusion.
110. For the reasons stated above, when it comes to Factor 5 the court is satisfied in the context of the requested confirmation of the proposed capital reduction that all shareholders have been treated entirely equitably.

PART XI

FACTOR 6: THAT THE CREDITORS OF THE COMPANY ARE SAFEGUARDED
111. The court does not understand it to be contended that the creditors of the Company have not been safeguarded when it comes to the proposed capital reduction, as confirmed. To the extent that this is contended, if at all, it has not been established on the evidence before the court that the creditors of the Company are not safeguarded; in truth it does not appear that their interests are in any way adversely impinged upon by the proposed capital reduction. Quite the contrary: as part of the process of restoring the company to a better trading position, the proposed capital reduction would appear to be positively favourable to creditor interests.

PART XII

THE COMPANY ACCOUNTS
112. The Company's 2011 accounts show that the board of directors found it necessary to review the value of the investment in the Bank for impairment purposes, as required by international accounting standards. In this regard, the board of directors concluded that it was necessary to recognise an impairment of the investment value of the Bank by an amount of €2,254m. This impairment represented the board's evaluation, in line with the applicable international accounting standard, that the value of the Bank was not recoverable and needed to be written down by €2,254m. That impairment was shown as a loss in the income statement of the Company for that year and resulted in a negative retained earnings position at the end of the year in the amount of €1,628m (*i.e.* a positive €625m at the start of the year, reduced by the impairment of €2,254m). While it is the case that the investment value of the Bank has remained at €1,085m in the Company's year-end accounts from 31st December, 2010, this does not appear in any way to be inconsistent with the impairment. No expert accounting evidence has been tendered before the court which suggests that the board erred in any of the foregoing.

113. To the extent that the Notice Parties may wish to complain about the preparation of the Company's accounts, the court would note that as a matter of law the ability of an individual shareholder to complain about the preparation of company accounts by the company of which she, he or it is shareholder is highly limited. A good example of just how limited the ability of a shareholder is in this regard is offered by the decision of the High Court of England and Wales in *Devlin v. Slough Estates Ltd*. [1983] BCLC 497. In that case, the accounts of the defendant company had for a number of years contained a note of possible contingent liabilities for damages in an action commenced against the company. The accounts for 1979 omitted reference to the contingent liability or to other litigation. The plaintiff, a shareholder in the company, commenced an action alleging that the failure to disclose the contingent liability rendered the accounts defective. He accordingly claimed either, as a shareholder, a personal right to complain or, alternatively, a right to bring a derivative action on behalf of the company on the grounds that the directors were in breach of their duty to prepare accounts. In the course of his judgment, Dillon J. noted as follows, at pp.503-504:

> *"There are very many matters in accounts where the treatment must be a matter of opinion. The requirement…that every balance sheet shall give a true and fair view of the state of affairs of the company, must involve matters of judgment to which there is no one correct answer, and likewise, apart from the question of materiality…it must be a matter of judgment as to how liabilities are to be summarised with such particulars as are necessary to disclose their general nature. The shareholder has the protection that the accounts have to be submitted to the auditors and have to be audited. He has the possibility, if he can get sufficient support, of requisitioning a meeting to reject the accounts or reverse the decision whereby they were approved. He has the possibility of applying in an appropriate case…to the Department of Trade. I do not think it is open to him to apply by representative shareholder's action for merely declaratory relief on a matter of account of this nature. Furthermore, in so far as the formulation of the accounts involves matters of judgment such as I have mentioned, that is a matter of business judgment. The court does not interfere with the business judgments of directors in the absence of mala fides. The duty of causing the accounts to be prepared and presented to the company is laid on the directors by the Act and by the articles, and there is no allegation of bad faith on the part of the directors."*

114. To the extent that the Notice Parties would seek to have the court look behind audited accounts that have patently been prepared in good faith by the directors of the Company, it is not open to the Notice Parties so to seek.

PART XIII

ALLEGED ABUSE OF PROCESS
115. The Notice Parties contend that the within petition represents an abuse of process in light of allegedly overlapping proceedings, in particular that the Company is seeking to circumvent a pending ruling of the Court of Appeal in one of the many actions in which the Notice Parties are now involved. There are two problems with this allegation. First, it does not seem possible that the Company could be committing an abuse of process by continuing with hearings which it was sought unsuccessfully to enjoin in the High Court, and where the Court of Appeal, despite an appeal against a refusal of injunctive relief, has not granted any form of injunctive relief pending the hearing of that appeal. Second, the Notice Parties might recall that just a fortnight ago, this Court (in *Permanent TSB Group Holdings plc v. McManus and Ors* (Unreported, High Court, 13th July, 2015)) delivered a reserved judgment refusing them an order, *inter alia*, staying the within proceedings pending the determination of the appeal of the previous refusal of injunctive relief. So in truth, insofar as the Notice Parties claim an abuse of process to arise, they have stood logic on its head: in seeking to re-open the previous ruling of this Court it is they who might more properly be contended to have strayed across the line into abuse of process.

PART XIV

SUGGESTED SET-ASIDE OF €364 MILLION
116. By way of alternative proposal, the Notice Parties drew a loose analogy with arrangements put in place for the protection of creditors in *Re Grosvenor Press plc* [1985] 1 WLR 980 and *Re Jupiter House Investments (Cambridge) Ltd* [1985] 1 WLR 975 and suggested that if the court was (and, for the manifold reasons stated in the within judgment, it was) minded to confirm the proposed capital reduction, then it would be desirable that the €364m share premium in controversy be placed in a capital reserve fund which would be treated as undistributable until the legality of Minister's shareholding is confirmed following the determination of the reference to the CJEU.

117. The court notes that in making this proposal the Notice Parties have effectively conceded that it is hard cash that is ultimately in dispute in the within proceedings; they consider themselves entitled to a large portion of this cash. But if that is so then this is surely an *exemplum classicum* of a case in which damages will suffice by way of remedy to the Notice Parties, if they are ultimately successful in establishing a compensable wrong arising. There are, in any event, a few difficulties with the proposal:

> - first, the proposal seems implicitly to hinge on the notion that the legality of the Minister's shareholding is at this time in any doubt: for the avoidance of doubt, and for the reasons stated elsewhere above, there is no doubt arising at this time as to the legality of the Minister's shareholding;
>
> - second, the proposal is infected with the same misunderstanding of share premium and company capital generally that pervades the Notice Parties' opposition to the within proceedings and which has been expounded upon elsewhere above;
>
> - third, the proposal overlooks the fact that in the *Grosvenor* and *Jupiter* cases, the concern of the High Court of England and Wales was, quite legitimately, for creditors. This is because where capital is reduced in respect of assets which are not, or may not be, permanently lost, the position of creditors is clearly impacted in a potentially material manner. (Of course where, by contrast, assets are permanently lost, the position of creditors is not worse where the capital is reduced to reflect the reality). The position of members is quite different. To the extent that distributable profits are created by, or consequent upon the reduction of share capital, such profits are distributable. So, as is the case in the within proceedings, it is very much in the advantage of shareholders that distributable reserves are created (a fact of which the 99.95% of the votes cast at the AGM of 8th April approving the proposed capital reduction stands in permanent testament).

118. Given that there is no present doubt as to the legality of the Minister's shareholding, given that the set-aside proposal involves the same confused notion as to share premium and company capital that the court has considered elsewhere above, and given that the within proceedings do not present the same concerns as inform the Grosvenor and Jupiter cases, the court declines to accede to the above-mentioned proposal.

PART XV

THE MOTIONS FOR DISCOVERY

i. Overview.
119. On the day of hearing of the within application the court was presented with three applications for discovery by, respectively, the notice parties, Mr Keohane and Mr Neuberger.

ii. The Notice Parties.
120. That the Notice Parties sought discovery ignored the fact that on 13th July 2015 the court (in *Permanent TSB Group Holdings plc v. McManus and Ors* (Unreported, High Court (Barrett J.), 13thJuly, 2015), had delivered a reserved judgment in which the court declined the Notice Parties an order for discovery. In that judgment the court found that an earlier motion which included an application for discovery sought, in effect, to set aside certain directions given by the court (McGovern J.) on 8th June last. This being so, the court indicated that the application before it ought more properly to be the subject of an appeal to a higher court, the court stating as follows, at para. 18 of its judgment:

> *"As the matters which are the subject of the within application ought properly to be the subject of an appeal to a higher court, it follows that it would be inappropriate for this Court to adjudicate on any of the many contentions advanced by the notice parties at last Friday's hearings concerning the merits of the present application."*

121. At the hearing of the within application, the Notice Parties contended that because the court had not made any adjudication on the issue of discovery previously before it (stating simply that it was a matter for an appellate court), it was open to the Notice Parties to press again for discovery on the basis that the court had avoided reaching any conclusion on to the merits of their previous application for discovery. This conveniently overlooked the fact that the court had concluded that any variation of the order of McGovern J., including the question of discovery, was for a higher court. The court therefore struck out the Notice Parties' application for discovery.

122. The court notes in passing that it is well established that it is an abuse of process for parties to raise the same point in different hearings before different courts. In the recent case of *O'Donnell v. Lehane* [2015] IEHC 228, Costello J. refused an application to annul an adjudication of bankruptcy on grounds, *inter alia*, that the application was an abuse of process where the points relied upon have been raised in various other proceedings that are before the courts, stating as follows, at para.28 of her judgment:

> *"Parties cannot raise the same point in multiple proceedings in different hearings before different courts. This clearly amounts to an abuse of process and runs the grave risk of there being different decisions of different courts possibly in different divisions of the High Court on the same point. This is exacerbated when the point is raised in the High Court and the Court of Appeal…".*

123. An abuse of process such as that identified by Costello J. in *O'Donnell*, and as just identified in the within proceedings, would seem relevant to any application as to costs that may follow the delivery of judgment; certainly, in the within proceedings, it is a matter that the Notice Parties would be wise to address in the event of such an application being made.

iii. Mr Keohane and Mr Neugebauer.
124. Mr Keohane and Mr Neugebauer each brought a separate motion seeking various reliefs akin to those previously sought by the Notice Parties and refused by the court in its judgment in *Permanent TSB Group Holdings plc v McManus and ors* (Unreported, High Court, (Barrett J.) 13th July, 2015).Though their respective motions were ostensibly separate applications from those previously brought by the Notice Parties, they each appeared, in truth and substance, to represent an inappropriate attempt by Messrs Keohane and Neugebauer, in dubious independence from the Notice Parties, to attain by another route various reliefsthat the Notice Parties had previously failed to achieve. The court finds, on the balance of probabilities, that what Mr Keohane and Mr Neugebauer attempted was part of a coordinated effort, in tandem with the Notice Parties, unnecessarily to delay and/or to protract the hearing of the within confirmation application. Evidence of this abounds: Mr Keohane and Mr Neugebauer are involved in other proceedings with the Notice Parties; the cynical staggering of applications mirrored similar such manoeuvres undertaken by these litigants in a bid to set aside an earlier order under the Act of 2010; and they exhibited to their (unsworn) affidavits a copy of sensitive commercial information that had previously been supplied by the Company to the Notice Parties pursuant to an order for discovery made in one of the other actions to which the latter are party. This is a court of law, not a circus for procedural shenanigans. In the face of the

clear abuse of process which Messrs Keohane and Neugebauer sought, in their respective motions, to perpetrate, the court refused them all reliefs sought.

iv. No basis for discovery.
125. Without prejudice to any of the foregoing, the court notes that, when it comes to discovery, there was, in any event, no basis for discovery in the within proceedings. Discovery can only ever arise where there is a factual dispute between the parties. There was no factual dispute arising in the within proceedings that was relevant to the issues to be decided by the court. These proceedings were concerned with a petition seeking the confirmation of the High Court for a reduction of the Company's share capital. None of the categories of discovery sought related to any contested matter of fact relevant to the issues arising for determination of the petition. Moreover, in the stated reasons given in support of the various categories of discovery sought were bald assertions that the Notice Parties, or Mr Keohane and Mr Neugebauer, as appropriate, considered certain averments made by the company in its affidavit evidence to be false. However, in the analogous context of discovery in judicial review, the courts have held that a bald traverse of an opponent's affidavit will not suffice to justify an order for discovery. Thus, for example, Glidewell L.J. in *R. v. Secretary of State for Home Affairs, ex parte Harrison* (Unreported, Court of Appeal, 10th December, 1987) stated that *"[W]ithout some prima facie evidence for suggesting that the Affidavit is in some respects incorrect it is improper to allow discovery of documents the only purpose of which as I have said, would be to act as a challenge to the accuracy of the Affidavit."* A similar assertion is to be found in the judgment of Laws J. in *R. v. Arts Council of England, ex p Women's Playhouse Trust* [1998] C.O.D. 175. These observations were quoted with approval by Geoghegan J. in *Kilkenny Communications v. Broadcasting Commission* [2004] 1 I.L.R.M. 170. The present case does not present that *prima facie* evidence contemplated by the judgments of Glidewell, Laws. Or Geoghegan JJ. So although discovery in the context of a petition brought under s.72 of the Act of 1963/s.85 of the Act of 2014 is theoretically possible (albeit, it seems, unprecedented), the absence of such evidence has the result that even if the purportedly separate applications for, *inter alia*, discovery that were brought in the context of the within application did not, when it comes to discovery, suffer from the fatal deficiencies identified previously above, they would in any event have failed.

PART XVI

CONCLUSION
126. For the reasons stated above, the court was satisfied (a) to confirm the proposed capital reduction and to make all necessary orders in this regard, (b) to strike out the Notice Parties' motion for discovery, and (c) to refuse the various reliefs sought respectively by Mr Keohane and Mr Neugebauer.