ï»¿ S65

Supreme Court of Ireland Decisions

Judgment

Title:	Glegola v Minister for Social Protection
Neutral Citation:	[2018] IESC 65
Supreme Court Record Number:	56/17
Court of Appeal Record Number:	2015 474 COA
Date of Delivery:	20/12/2018
Court:	Supreme Court
Composition of Court:	O'Donnell Donal J., McKechnie J., Dunne J., Charleton J., O'Malley Iseult J.
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Appeal dismissed

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AN CHÚIRT UACHTARACH

THE SUPREME COURT

2017/56

O'Donnell J.
McKechnie J.
Dunne J.
Charleton J.
O'Malley J.

Between/

Magdalena Glegola

Applicant/Respondent

AND

The Minister for Social Protection, Ireland and

The Attorney General

Respondents/Appellants

Judgment of O'Donnell J. delivered the 20th day of December 2018

Introduction

1 The Protection of Employees (Employers Insolvency) Act 1984 (as amended) ("the 1984 Act") is an important piece of legislation permitting employees to recoup certain debts owed to them by an insolvent employer from the Social Insurance Fund. Section 1(3) of the 1984 Act provides as follows:-

> "For the purposes of this Act, an employer shall be taken to be or, as may be appropriate, to have become insolvent if, but only if,
>
> (a) he has been adjudicated bankrupt or has filed a petition for or has executed a deed of, arrangement (within the meaning of section 4 of the Deeds of Arrangement Act, 1887); or
>
> (b) he has died and his estate, being insolvent, is being administered in accordance with the rules set out in Part I of the First Schedule to the Succession Act, 1965; or
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> (c) where the employer is a company, a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge; or
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> (d) he is an employer of a class or description specified in regulations under section 4 (2) of this Act which are for the time being in force and the circumstances specified in the regulations as regards employers of such class or description obtain in relation to him; or
>
> (e) the employer is an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State in accordance with Article 2(1) of Council Directive 80/987/EEC of 20 October 1980 as amended by Article 1(2) of Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 and the employees concerned are employed or habitually employed in the State."

2 As this case concerns a company, the relevant provision is s. 1(3)(c). Accordingly, for the purposes of the 1984 Act, an employer company will be taken to be or to have become insolvent if, but only if, one of the events in that subparagraph has occurred. In this case, there is no question of a receiver or manager being appointed, or of possession being taken of any property of the company on foot of a floating charge. The focus of the dispute is on the requirement in s. 1 (3)(c) that, in order to be deemed insolvent for the purposes of the 1984 Act, the company must be the subject of a winding up order, or a resolution for voluntary winding up.

3 Although the 1984 Act is not expressed to be a measure giving effect to a European Union law measure, it is common case that the 1984 Act is and was the implementing legislation in respect of the obligations established originally by the terms of Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer ("the 1980 Directive"). In accordance with Article 11(1) of the 1980 Directive, the deadline its transposition was 23 October 1983. The 1980 Directive was subsequently amended by the provisions of Directive 2002/74/EC ("the 2002 Directive"), and the amended version codified in Directive 2008/94/EC ("the 2008 Directive"). The relevant provision for present purposes is Article 2(1) of the 2008 Directive. It provides:-

> "For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:
>
> (a) either decided to open the proceedings; or
>
> (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings."

The 1984 Act continues to be the legislation satisfying the obligation contained in the above Directives to bring their provisions into effect in national law.

Facts

4 The respondent to this appeal, Ms. Glegola, had been employed by a company, Metro Spa Limited, which had premises at Clarendon Street in Dublin. She claimed that she was dismissed from this employment on 30 November 2011, having been informed that the company was going into liquidation. The reason given for her dismissal was redundancy. As set out in the judgment of Finlay Geoghegan J. for the Court of Appeal herein (see [2017] IECA 37), it appears that Ms. Glegola formed the view that the company had continued to trade, and accordingly made a complaint to the Rights Commissioner Service of the Labour Relations Commission in May 2012 under the Payment of Wages Act 1991, the Organisation of Working Time Act 1997, and the Unfair Dismissals Acts 1977 to 2001. Her solicitor wrote to the company alleging that the company was still trading, and demanding reasons for the respondent's dismissal. On 7 June 2012, solicitors for the company responded by stating:-

> "Our client ceased trading in November 2011. This can be verified from an inspection of the premises at Clarendon Street from which it used to trade. The only reason the company has not entered into liquidation is because of the costs which would be attendant on same and a lack of any resources within the company to meet the same. In the circumstances it

> is clear that a true redundancy situation did exist and is verifiable."

5 A hearing was held before a Rights Commissioner in August 2012. The company did not attend. A recommendation was issued on 11 October 2012. That recommendation stated:-

> "As there was unexplained absence of the respondent, I accept the uncontested evidence presented on behalf of the claimant. I find her claim is well founded and make the following awards:
>
> Unfair Dismissals Act - €10,000 in compensation
>
> Organisation of Working Time Act - €5,000 in compensation
>
> Payment of Wages Act - €1,818.75 in unpaid wages.
>
> Therefore, the total amount awarded was €16,818.75.

6 Again, as is set out in the judgment of the Court of Appeal, the recommendation also contained a summary of Ms. Glegola's position, which stated:-

> "The claimant does not accept that a redundancy situation exists and further asserts that the procedures applied to her, culminating in her dismissal were unfair. The respondents company has not been placed in liquidation and continues to trade. There were plenty of opportunities for the claimant to be reengaged and retrained where appropriate."

It is accepted that the recommendation, not having been appealed, has now become binding, and consequently constitutes a debt due by the company to the respondent. On 16 October 2013, the company was struck off the Register of Companies for failing to file accounts. On 13 March 2014, Ms. Glegola issued a petition in the High Court in which she sought (*inter alia*) an order restoring the company to the register, an order winding up the company pursuant to the provisions of the Companies Acts, and a declaration pursuant to s. 251 of the Companies Act 1990 ("the 1990 Act"). The petition was served on the company, but was not advertised in the ordinary way. The petition and the grounding affidavit explained that the purpose of the petition was to seek to have the award from the Rights Commissioner paid from the Social Insurance Fund (which is the fund nominated under the 1984 Act in succession to the Redundancy Fund established under s. 26 of the Redundancy Payments Act 1967, and re-designated as the Redundancy and Employer's Insolvency Fund pursuant to s. 2 and 6 of the 1984 Act, on its initial enactment). It was explicitly submitted that the company was unable to meet the costs of a liquidator, and the respondent was therefore seeking not the appointment of a liquidator and winding up of the company, but rather a declaration under s. 251 of the 1990 Act, on the basis that she was advised that it would sufficient to comply with the requirements of Article 2 of the 2008 Directive, which, it was also contended, had direct effect. In plain terms, therefore, the object of the proceedings was to seek to access the Social Insurance Fund to secure payment to the respondent of the amount recommended by the Rights Commissioner. It might be observed at this juncture that had it been practicable for a winding up order to be made and a liquidator to appointed, the amount of €16, 818.75 would in principle have been recoverable from the Social Insurance Fund under the 1984 Act. The reliefs sought in the petition proceedings were an attempt to avoid the difficulties posed for the respondent by the insufficiency of the company's assets to meet the costs of the liquidation.

7 In the High Court, Charleton J. dispensed with the advertisement of the petition; deemed the hearing of the motion to be the hearing of the petition; restored the company to the Register of Companies; and was prepared to declare:-

> "[…] pursuant to s. 251 of the Companies Act 1990, that the company is unable to pay its debts and that the reason for it not being wound up is due to the insufficiency of its assets."

It appears, however, that, having been informed of the reason he was being asked to make the declaration, Charleton J. did not consider he was in a position to go further and make a declaration pursuant to or by reference to s. 251, to the effect that the business of the company had been definitively closed down.

8 Having obtained the declaration made by Charleton J., the solicitor for the respondent wrote to the Secretary General of the Department of Social Protection seeking payment of the amount recommended by the Rights Commissioner from the Social Insurance Fund, contending that the said declaration was sufficient to trigger Article 2(1)(b) of the 2008 Directive, which it was submitted, had direct effect in the Irish law. The claimant also reserved her right to seek damages from the State for its failure to transpose European Union law, in accordance with the principle established by the CJEU in its judgment in *Francovich and Bonifaci v. Italy* (Joined Cases C-6/90 and 9/90) [1991] ECR I-5357 (for convenience, referred to hereafter in short form as " *Francovich I* ").

9 It is perhaps important to observe that the background to these legal manoeuvres followed from a previous attempt to obtain payment from the Social Insurance Fund under the 1984 Act which was the subject matter of the decision of the High Court in *Re Davis Joinery Ltd.* [2013] IEHC 353, [2013] 3 I.R. 792. There, a petitioner sought to make a claim against the Social Insurance Fund in respect of a debt of €53,080. A petition was brought before the High Court to wind up the company for the explicit purpose of triggering the provisions of the 2008 Directive. It was proposed that a winding up order be made in circumstances where the 18-month time limit for the claim for payment out of the Social Insurance Fund was due to expire, and where a provisional liquidator was available for appointment, but no official liquidator had consented to act due to the lack of assets in the company. The High Court (Laffoy J.) refused to take this course, and adjourned the petition to enable the parties to ascertain whether the insolvency practitioner in question was prepared to consent to act as an official liquidator. In the event, that person agreed to do so, and on that basis, the petitioner was in a position to demonstrate compliance with the provisions of the 1984 Act once a winding up order was made in respect of the company, and thus, became entitled to be paid out of the Social Insurance Fund. However, Laffoy J. took the opportunity of delivering a comprehensive and lucid written judgment setting out the difficulties which arose in the case, which she identified as being of more general concern in situations involving what might be described as informal insolvencies. In particular, a number of pertinent observations were made at pp. 803 to 804 of the judgment, as follows:-

> "[33] While the court has been able to provide assistance to the Petitioner, it has been able to do so by applying the provisions of the [Companies Act 1963] in the ordinary way. However, the problem arising from the transposition of the Employers' Insolvency Directive has been around for a long time and, as stated in Regan on *Employment Law* (Bloomsbury, 2009) at para. 12.23:-
>
> > 'The Act's failure to deal with informal insolvency is probably its greatest defect and certainly its most controversial one.'
>
> That problem is not cured by this decision.
>
> [34] The Petitioner in this case has been fortunate in that his solicitors and counsel have taken the matter this far on his behalf and have been of very considerable assistance to the court and must be commended for that. However, one has to be concerned for less fortunate employees of corporate employers who have become caught up in what has become known as 'informal insolvency' and who are not in a position to petition to have the employer corporation wound up. Unless the issue is successfully

> litigated by an adversely affected employee in the future in this jurisdiction, or on a reference to the ECJ, the obvious unfairness inherent in the Act of 1984, as amended, will only be redressed by legislative change. Whether such change should be implemented is a matter of policy for the Government and the Oireachtas.
>
> [35] Finally, for the avoidance of doubt, it must be emphasised that nothing in this judgment should be interpreted as expressing any view as to whether the Petitioner can maintain an action against the State for loss incurred as a result of the manner of transposition of the Employers' Insolvency Directive."

The judgments of the High Court and the Court of Appeal

10 In the present case, it appears that respondent's request for payment out of the Social Insurance Fund was refused, and the matter subsequently came before the High Court (Hedigan J.) in application for judicial review of that decision (see [2015] IEHC 428). The High Court dismissed Ms. Glegola's claim on the grounds that the requirements of Article 2 (1) of the 2008 Directive were not satisfied. Accordingly, the issues in relation to direct effect and *Francovich* damages did not arise. That decision was reversed in the Court of Appeal. In a careful and comprehensive judgment, Finlay Geoghegan J. traced the history of the case. She concluded that s. 251 of the Companies Act 1990 did not provide a route whereby Article 2(1) of the 2008 Directive could be complied with. The section did not permit the making of a declaration to the effect that the employer's undertaking or business had been definitively closed down and that the available assets were insufficient to warrant the opening of the proceedings. In the first place, as already touched upon, the declaration made by the High Court (Charleton J.) in the present case did not go so far as to establish one of the necessary proofs, i.e. that the undertaking or business had been "definitively closed down". However, at para. 35 of her judgment, Finlay Geoghegan J went further, observing that she did not consider that s. 251 gave a jurisdiction to make a declaration of the type sought. On its face, s. 251 merely had the effect of applying certain provisions of the Companies Acts which would normally only apply to a company which had been formally wound up. As she put it:-

> "The only decision to be made on an application pursuant to s. 251(1) is whether it applies to the company or not. It does not confer jurisdiction to make other declarations."

11 The court then proceeded to consider whether there had been a failure to transpose the provisions of the 2008 Directive. Finlay Geoghegan J. considered that Article 2(1) had the effect that an employer company would be in a state of insolvency where, in an Irish context, a petition had been presented for its winding up and the appointment of a liquidator, and the court had, in accordance with Irish law, either decided to make a winding up order or appoint a provisional liquidator with a view to the hearing of a petition and the making of a winding up order, or made a finding or declaration that the undertaking or business of the company had been definitively closed down and any available assets were insufficient to warrant the making of a winding up order or appointing, as an initial step, a provisional liquidator. It was common case that there was no provision of the Companies Acts which enabled a petitioner for an order for winding up of a company to be granted the alternative form of order which it appeared was envisaged by Article 2(1)(b): that is, a finding or declaration that the undertaking had been definitively closed down and the available assets were insufficient to warrant the making of a winding up order. It appears that consideration was also given to s. 216 of the Companies Act 1963 (as amended) ("the 1963 Act"), but it was not submitted that the jurisdiction provided therein for the court to make "any other order that it

thinks fit" extended so far as to grant a power to make a declaration in a form which would satisfy the terms of Article 2(1)(b) of the 2008 Directive. That matter was not further debated in this court, and accordingly I express no view upon it.

12 Finlay Geoghegan J. concluded that the provisions of the 1984 Act could not be said to confer any such jurisdiction. Not only was no such jurisdiction adverted to expressly, but s. 1(3) of the 1984 Act provided that an employer which was a company shall be taken to be insolvent "if, but only if" a winding up order is made, if a resolution for a voluntary winding up is passed, or if one of the other events enumerated in s. 1(3)(c) occurs, as applicable. Accordingly, she concluded that the State had failed to correctly transpose Article 2(1) of the 2008 Directive.

13 The next issue then became the consideration of whether damages could be awarded against the State for the failure to transpose. This involved an application of the principles established in the case of *Francovich and Bonifaci v. Italy* (Joined Cases C-6/90 and 9/90) [1991] ECR I-5357, as elaborated in *Brasserie du PechÃªur S.A. v. Germany* (Case C-46/93) [1996] ECR I-1029. In Francovich I, which, coincidentally, involved the provisions of the original 1980 Directive, it had been decided that if there was a failure to transpose that could give rise to a right to damages, but only if certain conditions were satisfied. These were, first, that the provisions of the Directive in question entailed the grant of right to individuals; second, that it should be possible to identify the content of those rights on the basis of the provision of the Directive; and third, that there was a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties. No issue arises in this case as to whether the provisions at issue entailed the grant of right to individuals. In fact, the argument in this case has focussed almost exclusively on the subsequent expansion on the conditions contained at paras. 55 and 56 in the decision in *Brasserie du PÃªcheur* :-

> "55 As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> 56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."

14 It should be said that it is accepted that it is for the national court to make a decision on the question of manifest and grave disregard of the limits of discretion in the light of the considerations identified by the CJEU in *Brasserie du PechÃªur S.A. v. Germany* (Case C-46/93) [1996] ECR I-1029 and subsequent cases. One significant qualification is that contained in the subsequent case of R *. v. Ministry of Agriculture, Fisheries and Food Ex p. Hedley Lomas (Ireland) Ltd. (Case C-5/94)* [1996] ECR I-2553 and elaborated on in *Haim v. Kassenzahnarztliche Vereinigung Nordrhein (C-424/97)* [2000] ECR I-5123, *Sweden v. Stockholm LindÃ¶park A.B. (Case C-150/99)* [2001] ECR I-493 *and Robins v. Secretary of State for Work and Pensions (Case C-278/05)* [2007] ECR I-1053, which explain that the extent of discretion accorded to a Member State is relevant to the application of the test. Where the Member State is not, in effect, in a position to make legislative or other choices, and has considerably reduced or even no discretion, the mere fact of infringement may be sufficient to establish the existence of a

sufficiently serious breach.

15 Finlay Geoghegan J. made reference to the then recent decision in the Court of Appeal in the case of *Ogieriakhi v. Minister for Justice* [2016] IECA 46, [2016] 1 I.L.R.M. 504, in which the Court of Appeal had set aside award of Francovich damages made by the High Court . In the light of the test set out in the case law, the court considered that Article 2(1) of the 2008 Directive set out with clarity the conditions on which an employer will be deemed to be in a state of insolvency: Article 2(1) made clear that a formal order for winding up is not required, and that a deemed state of insolvency may exist where a Court, in proceedings in which there is a petition to wind up, makes the alternative type of order set out in Article 2(1)(b). Furthermore, the decision of Laffoy J. in *Re Davis Joinery Ltd.* [2013] IEHC 353, [2013] 3 I.R. 792 had been available more than eight months prior to the petition in the present case. While the court noted that no infringement proceedings had been commenced against Ireland by the Commission, it nevertheless considered that there had been manifest disregard by the State of the limits of its discretion. The court also considered that the State had not been called on to make a legislative choice in transposing Article 2(1).

16 Finally, the court considered the question of a causal link. The court had to consider whether it could be satisfied that, if the procedure required by Article 2(1)(b) had been in place at the relevant time, the respondent would, as a matter of probability, have satisfied the court that the company's undertakings had been definitively closed down; that the available assets were insufficient to warrant the making of a winding up order; and that the respondent would have brought the application within the time specified in the 1984 Act. Notwithstanding the fact that Ms. Glegola had given evidence that she considered the employer was continuing to trade, the court considered that on the available evidence, and in particular the letter of 2 June 2012 from the company's solicitor, that there was evidence that the company had definitively closed down. The court was satisfied to conclude that, had the procedure been in place, the respondent would, as a matter of probability, have been able to discharge the requisite evidential burden, and that again, as a matter of probability, any application would have been made within the relevant time. Accordingly, the respondent was entitled to recover damages in the sum of €16,818.75 against the State for its failure to correctly transpose the provisions of the 2008 Directive.

The present appeal

17 On 13 December 2017, this court granted leave to appeal to the appellants (the Minister for Social Protection, Ireland, and the Attorney General) on the grounds set out in the application for leave, including the ground listed as Issue 1(a) that the Court of Appeal had erred in deeming Article 2(1)(b) to be mandatory, notwithstanding the disjunctive wording of Article 2(1) and/or the reference in Article 2(1) to insolvency as a concept "as provided for under the laws, regulations and administrative provisions of a Member State" (see [2017] IESCDET 143).

Issue 1 - the correct interpretation of Article 2(1) of Directive 2008/94/EC

18 The first issue argued on behalf of the State appellants relates to the true interpretation of Article 2(1) of the 2008 Directive. It was argued forcefully that Article 2(1) of the 2008 Directive does not require a process for informal insolvency. Rather, it is said that what is described as the apparently nebulous terms of the Directive give Member States a choice. Part of the background reasoning appears to be that since the 2008 Directive creates only a form of partial harmonisation and does not itself define a state of insolvency and defers at some level to national law, then as the *Francovich* litigation itself shows, there can be national variations in the manner in which the protection intended by the Directive is provided. It is suggested that the interpretation

adopted in good faith by Ireland is that:-

> "Article 2(1)(b) is conditional on the opening lines of Article 2(1) and the deference therein to national insolvency laws can, and perhaps must, be read disjunctively.

This means that:-

> "In effect, Article 2(1)(b) only applies where a Member State's national insolvency law, regulations or administrative provisions provides for such. Alternatively, the Directive can be read as merely setting out minimum standards with deference to national insolvency law, if the reference to national insolvency law in Article 2(1) is to have some meaning. In any event it is clear that Article 2(1) must afford the Member States with a significant level of discretion. In sum, therefore, some Member States may adopt 2(1)(a) or (b) or both so long as such procedure is in accordance with their own national law on insolvency."

19 It is also argued that this interpretation is consistent with the decision of the CJEU in *Mustafa v. Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguritelen institut (Case C-247/12)* EU:C:2013:256, and in particular para. 32 thereof which provides:

> "Accordingly, it is apparent that, in order for the guarantee provided by Directive 2008/94 to apply, two conditions must be satisfied. First, there must have been a request for the opening of proceedings based on the insolvency of the employer and, second, there must have been a decision either to open those proceedings or, where the available assets are insufficient to warrant the opening of such proceedings, it must have been established that the undertaking has been definitively closed down."

20 I cannot accept this interpretation. It appears to me that it seeks to extend the concept of the minimum harmonisation effected by the 2008 Directive to a point well beyond that contemplated by that measure. Article 2(1)(b) of the 2008 Directive plainly requires Member States to do something . Accordingly, I do not agree that Article 2(1) creates an option for Member States: rather Article 2(1) requires Member States to offer an alternative course to employees of insolvent employers. This in my view follows from a straightforward reading of the English text of the Directive. The conditions required for an employer to be deemed to be in a state of insolvency are that a request be made for the opening of collective proceedings involving an employer's assets, and that the competent authority has either decided to open proceedings, *or* has established that the employer's undertaking or business has been definitively closed down, and that the available assets are insufficient to warrant the opening of the proceedings. That interpretation follows naturally from the grammatical structure and syntax of the Article 2(1). The same result is arrived at if a broader approach is taken to the interpretation of the provision in the light of the objectives of the 2008 Directive itself. It follows from the argument made on behalf of the appellants that if Article 2(1) is to be read as providing an option to the Member States, then the Member States can choose one or other, or both. But if this were so, then on this interpretation, Ireland, and any other Member State, would be entitled to provide that recourse to the Social Insurance Fund would be available to employees only where the alternative in Article 2(1)(b) applied, i.e. where a request had been made to open insolvency proceedings, and it had been established by the competent authority that the employer's undertaking had been definitively closed down and the available assets were insufficient to warrant the opening of the proceedings. This, however, is a conclusion that makes little sense when viewed in light of the object sought to be achieved by the 2008 Directive. It would mean that whether the Social Insurance Fund would be available to meet employees claims would depend on the happenstance of the nature and degree of the insolvency of their employer; further, it would ignore the fact that Article 2 (1), in referring to the necessity for a

"request…for the opening of collective proceedings based on the insolvency of the employer" is predicated on the idea that the opening of some form of 'formal' insolvency procedure should be one of the options triggering the application of the Directive; and finally, it would run counter to the view of the Commission in its report of 28 February 2011 on the implementation and application of certain provisions of the 2008 Directive (COM(2011) 84 final), at p. 4, that the proceedings to which the 2008 Directive applies are in general the same as those covered by Regulation 1346/2000 on insolvency proceedings (superseded as of 26 June 2017 by Regulation 2015/848 on insolvency proceedings (recast)), albeit that certain Member States had notified it of certain exceptions to this in their transposing legislation. Finally, it does not appear to me that the text of the judgment in *Mustafa v. Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguritelen institut (Case C-247/12)* EU:C:2013:256 supports the interpretation advanced by the State. Rather, it makes it clear that two things are required: first, a request for the opening of collective proceedings, and second, a decision by the competent authority. That decision may be to open proceedings, or to establish that the undertaking has been definitively closed down, but it is clear that either decision is sufficient for the purposes of the 2008 Directive. Accordingly, I conclude that the decision of the Court of Appeal in this respect is correct. In follows that the 2008 Directive must be interpreted as requiring Member States to have a mechanism allowing the court to determine that a state of insolvency arises permitting employee claims to be met from the Social Insurance Fund without out making a winding up order.

21 I also agree with the decision of the Court of Appeal that, at least insofar as the issue was advanced in this case, Irish legislation does not provide for the necessary procedure. It is plain that s. 1(3) of the 1984 Act cannot be interpreted as extending to an informal insolvency situation since it provides that an employer is to be taken as being, or having become insolvent "if, but only if", in the case of a company, a winding up order has been made, a voluntary winding up resolution passed, a receiver or manager duly appointed, or possession has been taken of any property of the company on foot of a floating charge. I also agree that s. 251 of the 1990 Act cannot supply the deficit. Section 251 does apply to companies which are insolvent where it is proved to a court that it is unable to pay its debts and that the principal reason that it is not being wound up is that there are insufficient assets to do so. However, the section also expressly identifies the consequences of any such determination. It has a limited effect that some sections of the 1990 Act and the 1963 Act will apply to the company. In the first place, therefore, as pointed out by Finlay Geoghegan J. in the Court of Appeal, any declaration made under s.251 cannot, as a matter of law, and did not in this case, go quite so far as Article 2(1) requires, by declaring that a business has been "definitively closed down". More importantly, however, s. 251 does not permit the making of any open-ended declaration in insolvency proceedings. Rather, it sets out the consequences for any case falling within s. 251, which do not include the making of a declaration in insolvency proceedings for the purposes of Article 2(1) of the 2008 Directive.

22 The Court of Appeal did advert to the provisions of s. 216 of the 1963 Act. However, it was not argued in the Court of Appeal, or by extension in this court, that the provisions of that section might permit an order to be made for the purposes of Article 2(1), although that section does permit a court on hearing a winding up petition to "make any other order it thinks fit". As noted above, like the Court of Appeal, I express no view on the interpretation of that section. Accordingly, the case must be considered on the basis that, first, the Directive requires a procedure to cover informal insolvencies, and second, that Irish law did not at the relevant time contain any provision for such a procedure. The Court of Appeal concluded that in the circumstances of this case, the test for Francovich damages was satisfied. It is this issue which was most hotly contested on this appeal.

Issue 2 - *Francovich* damages

23 The starting point for considering the award of damages is that it is decidedly not the

case that the establishment of a breach of European Union law does not, as it might have done, give rise *per se* to an award of damages to a party who has suffered loss, or might have obtained a benefit under the relevant provision. The jurisprudence is strict, in requiring, first, that the rule infringed must have been intended to confer rights on individuals, second that the breach of the rule was sufficiently serious, and third, that there is a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured party. The justification for such a test is well explained by Paul Craig in his article, 'Once more unto the breach: the Community, the State, and damages liability' (1997) 113 L.Q.R. 67, at p. 80:-

> "To render governmental authority strictly liable [in circumstances where Member State is making difficult legislative and discretionary choices] would be too onerous. This is particularly so given the broad reach of illegality itself. The fact that a court might interpret complex discretionary provisions differently from the primary decision maker, and thereby conclude that the decision is vitiated by illegality on the grounds of irrelevancy, in propriety of purpose or the like, should not be sufficient without more to render the public purse liable for what might be considerable sums of money."

As observed there, this is a test which has parallels in national law, since it distinguishes between the finding of illegality and consequential annulment, and the circumstances in which damages may be awarded.

24 Later, at pp. 83 to 84, he argues:-

> "Public bodies, whether at Community or national level, often have to interpret complex statutory provisions. A court may later decide that a public body has misconstrued the legislation by, for example, making a jurisdictional error, or taking an irrelevant factor into account. This should not of itself give rise to damages liability. It would expose public bodies to crippling monetary suits where they had made a bona fide interpretation of legislation, which ultimately proved to be mistaken in the sense that the court differs in its construction of the relevant provisions […] Where the relevant norm is imprecise and reasonably capable of bearing the construction given to it by the Member State then, even if this is not the interpretation adopted by the [CJEU], the illegality should not […] be deemed sufficiently serious to justify damages liability."

25 The author further expresses the view that strict or *per se* liability is equally inappropriate regardless of whether the Member State is exercising a *legislative discretion* (e.g. where a Member State, in implementing a Directive, exercises choice as to the manner in which the ends stipulated in the Directive should be attained), an *interpretative discretion* (where a Member State is required to construe Union norms in order to determine the ambit of their application) or a discretion to derogate (where explicit provision is made for Member States to derogate from certain Treaty articles or legislative provisions on various, specified grounds). At p. 84, he states:-

> "It is often assumed, for example, that the exercise of interpretive discretion is easier than implementing legislative discretionary power. This is mistaken. Application of the former can be just as difficult as, and may be more difficult than, the latter. Nor is the line between the type of judgment which has to be made in the two areas as different as some would think. Interpretative choices can, and often will, involve the weighing of complex variables in order to decide which interpretation best effectuates the aims of the legislation; the exercise of legislative discretionary power will often be affected, explicitly or implicitly, by interpretative judgments as to the meaning of variables which have to be balanced."

There is a link between the consideration of this issue and the earlier question of whether there has been a breach of Union law. That is because among the factors to be taken into account in considering whether there has been a manifest and grave disregard of the limits of a Member State's discretion are the clarity and precision of the rule which is breached, the measure of discretion left to the national authorities, and whether any error of law was excusable or inexcusable. It may follow, therefore, that the more arguable and debatable the question of interpretation is, the more easy it is to argue that any error was excusable.

26 It might be contended that since the test is whether the institution or Member State has manifestly and gravely disregarded the limits of its discretion, the test can have little application where it is determined that no or no significant discretion in which case the mere infringement of union law would suffice to establish a serious breach (see *R. v. Ministry of Agriculture, Fisheries and Food Ex p. Hedley Lomas (Ireland) Ltd. (Case C-5/94)* [1996] ECR I-2553). However, as observed by Craig (op. cit.), it is necessary to be alive to the fact that the meaning of particular provisions of a Regulation or Directive may be unclear and open to a spectrum of possible reasonable interpretations. In this case, it is said that the approach taken by Ireland, even if incorrect, was a reasonable one, since the United Kingdom had not made a separate provision for informal insolvencies at least until relatively recently, and the European institutions, and in particular the Commission, had not expressed any criticism or disapproval of the manner in which the 2008 Directive had been implemented in the law of both Ireland and the United Kingdom.

27 In particular, the appellants place reliance on the recent decision of this court in *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52, [2017] 2 I.L.R.M. 340. That case had proceeded in parallel to the present proceedings, and indeed the Court of Appeal decision in Ogieriakhi was referred to in the Court of Appeal decision in this case.

28 The facts of *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52, [2017] 2 I.L.R.M. 340 are complex. The plaintiff was a Nigerian national who claimed entitlement to reside permanently in Ireland pursuant to the provisions of Regulation 12 of S.I. No. 656/2006 - European Communities (Free Movement of Persons) (No. 2) Regulations 2006 ("the 2006 Regulations"), which came into effect in April 2006, and implemented, in particular, the provisions of Article 16 of Directive 2004/38/EC ("the 2004 Directive") which made provision for rights of residence for third-country nationals married to citizens of Member States exercising free movement rights within the European Union. The position of such third-country nationals had originally been regulated by Regulations 1612/68/EEC, which linked the entitlement to residence to the ongoing economic activity of the Member State citizen. However, Recital 17 of the 2004 Directive provided:-

> "Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host member state would strengthen the feeling of Union citizenship and is a key element promoting social cohesion which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host member states in compliance with the conditions laid down in this directive during a continuous period of five years without becoming subject to an expulsion measure."

29 Article 16 (1) and (2) of the 2004 Directive provided as follows:

> "1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent

residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

At least three issues arise on the terms of this provision all of which were present in the *Ogieriakhi* case. What was meant by residence with the Union citizen in the host Member State? What was contemplated by residence of the Union citizen in the Member State? Finally, did the five year period have to commence after the coming into force of the 2004 Directive, or at least be in existence at that time?

30 The plaintiff in *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52, [2017] 2 I.L.R.M. 340 had arrived in Ireland as an asylum seeker in 1998 and married a French national in 1999. However, the marriage broke down in 2001, and it appears that the plaintiff's wife return to France in December 2004. As already observed, the relevant Regulations came into force in April 2006. The plaintiff formed a new relationship with an Irish citizen, and a child was born of that relationship. Although these facts would have given rise to certain entitlements to residence in Ireland, they were not relevant for the particular proceedings which was solely concerned with the application of the 2006 Regulations, which implemented the terms of the 2004 Directive, with respect to the plaintiff's marriage to a French national and his residence in Ireland thereafter. The fact was that the plaintiff could show five years' continuous residence in Ireland while married to a citizen of a Member State who was herself also resident in Ireland, but could not show that he had resided with that person for more than two years. Furthermore, she was no longer residing in Ireland at the time the 2004 Directive came into force.

31 There was no question of the interpretation of the 2006 Regulations, because those simply adopted in identical terms the relevant provisions of the 2004 Directive. There was, however, considerable debate as to the true interpretation of the 2004 Directive. Indeed, it appeared that the plaintiff had been in communication with the Commission, and that correspondence suggested that the Commission took the view that, had the plaintiff's French wife not been resident in Ireland after 2004, the plaintiff would not have qualified under the Directive. In the event, however, the CJEU took an expansive view of the scope of the 2004 Directive in *Secretary of State for Work and Pensions v. Lassal (Case C-162/09)* [2010] ECR I-9217. The court repeated the observations made in *Metock v. Minister for Justice, Equality and Law Reform (Case C-127/08)* [2008] ECR I-6241 that the Directive could not be interpreted restrictively. Accordingly, five years' residence while married to a citizen of a Member State also residing in another Member State (but not necessarily with the citizen) could entitle an applicant to reside in the Member State even if that five year period during which both parties had resided in the same Member State had expired prior to the coming into force of the Directive and any implementing regulations. It was clear, however, from the decision in *Lassal* , that the decision of the Minister to refuse a residency permit to Mr. Ogieriakhi was invalid. However, the more difficult question was whether he was therefore entitled to *Francovich* damages. The High Court upheld his claim and awarded him substantial damages. That decision was reversed by the Court of Appeal, and this court upheld the decision of the Court of Appeal, albeit on narrower grounds.

32 The appellants also rely on the limits to the application of the 2008 Directive as illustrated by the outcome of the *Francovich* litigation and the fact that some distinguished authors had concluded that the failure of the Irish legislation to include informal insolvencies was not a matter which could give rise to a *Francovich* -type remedy. Thus, in a comment by Gavin Barrett, 'European law - Mr. Francovich strikes again or when is an insolvency not an insolvency?' (1996) 18(1) D.U.L.J. 157, the

author had expressed the view that the outcome of the second instalment of the Francovich litigation, *Francovich v. Italy (Case C-479/93)* [1995] ECR I-3843 (for convenience, referred to hereafter in short form as " *Francovich II* ") might mean that a claim for damages by an employee who employer was insolvent, but had not been the subject of a winding up order, might not be maintainable. At pp.165 to 166, he said:-

> "The main problem which has affected the operation of the 1984 Act to date has been its failure to cover the situation of so-called "informal insolvencies" — i.e., situations where no formal winding-up or bankruptcy has been initiated but rather the employer simply ceases trading without any formal winding-up. Despite the opportunity to remedy this situation provided by the presence on the statute books of section 4(2) of the 1984 Act, Ministerial regulations covering this situation have never been made. (As long ago as 1990, the then Minister for Labour stated in the Dail that it was his view that, for several reasons, the making of regulations to cover the situation of "informal insolvencies" would not be feasible. No relevant legislative developments have occurred since that time.
>
> […]
>
> In the event, Francovich failed in his claim, his argument running into what in the event proved to be the insuperable hurdle of the wording of Article 2(1). The conclusions to be drawn for Irish law seem clear. Ireland's failure to provide the same protection for employees in informal insolvency situations as it provides for employees in an identical situation save that their employers have been the subject of formal bankruptcy or insolvency procedures may well continue to be an inequality which begs to be remedied. But the decision of the Court of Justice in [*Francovich II*] constitutes a clear indication that pressure for its resolution will not emanate from any interpretation put upon Directive 80/987 by the Court."

33 A similar conclusion appears to have been expressed by Aimée Sweeney in her article, 'Problems with the Protection of Employees (Employer's Insolvency) Act 1984' (2009) 6(4) I.E..L.J. 98, where, having observed that there was clearly a potential for an Irish litigant to bring a claim to the CJEU in light of Ireland's failure to transpose the 2008 Directive into Irish law in a way which would cover an informal insolvency situation, the author concluded that in the light of the decision in *Francovich v. Italy (Case C-479/93)* [1995] E.C.R. I-384, it seemed likely that such a claim would fail. The author's view was that the CJEU gives each Member State a broad discretion in relation to the definition of an "insolvent employer", and thus the only avenue by which to remedy the lacuna in Irish law on the protection of employees in the event of an employer's insolvency was through legislative intervention. Against this, however, it should be said that in the leading work of Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue* (2nd edn., Bloomsbury, 2012) , the authors expressed the view at p. 309 that since there is no provision in Irish law which allows a court to make the determination required by Article 2(1)(b) of the 2008 Directive, "Ireland would appear to have failed to provide the minimum level of protection for employees as required by the Directive".

34 On a superficial level, it might appear that this case therefore is broadly similar to *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52, [2017] 2 I.L.R.M. 340, in that the Commission, while reviewing the implementation of the 2008 Directive in its 2011 report (COM(2011) 84 final) had raised no issue with the Irish legal regime, or with that which obtained in the United Kingdom with regard to informal insolvencies. Moreover, the United Kingdom, the Member State whose law was most comparable to the legal position in Ireland, had at least for a time adopted the same conclusion. As

outlined above, a number of authors had expressed the view that the legislative position in Ireland, while perhaps unsatisfactory, would nonetheless be unlikely to give rise to a claim for *Francovich* damages. On that basis, it is suggested that the error was excusable. However, in my view, on closer analysis, this contention cannot be sustained.

35 First, *Ogieriakhi v. Minister for Justice and Equality* [2017] IESC 52, [2017] 2 I.L.R.M. 340 was quite a different case, in that the interpretation adopted by the CJEU in *Secretary of State for Work and Pensions v. Lassal (Case C-162/09)* [2010] ECR I-9217 was one which (being described as expansive) necessarily implied that other interpretations could reasonably have been adopted. Here, for the reasons carefully analysed in the first place in *Re Davis Joinery Ltd.* [2013] IEHC 353, [2013] 3 I.R. 792, and secondly in the decision of the Court of Appeal in the present case, it does not appear to me that on close analysis it is possible to advance any other reasonable interpretation of Article 2(1) of the 2008 Directive, other than that it requires that the guaranteed fund to be established pursuant to the 2008 Directive should also be available in the case of informal insolvencies: that is, where proceedings have been opened, but it has been determined that a business has definitively closed down, and that its assets are insufficient to justify a formal winding up. In *Re Davis Joinery Ltd* . and in this case, the courts have of course benefitted from the close scrutiny brought to bear on such a provision in the course of focussed adversarial proceedings, which is not always available to the academic commentator or the textbook author and therefore while I respect and indeed greatly value observations made on the general state of the law, I do not think that the expression of such views can determine this question, if on close analysis a different conclusion appears compelling.

36 Furthermore, it is apparent that the contrary views are themselves dependent upon a contention that the decision in *Francovich v. Italy (Case C-479/93)* [1995] E.C.R. I-384 precludes such an interpretation of the 2008 Directive. Again, however, on analysis it appears to me that this does not follow. It is the case that the 2008 Directive itself is drafted in some places in somewhat nebulous terms, that it affects only a minimum harmonisation, and accordingly, that it accords some scope to national law, which, as in *Francovich II* itself, may have the effect of narrowing the scope of protection afforded in some Member States. In that case, however, the ultimate conclusion could be attributed to the fact that the Italian legislation introduced to transpose the (then applicable) 1980 Directive limited the retroactive effect of the possibility of receiving compensation for loss and damage caused by the delayed transposition (clarified in *Francovich and Bonifaci v. Italy (Joined Cases C-6/90 and 9/90)* [1991] ECR I-5357) to employees whose employers were subject to proceedings to satisfy collectively the claims of creditors. Italian law excluded several categories of employer from proceedings to satisfy collectively the claims of creditors: in the Opinion of Advocate General Cosmas in *Francovich II* , para. 9, footnote 5, it is noted that the order for reference cited as examples of such categories of employer, "farmers, nonentrepreneurial employers (members of the professions) and businessmen who have ceased trading more than one year ago". The employee in *Francovich II* worked for an employer falling within a category which was excluded from the application of collective proceedings under Italian law, and thus, and in consequence his situation fell outside the scope of the 1980 Directive. However, that issue does not arise in this case. The employer in the present case - a limited company - is undoubtedly an entity which could ordinarily be the subject of collective proceedings to satisfy the claims of creditors. Therefore, the respondent's situation comes within the scope of the Directive. Once that step is taken it cannot be said, in my view, that the 2008 Directive affords further scope for or deference to national law in respect of the circumstances giving rise to the entitlement to recover . . The protection provided by the 2008 Directive is clearly intended to apply to situations where insolvency proceedings are commenced, but it is established that the undertaking or business has definitively closed down, and that its assets are insufficient to justify a formal winding up. It does not appear to me that there is a scope for any interpretative discretion in that regard. Further, it is obvious that the 2008 Directive is intended to

secure important benefits for citizens. In this case, I do not think it is appropriate or permissible to treat the limited implementation of the 2008 Directive as excusable or understandable because of the absence of complaint by the Commission and the views expressed in certain academic articles, referred to above. That, in my view, would be to apply too low a standard. The Commission's 2011 report (COM(2011) 84 final) does not address the question of informal insolvencies in Ireland at all. Accordingly, the weight to be attached to it is limited, given that what is relied on is the absence of any observation on the Irish position with regard to informal insolvencies, rather than a positive endorsement of it. It is also the case that the length of time during which Irish law, and it appears the law in the United Kingdom, remained unchanged is not compelling, in circumstances where the appellants have not shown before this court that the issue arose or the law was in fact tested and found capable of surviving judicial scrutiny either here or in the United Kingdom. Finally, the stated view that Ireland was not obliged to make provision for such informal insolvencies appears to have been influenced by the coincidence that the *Francovich* litigation occurred in the context of the 1980 Directive, and draws attention to the fact that, in certain respects, the Directive could produce different outcomes in different Member States. However, I conclude that when the focus is limited to the question of the circumstances in which Ireland and other member states were required to make provision for claims on the Social Insurance Fund , the analysis contained in the decision of the Court of Appeal is clear and correct.

37 The last step in the test is in demonstrating a direct causal connection between loss suffered and the breach of European Union law in question. In this case, that required the Court of Appeal to consider whether, if there had been legal provision for informal insolvencies, the respondent in this case would have been able to satisfy a court that her employer's business or undertaking had definitively closed down, and that its assets were insufficient to justify a formal winding up. There was only limited evidence in this regard, and the Court of Appeal proceeded cautiously. However, the court was prepared to conclude that, as a matter of probability, the respondent would have brought an application within the relevant time frame, and would have been able to satisfy the criteria Article 2 (1) of the Directive. In particular, the court referred to the fact that the employer did not appear at the hearing, that the position maintained in the letter of 7 June 2012 by solicitors on behalf of the employers was that the company had ceased trading in November 2011, that this could be verified from an inspection of the premises from the company it used to trade, and that the company was subsequently struck off by the Register of Companies on 11 October 2013 for failure to file returns. Finally, when the petition was presented in this case in March 2014 and served on the company, the company did not appear in court. In my view, given the difficulties of proof in an area such as this, the Court of Appeal was entitled to come to the conclusion which it did on the available evidence in this respect. However, it may not have escaped the attention that there is a certain irony in the letter of 7 June 2012 becoming a key factor in concluding that the respondent was entitled to obtain payment from the Social Insurance Fund in respect of the recommendation made by the Rights Commissioner, since, in proceedings before the Rights Commissioner, her case had been that the letter was incorrect. This was because she maintained that she had not been dismissed on grounds of redundancy, but rather had been unfairly dismissed by a company still in existence. This is an unsatisfactory situation. The fact that the company did not appear before the Rights Commissioner cannot be a surprise in circumstances such as this. Nor can it be expected that a company which does not have sufficient assets to justify a winding up would be in a position to retain legal representation. The fact that one party does not appear in proceedings should not mean that the opposing party's contention is accepted by default and without question . There is, in my view, an obligation on any decision-maker to satisfy themselves that an applicant's case is well founded, particularly where there is an obligation on the part of the State, or another party, not represented in the proceedings to satisfy the award. In this case, however, it seems clear that the respondent was entitled to some award which ought to have been met

from the Social Insurance Fund, and, as the Court of Appeal points out, the determination is now binding and must be treated as a debt due by the company to the respondent. In those circumstances, I would uphold the Court of Appeal decision that the respondent is entitled to recover damages in the sum of €16,818.75 against the State for its failure to correctly transpose the 2008 Directive.