THE COURT OF APPEAL

Appeal Number: 2020/149

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

SCOTCHSTONE CAPITAL FUND LTD AND PIOTR SKOCZYLAS

PLAINTIFFS/
APPELLANTS

- AND -

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/
RESPONDENTS

UNAPPROVED

JUDGMENT of the Court delivered on the 31st day of January, 2022

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SECTION 1: INTRODUCTION

The Nature of this Appeal

1. This appeal arises from a judgment and order of the High Court dismissing the appellants' claim on the basis that it was frivolous or vexatious and bound to fail. The phrase "frivolous or vexatious" has a technical meaning in this legal context. We will later be discussing the jurisprudence as to the appropriate tests when applying the concepts of "frivolous and vexatious" and "bound to fail"; at later points in this judgment we will refer to both lines of authorities as the "bound to fail" jurisprudence.

2. The appellants' claim in these proceedings consists of what will be referred to in this judgment as a "*Köbler* claim". This is a claim of a very particular nature which was identified by the CJEU in a judgment bearing that title. Such a claim amounts, in essence, to a claim against the State for damages for loss caused by a manifest infringement of a litigant's EU law rights in circumstances where a decision of the State's court of final instance is alleged to constitute or contain the infringement in question.

3. A *Köbler* claim is therefore a unique type of EU law claim which has at its core the claim that a *particular court* (a court of final instance) has engaged in a *particular kind of error* (a manifest error of EU law) thereby causing damage to the litigant's interests for which he is entitled to reparation if the claim is successful.

4. A *Köbler* claim is in and of itself, therefore, quite a complex type of claim involving, of necessity, a second set of proceedings in which a complaint is made about a first set of proceedings; a court (or courts) in a second set of proceedings (the "*Köbler* proceedings")

must engage in a review of the decision of the court of final instance in prior proceedings (the "base proceedings") to ascertain whether there was a "manifest infringement" of EU law by the court of final instance. It will also be readily apparent from this brief characterisation of a *Köbler* claim that it is a claim which amounts to an exception to the normal operation of the principle of *res judicata.* This will of course be discussed in further detail below.

5. The complexity is increased in the present case by reason of the fact that the State brought a motion to strike out the proceedings for being bound to fail and/or frivolous or vexatious, which is itself an exceptional jurisdiction or procedure. Thus, the situation presenting itself in this case involves the interaction between not one, but two, exceptional jurisdictions or procedures.

6. Although the Court considers that the entirety of the case ultimately resolves itself into a net legal point, we have dealt here with the matter at some length for a variety of reasons. First, this is, to the best of the knowledge of the Court, the first time a *Köbler* claim has been brought in this jurisdiction and it is, as already observed, an exceptional form of claim. Secondly, as already observed, because the State brought a motion to strike out the claim, the Court must concern itself with the interaction between a *Köbler* claim and the "strike out" jurisdiction. Thirdly, the history of the "base proceedings" (or "the *Dowling* litigation") is itself complex; it involved three levels of Irish court (encompassing 3 High Court judgments, one Court of Appeal judgment, and a Supreme Court determination), together with a decision of the CJEU on two questions referred by the High Court pursuant to the Article 267 preliminary reference procedure. Fourthly, while the appellants have certain foundational complaints, they have built multiple layers of complaint on top of these

basic elements. Fifthly, if the High Court's Order here is upheld, the present decision is itself a decision of last instance concerning a matter of EU law, against which the appellants have no recourse unless the Supreme Court grants leave to appeal.

7. We have referred to a *Köbler* claim involving a first set of proceedings, referred to here as the "base proceedings", which are then reviewed in a second set of proceedings. In the present case, the "base proceedings" will at times be referred to as "the *Dowling* litigation". We will now give an overview of the *Dowling* litigation in order to set the context for the present appeal.

Brief Overview of The *Dowling* Litigation

8. At this point in our judgment, we will confine ourselves to giving an overview only of the *Dowling* litigation. It will be necessary to return to certain parts of the judgments therein in further detail later, for obvious reasons.

9. The judgments and decisions to which we refer collectively as the *Dowling* litigation are as follows:-

1. *Dowling & Ors. v. The Minister for Finance* [2014] IEHC 418 ("the first High Court judgment");
2. *Dowling v. Minister for Finance (Case C-41/15)* [2016] E.C.R I-836 ("the CJEU ruling");
3. *Dowling v. Minister for Finance* [2017] IEHC 520, ("the second High Court judgment");

4. *Dowling v. Minister for Finance* [2017] IEHC 832, ("the third High Court judgment");
5. *Dowling v. Minister for Finance* [2018] IECA 300, ("the Court of Appeal judgment");
6. *Dowling v. Minister for Finance* [2019] IESC DET 55, ("the Supreme Court Determination").

10. The overall context to the *Dowling* proceedings was the financial crisis of 2008 and thereafter, and the making of a direction order by the High Court in July 2011 pursuant to the Credit Institutions (Stabilisation) Act 2010 ("CISA" or "the 2010 Act"), which enabled the Minister for Finance to acquire a 99.2% shareholding in Irish life & Permanent plc ("ILP") in order to facilitate its recapitalisation. Certain matters are exhaustively dealt with in the judgments referred to above and we do not propose to repeat the details here as this would add unnecessary length to this already-lengthy judgment. The matters which we do not repeat here include: (1) a description of the financial crisis itself; (2) the impact of the financial crisis upon ILP and Irish Life & Permanent Group Holdings plc ("ILPGH") which operated as a holding company and was the owner of ILP.; (3) the provisions of the 2010 Act; (4) the circumstances leading up to the making of the direction order of July 2011; and (5) the position of the appellants throughout the relevant period.

11. Following the making of the direction order, application was made pursuant to s.11 of the 2010 Act by a number of plaintiffs - Gerard Dowling, Padraic McManus and the appellants in the within proceedings - to the High Court to set aside the direction order. All four were shareholders in ILPGH.

12. The plaintiffs in the *Dowling* proceedings contended that the direction order was in breach of both domestic law and EU law. They contended, *inter alia*, that the company was a solvent and viable company and that there were less restrictive, practical and equally effective means for recapitalisation which existed and which had been recommended by the company's board. One of the points which arose in the case was whether the direction order was made in breach of EU law, specifically the provisions of the Second Council Directive 77/91/EEC, 13 December 1976 ("the Second Directive"). There were also questions of domestic law such as whether the procedural requirements of the 2010 Act had been complied with and whether, as a matter of Irish administrative law, the measure taken was valid and lawful.

13. The potential relevance of the Second Directive was as follows. Pursuant to Article 8 of this Directive, shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par. Under Article 25(1), any increase in capital must be decided upon by the general meeting. Article 25(2) provides that *"Nevertheless, the statutes or instrument of incorporation or the general meeting… may authorize an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law."* Article 29(1) provides that whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares. Moreover, pursuant to Article 29(4), the right of pre-emption cannot be restricted or withdrawn by the statutes or instrument of incorporation, but only by a decision of the general meeting under the conditions specified in that paragraph.

14. In what we refer to throughout this judgment as "the first High Court judgment", the High Court (O'Malley J.) made certain findings of fact and then referred two questions to the CJEU on a preliminary reference pursuant to Article 267 TFEU. The precise wording of these questions will be set out later.

15. The CJEU answered the two questions and the matter came back before the High Court. There was dispute between the parties as to what the CJEU had actually decided and, in particular, whether it had in effect already applied EU law to the direction order or whether it had left it to the domestic courts to apply a test which the CJEU had merely expounded in general terms. In a second judgment, ("the second High Court judgment") the High Court effectively determined that the former was the case and it went on to deal with the remaining domestic law issues in the case, ultimately dismissing the plaintiffs' claim. The appellants maintain that the High Court erred in its interpretation and application of the CJEU decision in *Dowling*.

16. An appeal to the Court of Appeal was unsuccessful. The appellants maintain that the Court of Appeal erred in its interpretation and application of the CJEU decision in *Dowling,* and that its error amounted to a manifest infringement of the appellants' rights under EU law within the meaning of the *Köbler* doctrine.

17. The *Dowling* plaintiffs sought leave to appeal from the Supreme Court and requested that court to refer further questions to the CJEU pursuant to Article 267. The Supreme Court refused leave to appeal and refused to refer any further questions to the CJEU. The appellants maintain that the Supreme Court, in doing so, engaged in an error which

constituted a manifest infringement of the appellants' rights under EU law within the meaning of the *Köbler* doctrine.

18. Accordingly, it will be necessary, in due course in this judgment, to examine those judgments more closely. As already noted, the above is merely a brief summary by way of overview of the *Dowling* litigation in order to place the present case in context.

SECTION 2: THE PLEADINGS, THE TWO MOTIONS AND THE HIGH COURT JUDGMENT

The Pleadings

19. The Supreme Court refused leave to appeal in the *Dowling* litigation on the 2 October 2018. The plenary summons in the present proceedings was issued on the 11 April 2019. The general endorsement of claim to the plenary summons alleges ten infringements of EU law, listed in some detail at "A" to "J". The alleged infringements are addressed in even more detail in the statement of claim which was delivered on the 14 May 2019 and which runs to some 66 pages and 61 numbered paragraphs.

20. In broad terms, the reliefs sought are three-fold: (1) declarations are sought in terms of paragraphs A-J inclusive; (2) damages by way of reparation by reason of manifest breaches of EU law effected by the court of last instance are sought; (3) request for further reference(s) to the CJEU. It is clear from the pleadings that the claim is a *Köbler*-type claim.

21. While the "court of last instance" is not identified in the plenary summons, there are references, variously, in the statement of claim to the judgment of the Court of Appeal and

the determination of the Supreme Court in the *Dowling* proceedings. During the hearing in the court below of the application to strike out, the second appellant clarified, at the invitation of the motion judge, that the Court of Appeal's judgment in *Dowling* was "*final and conclusive*" pursuant to Article 34.4.3 of the Constitution as far as *"the base case"* (*Dowling*) was concerned and that the infringement of EU law complained of by the plaintiffs stemmed from the Supreme Court determination in not granting an appeal from the Court of Appeal judgment.

22. It is proposed at this juncture to summarise the pleadings as set out in the statement of claim using the heads of claim recited therein.

- ***Manifest infringement of Art. 267 TFEU (Point "A" in the Plenary Summons)***

23. The appellants allege two separate infringements under this heading. Firstly, they plead that the Supreme Court failed as a result of its determination to make a reference to the CJEU under Art. 267 TFEU in respect of the questions raised before it and failed to consider and engage with those questions. It is pleaded that in ruling as it did at para. 46 of its determination, namely that *"it does not appear to the Court to be necessary for it to consider such a reference before being able to determine this application",* the Supreme Court failed to vindicate the plaintiffs' rights under EU law including, *inter alia*, the judgments of the CJEU in *CILFIT (Case 283/81)* [1982] E.C.R 335 and *Commission v. France (Case C-416/17)* [2018] E.C.R I-811 and the plaintiffs' rights in accordance with the relevant case law of the European Court of Human Rights ("ECtHR").

24. The appellants allege that questions 1-4 of their suggested questions for reference by the Supreme Court to the CJEU *"(a) were highly relevant – and in fact decisive – for the adjudication of the matters put before the Supreme Court and adjudicated upon in the Court of Appeal judgment; (b) have never been interpreted by the CJEU in a manner supporting the Court of Appeal judgment – in fact, the jurisprudence of EU law contradicts the Court of Appeal judgment in these regards; and (c) were not such that the correct application of EU law was so obvious as to leave no scope for any reasonable doubt regarding the Court of Appeal judgment – in fact, the contrary was the case, given that the jurisprudence of EU law contradicts the Court of Appeal judgment in these regards."*

25. They plead that the alleged infringements of EU law are reinforced by the Supreme Court's erroneous description of certain questions as a challenge to the CJEU ruling in the *Dowling* litigation. They further assert that some 34 further questions listed in Schedule 2 of the Points of Claim as appended to the leave application were completely ignored and not even adverted to in the Supreme Court determination.

26. The second basis on which the appellants plead a manifest infringement of Article 267 is that the Supreme Court *"allowed and/or endorsed and/or gave effect to an erroneous invented novel interpretation of EU law [on the part of the Court of Appeal], according to which the CJEU, by means of its preliminary ruling in [the Dowling case] (a) applied EU law to the facts in the national case; and (b) determined that the July 2011 ex parte Direction Order was lawful and compatible with EU law".* It is pleaded that the Supreme Court endorsed this erroneous approach in circumstances where under Article 267, the role of the CJEU is not to determine the compatibility of measures of national law with EU law. It is further pleaded that the CJEU does not have jurisdiction under Article 267 to apply

rules of EU law to a particular case, a principle, which, it is pleaded, "*was belied by the Court of Appeal [in the Dowling litigation when it ruled that] 'the question of whether the Direction Order infringed the terms of the Second Company Law Directive…was ultimately determined by the [CJEU]'.*"

- ***Manifest infringement of the fundamental principle of proportionality of EU law and of Article 17 of the Charter of Fundamental Rights of the European Union, and of article 1 of Protocol No. 1 ECHR (Points "B" and "C" in the Plenary Summons)***

27. The appellants allege that the Supreme Court's failure to grant leave to appeal from the Court of Appeal which had held, *inter alia,* that the proportionality and reasonableness of the direction order *"were governed by domestic law as opposed to EU law"* amounts to a manifest infringement of the principle of proportionality under EU law. It is asserted that the Supreme Court failed to fulfil its duty to give full effect to the fundamental principle of proportionality of EU law, in particular to the *"least restrictive alternative test/criteria/principle as pertaining to actions of Members States applying EU law",* an infringement which the appellants say is compounded by the Supreme Court's failure to make a reference to the CJEU in respect of the second part of question 1 as raised in the leave application. It is further pleaded that the Supreme Court determination gave effect to the breaches of EU proportionality law contrary to O'Malley J.'s determination, in the third High Court judgment (at para. 51), that *"[t]he principles of proportionality and the requirement to adopt the measure that is 'least detrimental' or 'least restrictive' vis a vis the rights at issue…are particularly significant when the right in question (in this case freedom of establishment) is a fundamental one conferred on individuals by the Treaty."*

- ***Manifest infringement of Articles 25(1), 29(1) and 8(1) of the Second Directive combined with the principle of proportionality (Points "D", "E" and "F" in the Plenary Summons)***

28. At para. 54 of the statement of claim, it is pleaded that the Supreme Court determination failed to give effect to Article 25(1), 29(1) and 8(1) of the Second Directive and the extant CJEU jurisprudence in relation thereto. It is asserted that the breaches of the Second Directive are manifest given that the Supreme Court determination resulted in, allowed or endorsed breaches of the applicable CJEU jurisprudence. It is argued that these breaches were compounded by the Supreme Court's failure to make a reference to the CJEU in respect of the first part of question 1 of the questions which the *Dowling* applicants had requested be referred to the CJEU, or even adequately engage with that question.

29. In essence, under this head of pleading, the appellants assert that in circumstances where the State's intervention in the financial institutions of the State was unprecedented, the Court of Appeal lacked jurisdiction (without first making a reference for a preliminary ruling to the CJEU) to make a *"novel interpretation of EU law"*, namely that the contested direction order could not be construed as implementing a legal obligation imposed on Ireland by EU law. The plaintiffs assert that the extent of the ruling in *Dowling* was that the CJEU established a limited derogation from Article 8(1), 25 and 29 of the Second Directive for State measures that were the *"only means of ensuring"* a recapitalisation during the severe systemic crisis. They say that the CJEU was not adjudicating on the *Dowling* case itself (in accordance with its jurisdiction) but rather was making only a general interpretation of EU law by making references to *"a measure <u>such as</u> the Direction Order at issue in the main proceedings"* (emphasis in the statement of claim).

30. At para. 25A of the statement of claim, the appellants take issue with the approach of the CJEU itself. They plead that the Court extended *"of its own volition the facts of the national case beyond those actually made by the referring court."* They assert that it exceeded its jurisdiction under Article 267 TFEU in making, at para. 48, findings of fact that had not been made by the referring court. In this regard, they point to the CJEU's finding that *"the referring court, after weighing the competing interests, came to the conclusion that…the Direction Order was the only means of ensuring …the recapitalisation of ILP"* (emphasis in the statement of claim). They assert, at para. 54, that the CJEU ruling in *Dowling "is not entirely applicable to the base case because - as established by the High Court – [in the second High Court judgment] the preliminary ruling is based on a factual premise conceived by the CJEU and not derived from [the first High Court judgment] that was the very basis for the reference to the CJEU under Art. 267 TFEU."* They assert that the CJEU's erroneous findings *"had far-reaching implications for the application of the principle of proportionality in the base case."*

- ***Manifest infringement of the fundamental principle that more recent CJEU case law on a Directive such as the Second Directive cannot supersede less recent CJEU case law unless that less recent case law has been explicitly resiled from by the CJEU. (Point "G" in the Plenary Summons)***

31. Under this head of claim, the appellants plead that there is a well-established body of EU case law (in effect what is referred to hereinafter as "the Greek bank cases") to the effect that Articles 25(1), 29(1) and 8(1) of the Second Directive can only be derogated from in the most exceptional circumstances, for example, where a company has effectively become

insolvent, or where legislative measures placing the company under administration in the interests of safeguarding creditors' rights have become necessary. They cite this body of CJEU jurisprudence at para. 55 of the statement of claim, including *Pafitis & Ors (Case C-441/93)* [1996] E.C.R. I-01347 (and other Greek bank cases), *Kotnik et al (Case C-526/14)* [2016] E.C.R. I-767 and, indeed, the CJEU ruling in *Dowling* itself (as the plaintiffs interpret it).

32. They plead that the Court of Appeal's *"invented novel interpretation of EU law"* in concluding that the Greek Bank cases have been superseded by *Kotnik* and *Dowling* was arrived at contrary to *"the very far-reaching, precise and decisive language"* of the established CJEU jurisprudence.

- ***Manifest infringement of article 6(1) ECHR and respective ECtHR case law (Point "H") in the Plenary Summons***

33. The appellants plead a manifest infringement of article 6(1) ECHR and European Court of Human Rights case law on the part of the Supreme Court by virtue of it having allowed or endorsed or given effect to a manifest failure to ensure that a fair trial of the issues in the *Dowling* litigation in circumstances where an important ground of appeal before the Court of Appeal was the High Court's manifest *"non-engagement"* with *"crucial evidence"*. The Court of Appeal failed to address the High Court's failure to engage with actual evidence and to itself conduct a proper examination of *"the facts, evidence, submissions and grounds of appeal"* presented by the *Dowling* applicants.

- ***Manifest infringement of the Rules of EU law conferring rights on individuals regarding burden-sharing (Point "I") in the Plenary Summons***

34. At para. 57 of the statement of claim, the appellants assert that the Supreme Court determination allowed, endorsed or gave effect to *"an erroneous invented novel interpretation of EU law, according to which the European Commission's decision regarding State aid was allegedly determinative – having regard to the burden-sharing rules in light of State Aid – of the legality and proportionality of the July 2011 ex parte Direction Order."*

35. It is pleaded that this was in the face of the European Commission and the Advocate General having made it clear in the *Dowling* case that the Commission's decision on State aid was not capable under Article 107 TFEU of determining the legality of the direction order. It is asserted that this was however belied by the judgment of the Court of Appeal in the *Dowling* case. The core tenet of the pleading under this head of claim is that pursuant to EU law, there was no basis to impose any burden-sharing on the ILPGH shareholders.

- ***Manifest infringement of Article 42 of the Second Directive combined with the principle of proportionality. (Point "J") in the Plenary Summons***

36. Under this head of claim, the appellants allege that by its determination, the Supreme Court allowed, endorsed or gave effect to *"an erroneous invented novel interpretation of EU law, according to which, in a situation of a serious disturbance of the economy and the financial systems of a Member State threatening the financial stability of the EU, Art.42 of [the Second Directive] could be interpreted as meaning that: (i) a Member State that imposes*

exceptionally oppressive terms of a recapitalisation of a viable holding company of a viable bank need not ensure as part of that recapitalisation an equal treatment of all the holding company's shareholders… and (ii) a Member State that is a shareholder in a viable holding company of a viable bank is not precluded from forcibly recapitalising that holding company… [despite the fact that] less restrictive, practical and equally effective alternative recapitalisation means existed and were explicitly formally recommended by the holding company's Board under the statutory provisions of the relevant national legislation."

37. The appellants further complain that the Supreme Court failed, as a result of its determination, to make a reference to the CJEU in respect of Questions 7 and 8 of the questions set out in the application for leave, or to even adequately engage with those questions.

38. As noted earlier, in addition to the declarations sought, the appellants seek damages, and that questions be referred to the CJEU. These are set out later in this judgment.

The two motions

39. Following the delivery of the statement of claim, and the respondents having failed to file a defence within the requisite timeframe, on the 26 July 2019 the appellants issued a motion for judgment in default of defence. The motion was grounded on a 76-page affidavit sworn by the second appellant on the 26 July 2019, with some 83 exhibits comprising 1,789 pages.

40. On the 1 August 2019, the respondents issued a motion for an order pursuant to Order 19, r.28 RSC and/or the inherent jurisdiction of the court striking out the proceedings on the

grounds that they were frivolous, vexatious or bound to fail. The motion was grounded on the affidavit of Joanne O'Connor of the Chief State Solicitor's Office ("the CSSO") sworn on the 1 August 2019. Ms. O'Connor's affidavit was confined to the argument that the proceedings were, in substance, an attempt to reopen arguments made and lost by the applicants in the *Dowling* litigation and that the issues at the heart of the statement of claim *"have already been decided by the CJEU, and have been applied by the Court of Appeal and Supreme Court"*. The second appellant has pejoratively referred to this motion as a *"retaliatory"* motion by the respondent, a point to which we will later return.

41. The second appellant swore a replying affidavit on the 22 October 2019.

42. Both motions came on before the High Court on the 19 and 20 December 2019. The motion judge determined that the motion to strike out would be heard first. This in itself is a matter about which the appellants make complaint, and again it is a point to which we will later return.

The Motion Judge's Analysis

43. The motion judge in the first place rejected the appellants' submission that the motion to strike out was an abuse of process and/or should be barred by the doctrine of *laches*. He found that the defendants were entitled to issue the motion and the fact that they were in default of defence at the time or issued the motions some seven months after the proceedings commenced did not warrant the application of the doctrine of *laches.*

44. He considered that the central issue for determination was

a) whether, as the respondents contended, the ruling of the CJEU answered the questions of law referred to it in such a way as to make it clear beyond argument that the direction order was not in breach of EU law or,

b) whether, as the appellants contended, the CJEU did not apply EU law to the actual factual situation pertaining in *Dowling* case or actually determine that the direction order was lawful and compatible with EU law.

45. He noted that the appellants' contention that the principle of proportionality under EU law had not been observed by the Irish courts in the face of ILPGH's submission that the *"extreme measures"* taken by Ireland *"were forced in the circumstances where less restrictive, practical and equally effective recapitalisation means existed"* had been raised before O'Malley J. and rejected by her in the second High Court judgment (at paras. 48 – 50) in light of the ruling of the CJEU that Articles 8(1), 25 and 29 of the Second Directive did not preclude a measure *"such as the Direction Order at issue in the main proceedings"*. He noted that O'Malley J.'s decision in this regard was upheld by the Court of Appeal.

46. The motion judge considered that issues as to the effect of the CJEU ruling and the application of the EU principle of proportionality dominated the case being made by the appellants and the reliefs sought. Their position was that the requirement to consider EU principles of proportionality derived from the decisions of the CJEU in the Greek bank cases and *Commission v. Spain (Case C-338/06)* [2008] I-04515 in circumstances where the CJEU must be deemed not to have made a binding or prescriptive ruling in relation to the specific facts of the *Dowling* case, and, in particular, not to have decided whether the direction order in issue in *Dowling* was in breach of EU law.

47. The issue the court had to determine was whether, by reason of the manner in which the appellants had formulated their claim, and applying the principles governing the jurisdiction to strike out proceedings which are set out at paras. 48 – 57 of the judgment, the proceedings were frivolous, vexatious or bound to fail, as contended by the respondents.

48. In order to address this issue, the motion judge considered it necessary to reach some conclusions about:

(i) Whether the CJEU had made a binding prescriptive ruling in the *Dowling* case; and

(ii) Whether the CJEU ruling in *Dowling* superseded the Greek bank cases and *Commission v. Spain.*

49. He noted that the Court of Appeal had taken the view that it could not *"look behind"* the CJEU ruling and considered the ruling *"an authoritative and final determination on this issue of EU law"*, and that the Supreme Court in its determination had referred to the Court of Appeal as being *"obliged… to determine the issues in controversy on the basis of being bound by the judgment of the Court of Justice; that judgment could not be re-opened by the appellate court".*

50. As observed by the motion judge, the appellants' principal argument was that it was not open to the CJEU to give a ruling in relation to the facts of a national case and that in the *Dowling* case it did not do so. Rather, the CJEU had only established *"an additional limited derogation from Article 8(1), 25(1) and 29(1) of the Second Company Law Directive in certain circumstances".* On this basis, the appellants' contention was that *"the earlier case law on the Directive now harmoniously co-exists with Dowling"* and that the CJEU ruling

in *Dowling "… must be reconciled with the CJEU judgments in the so-called Greek cases… and Commission v. Spain".*

51. In respect of the questions which had actually been referred in *Dowling*, the motion judge observed that *"the High Court did not express its [first question] in terms devoid of context",* a conclusion derived from the manner in which the first question was framed. That the High Court was not raising an academic issue was equally clear from the second question referred, namely, *"[w]as the Direction Order made by the High Court pursuant to section 9 of the 2010 Act in relation to ILPGH and ILP in breach of European Union law?".*

52. He noted that from a reading of para. 55 of the CJEU's ruling, *"there can be no doubt that the CJEU was answering the second question in the negative i.e. that the direction order made by the High Court was not in breach of EU law".*

53. Noting the second named appellant's argument that the CJEU was not entitled in a preliminary ruling to adjudicate on the national case or apply EU law to the factual situation underlying the national proceedings, and that to hold that it did would be to give effect to *"an invented novel interpretation of EU law",* the judge rejected that argument as *"utterly erroneous and bound to fail".* In so concluding, he had regard to established CJEU jurisprudence which demonstrated that a *"prescriptive"* approach was not uncommon in rulings under Article 267 TFEU. He had regard to a number of cases, including *Hogan (Case C-398/11)* [2013] E.C.R. I-272 and *Asociatia ACCEPT v. Compaterea Discriminarii (Case C-81/12)* [2013] E.C.R. I-939 in this regard.

54. The motion judge then went on to state:

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

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

55. Accordingly, the motion judge found the observations of O'Malley J. at para. 50 of the second High Court judgment in relation to the plaintiffs' arguments *"apposite and ... unarguably correct".*

56. He further stated:

"129. The ruling of the CJEU was unequivocal and completely clear as to its meaning, and in those circumstances – as the Court of Appeal and the Supreme Court have pointed out – the High Court was bound to apply it to the facts of the instant case. Given the

findings of law and fact by the High Court in the first judgment at sub-paragraphs 32-35 (see para. 14 above) and the ruling by the CJEU which made it clear that the direction order was not in breach of EU law, it was clear that the Minister's opinion was not "vitiated by legal error". The court dealt with contentions directed towards the supposed unreasonableness of the Minister's opinion, rejecting all such arguments.

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

> *"... the proportionality and reasonableness of these measures is in essence governed by domestic law rather than by EU law. I would regard that the power to set aside a direction order on grounds of reasonableness or error of law contained in s.11 of the 2010 Act in effect provides in statutory form for judicial review of an administrative decision such as the High Court ordinarily enjoys in a standard Order 84 proceedings." [para. 170]*

Accordingly, matters of proportionality or reasonableness were dealt with on the basis that they were governed by Irish law."

57. The motion judge found it difficult to see how the Court of Appeal could have adopted any other approach.

58. The motion judge proceeded to consider the appellants' claims against the aforementioned backdrop, and the requirement of the *Köbler* doctrine itself, namely that *"the rule of law must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties…".* Being of the view that the Court of Appeal did not misinterpret the CJEU ruling and that it had correctly held that it could not look behind the ruling *"insofar as it was concluded that the making of the*

direction order was essentially outside the scope of the Second Company Law Directive, so that the Direction Order could not be held to be unlawful on that account", the motion judge held that it followed that there could not *"have been any infringement of EU Law by a court of last resort in that regard, much less a 'manifest infringement'*".

59. He was further satisfied that as the CJEU had ruled that the making of the direction order was essentially outside the scope of the Second Directive, it followed, as found by the Court of Appeal, that the standard by which the opinion of the Minister was to be judged was provided for in the 2010 Act, i.e. whether the opinion was unreasonable or vitiated by legal error. As the question of whether it was reasonable or disproportionate was to be judged by reference to domestic law, the question of infringement of the principle of proportionality of EU law as alleged by the appellants could not occur.

60. The motion judge next addressed the appellants' complaint of manifest infringement of the rule of EU Law conferring rights on individuals regarding burden-sharing in light of State aid. He noted that while the Commission found that the proposed recapitalisation by the State of ILP up to a sum of €3.8 billion met the criteria of *"appropriateness" "necessity"* and *"proportionality"* previously set by the Commission, as observed by O'Malley J. *"[the Commission's] decision turned on the applicable criteria for State Aid only should not be taken as an assessment of the overall legality of the measure. Further, it must not be seen as amounting to a derogation from the provisions of the Second Company Law Directive"*. The view of O'Malley J. was noted by the motion judge to have also been adopted by the Court of Appeal.

61. At para. 57 of the statement of claim, the appellants plead that pursuant to EU law, there was no basis to impose burden-sharing on the shareholders in ILPGH, as opposed to the shareholders in ILP and, accordingly, *"no basis for using the burden-sharing provisions under EU law to justify the… Direction Order".* The motion judge concluded that this complaint was without merit as the review of the legality and proportionality of the direction order carried out by the Court of Appeal had been considered in accordance with the principles of domestic law and, therefore, *"[t]he question of a 'manifest infringement of the rule of EU law conferring rights on individuals regarding burden-sharing' simply does not arise"* (at para. 141).

62. The judge then turned his attention to the complaint that a manifest infringement of Article 267 was perpetrated by the Supreme Court's failure to refer to the CJEU the ten questions raised in the leave application or indeed adequately consider or engage with those questions. As already indicated, the appellants characterised the failure to make a reference as giving effect in respect of essential parts of their case to the *"novel interpretation of EU law invented in the judgment of the Court of Appeal".*

63. Addressing the appellants' *"trenchant criticisms"* of the Supreme Court's failure to refer the ten questions (together with the 34 further questions they had raised in Schedule 2 to the leave application), the motion judge observed, with reference to paras. 44-45 of the Supreme Court determination:

> *"147. It must be remembered that the Supreme Court was not embarking on a determination of the issues in the proposed appeal. The only matter which the Supreme Court had to determine was whether or not to grant leave to appeal. The context of the Supreme Court's decision in this regard is set out in the determination, which engages*

with the criteria for such an application set out in Article 34.5.3 of the Constitution, i.e. whether the decision sought to be appealed involves a matter of general public importance or that it is otherwise necessary in the interests of justice that there be an appeal to the Supreme Court.

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

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

150. In any event, it is evident from a perusal of the questions sought to be referred that, for the most part, they seek to reargue matters already decided by the CJEU, the High Court or the Court of Appeal."

64. The judge was satisfied that the questions posed "*simply refuse to accept the reality that the CJEU ruled that the Direction Order was not in breach of EU law".*

65. He next addressed the request set out at para. 100 of second appellant's affidavit grounding the motion for judgment that some ten questions should be referred by the High Court itself to the CJEU. He noted that questions 2-10 corresponded to questions 1-9 of the questions which the Supreme Court had been requested to refer. By reason of the conclusions he had already reached in his judgment, the motion judge did not consider that he should refer question 2-10 to the CJEU.

66. The remaining question in respect of which the appellants requested a referral to the CJEU was expressed in the following terms:

"A. In the circumstances such as the circumstances of this case, does seeking a declaration and related damages, in accordance with the principles established by the Court of Justice of the European Union in inter alia, [Köbler, Traghetti and Ferreira], that a member state is obliged to make good damages caused to the plaintiffs by infringements of EU law for which the member state is responsible, where the alleged infringements stem from a decision of the court adjudicating at last instance,

- *Have the consequence of calling in question that decision as res judicata? or*
- *Call into question an independence of the judiciary of the member state? or*
- *Diminish the authority of the court adjudicating at last instance?"*

67. Addressing the request, the motion judge noted that the respondents were not arguing that the questions agitated by the appellants in the proceedings were *res judicata*. Equally, he did not understand them to be arguing that the independence of himself or any member of the judiciary was called into question by the invocation of the *Köbler* doctrine.

Furthermore, he did not consider that there was any question of the authority of a court adjudicating at last instance being diminished. He stated:

"159 ... Such a court is required to bring before the CJEU the questions contemplated by Article 267, save in certain circumstances such as those set out in CILFIT. Köbler makes it clear that an individual must have the possibility of obtaining redress for an infringement of rights under EU law by a court of last instance, and Traghetti establishes that such redress would extend to an erroneous failure to refer questions in accordance with Article 267. These are established principles of EU law which Irish Courts are bound to apply, and the question of the authority of a court being diminished by the invocation of the Köbler principle does not arise.

160. I do not consider therefore that I should refer to the CJEU any of the ten questions raised at para. 100 of the affidavit of Mr. Skoczylas grounding the motion for judgment."

68. He next considered the request of the second appellant, i.e. were the High Court inclined to accede to the motion to have the proceedings struck out, that two questions would be referred to the CJEU before the High Court would make such an order. The questions which the appellants wished the High Court judge to refer to the CJEU can be summarised as follows:

(1) Should the *Köbler* doctrine be interpreted as precluding a national court of first instance before which *Köbler* proceedings are brought from striking out such proceedings in circumstances where the proceedings are not *res judicata;*

(2) Should the *Köbler* doctrine be interpreted as preventing a national court from striking out *Köbler* proceedings on the ground they are an abuse of process in circumstances where, as here, the State is contending that the CJEU in *Dowling* was applying national law to a national case.

69. Rejecting the need to refer the first question, and citing *Barry v. Buckley* [1981] IR 306 and *Keohane v. Hynes* [2014] IESC 66, the motion judge observed that the court has an inherent jurisdiction to strike out proceedings if they are frivolous, vexatious or bound to fail, noting that the jurisdiction, according to Costello J. in *Barry v. Buckley*, *"... exists to ensure that an abuse of process of the courts does not take place".* He went on to state:

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

70. With regard to the second question, the motion judge opined that the question, as formulated, *"is in reality an invitation to the CJEU to acknowledge that it was in error and exceeded its jurisdiction, or to gainsay what all of the Irish Courts which have considered its ruling infer is the clear import of what the court actually says".* (at para. 164). Accordingly, he did not consider the second question appropriate for referral.

71. The motion judge next addressed the contention, at para. 56 of the statement of claim, that there was *"manifest infringement of Art. 6(1) ECHR and ECtHR case law by the Court of Appeal's failure to engage and properly consider evidence, facts and provisions of EU*

law", a failure which the appellants claimed was *"allowed and/or endorsed and/or given effect to be the Supreme Court determination".*

72. The motion judge found nothing in *Köbler* or the other EU cases which suggested that the *Köbler* doctrine extended to infringements by a national court of last instance of principles that do not emanate from EU law. He noted that the *Köbler* doctrine was *"specifically and exclusively concerned with the misapplication of EU law"*. He opined that even if he was wrong in so concluding, *"[a] failure to engage with the facts or evidence, even if it were established is not an infringement of EU law"*. He further noted that the statement of claim *"ignores the fact that the Court of Appeal is not a fact finding body at all".* Insofar as the Court of Appeal had gone into detail about the facts, the motion judge found that *"this is by way of providing context for the discussion of the legal issues which that court had to determine"*, as had been made clear by Hogan J. at para. 100 of the Court of Appeal judgment.

73. The motion judge found that in all the circumstances, any alleged failure to consider facts or evidence did not give rise to a cause of action as envisaged by *Köbler* and that as far as any failure to engage with EU law was concerned *"the Court of Appeal came to the view that the CJEU had resolved any questions of EU law relevant to the matter…".*

74. As to what would constitute a *"manifest infringement"* of EU law, the motion judge noted that the Court of Appeal of England and Wales ("the UK Court") in *Cooper v. A.G.* [2011] QB 976 considered that when determining whether *Köbler* liability arose *"the national court should have regard to all the factors which categorise the situation, including those*

listed in Köbler…". The Court of Appeal considered it helpful to set out what would not constitute a manifest breach. It stated:

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

75. The UK Court considered that the point was illustrated by the facts of *Köbler* itself. Albeit that the Verwaltungsgerichtshof (Administrative Supreme Court of Austria) had lodged a reference with the CJEU and then withdrawn it having wrongfully persuaded itself that a subsequent ruling of the CJEU in another case provided the answer to the questions referred when it had not, the CJEU did not find that the actions of the Verwaltungsgerichtshof reached the threshold for *Köbler* liability. As the UK Court observed, *"the Court of Justice did not ask whether its interpretation was reasonable or not… [t]he evaluation that a national court makes of a point of interpretation which it determines is acte clair is, moreover, an integral part of the normal judicial function of identifying the meaning of legislation."*

76. Viewed against that backdrop, the motion judge opined that in circumstances where the High Court in *Dowling*, on being called upon to consider whether the direction order was compatible for the Second Directive, actually referred that question to the CJEU, *"which gave an unequivocal ruling"* and which was accepted and applied by the High Court, and where the Court of Appeal found the High Court correct in so doing, *"it is difficult to see… how it could be said that there was any infringement of EU law; it is yet more difficult how it could be said that any such infringement was 'manifest'."*

77. Noting that the appellants' case depended on his accepting their argument that the CJEU ruling did not in fact determine the compatibility of the direction order with EU law and that other principles of EU law (including as to proportionality) rendered the direction order unlawful, the motion judge observed that their arguments *"only get off the ground if successive Irish Courts were manifestly infringing EU law by holding, pursuant to the CJEU ruling [as interpreted by the plaintiffs], that the Direction Order was not in breach of EU law".* However, given the *"clear and unequivocal nature of the [CJEU] ruling"* (namely that the Second Directive did not preclude a measure such as that in issue in *Dowling*), the motion judge did not consider that the appellants' contentions had any prospect of success. He concluded, for the reasons set out in his judgment, that the proceedings were frivolous and vexatious in that they amounted to a complaint that was *"futile or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome"* (as per Birmingham J. in *Nowak v. Data Protection Commissioner* [2012] IEHC 449). While conscious of the *"high bar"* which the respondents had to overcome to have the proceedings struck out on the basis sought, and notwithstanding the undoubted complexity of the proceedings as set out in the plenary summons, the statement of claim and the affidavits and submissions (a complexity which was *"more apparent than*

real"), the motion judge was satisfied that the respondents were correct in stating that the ruling of the CJEU was *acte clair* and that it was "*appropriately considered and applied by each Irish court thereafter."*

SECTION 3: SOME GENERAL OBSERVATIONS ABOUT THE ARTICLE 267 PROCEDURE

The obligation to refer

78. At this point, we wish to turn to the obligation imposed by Article 267 upon courts of final instance to refer questions to the CJEU. A clear understanding of this obligation is essential to the resolution of this case. We should perhaps explain at the outset that while courts other than courts of final instance have a *discretion* to make a reference, courts of final instance have an *obligation* to refer within the parameters discussed below. Wherever we refer to the "obligation" to refer in the course of this discussion, we are of course referring to the obligation on courts of *final instance.*

79. Craig and De Búrca, *EU Law, Text, Cases and Materials* (7th Edn., Oxford University Press, 2020) make the point that a request by a party to a case does not of itself impose the obligation; this decision is ultimately for the (domestic) court itself:

> *"It is for the national court to decide whether to make a reference. The mere fact that a party before the national court contends that the dispute gives rise to a question concerning EU law does not mean that the Court is compelled to consider that a question has been raised within the meaning of Article 267 TFEU. The national court may conclude that a reference is not required because the EU courts*

have already resolved the issue, because there is no doubt as to the validity of the EU measure, or because a decision on the question is not necessary for the case before the national court". (p. 503)

80. The three conditions referred to in the last sentence of the above quotation are crucial to understanding the extent of the obligation on a court of final instance. The conditions were clearly established in the *CILFIT* case. In *CILFIT*, the plaintiffs alleged that certain duties imposed by Italian law were in breach of Regulation 827/68. The Italian Ministry of Health argued before the Italian Supreme Court of Cassation that it was not necessary to refer the matter to the ECJ because the answer to the question was so obvious as to remove the need for a reference. The Supreme Court of Cassation decided that this contention was itself an issue of Community law, and requested a ruling from the ECJ on whether the obligation to refer imposed in Article 177(3) [the predecessor of Article 267] was unconditional, or whether it was premised on the existence of reasonable interpretative doubt about the answer which should be given to a question. The Court, in its judgment on the reference, responded as follows (emphasis added in the following quotations):

"8. In this connection, it is necessary to define the meaning for the purposes of Community law of the expression 'where any such question is raised' in order to determine the circumstances in which a national court or tribunal against whose decision there is no judicial remedy under national law is obliged to bring a matter before the court of justice.

9. In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, <u>the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does</u>

not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

10. Secondly, it follows from the relationship between paragraph (2) and (3) of Article 177 that the courts or tribunal as referred to in para. 3 have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

11. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer the Court of Justice any question of interpretation which may arise.

12. The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by paragraph (3) of Article 177 by nonetheless be subject to certain restrictions.

13. It must be remembered in this connection that in … Da Costa the Court ruled that: 'Although paragraph (3) of Article 177 unreservedly requires courts or tribunals of a Member State against whose decision there is no judicial remedy under National law… to refer to the Court every question of interpretations raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially

when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'

14. The same effect, as regards the limits set to the obligation laid down by paragraph (3) of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical."

81. The Court went on to say at para. 16 *et seq:*

"16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility of resolving it.

17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise."

82. The Court concluded at para. 21 as follows:

"21. In the light of those considerations, the answer to the question submitted ... must be that paragraph (3) of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to

comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the community."

83. These parameters concerning the obligation to refer were again confirmed in the more recent case of *Commission v France (Case C-416/17)*, where the Court held that the French Conseil d'État had failed to fulfil its obligations under Article 267 TFEU by not making a reference to clarify a point of EU law in the area of taxation. This arose not in the context of a preliminary reference but instead in an action for infringement brought by the Commission against France pursuant to Article 258 TFEU, but the extent of the obligation to refer is equally relevant in that context.

84. In the course of its judgment, the Court reiterated the *CILFIT* approach and confirmed when it would *not* be necessary for a court of final instance to make a reference, namely where "*it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt"* (at para. 110).

85. In summary, there is no obligation on a court of final instance to refer a question to the CJEU if: (1) the question is irrelevant in the sense that it is not necessary to have an answer

to that question for the domestic court to able to reach a decision on the case; (2) if the point of EU law is so obvious as to leave no scope of any reasonable doubt; or (3) the point has in substance already been ruled on by the CJEU.

Interpretation v. Application: Decisions of the CJEU on Preliminary References

86. A central plank of the appellants' submissions in this case is that a CJEU decision on a preliminary reference *cannot ever* go so far as to apply EU law to the domestic measure which has given rise to the preliminary reference, but rather that the CJEU confines itself to providing a general interpretation of the point of EU law which it then falls to the domestic court to apply. Indeed, the appellants are disparaging of any contrary view and allege that the courts in the *Dowling* litigation were ignorant of this important distinction and employed an invented, novel approach to the CJEU decision in *Dowling* itself by interpreting it as having definitively ruled that the direction order did not breach EU law.

87. The appellants cite in this regard an extract from the CJEU Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings: *"Under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply the law to the factual situation underlying the main proceedings".*

88. The appellants rely, *inter alia*, on the case of *Patriciello (Case C-163/10)* [2011] E.C.R. I-07565. The applicant was an MEP who had been charged under domestic law with wrongfully accusing a police officer of illegal conduct. This arose from an altercation which took place in a public car park close to the applicant's home. The applicant claimed

that the police officer had falsified the times concerned when booking several drivers whose vehicles were parked in contravention of road traffic laws, and he allegedly repeated his accusations before other police officers who came to establish whether the offences had been committed. The European Parliament decided to defend Mr Patriciello's request to defend his immunities and privileges on the basis that he was carrying out his duty as a member of Parliament in expressing his opinion on a matter of public interest to his constituents. An Italian court decided to refer a question for a preliminary ruling from the Court of Justice as to whether the statements could be categorised as an expression of opinion on the performance of parliamentary duties for the purpose of Article 8 of the Protocol on the Privileges and Immunities of the European Union.

89. In the course of its judgment, the Court said that in proceedings brought pursuant to Article 267 it had no jurisdiction to apply rules of EU law to a particular case, but that it may provide the national court with all guidance concerning EU law that could be useful for its decision. Consequently, it said, it was for the domestic court to decide whether the statements were covered by the immunity, although it was for the Court to provide the national court with all the necessary information with a view to offering guidance in the determination, recasting, if necessary, the question referred to it.

90. The Court answered the question posed by saying that Article 8 of the Protocol must be interpreted to the effect that a statement made by a member of the European Parliament beyond the precincts of that institution and giving rise to prosecution for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity unless that statement "*amounts to a subjective appraisal having a direct, obvious connection with the performance of those*

duties". It was for the court making a reference to determine whether those conditions have been satisfied in the case in the main proceedings. Nonetheless, the Court also observed in the course of its judgment (at para. 36), that having regard to the circumstances and the content of the allegations at issue in the main proceedings, "*they appear to be rather far removed from the duties of a member of the European Parliament and hardly capable, therefore, of presenting a direct link with the general interest of concern to citizens*". Thus, even if such a link could be demonstrated, it would not be "*obvious*". While the case therefore contains a statement of the theoretical distinction between interpretation of EU law and its application to the individual case, it also demonstrates how fine the line between the two concepts can often be. The Court in effect applied the EU law principles to the facts by stating its views in such a manner as to leave no doubt as to how the national court should ultimately decide the case.

91. The same is true of C-484/10 *Ascafor and Asidac (Case C-484/10)* [2012] E.C.R. I-113, a case concerning the standards of imported steel for concrete to be used in construction. A Spanish court referred a question concerning whether the methods required to be complied with under domestic law to ensure the necessary quality of steel were excessive and disproportionate to the objective pursued, and whether the domestic measure constituted an unjustified restriction which amounted to an obstacle to the marketing of imported products contrary to Articles 34 and 36 TFEU.

92. The CJEU said that the procedure laid down in Article 267 was based on a clear separation of functions between the national courts and the Court of Justice:

> *"It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the*

light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgement and the relevance of the questions which it submits to the court".

It was not the task of the Court in such proceedings to rule upon the compatibility of provisions of national law with EU law or to interpret national legislation or regulations. However, and importantly, the Court went on to add that it had, "*repeatedly held*" that it was competent to give the referring court "*full guidance on the interpretation of European law in order to enable it to determine the issue of compatibility for the purposes of the case before it*".

93. Accordingly, the Court refused to declare the referred question to be inadmissible. It noted that the concerns expressed by the national court arose from the precise nature of the requirements laid down in the domestic legislation, and said it was therefore precisely that context in which it was appropriate to provide an answer which would be of use to the referring court. It went on to consider the details of the domestic law and concluded that it *was* a quantitative restriction within the meaning of Article 34 TFEU. It held that the restriction might be justified by the objective of the protection of human life and health, provided that the requirements laid down were not higher than the minimum standards required for the use of reinforcing steel for concrete in Spain. It was for the referring court to ascertain, however, whether some of the requirements laid down went beyond what was necessary to ensure compliance with the minimum standards laid down by the concrete regulations for guaranteeing the protection of human life and health.

94. At the level of theory and general principle, therefore, it is true to say that the CJEU in its decision on an Article 267 reference merely provides a general interpretation of the EU point of law; but the reality is that under the rubric of providing to the domestic court "*full*

guidance on the interpretation of European law in order to enable it to determine the issue of compatibility for the purposes of the case before it", the Court comes very close to providing a ruling on the compatibility of the domestic measure with EU law, and sometimes actually does so. As the learned authors Craig and De Búrca explain:

> *"Article 267 gives the CJEU power to interpret the Treaty, but does not empower it to apply the Treaty to the facts of a particular case. The distinction between interpretation and application is said to characterise the division of authority between the CJEU and national courts: the former interprets the Treaty, the latter apply that interpretation to the facts of a particular case. This distinction is said to differentiate the relationship between national courts and the CJEU from that in a more truly federal, appellate system, where the superior court may well decide the case.*
>
> *Theory and reality have not, however, always marched hand in hand. The dividing line between interpretation and application can be perilously thin, more especially because many questions submitted to the court are very detailed, and require a specific response. The more detailed is the interpretation provided by the CJEU, the closer it approximates to application. It is, moreover, common for the CJEU to give 'guidance' to the national court as to how the law should be applied in the instant case, which further diminishes the line between interpretation and application.*
>
> *Litigants have often argued that the Court should decline to give a ruling because the question posed was not seeking an interpretation but, rather an application, of the Treaty. The Court has not been deterred by such objections. Thus, in Van Gend en Loos it was argued that the question presented concerning the tariff classification of urea-formaldehyde required, not an interpretation of the Treaty,*

but rather an application of the relevant Dutch Customs' legislation. The Court rejected the argument, stating that the question related to interpretation: the meaning to be attributed to the notion of duties existing before the coming into force of the Treaty.

A willingness to respond in detail can be perceived in other cases. Cristini was concerned with the meaning of Article 7(2) of Regulation 1612/68 which provides that a community worker who is working in another Member State should be entitled to the same 'social advantages' as workers of that State. The question put by the French Court was whether this meant that a provision which allowed large French families to have reduced rail fares was a social advantage within the ambit of Article 7(2). The ECJ denied that it had power to determine the actual case, but in reality did so by stating that the concept of a 'social advantage' included this ? fare reduction.

Marleasing provides another example of the detailed nature of the ECJ's ruling. The ECJ provided a detailed response to the question whether Article 11 of Directive 68/151 was exhaustive of the type of case in which the annulment of the registration of a company could be ordered. The judgment furnished the national court with a very specific answer, which simply required the Spanish Court to execute the ECJ's ruling.

The Court's willingness to provide very specific answers to questions serves to blur the line between interpretation and application. It also renders the idea of the CJEU and the national courts being separate but equal, each with their own assigned roles, more illusory. The more detailed the CJEU's ruling, the less there is for the national court to do, other than execute the ruling in the instant case." (p. 527)."

95. Further cases are referred to at paras. 120-124 of the motion judge's judgment (the C-398/11 *Hogan* ("the Waterford Crystal case"); C-81/12 *Asociatia ACCEPT v. Compaterea Discriminarii (Case C-81/12)* [2013] E.C.R. I-939) which also exemplify this approach.

96. Whether the CJEU's practice in this regard is appropriate or not has been debated by many commentators; it is not necessary for this Court to comment on that issue. For present purposes it is sufficient to say that the practical reality, widely recognized among expert commentators in the area of EU law, is that the CJEU does in fact in some cases, for all practical purposes, determine the compatibility of a particular domestic measure with EU law. Indeed, the matter is so widely accepted that a helpful threefold categorisation of decisions by the CJEU on preliminary references is set out by one such expert as follows:

> *"One may distinguish three categories of cases depending of the specificity of the ruling. The ECJ may give an answer so specific that it leaves the referring court no margin for manoeuvre and provides it with a ready-made solution to the dispute (outcome in cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (deference cases)."* (quotation from Tridimas T, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, (2011) 9 I-CON 737–756.

97. One way of stating the key issue in the present case is to ask whether the CJEU decision in *Dowling* was an "outcome" decision or a "guidance" or "deference" decision within the meaning of that suggested taxonomy. This key issue is returned to below.

A failure to give reasons for a refusal to refer pursuant to Article 267 might constitute a breach of article 6(1) of the European Convention on Human Rights

98. We note that the European Court of Human Rights has held that a failure to comply with the Article 267 obligation to refer (to the court of final instance) might also constitute a breach of the right to a fair hearing pursuant to article 6(1) of the European Convention of Human Rights. This was made clear in *Ullens De Schooten v. Belgium* (App. Nos. 3989/07 & 38353/07) (Unreported, European Court of Human Rights, 20 September 2011). The applicants appealed against their criminal convictions in the domestic courts concerning their management of a clinical biology laboratory, arguing that a particular provision of a domestic law was incompatible with certain articles of the Treaty Establishing the European Community (Articles 86, 82 and 43). The domestic courts, including the Court of Cassation, which was the court of final instance, dismissed their appeals and also held that there was no need to refer any question to the Court of Justice.

99. Subsequently, the European Commission adopted a reasoned opinion that the domestic legislative provision in question was indeed incompatible with Article 43 of the Treaty. Belgium then enacted a law amending the original law and a second set of proceedings led to further argument by the applicants in the Court of Cassation that a question should be referred to the Court of Justice concerning the conflict between the principle of *res judicata* and the primacy of Community law. The Court of Cassation again refused to refer the question to the CJEU.

100. The applicants brought proceedings before the European Court of Human Rights, alleging a breach of article 6(1) of the European Convention on Human Rights. They alleged that they had not received a fair hearing because the Court of Cassation had erroneously given precedence to *res judicata* over Community law and had refused their request for a preliminary ruling.

101. Although it held that there had been *no* breach of article 6(1) in that particular case, the Court acknowledged that there could in some cases be such a breach of article 6(1) by reason of a failure to give reasons on the part of a court refusing to make an Article 267 referral. It is important to note, however, that what the European Court of Human Rights was concerned with was the issue of giving reasons for the refusal. The Court, having referred to the role of domestic courts in making references and the parameters described in *CILFIT*, said:

> *"59. It should further be observed that the Court does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – even if that court is not ruling in the last instance (see, among other authorities Predil Anstalt S.A. v. Italy (dec.), no. 31993/96, 8 June 1999, and Herma v. Germany (dec.), no. 54193/07, 8 December 2009) –, whether the preliminary ruling would be given by a domestic court (see Coëme and Others, Wynen, and Ernst and Others, cited above, same references) or a Community court (see, for example, Société Divagsa v. Spain, no. 20631/92, Commission decision of the 12 May 1993, Decisions and Reports (DR) 74; Desmots v. France (dec.), no. 41358/98, 23 March 1999; Dotta v. Italy (dec.), no. 38399/97, 7 September 1999; Moosbrugger v. Austria (dec.), no.*

44861/98, 25 January 2000; John v. Germany (dec.), no. 15073/03, 13 February 2007; and the Predil Anstalt S.A. and Herma decisions, cited above). The same is true where the refusal proves arbitrary (ibid.), that is to say where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto, where the refusal is based on reasons other than those provided for by the rules, and where the refusal has not been duly reasoned in accordance with those rules.

60. Article 6 § 1 thus imposes, in this context, an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis.

61. Consequently, when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning. That being said, whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.

62. In the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (Article 267 of the Treaty on the Functioning of the European Union), this means that national courts against whose decisions there is no remedy under national law, which refuse to refer to the Court of Justice a preliminary question on the interpretation of Community law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of the Court of Justice. They will thus be required, in accordance with the above-mentioned Cilfit case-law, to indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in

question has already been interpreted by the Court of Justice, or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.

63. The Court observes that this obligation to give reasons has been fulfilled in the present case."

(Emphasis added by way of underlining)

SECTION 4: THE GENERAL CONTOURS OF A KÖBLER CLAIM

102. As this case appears to involve the first *Köbler* claim brought in this jurisdiction, we consider it necessary to discuss the general parameters of a claim of this nature. It is a highly specific form of claim and its contours were discussed in C-224/01 *Köbler v. Osterreich (Case C-224/01)* [2003] E.C.R. I-10239, *Traghetti Del Mediterraneo Spa v. Italy (Case C-173/03)* [2006] E.C.R I-05177, and *Ferreira v. Portugal (Case C-160/14*) [2015] E.C.R. I-565.

Köbler

103. In *Köbler v. Austria*, the Court of Justice confirmed that the existing principle that Member States are liable for infringements of EU law which affect the rights of individuals also encompasses breaches by domestic courts of last instance. Courts were not exempted from this principle. The Court clearly articulated the conditions for State liability in circumstances where the relevant breach of EU law was committed by the court of last instance, confining it to cases of "manifest infringement". Thirdly and interestingly, it held

that there had been an infringement of EU law in that case but that the infringement was *not* sufficiently "manifest" for the State to incur liability. This emphasises the point that the claimant must not merely establish an infringement of EU law but also that the infringement was "manifest".

104. The facts in the main proceedings in *Köbler* were as follows. Mr. Köbler, an Austrian professor, applied for, and was denied, a special length of service increment to his salary. Austrian law required him to have completed fifteen years' service as a professor at Austrian universities. Mr. Köbler contended that he had the requisite length of service if the duration of his service in the universities of *other* Member States was taken into consideration and complained that the condition of completion of fifteen years' service solely in Austrian universities, with no account being taken of periods of service in universities in other Member States, amounted to indirect discrimination under EU law.

105. Initially the Verwaltungsgerichtshof, or Administrative Supreme Court of Austria, requested a preliminary ruling from the CJEU in relation to the dispute, but while the reference was pending, the CJEU handed down its decision in an analogous case. Upon learning of that decision, the Verwaltungsgerichtshof, having consulted the parties, withdrew its request for a preliminary ruling. Ultimately, by a judgment of the 24 June 1998 it dismissed Mr. Köbler's application on the grounds that the length of service increment was a loyalty bonus which justified a derogation from the free movement principle. It reached this conclusion based upon its own interpretation of the CJEU's decision in the other case.

106. Mr. Köbler then brought an action for damages against Austria on *Frankovich* principles for reparation of the loss resulting from the non-payment of the increment, on the basis that the judgment of the Verwaltungsgerichtshof infringed directly applicable provisions of Community law as interpreted by the CJEU. The Austrian court hearing the damages claim made a reference to the CJEU seeking a ruling to clarify whether damages could be sought as against a Member State where the judicial arm was responsible for a breach of EU law. Thus, the stage was set for a CJEU judgment on the scope of Member State liability for *judicial errors of a particular kind.*

107. The CJEU held that damages could be sought in such a situation. In so finding, it held that the doctrine of Member State accountability applied in general to all Member State actions, and that it did not distinguish on the basis of the branch or department of government that had actually committed the breach. This was because of the principle in international law that "*a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive"* and that that principle "*must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pecheur and Factortame …)"*

108. The Court went on to state:

"33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals

were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance."

and

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

109. The Court addressed the arguments of certain Member States that the principle of State liability could not be attributed to a court of last instance by reason of the principles of *res judicata*, legal certainty and the independence and authority of the judiciary. At para. 38, it acknowledged that *"the importance of the principle of res judicata cannot be disputed"* in ensuring the stability of the law and legal relations and the sound administration of justice. However, it said, *"… recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata."* This was because proceedings seeking to render the State liable *"do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata."* Hence, *"[t]he applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage"* (at para. 39).

110. The CJEU was equally emphatic that arguments based on the independence and authority of the judiciary could not hold sway. There was no threat to the independence of the judiciary because *"the principle of liability in question concerns not the personal liability of the judge but that of the State".* Equally, there was no risk of a diminution of the authority of a court adjudicating at last instance because *"the existence of a type of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary".*

111. In a section entitled *"Conditions governing State Liability*," the CJEU, citing established jurisprudence, reprised the conditions which must be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which the State is responsible; (1) *"the rule of law infringed must be intended to confer rights on individuals,"* (2) *"the breach must be sufficiently serious"* (3) *"there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties …"* It held that State liability for loss caused by a decision of a national court was governed by the same conditions.

112. At para. 53 of its ruling, the CJEU discussed the *"sufficiently serious"* criterion and its application in a situation of State liability owing to a decision of a national court adjudicating at first instance. In seeking to establish possible State liability in that instance, *"regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this*

case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law."

113. In this regard, and crucially, the Court went on to state:

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

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. (now Art. 267 TFEU).

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

(Emphasis added).

114. At para. 58, citing *Francovich*, the CJEU opined that where the conditions for State liability are met, reparation must be made *"on the basis of rules of national law"* emphasising that "*the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation…"*

115. With the conditions for liability it had laid down in mind, addressing Mr. Köbler's case, the CJEU readily concluded that the free movement principle was meant to create individual rights. However, it went on to determine that the breach complained of was not sufficiently serious as to warrant Member State liability.

116. The judgment in *Köbler*, therefore, deploys *Francovich* liability to make a Member State's court of last instance, when interpreting EU law, subject to judicial oversight by the CJEU. However, the conditions for liability are set at a high level by reason of the requirement that there be a "manifest" infringement of EU law.

Traghetti

117. In *Traghetti,* the CJEU, sitting as a Grand Chamber, further explained the kind of judicial error which might attract *Köbler* liability on the part of a Member State and emphasised that domestic legislation may not make the conditions for State liability more restrictive than the criteria set down by the Court itself in *Köbler*. In the course of its judgment, the Court made comments about the nature of judicial decision-making, including assessment of evidence, which were heavily relied upon by the appellants in the present proceedings. Those comments therefore bear careful examination.

118. Italian domestic law provided at that time that a person could recover damages as a result of judicial conduct only in certain restrictive conditions, namely if the judge was guilty of "*intentional fault or serious misconduct in the exercise of his functions*." There was further

derogation as follows: "*in the exercise of judicial function the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability*".

119. The background to the case was that a maritime transport company in liquidation, TDM, brought proceedings against Italy in respect of the granting by the State of direct subsidies to a competing company. TDM's claim for compensation was ultimately dismissed by the Supreme Court of Cassation on the basis of its interpretation of EU law on State aid. It refused to refer any question to the Court of Justice.

120. TDM then instituted an action against Italy before a different tribunal seeking reparation for the damage allegedly caused to it by the judgment of the Court of Cassation. TDM claimed that the judgment was based on an incorrect interpretation of the Treaty Rules relating to competition and State aid and an erroneous assumption that there was settled case law of the Court of Justice on the subject. It complained of the Supreme Court's failure to make a reference to the Court of Justice.

121. That tribunal chose to refer questions to the Court of Justice, one of which was summarised by the Court in the following terms:

> *"…whether Community Law and, in particular, the principles laid down by the Court in the Köbler judgment preclude national legislation such as that in issue in the main proceedings which, firstly, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance where that infringement is <u>the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court</u>, and, secondly, also*

limits such liability solely to cases of intentional fault and serious misconduct on the part of the Court" (at para. 24) (emphasis added).

122. Italy (supported by Ireland and the UK) argued that the domestic law was compatible with EU law because it created a fair balance between the need to preserve, on the one hand, the independence of the judiciary and the requirements of legal certainty, and on the other, the provision of effective protection to individuals *"in the most flagrant cases of infringement of Community law".* This argument was not accepted by either the Advocate General or the Court.

123. The appellants place emphasis upon the comments of the Advocate General and the Court concerning the function of domestic courts in the assessment of evidence relating to matters of EU law, and these will therefore now be discussed in some detail. The appellants seek to argue, on the basis of *Traghetti,* that the Irish courts in the *Dowling* proceedings erred in the manner in which they addressed and assessed the evidence concerning ILP's situation in July 2011 and the necessity (if any) for the direction order; the appellants contend that this is one of the fundamental errors that was made in the *Dowling* litigation, in respect of which, they say, they are now entitled to seek damages under the *Köbler* doctrine.

The Opinion of Advocate General Leger in Traghetti

124. In his opinion of the 11 October 2005, Advocate General Léger recapitulated the principle set out in *Köbler* and said that these principles could not justify the exclusion of State liability in the case where the infringement of Community law on the part of a Supreme Court related to the interpretation of provisions of law. He said that the interpretation of provisions of law occupied an essential place in judicial activity, and he gave a number of

examples of how a national court might commit a breach of Community law by misinterpreting the law, giving rise to State liability, (provided, of course, that the breach was manifest); (see paras. 56-64). He also described how a failure to make a preliminary reference might also constitute a manifest error. (paras. 65-76 inclusive).

125. He went on to consider the question of the exclusion of state liability where the infringement of Community law was attributable to "*an assessment of facts and of evidence"* by the domestic court of final instance. He acknowledged that at first sight, one might wonder how this could arise at all in circumstances where courts of final instance, unlike ordinary courts, examine points of law and not points of fact and are not supposed to assess either the truth of alleged facts or the relevance, meaning or scope of the evidence adduced in order to establish them, because that exercise falls by its nature to courts hearing the merits of the case. However, he said:

"The assessment of facts and of evidence carried out by those courts does not fall totally outside the review of Supreme Courts since, in particular, the latter ensure compliance with rules of evidence (concerning the admissibility of evidence or the burden of proof), and have to verify the accuracy of the legal classification of facts, that is to say, to consider whether the facts of the case, as set out in the judgment under appeal, do indeed fall within the legal category to which the court hearing the merits of the case have assigned them, thus determining which specific set of legal rules they are subject to. Each of these operations forms part of the review for error of law, whether it concerns the proper establishment of the facts found by the court hearing the merits or the consequential legal effects, which that court has inferred from them (which may moreover result from an erroneous interpretation of the concept as it relates to the legal category concerned)" (at para. 84).

126. He then commented (at para. 85) that such a review is not unknown in Community law. He said that in the first instance, although the procedural rules to safeguard individual rights under Community law remain broadly governed by the principle of the procedural autonomy of the Member States, there were certain rules of Community law which related to evidence, such as the rules laid down in several directives relating to the burden of proof on the issue of discrimination. He said that there were many concepts of Community law which *"lend themselves to review of the legal classification of the facts"* (para. 87), which he said applied most particularly in matters of State aid. He then went on to describe precisely how, in cases of State aid, various operations would have to be carried out by the national court involving legal classification of the facts (paras. 88 – 91). He said that it was possible that in the course of such a review for error of law, the Supreme Courts might themselves commit an error of law giving rise to State liability if, according to the criteria laid down in *Köbler*, it resulted in a manifest infringement of the relevant Community law (para. 92). Accordingly, he concluded that the principle of State liability under *Köbler* precluded the liability of the State being generally excluded under national legislation solely on the ground that the infringement in question related to the assessment of facts and of evidence by that State's Supreme Court.

The CJEU's decision in Traghetti

127. The Court delivered judgment on the 13 June 2006. It accepted that State liability under the *Köbler* claim was not unlimited and that it emphasised the exceptionality of the cases in which reparation would be granted:

"As the court has held, State liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law". (Emphasis added).

128. Having reiterated the factors which must be taken into account by a domestic court, it turned to the exclusion of liability under the relevant Italian law. The Court agreed with the Advocate General that the need to guarantee effective judicial protection to individuals of the rights conferred on them by EU law precluded the exclusion of State liability *"solely because the infringement of Community law attributable to a national court adjudicating at last instance arose from the interpretation of provisions of law made by that court."* (para. 33). Noting that *"a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules – of national and/or Community law – in order to resolve the dispute brought before it",* it went on to say that "*it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation"* (para. 35), for example where a national court attributes to a substantive or procedural rule of Community law a manifestly incorrect meaning.

129. Adopting the observation in the Opinion of Advocate General Léger, the CJEU found that *"to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court could be tantamount to rendering meaningless the principle laid down by the Court in the Köbler judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for insuring that rules of law are given a uniform interpretation."* (at para. 36)

130. The Court went on to state that *"[a]n analogous conclusion must be drawn with regard to legislation which in a general manner excludes all State liability where the infringement attributable to a court of that State arises from its assessment of the facts and evidence."* (at para. 37). It considered that, like the interpretation of provisions of law, the assessment of facts and evidence:

> *"constitutes… another essential aspect of the judicial function since, regardless of the interpretation adopted by the national court seised of a particular case, the application of those provisions to that case will often depend on the assessment which the court has made of the facts and the value and relevance of the evidence adduced for that purpose by the parties to the dispute."* (at para. 38).

131. At para. 39 it said that such an assessment, "*which sometimes requires complex analysis…may also lead, in certain cases, to a manifest infringement of the applicable law, whether that assessment is made in the context of the application of specific provisions relating to the burden of proof or the weight or admissibility of the evidence, or in the context of the application of provisions which require a legal characterisation of the facts*".

132. It concluded:

> *"40. To exclude, in such circumstances, any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the Köbler judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.*

41. As the Advocate General observed in points 87 to 89 of his Opinion, that is especially the case in the State aid sector. To exclude, in that sector, all State liability on the ground that an infringement of Community law committed by a national court is the result of an assessment of the facts is likely to lead to a weakening of the procedural guarantees available to individuals, in that the protection of the rights which they derive from the relevant provisions of the Treaty depends, to a great extent, on successive operations of legal classification of the facts. Were State liability to be wholly excluded by reason of the assessments of facts carried out by a court, those individuals would have no judicial protection if a national court adjudicating at last instance committed a manifest error in its review of the above operations of legal classification of facts."

133. Clarifying that any *"manifest infringement"* in such circumstances fell to be assessed in light of the criteria set out at paras. 53 – 56 of *Köbler*, the CJEU went on to state, at para. 44, that while it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of EU law attributable to a national court adjudicating at last instance, *"under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law"* albeit *"this does not mean the State cannot incur liability under less strict conditions pursuant to national law."*

134. The Court formally answered the question referred by stating:

"*Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an*

assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the Köbler judgment."

135. We consider it correct to say, therefore, that at the level of general principle, a manifest infringement of EU law may be committed by a court of last instance in the manner in which it addresses the facts and evidence in a case in connection with a matter of EU law. Whether a stateable case has been made out that such a manifest infringement occurred in the *Dowling* litigation is a different matter, and one to which we return later.

Ferreira

136. In *Ferreira da Silva e Brito & Others v. Portugal (Case C-160/14)*, the Court discussed the relationship between a *Köbler* claim and the impugned decision of the domestic court of last instance, emphasizing that a *Köbler* claim was concerned with the issue of reparation for the litigant and not revision of the judgment of the court of last instance. Specifically, it held that where a national law required the setting aside of the decision of the court of last instance as a pre-condition to a claim for reparation under the *Köbler* doctrine, this was too restrictive to satisfy those requirements of the *Köbler* doctrine.

137. The EU legal framework in question was that concerning the transfer of undertakings as set out in a Council Directive. An airline company was wound up and the applicants were

dismissed as part of a collective redundancy. They brought an action for their reinstatement within a new company (which had taken over some of the functions of the old company) and payment of their renumeration under the Directive.

138. Proceedings made their way through the Portuguese courts and the Supreme Court of Justice held that the collective redundancy was not unlawful. It also refused to make a preliminary reference to the Court of Justice on the basis of its view that there was no material doubt as to the interpretation of the EU rules.

139. The applicants then brought new proceedings against Portugal, claiming that the State should be ordered to pay damages for material losses they had sustained. They contended that the judgment of the Supreme Court was manifestly unlawful because it misinterpreted the concept of a "transfer of business" within the meaning of the Directive and had failed to comply with its obligation to refer appropriate questions to the Court of Justice. Portugal argued that under domestic law a claim for damages must be based on the prior setting aside by the court having jurisdiction of the decision which caused the loss or damage; and this had obviously not been done in respect of the Supreme Court's decision. The court of first instance in Lisbon decided to stay the proceedings and refer questions to the Court of Justice for a preliminary ruling. One of the questions was whether the *Köbler* doctrine precluded the application of a national provision which made a claim for damages against the State conditional upon the decision that caused the loss or damage having first been set aside.

140. The CJEU distilled the question in issue as follows:

"By its third question, the referring court seeks to ascertain, in essence, whether EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible". (at para. 46)

141. The Court noted that the provision of national law in question was *"dictated by concerns connected with the principle of res judicata and the principle of legal certainty"* and the argument of Portugal that the decisions of the Supreme Court were intended to determine a case once and for all, because if the rule of law and respect for judicial decisions were called into question, this would undermine the hierarchical structure of the judicial system.

142. The CJEU once again rejected the suggestion that these issues or concerns could supplant the *Köbler* doctrine. On the issue of *res judicata*, it stated:

"It is true that the Court has stressed the importance, both for the EU legal order and for the national legal systems, of the principle of res judicata, stating that in the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States (see, to that effect, judgment in Fallimento Olimpiclub, C‑2/08, EU:C:2009:506, paragraphs 22 and 24)." (at para. 54)

143. It went on to say at para. 55:

> *"As to the impact of the principle of* res judicata *on the situation at issue in the main proceedings, it need only be observed that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. In an action brought to establish the liability of the State the applicant will, if successful, secure an order against it for reparation of the damage incurred but will not necessarily obtain a declaration invalidating the status of res judicata of the judicial decision which was responsible for that damage. In any event, the principle of State liability inherent in the EU legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage (see judgment in Köbler, C 224/01, EU:C:2003:513, paragraph 39)."*

144. The Court held that the principle of legal certainty "*cannot frustrate the principle that the State should be liable for loss and damage caused to individuals as a result of infringements of EU law which are attributable to it*." To take account of that principle where a decision of a court adjudicating at last instance was manifestly incorrect would mean that an individual "*would be prevented from asserting the rights that he may derive from the EU legal order and, in particular, those that stem from the principle of State liability*." At para. 59, it stated:

> *"Accordingly, a significant obstacle, such as that resulting from the rule of national law at issue in the main proceedings, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU*

law cannot be justified either by the principle of res judicata or by the principle of legal certainty."

145. The CJEU thus answered the question referred in the following terms:

"60. It follows from the foregoing that the answer to the third question is that EU law and, in particular, the principles laid down by the Court with regard to State liability for loss or damage caused to individuals as a result of an infringement of EU law by a court or tribunal against whose decisions there is no judicial remedy under national law must be interpreted as precluding a provision of national law which requires, as a precondition, the setting aside of the decision given by that court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible."

146. It is therefore emphasised in *Traghetti* that when a person brings a *Köbler* claim in the courts of a member state, he cannot be met by an argument that the court of last instance has already decided the issue, because the whole point of a *Köbler* claim is to assert that the court of last instance was (manifestly) in error and that the litigant is entitled to reparation for the damage caused by that (manifestly) erroneous decision. The issue upon which the court of last instance is said to have erred must be argued in the new proceedings and the court hearing the fresh proceedings is entitled to reach a different conclusion on the merits to the Supreme Court.

147. This may seem like a rather unusual situation, particularly when one considers that the ultimate appellate court dealing with a *Köbler* claim may well be the same court which delivered the judgment which is alleged to be erroneous e.g. the Supreme Court in Ireland. Nonetheless, it is clear that the *Köbler* doctrine operates as something of an exception to

the principle of *res judicata* insofar as the defence to a *Köbler* claim cannot simply consist of a response that the Supreme Court has already decided the issue of EU law. The exception exists because it is concerned with State liability at an EU level, albeit that the claim is litigated in the domestic courts. However, even though it is an exception to *res judicata*, it is a highly qualified and restrictive exception because of its precise contours, particularly the requirement that the error be a "manifest" error.

Summary of the Key Features of the law governing *Köbler* claims

148. It may be helpful at this point to summarise the following as the principles which can be derived from *Köbler, Traghetti* and *Ferreira*:

1) The claim is concerned with an adjudication by a court of last instance in a Member State.
2) There must have been an infringement by a court of last instance of an EU law which was intended to confer rights on individuals.
3) The infringement must be *"sufficiently serious"*. In the context of State liability in respect of a decision of a court adjudicating at last instance, the *"sufficiently serious"* threshold will be met *"only in the exceptional case where the court has manifestly infringed the applicable law"*.
4) The manifest infringement may arise during the exercise of interpreting a substantive or procedural rule of EU law or in the assessment which the court has made of the facts and evidence relevant to the EU law issue, for example, in the application of specific EU provisions relating to the burden of proof, the weight or admissibility of the evidence or in the context of the application of provisions which require a legal characterisation of the facts for the purposes of EU law.

5) In assessing whether there has been a *"manifest breach",* the national court hearing the claim must take account of all the factors which characterise the situation before it, including (a) the degree of clarity and precision of the rule infringed, (b) whether the infringement was intentional, (c) whether the error of law was excusable or inexcusable, (d) the position taken, where applicable, by a Community institution and (e) non-compliance by the court in question with its obligation to make a reference for a preliminary ruling.
6) There must be a direct causal link between the breach of the obligation and the loss or damage sustained by the injured party.
7) A claim for redress for a manifest infringement of EU rights stemming from a decision of a court adjudicating at last instance is for the national courts of each Member State (albeit that the CJEU also retains judicial oversight in this regard).
8) At national level, the principles of *res judicata*, legal certainty and the independence or authority of the judiciary may not be invoked to resist a *Köbler* claim.

SECTION 5: THE PRELIMINARY REFERENCE AND THE CJEU DECISION IN *DOWLING*

The Article 267 Reference from the High Court in the *Dowling* litigation

149. It is now necessary to examine more closely the judgments which made up the *Dowling* litigation or "base proceedings". We start by examining the context and circumstances of the Article 267 reference to the CJEU from the High Court. It will be recalled that the applicants in the *Dowling* litigation had challenged the validity of the direction order

pursuant to both domestic and EU law and sought relief pursuant to s.11 of the 2010 Act, setting aside the direction order.

150. In the first High Court judgment, and before she made her reference to the CJEU, O'Malley J. made a number of factual findings, set out at para. 41.2 of her judgment, as follows:

> *"1. From 2008 onwards, ILP along with other Irish banks became increasingly reliant upon State and EU financial support. As time went by and the financial turmoil of those years did not resolve, the efforts of the Irish government to support the banks did not succeed in convincing the markets of either the banks' viability or the State's capacity to continue supporting them.*
>
> *2. By late 2010 it was apparent that there was a serious threat to the financial stability of the State, in significant part due to the State's commitments to the banks.*
>
> *3. The State's guarantees in respect of ILP amounted to c. €26 billion.*
>
> *4. In entering into the Programme of Support in November 2010, the Irish State entered into binding legal commitments to the European Commission, the European Central Bank and the International Monetary Fund, including a commitment to recapitalise viable Irish banks.*
>
> *5. As part of the Programme, the Central Bank of Ireland committed itself to carry out a Prudential Capital Assessment Review and a Prudential Liquidity Review and to determine the capital needs of the banks on the basis of the results.*
>
> *6. The PCAR and PLAR results were published on the 31st March, 2011.*

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

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

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

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

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

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

13. The failure of ILP would, as a matter of probability, have had extreme, adverse consequences for the Irish State, whether by reason of a run on the bank and subsequent calls on the State guarantee of up to c. €26 billion, the contagion effects in relation to the other banks, a full or partial withdrawal of funding to the State under the Programme of Support for non-compliance with its terms, sanctions imposed under the Treaty, or a combination of some or all of these possibilities.

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

15. The 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 €2.3 billion, contingent capital in the sum of €0.4 billion, and a "standby" investment of €1.1 billion. The price to be paid per share was €0.06453, a discount of 10% to the middle market price on the 23rd June, 2011. The calculation of the number of shares required to be issued in return for the €2.3 billion resulted in the acquisition by the Minister of 99.2% of the company.

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

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

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

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

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

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

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

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

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

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

27. The Minister decided to make a proposed direction o*rder pursuant to the provisions of the Credit Institutions (Stabilisation) Act, 2010.*

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

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

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

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

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

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

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

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

151. O'Malley J. was satisfied that the application for the direction order was made and granted in accordance with the procedure set out in the 2010 Act, that there was no lack of

candour or breach of duty to the court by the Minister in making the application, and that the 2010 Act permitted the action taken by the Minister. She said that in those circumstances, the direction order could not be set aside unless (1) the Minister's opinion was unreasonable or (2) it was vitiated by legal error. She considered there was little purpose in reviewing whether or not the opinion was unreasonable if it was vitiated by legal error, and took the view that in order to ascertain if there was a legal error, a preliminary reference to the CJEU was necessary. This led to the preliminary reference pursuant to Article 267.

152. The questions referred by O'Malley J. were as follows:

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

153. The specific effects of the direction order as referenced within the first question above refer, of course, to the matters dealt with in the Second Directive (increasing a company's capital without the consent of the general meeting; allocating new shares without offering them on a pre-emptive basis to existing shareholders, without the consent of the general meeting; and lowering the nominal value of the company's shares without the consent of the general meeting).

154. The precise terms of the two questions may be noted; the first question concerned the compatibility of the direction order with the Second Directive, while the second concerned the compatibility of the direction order with EU law generally. However, both questions referred to the domestic provision, namely the direction order. This is important to bear in mind when deciding whether or not the court ultimately indicated that it considered the direction order to be compatible with EU law/the Directive, or whether it merely set out a general test to be applied by the domestic courts to the direction order.

155. Before we turn to the answer(s) given by the CJEU in *Dowling*, we wish to deal with the decision of the CJEU in *Kotnik.* We do so because it is an important chain in the reasoning of the Advocate General and the Court in the *Dowling* opinion and decision, albeit that it concerned State aid.

The decision of the CJEU in *Kotnik*

156. While the *Dowling* preliminary reference was before the Court of Justice, the Court dealt with *Kotnik v. Slovenia* (Case C-526/14, 19 July 2016). The decision in *Kotnik* concerned the implications of a Banking Communication issued by the Commission on the 1 August

2013. It was one of a series of communications issued during the financial crisis and its purpose was to provide guidance on the rules relating to State aid for the financial sector in that context.

157. In December 2013 the Slovenian authorities, acting on the basis of legislation intended to implement the Communication, adopted measures for the recapitalisation of certain banks. This involved the writing off of subordinate rights. Although the court proceedings that ensued purported to challenge the constitutionality of the national legislation, the complaints were seen as being directed at the validity and interpretation of the Communication itself and the Commission's view that there had to be burden-sharing by shareholders and subordinated creditors as a prerequisite to the authorisation of State aid in the banking area so as to ensure compatibility with the internal market.

158. At para. 50, the Court noted the central role played by financial services in the EU economy, describing them as an essential source of funding for businesses that are active in the various markets. It observed that a number of them operate internationally and that they are interconnected, and that this was why the failure of one or more banks was liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. This was likely, in turn, to produce negative spill-over effects in other sectors of the economy.

159. The Court endorsed the Commission's view that burden-sharing measures were essential, that State aid in the banking sector should be limited to the minimum necessary, and any distortions of competition in the internal market should be limited. Such burden-sharing measures could be understood as designed to prevent recourse to State aid merely as a tool

to overcome the financial difficulties of the banks concerned. The burden-sharing measures were designed to ensure that, prior to the grant of any State aid, the banks which showed a capital shortfall would take steps with their investors to reduce that shortfall, in particular by raising equity capital and by obtaining a contribution from subordinated creditors. This would limit the amount of State aid granted. Otherwise there would be a distortion of competition.

160. It was also necessary to overcome the problem of what it described as "*moral hazard*", namely that individuals are inclined to engage in risk-taking when the possible negative consequences of so doing were borne by the Community as a whole.

161. The Court held that the burden-sharing measures at issue did not breach the principle of legitimate expectation. Even if the circumstances for the principle to come into play had been established, there was an overriding public interest in ensuring the stability of the financial system while avoiding excessive public spending and minimising the distortion of competition.

162. As regards to the position of the property rights of the shareholders, the Court said that they must fully share the risk of their investments in accordance with the general rules applicable. Since shareholders were liable for the bank's debts up to the amount of its share capital, the fact that the Banking Communication required that those shareholders should contribute to the absorption of the losses suffered by the bank to the same extent as if there were no State aid could not be regarded as adversely affecting their right to property.

163. The Court also considered Directive 2012/30, the provisions of which replicated the articles of the Second Directive concerning an increase or reduction in share capital. The Court said that the Directive was intended to protect the interests of shareholders and others, and to reassure investors that their rights would be respected throughout the internal market. The measures in the Directive were to guarantee protection in the "*normal operation of public limited liability companies*" (at para. 87). By contrast, the Court said, the burden-sharing measures involving both shareholders and subordinated creditors constituted, when they are imposed by the national authorities, "*exceptional measures"*. They could only be adopted "*in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system*". The Court therefore held that the Directive did not preclude measures relating to share capital without the approval of the company general meeting, in certain specific circumstances such as those mentioned in the Banking Communication. Importantly, the Court also held that this conclusion was not called into question by the *Pafitis* judgment.

164. In this regard, we should explain that the *Pafitis* judgment is one of the line of cases which, as we have alluded to at para. 31, are commonly referred to collectively as "the Greek bank cases": *Syndesmos Melon & Ors v The Greek State & Ors (Case C-381/89)* [1992] E.C.R. I-02111; *Karella and Karellas v Minister for Industry, Energy and Technology & OAE (Cases C-19/90 and C-20/90)* [1991] E.C.R. I-02691; *Kerafina v The Greek State (Cases C-134/91 and C-135/91)* [1992] E.C.R. I-05699; *Pafitis & Ords v Trapeza; Kentrikis Ellados AE & Ors (Case C-441/93)* [1996] E.C.R. I-01347; *Diamantis v The Greek State & OAE (Case C-373/97)* [2000] E.C.R. I-01705; *Kefalas & Ors v The Greek State (Case*

C-367/96) [1998] E.C.R. I-02843. The theme emerging from those cases was described by the CJEU in *Pafitis* itself in the following terms:

> *"... it must be pointed out, first, that the Second Directive is intended, in accordance with Article 54(3)(g) of the EC Treaty, to coordinate the safeguards which are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent and protecting the interests of members and others. The Second Directive thus seeks to ensure a minimum level of protection for shareholders in all the Member States.*
>
> *That objective would be seriously frustrated if the Member States were entitled to derogate from the provisions of the directive by maintaining in force rules — even rules categorized as special or exceptional — under which it is possible to decide by administrative measure, separately from any decision by the general meeting of shareholders, to effect an increase in the company's capital (see the judgments in Joined Cases C-19/90 and C-20/90 Karella and Karellas [1991] ECR 1-2691, paragraphs 25 and 26, and Case C-381/89 Syndesmos Melon tis Eleftheras Evangeliku Ekklisias and Others [1992] ECR I-2111, paragraphs 32 and 33).*
>
> *For those reasons, the Court has thus already held that Article 25(1) of the Second Directive precludes the application of rules which, being designed to ensure the reorganization and continued trading of undertakings that are of particular importance to the national economy and are in an exceptional situation by reason of their debt burden, allow an increase in capital to be decided upon by*

administrative measure, without any resolution being passed by the general meeting (judgments in Karella and Karellas, paragraph 31, Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others, paragraph 37, and Joined Cases C-134/91 and C-135/91 Kerafina-Keramische und Finanz-Holding and Vioktimatiki [1992] ECR I-5699, paragraph 18, hereinafter 'the Karella and Syndesmos Melon line of cases')."

165. In the present proceedings, the appellants contend that the Irish courts erred in taking the view that the (CJEU) *Dowling* decision had implicitly overruled the *Pafitis* line of authority. We note therefore that, as described above, the CJEU in *Kotnik* considered that those Greek cases did not govern a situation where, to use the CJEU's own words, there was a "*context of there being a serious disturbance of the economy of a member state and with the objective of preventing a systemic risk and ensuring the stability of the financial system*". And as we shall now see, the decision in *Kotnik* featured heavily in *Dowling,* both in the opinion of the Advocate General and in the CJEU's judgment.

The Opinion of the Advocate General in *Dowling*

166. Of particular interest is the manner in which Advocate General Wahl framed the issues arising in the reference:

"*1. Did the Irish Government breach central provisions of EU company law when, in the summer of 2011, it took control of Irish Life and Permanent Group Holdings plc (subsequently Permanent TSB Group Holdings plc; 'ILPGH' or 'the Company') and, on the same occasion, of its subsidiary Irish Life and Permanent plc (subsequently*

Permanent TSB plc; 'ILP' or 'the Bank')? That is the gist of the dispute of which the High Court (Ireland) is seised.

2. In line with my stated position in my Opinion of 18 February 2016 in Kotnik and Others, (2) I consider, for the reasons given below, that the rights conferred upon shareholders by Directive 77/91/EEC ('the Second Directive') (3) do not preclude a Member State from urgently recapitalising an ailing credit institution which is central to the backbone of its economy, failing which that economy might be severely harmed and might, in turn, cause risk to that of other Member States.

3. I am therefore of the mind that the measure at issue in the matter under consideration was taken in compliance with EU law. However, in the final analysis, that is a matter for the High Court to verify." (Emphasis added).

It is worth noting the third numbered point above. The Advocate General was drawing attention to the distinction described above at section 3 between interpretation and application. As we shall see, the Court did not explicitly advert to this distinction.

167. At para. 39 of his Opinion, the Advocate General noted that the first question referred by the High Court was in general terms rather than only referring to the circumstances of the main action. He said that he inferred from this that the High Court was seeking, first and foremost, an answer of principle from the Court. Again, as we shall see, this distinction was not drawn by the Court in its judgment.

168. The Advocate General said that the case concerned the limits to the government's powers to take over, in times of crisis, an ailing credit institution which constitutes one of the pillars of the economy. He was of the view that the Court ought to follow the approach he proposed

in *Kotnik* albeit that the latter decision concerned State aid rather than the Second Directive. He said that the fact that a public limited company might be experiencing financial difficulties did not of itself justify negating shareholders' rights under the Directive, but that the Directive did not preclude the State from taking urgent measures in order to preserve financial stability within its territory as well as minimising risk of contagion. He said he shared the doubts expressed by the High Court that the "*line of cases which I shall call the Pafitis case law*" provides authority to interpret the Second Directive in the manner sought by the applicants for the reasons he had indicated in his Opinion in *Kotnik*. His use of the phrase "*Pafitis case-law"* to designate the Greek bank cases may be noted.

169. He stated that in the first instance, as was the case in *Kotnik*, it would be an understatement to say that the factual circumstances giving rise to the "*Pafitis case-law*" were highly different from those of the cases currently pending before the Court. He said that while recognising that the Second Directive "*continues to apply to 'ordinary re-organisation measures' – such as the circumstances of that case – the Court did not take a position as to re-organisation measures which must be classified as extraordinary*".

170. Secondly, the essential purpose of the Second Directive was to maintain the balance of powers between the different organs of the public limited company, especially in cases of conflict between them. It was not its purpose to preclude a Member State from intervening in respect of such a company in order to address a serious disturbance of the economy of a potentially contagious nature.

171. Thirdly, the state of play of European cooperation and integration in financial and monetary matters had evolved dramatically since the time the judgments in the Greek bank cases were delivered, at the level of both primary law and secondary law.

172. He said that in any event the matter under consideration in the *Dowling* reference did not raise issues substantially different from those in *Kotnik* even though they were different in detail. *Kotnik* concerned the imposition of a "bail-in" measure in respect of share capital, hybrid financial instruments and subordinate debt, whereas in the case under consideration what was in issue was an increase in share capital. Nonetheless what was common to both cases was that the direction order also involved a burden-sharing measure; this was because of the combined effect of the massive increase in share capital of ILPGH and the shareholders' inability to exercise pre-emption rights in the main action was to deprive the original shareholders of the influence which the shares would otherwise have given them.

173. The Advocate General pointed out that the financial and economic contexts in which the recapitalisation took place were not merely exceptional from a domestic point of view, but in fact were so exceptional that the Council had agreed in the Implementing Decision that they warranted the adoption of the programme. The Commission concurred, approving the State aid measures involved in rescuing and restructuring ILP in order to remedy a serious disturbance in the Irish economy. Both were final and unchallenged policy decisions. He accepted that the court held in the *Pafitis* case law that the fact that national rules were categorised internally as exceptional did not in itself justify departing from the rules of the Directive, but he said that that statement could not be read as extending to a situation of an international magnitude such as the one giving rise to the proceedings (para.54).

174. The Advocate General then said that the Implementing Decision did not require Ireland to recapitalise in the manner prescribed in the direction order; this issue was for Ireland alone, although the obligation to recapitalise was part of the consideration given for the financial assistance under the support programme. The recapitalisation of the domestic banks including ILP was simply a condition for the aid but it did not require any particular method of providing that aid.

175. The Advocate General also considered it to be relevant that the decision was made by an order of the High Court, an impartial and independent body, whereas in the *Pafitis* line of cases, the competent Minister alone decided whether to place undertakings in serious financial difficulties under the scheme enacted by that legislation, commenting:

> "*Those cases were therefore symptomatic of unrestrained government interference in the autonomy of a public limited company".* (At para. 58)

He said that the Second Directive recognises the importance of the authority of judicial decisions, referring to them on several occasions. He firmly disagreed with the argument of the applicants that the direction order was in effect an administrative decision and not a court order, bluntly rejecting the applicants' argument that "*the Irish courts blindly rubberstamped the Minister's proposed direction order without considering its merits at all*".

176. At para. 73 the Advocate General said that he took the view that the matter under consideration essentially raised the same issue as in *Kotnik* and ought therefore to be dealt with in largely the same way. He noted the applicants' assertion that this would amount to the Court "*retroactively resiling from its case law, contrary to the principle of legal*

certainty" but considered that "*such criticism is entirely without merit*". He said as follows at para. 76:

"*First, such a view fails to take into account the difference between clarifying or nuancing case law on the one hand, and overturning it on the other (the Court indicates specifically when it intends to depart from its case-law). The matter under consideration does not give rise to setting the Pafitis case-law aside-on the contrary, it tends to confirm it on principle. It is a simple instance of distinguishing between situations and the relevant case law*".

177. At para. 78, the Advocate General expressed his conclusion on the first question in the following terms:

"On the matter of principle therefore, I propose that the Court should answer the first question referred to the effect that, on a proper construction of Articles 8, 25 and 29 of the Second Directive, those provisions do not preclude legislation of a Member State according to which, in order to address the disruption to the economy and the financial system of the threat to the stability of certain credit institutions in that Member State and the financial system generally as well as minimising the risk of spread to other Member States, a court may order a public limited liability company to which that directive applies, which is of systemic importance to the economy of that Member State and which cannot, of its own volition, meet the regulatory requirements imposed by the Member States relating to the prudential supervision of financial institutions, to be taken over by the government without the consent of the general meeting" (emphasis added).

178. It is arguable that the underlined phrases used in his answer show that he was seeking to maintain the distinction between "interpretation" and "application" (as described in our Section 3).

179. The Advocate General then went on to consider the second question, which he described as "*doubly problematic*" from the point of view of the jurisdiction of the CJEU, because the referring court was essentially requesting the Court to *apply* EU law to the facts of the main action, and it was not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of measures of national law with EU law (having regard to case law such as *Patriciello* and *Ascafor and Asidac)*. However, notwithstanding his reservations, the Advocate General's understanding of the second question was that the referring court *"seems to want to know whether EU law precludes recapitalising in the manner done in the main action"*. Moreover, the *"vagueness"* of the term *"European law"* in the question was not a barrier to his understanding that this was a reference *"at the very least"* to the Second Directive. He thus went on to say:

> "*In that connection, the Court has consistently held that its powers under Article 267 TFEU extend to providing the national court with the necessary guidance on the interpretation of EU law that might be useful for its decision"."*

180. He therefore turned to the substance of the second question (para. 91). The principle of proportionality featured in his answer, in the following manner. He said that Recital 11 of the Implementing Decision makes clear that the operations which the EU helps to finance must be compatible with Union policies and the law of the Union. This included general principles of EU law which comprised not only the right to property enshrined in Article 17 of the Charter, but also the principle of proportionality:

"*91.…Specifically, the latter principle requires Member States to employ means which, while enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation*.

92. It is for the High Court when reviewing the Direction Order pursuant to section 11 of the Act, to consider whether the principles mentioned in the preceding point have been observed and, in particular, whether the Direction Order constitutes the measure least detrimental to the objectives and the principles laid down by the Second Directive."

181. He went on to say:

"95.… Ireland, supported by ILP and ILPGH, stated that the intervention at the level of ILPGH had 'made no difference as regards ILPGH shareholders. Had the Minister intervened at the level of ILP, the shareholders would have been the 100% owners of an ILPGH that owned 0.8% of ILP, as opposed to being 0.8% shareholders of ILPGH. Those parties proceeded to state that the Direction Order had been addressed to ILPGH, rather than the Bank, to secure Ireland a return on its investment, inasmuch as it was deemed that ILPGH-which, according to the government, has been relisted in the meantime-was more attractive to prospective purchasers.

96. Those statements are of the utmost importance. They find support in the background to the scheme of arrangement mentioned above at point 22 and lodged with the file, from which it emerges that ILPGH's start-up capital was raised by a contribution in kind consisting of the entire share capital in ILP (or something akin thereto). Moreover, as held by the High Court, ILPGH did not hold any assets other than ILP. The statements would therefore explain the High Court's finding that the failure of ILP

would, as a matter of probability, have resulted in a complete loss of value to the shareholders of ILPGH.

97. On the assumption that these statements are correct, the applicants' contention that the Direction Order is unjustified must be dismissed. Indeed, in that scenario, the Bank was and is the sole asset of the company, meaning that the Bank's failure would lead to the Company's shares becoming entirely worthless, as indicated in the order for reference. I am therefore unable to see how, in that eventuality, there might have been any interference in the applicant's right to property.…

98. This would, furthermore, lead me to consider it unnecessary to examine the legal consequences arising from a possible breach of Articles 8, 25 and 29 of the Second Directive. In any event, as Ireland points out, the Court is not asked, at present, to rule on the remedial action available in the event of an affirmative answer to either question referred, and I shall not pursue that line of thought any further.

99. All the same, it is for the High Court to verify that the statements mentioned above at point 95 are correct.

100 In light of the above the joint answer to both questions ought to be as stated above at point 78, on condition that the Member State concerned has recourse to means which, while enabling it effectively to attain the objectives pursued by its emergency legislation, are the least detrimental to the objectives and the principles laid down by the second directive. The national courts are to verify this is the case." (Emphasis added).

182. If the judgment of the Court of Justice had been in similar terms to that of the Advocate General, the appellants herein would have a much stronger case for the interpretation they urge upon this Court. However, the Court of Justice, as we shall see, failed to either (a)

explicitly reference the principle of proportionality; (b) explicitly reference that the national courts were to verify anything upon the return of the case to Ireland; or (c) express any reservations about its having been asked to rule on the compatibility of the national measure. On the contrary, it repeatedly used the phrase "*a measure, such as the Direction Order at issue in the main proceedings".*

The Grand Chamber decision in *Dowling*

183. The Court of Justice (Grand Chamber) delivered its judgment on the 8 November 2016. It set out the relevant provisions of the Second Directive, of Council Regulation EU number 407/2010 of the 11 May 2010, of the Implementing Decision 2011/77/EU, of the Irish 2010 Act, the factual context in Ireland, and the domestic litigation to date and then said, at paras. 30 and 31:

> "30. *The referring court concluded on the balance of probabilities that ILP could not have raised the required amount of capital of €4 billion either from private investors or from existing shareholders, after the extraordinary general meeting of ILPGH had rejected, on 20 July 2011, the Minister's recapitalisation proposal. In the opinion of the court, if ILP had not been recapitalised by the deadline laid down in implementing decision 2011/77, that would have led to the failure of ILP, due to a number of possible developments, such as a run on deposits held with ILP, call for repayment of various notes or a cessation of funding under the emergency liquidity assistance scheme, or a combination of some or all of those possibilities.*
>
> *31. Further, the High Court considers that ILP's failure would not only have led to the complete loss of value of the shares to the shareholders, but would also have had adverse consequences for Ireland. The court refers to, inter alia, the possibility*

of a run on deposits held with the national banks, the subsequent call on the guarantee granted to ILP by the Irish state and the possibility of full or partial withdrawal of funding to Ireland under the economic and financial adjustment programme for non-compliance with the terms of the programme. In the opinion of the referring court, those adverse consequences for Ireland would probably have worsened the threat to the financial stability of other member states and of the European Union".

184. At para. 43, the Court characterized the questions posed as the referring court seeking to ascertain "*whether Article 8(1), together with Articles 25 and 29 of the Second Directive, must be interpreted as precluding a measure, such as the Direction Order at issue in the main proceedings, adopted where there is a serious disturbance of the economy and the financial system of the Member State that threatens the financial stability of the European Union…*" (emphasis added).

185. At para. 44, the Court said that it was clear from the information provided by the referring court that the direction order "*was adopted in the context of the financial and economic crisis which led Ireland, in 2008, to grant significant guarantees to the national banks affected and, in late 2010, when the financial situation of those banks was continuing to deteriorate and was also threatening the financial stability of that Member State, to request financial assistance from the European Union…*" .

186. At para. 45, it said that *"[a]ccording to the referring court, that situation of serious disturbance of the national economy made it essential, because of the fact that it was impossible for ILP itself to achieve the recapitalisation by the end of July 2011, as required*

in particular by the Memorandum of Understanding, that the Irish State take action in order to avoid a failure of ILP that would threaten both the financial stability of Ireland and that of other Member States and of the European Union."

187. It noted that the recapitalisation of national banks, including ILP, was also laid down by certain provisions of Implementing Decision 2011/77 as a condition for the payment of EU financial assistance to Ireland. That financial assistance constituted a measure taken as a matter of urgency with a view to maintaining the financial stability of the European Union (the financial assistance having been provided in accordance with Regulation 407/2010, itself adopted on the basis of Article 122(2) TFEU which is designed to allow action to be taken to deal with exceptional occurrences.)

188. It noted that the Implementing Decision did not specify how recapitalisation was to be achieved, and that the Irish authorities were not obliged to make a direct injection of capital into the share capital of ILP but could carry out that recapitalisation by means of increasing the share capital of ILPGH**.**

189. The CJEU then went on to say, in a paragraph upon which considerable emphasis was laid in argument before this Court, as follows at para. 48:

"*Further, as stated in paragraphs 30 and 31 of this judgement, the referring court, <u>after weighing the competing interests, came to the conclusion</u> that, once the decision of ILPGH's extraordinary general meeting of 20 July 2011 was made to reject the Minister's proposed recapitalisation, <u>the direction order was the only means of ensuring, within the time limit laid down by implementing decision 2011/77, the recapitalisation of ILP that was necessary to prevent the failure of that financial</u>*

institution and thereby to forestall a serious threat to the financial stability of the European Union" (emphasis added).

190. The appellants lay considerable emphasis upon the above passage and submit that the Court of Justice was thereby indicating that it was a necessary condition for the compatibility of the domestic measure with the Second Directive that it be *"the only means"* of ensuring the recapitalisation of the institution and the prevention of its failure. They submit that either the Court of Justice misunderstood that the Irish court had not in fact reached any such conclusion (it had not, they say, weighed the "competing interests"), or, alternatively, that the Court of Justice overreached its own function by reaching a factual conclusion that the Irish court had not reached. This interpretation is central to the appellants' *Köbler* claim: they contend that the correct interpretation of the CJEU decision in *Dowling* (particularly on the basis of the above passage) is that it was being left to the Irish court to decide *whether* the direction order was the only means of ensuring, within the time limit laid down by Implementing Decision 2011/77, the recapitalisation of ILP that was necessary to prevent the failure of that financial institution. This, they contend, the Irish courts failed to do, and thereby manifestly infringed EU law as laid down in *Dowling*.

191. The CJEU agreed with the observations of Ireland, ILP and ILPGH that the measures in the Directive related to the normal operation of companies, whereas the direction order was not a measure taken by a governing body of a public limited liability company as part of its normal operation but rather was "*an exceptional measure taken by the national authorities intended to prevent, by means of an increase in share capital, the failure of such a company, which failure, in the opinion of the referring court, would threaten the financial stability of the European Union*."

192. It added: *"[t]he protection conferred by the Second Directive on the shareholders and creditors of a public limited liability company, with respect to its share capital, does not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a member state and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned."* (At para. 50).

193. The Court concluded:

> *51. The provisions of the Second Directive do not therefore preclude an exceptional measure affecting the share capital of a public limited liability company, such as the Direction Order, taken by the national authorities where there is a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see, by analogy, judgment of 19 July 2016, Kotnik and Others, C 526/14, EU: C: 2016: 570, paragraphs 88 to 90).*
>
> *52. That conclusion cannot be called into question by the fact that the direction order could be classified, as claimed by the applicants in the main proceedings, not as a 'judicial measure', but a 'provisional administrative act'. It follows from the two preceding paragraphs that the Second Directive does not preclude, in circumstances such as those at issue in the main proceedings, the adoption of a measure such as the direction order, the nature of the national authority which issued that order being of no relevance in that regard."* (Emphasis added).

194. It will be noted that the CJEU approached the question of the precise nature of the body which had issued the measure in question in a slightly different manner from the Advocate General. It will be recalled that the latter had laid emphasis on the fact that the direction order was issued by a judicial authority i.e. a court. However, the Grand Chamber said that *"the nature of the national authority which issued that order [was] of no relevance in that regard".*

195. It is of some importance to note what the Court said about *Pafitis***.** The CJEU found its interpretation of the Second Directive in *Dowling* "*in no way irreconcilable with the interpretation adopted by the Court in the judgment of 12 March 1996, Pafitis and Others (C 441/93, EU:C:1996:92), contrary to what is claimed by the applicants in the main proceedings."* This was because *"[t]he factors set out in paragraphs 44 to 48 of this judgment distinguish the situation at issue in the main proceedings from the case that gave rise to the judgment of 12 March 1996, Pafitis and Others (C 441/93, EU:C:1996:92)",* the important feature of *Pafitis* being that it concerned the insolvency of a single bank. While stating that the Second Directive *"continues to apply in the case of 'ordinary reorganisation measures'"* the CJEU emphasised that it had not, in *Pafitis,* given a ruling *"on extraordinary reorganisation measures, such as a direction order designed to avoid, in a situation where there is a serious disturbance of the national economy and of the financial system of a Member State, the failure of a bank and thereby to maintain the financial stability of the European Union."*

196. It added to this the point that *Pafitis* dated from a time before the implementation of the Economic and Monetary Union and the introduction of the euro:

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

197. In conclusion, the CJEU stated as follows, in its formal answer to the question posed:

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

198. Unlike the Advocate General's opinion, nowhere does the Court explicitly state that the domestic courts must now undertake the task of applying EU law as interpreted by them to the direction order; nowhere does it express reservations about being invited to rule on the compatibility of the domestic measure as distinct from simply interpreting EU law; nowhere does it explicitly reference the proportionality principle. On the contrary, it rolled up its answer to both questions in the above conclusion, citing the "*questions*" (plural) and using the phrase "*a measure, such as the direction order at issue in the main proceeding".* This approach may be contrasted with the approach of the Advocate General, as described above. It also must be borne in mind when considering whether, for the purpose of the *Köbler* claim in these proceedings, it can be said that the appellants have a stateable case that the Irish courts "manifestly infringed" EU law as interpreted by the CJEU.

199. The appellants' position at all times, in these proceedings and in the *Dowling* litigation has been that the CJEU did not in fact rule the direction order to be compatible with the Second Directive or EU law more generally; that it did not depart from its position as expressed in the Greek cases including *Pafitis;* that the question of EU proportionality continued to arise and was required to be applied by the domestic court; and that the domestic court was still required to engage in the exercise of assessing the evidence before it to reach a conclusion on whether the direction order was the only method of recapitalising the bank at the time, this being the test for whether or not it was compliant with EU law.

SECTION 6: THE *DOWLING* CASE UPON ITS RETURN TO THE DOMESTIC COURTS

The Second High Court judgment in the *Dowling* litigation

200. Before we summarise the second High Court judgment, we wish to refer to an exchange which occurred the course of the hearing leading up to that judgment, which is relied upon by the appellants. During the hearing before the High Court which took place after the CJEU had delivered its judgment on the preliminary reference, the *Dowling* plaintiffs drew attention to para. 48 of the ruling which has been set out above. Queried by O'Malley J. about the contents of para. 48, counsel for the Minister acknowledged that the CJEU had attributed to O'Malley J. a finding of fact she had not made. The judge herself stated in the course of the exchange that she had hitherto avoided making any finding as to whether the direction order was the "only means" of the recapitalisation: "*I was avoiding making any finding as to whether it was the only means of doing what is being done…*" . She said that there were *"two problematic issues"* with para. 48 of the CJEU judgment: "*firstly, there's the statement that this court had weighed the competing interests, I think Mr Skoczylas is correct in saying that exercise has yet to be carried out*" and "*secondly, it says that, after weighing the competing interests, I came to the conclusion that this was the only means of ensuring the recapitalisation*".

201. Counsel for the Minister sought to explain para. 48 on the basis that earlier in its judgment (para. 43) the CJEU had made it clear that its analysis was concerned with *"[a] measure such as the Direction Order at issue in the main proceedings"*, that the CJEU *"wasn't referring to a particular singular direction order as being the only means of achieving recapitalisation in the time period"* but rather was referring to a direction order in general

terms evidenced, counsel opined, by the reference at para. 50 of the CJEU ruling to a national measure *"of that kind"* and the similar type language used by the Court at para. 53 when distinguishing the *Pafitis* case from the measure in issue in the *Dowling* proceedings. In further response to O'Malley J.'s reference to the *"problematic"* matter of the CJEU having concluded that she had weighed the competing interests and had determined that the direction order was *"the only means"* of ensuring the recapitalisation of IPL, counsel's response was that perhaps something *"got lost in translation"*. O'Malley J. commented that it was *"a bit of a jump to say it's a typing error or a translation error",* although she speculated that the reference in para. 48 to *"weighing the competing interests" "may be meant to relate to the findings that the capital couldn't have been raised from the shareholders".*

202. Comments made by a judge in the course of a hearing do not, however, necessarily express the judge's final view as expressed in the ensuing reserved judgment. In her judgment following this hearing ("the second High Court judgment"), O'Malley J. referred to paras. 30 and 31 of the CJEU's judgment and said that *"these two paragraphs correctly summarise some of the key findings in the first judgment".* She then referred to the following paragraph as being correct and without controversy, and then moved to para. 48, which had been the subject of much debate at the hearing before her. She said that the argument of the appellants was that the Court of Justice had either erroneously believed that the High Court had found the direction order to be the only means of recapitalisation, and that everything thereafter in its judgment was posited on that mistake, or (alternatively) it exceeded its jurisdiction to make findings of fact over and above those made by the domestic court.

203. At para. 50 of her judgment, she said:

> *"50. In my view this argument is based on a misreading of the CJEU judgment. The paragraph encompassing the formal ruling of the Court does not refer back to and is not conditional upon any findings of fact made by this Court, other than those relating to the threat to the stability of the financial system of this State and, as a consequence, to the financial stability of the European Union. The references throughout are to measures such as the Direction Order, 'adopted where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union' and that is intended to prevent the failure of the financial institution concerned and thereby to forestall such a threat. The Court was not purporting to find some form of derogation or discretion to permit a course of action to be taken if it was the only course possible - it stated clearly that the protection conferred by the Second Directive does not extend to and does not preclude a measure taken by the State in the circumstances and for the purpose stated. That this is the proper reading of the judgment is apparent from the analysis of the CJEU of the circumstances of the case, its reference to the terms upon which the decision had been made to grant financial aid to the State, and its references to Kotnik."*

204. O'Malley J. therefore considered the question of whether the direction order had been vitiated by legal error (i.e. infringed EU law/the Second Directive) had been determined by the CJEU decision. The appellants fundamentally disagree with this conclusion and say that everything done thereafter by the Irish courts was a manifest error and infringement of EU law, because they failed to properly apply EU law to the case by carrying out an assessment of whether the direction order was the only means of recapitalising the institution.

205. The remainder of this High Court judgment proceeds to address matters of domestic law. O'Malley J. went on to assess the reasonableness of the Minister's action, according to her view of the appropriate administrative law test to be applied (although it may be noted that the Court of Appeal would later determine that she applied the wrong test and should have applied the more stringent, "*least restrictive means*", *Heaney* proportionality test; we will return to this later).

206. It was in this context of an examination under domestic law that, at para. 70 onwards, O'Malley J. addressed the *Dowling* applicants' submission that the company was at all times a solvent, viable and operating normally; that it had adequate tier 1 capital; and that it simply suffered from temporary liquidity. She also addressed their submission that the finding that there would be a loss of value to the shareholders was purely theoretical rather than practical. She rejected both of these submissions. She said that the concentration by the plaintiffs on the technical definition of solvency involved disregarding the reality of the institution's situation and the exposure of the State as a result of the risk created by that situation. The evidence adduced was in her view sufficient to ground the finding that a failure to recapitalise would, on the balance of probabilities, have led to a failure of the bank. She held that her findings were not theoretical and were instead grounded on the evidence set out in the judgment which formed the basis for the reference to the CJEU. The risks created by the bank's situation were considered to be very real by the State, the Commission and the external partners, and she accepted the reality of those risks. She said that the proposition that there was no need to intervene and no need to dilute the shareholders' rights because the State guarantee would have ensured that the bank did not fail, ignored both "*the scale of the funding that the state would have to have found and the*

catastrophic possibility of the collapse of the financial system in this state, with the consequential effects in other Member States".

207. She dismissed the applicants' claim.

The Third High Court judgment in the *Dowling* litigation

208. The third High Court judgment was delivered by O'Malley J. on the 1 December 2017. Albeit finding that the *Dowling* applicants did not require the leave of the court to appeal a refusal to set aside a direction order, O'Malley J. proceeded to grant leave to appeal in relation to certain grounds on the basis that it may subsequently be found to be necessary that leave be granted by the High Court. Accordingly, she granted leave to appeal and the issue on which she did so was as to whether the High Court *"correctly applied the Ruling of the Court of Justice in this case and in Kotnik and Ors v. Slovenia (C-526/14), and as to whether the High Court correctly interpreted and applied the terms of s.11 of the 2010 Act"*.

209. The *Dowling* applicants brought an unsuccessful leapfrog application to the Supreme Court, but that application was rejected as it was found not to meet the constitutional threshold for leave to be granted to appeal to the Supreme Court ([2018] IESC DET 72). The appeal thus proceeded in the Court of Appeal.

The Court of Appeal judgment in the *Dowling* litigation

210. The grounds of appeal, insofar as they concerned the EU law points, were that:

- The High Court judge erred "in determining the rulings of the CJEU in this case" and in *Kotnik*, and failed to apply correctly the principles regarding a reference under Article 267;
- The judge failed to carry out an exercise to weigh the competing interests of the parties in determining that the direction order was necessary to achieve the statutory purposes for which it was sought and in determining that the direction order was not unreasonable by or vitiated by legal error;
- The judge erred in concluding that the respondents had not breached the Second Directive
- The judge erred insofar as she *"rejected the contention that there was an obligation on the State to recapitalise ILP in the manner prescribed in the Direction Order"*;
- The judge erred in failing to apply the relevant jurisprudence on the Second Directive and relevant EU legal principles of proportionality and legal certainty;
- The judge failed to ensure that the impugned measure was the "least detrimental" to the objectives and principles of the Directive;
- The judge erred in failing to apply correctly the provisions of the Bank, Recovery and Resolution Directive 204/59;
- The judge erred in failing to apply EU law regarding breaches of Article 10 of Directive 2009/101 EC, Articles 5, 42 and 45 of Directive 2001/34/EC, Article 42 of MiFID, Article 3 of the Takeover Directive and Article 63 of the TFEU.
- The judge erred in failing to carry out any or any sufficient weighing of the competing interests of the appellants, prior to coming to the conclusion that the direction order was the only means of ensuring the recapitalisation of ILP that

was necessary to prevent the failure of that financial institution and forestall a serious threat to the financial stability of the European Union.

211. Thus, the grounds of appeal in the *Dowling* litigation overlap substantially with the issues raised in the present proceedings, particularly insofar as a particular interpretation of the CJEU judgment in *Dowling* is put forward.

212. The Court of Appeal (Irvine, Hogan, Baker JJ) delivered its judgment on the 2 October 2018. Two clear points may be made about that judgment, for present purposes:

1. The Court of Appeal clearly considered that the CJEU had already determined the EU law issues in the case and that there was nothing left for the Irish courts to do in that regard in terms of analysis. What was left for the High Court (and the appellate court) was to apply domestic law.
2. The Court of Appeal considered that the domestic law proportionality test applied by the High Court was too weak and that the stronger *Heaney*-proportionality test should be applied; which it then proceeded to do. The Court explicitly said that it perceived no difference between this form of proportionality under domestic law, and proportionality under EU law.

213. Whether or not the Court of Appeal was correct on the first point is central to the present complaint that the court of final instance failed to apply a proportionality test of EU law. It is therefore important to note that the Court of Appeal itself considered that there was no difference between the EU proportionality test and the domestic *Heaney*-proportionality

test in any event. We proceed now to a more detailed examination of the Court of Appeal judgment, with particular emphasis on the above two points.

214. Writing for that Court, Hogan J. framed the primary issue in the appeal as follows:

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

215. By so framing the issue, he made it clear that he considered that the CJEU had already determined the EU law point(s) and the only remaining issues for the domestic court after the return of the case from Europe were issues of domestic law. This view was expressed at various other points in the judgment also, as we shall see.

216. One such example is at para. 10 of the judgment, where Hogan J. said that in order to succeed, the applicants must establish either that there was non-compliance with the requirements of s. 7 of the 2010 Act, or that the opinion of the Minister as to the necessity for a direction order was unreasonable or was vitiated by error of law. He said that as no issue arose in the appeal concerning compliance with the procedural requirements specified by s. 7, the issue remained one as to whether the opinion of the Minister was unreasonable or was otherwise vitiated by error of law. Those issues were issues of domestic law only.

217. Hogan J. proceeded to set out the background facts at some length. At paras. 45 -54, under the heading of "State aid", he described the involvement of the Commission and its view

that the (then proposed) measure was "proportionate" and identified burden-sharing as a critical feature of permissible State aid in the context of recapitalisation of credit institutions. It may be noted that Hogan J.'s description of the Commission's view was merely part of the narrative at this stage in the judgment; Hogan J. explicitly pointed out at para. 45 that *"It is unnecessary for present purposes to dealt at any length with the State aid issues, since this is exhaustively dealt with by O'Malley J. at paras 22.1 et seq of her first judgment, and is not part of the substance of the present appeal"* (emphasis added). From para. 55 onwards, he continued with the factual narrative, describing the EGM of the 20 July 2011, the efforts made to secure alternative investors, before moving on to the "false market" issue, and other matters.

218. At para. 103 of his judgment, under the heading *"Whether the case is governed by EU law or by national law"*, Hogan J. noted that there had been debate during the appeal hearing as to whether the case was governed by EU law or national law or a mixture of both. He commented that there were certainly aspects of the case that were clearly governed by EU law. Thus, for example, the question of whether the direction order infringed the Second Directive was certainly an issue of EU law which, he said, "*was ultimately determined by the Court of Justice*". He also said that, contrary to the submissions of the *Dowling* applicants, there was an obligation imposed by EU law to recapitalise ILP by the 31 July 2011, referencing Article 1(g) of Council Decision 2011/326/EU (as amended). He went on to say that, at the same time, "*EU law, broadly speaking, deferred to national law as to the manner in which the recapitalisation was to be achieved"* (emphasis in the original judgment) and added:

"The 2010 Act was an autochthonous item of legislation enacted by the Oireachtas. Since, moreover, the appellants' main complaints centred on the manner in which the

recapitalisation was effected by the provisions of the 2010 Act and the direction order, I consider that the issues which fall to be determined on this appeal are substantially governed by domestic law."

219. Importantly, Hogan J. also commented that it did not matter in any event whether domestic or EU law governed *"this aspect of the challenge",* saying at para. 105:

"*As it happens, nothing greatly turns on whether domestic or EU law provides governs (sic) this aspect of the application because the essential challenge in this case is to the proportionality of the direction order and the manner in which the recapitalisation of ILP was carried out. As I hope to show, the scope of review of administrative action on proportionality grounds is essentially no different irrespective of whether the matter is governed by Irish or by EU law. But, as I will explain below, this court is bound by the judgement of the Court of Justice in the [article 267] reference made by O'Malley J*".

220. At paras. 116 –128 of his judgment, Hogan J. examined the decision of the Court of Justice. He set out in full paras. 50-54 of the CJEU ruling, prefacing the quotation with the comment: "*The Court made it clear (at paras.50-55 of the judgment) that the making of the direction order was <u>essentially outside the scope of the Second Company Law Directive so that the direction could not be held unlawful on that account</u>"* (emphasis added).

221. He described the *Kotnik* case at some length and quoted portions of the Court of Justice's decision in that case. He then said that it was clear from the relevant passages in *Kotnik* and the corresponding passages in *Dowling* that-

"the judgments in Kotnik and Dowling have essentially superseded by what have been termed as the earlier Greek bank cases. Those bank cases - which dated from the 1990s

- all concerned various attempts to provide State aid to a variety of ailing Greek banks and, in essence, the Court of Justice ruled that all such attempts were unlawful."

He cited *Pafitis* as an example.

222. He considered that the circumstances of the Greek bank cases were very different to those under consideration in the *Dowling* proceedings:

"They all concerned unilateral attempts to provide state aid to individual banks at a time which long pre-dated the creation of the Euro. While these banks were, admittedly, of importance to the Greek economy, the failure of those banks did not pose a systemic risk to the European economy and nor could they have imperilled the future of the Euro-system which then lay in to the future. Nor were the cases decided against a background where there was a specific obligation imposed by a binding Council decision that required the recapitalisation of these institutions by a Member State by a particular date."

223. While noting that the CJEU did not as such adhere to a formal system of precedent, Hogan J. found that it was clear from the judgment in both *Kotnik* and *Dowling* that the Greek bank cases *"…must be taken as having been distinguished and held not to be applicable to the very different recapitalisations at issue in the present case."*

224. He said:

"We must accordingly take the judgment of the Court of Justice as we find it. <u>That Court has clearly ruled that the directions order did not amount to a violation of either Article 8, Article 25 or Article 29 of the Second Directive</u> even if it provided for an increase in

the provision of share capital to the company without the express consent of the shareholders. Irrespective of what might have been said earlier in Pafitis or the other Greek bank cases dating from this period, the Court of Justice has now given an authoritative and final determination on this issue of EU law which is averse to the contentions of the appellants. As it is that decision which binds this Court, it follows that the appellant's endeavours in this appeal is to re-open or to re-interpret the decision of the Court of Justice must accordingly fail." (Emphasis added).

225. Hogan J. went on to say that the very fact that the direction order could not be held to amount to an *ex ante* breach of EU law did not mean that it could not held to be disproportionate or unreasonable by reference to Irish administrative law rules. However, he went on to find that the measures taken were not disproportionate or unreasonable in all the circumstances.

226. At paras. 136 - 140, he discussed the scope of review and said that he proposed to deal with the case in light of the principles established and developed in common law judicial review and the test of reasonableness found there. However, in view of the clear implications of the direction order for the appellant's constitutional rights, he was of the view that the "no evidence test" of *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 would be ineffective to secure those constitutional rights. In this regard he cited some leading judicial review cases concerning a stricter standard of judicial review than that usually employed in ordinary judicial review cases: *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, [2004] 2 I.R. 575, *Clinton v. An Bord* Pleanála [2007] IESC 19, [2007] 4 IR 701, *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 201, *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R.798 and *N.M. (DRC) v. Minister for Justice* [2016]

IECA 217, [2016] 2 I.L.R.M. 369. He said that this was best illustrated perhaps by the Supreme Court decision in *Clinton,* a case involving a compulsory purchase order, where it was said that because the case involved an invasion of constitutionally-protected property rights, the ordinary judicial review test would not be sufficient.

227. Hogan J. said that the test required by Article 40.3.2 concerning the vindication of the applicant's property rights, required that any departure from the principle of market compensation would have to be subject to the principle of strict scrutiny and the principles of proportionality. He therefore would *"go further"* than O'Malley J. insofar as she placed reliance on the *O'Keeffe* test in adjudicating the reasonableness and proportionality of the direction order. He said that it was clear from the modern post-*Meadows* case law that the guiding test in cases of this kind, where administrative decisions materially impact on constitutional rights, is in substance the proportionality test articulated in *Heaney v Ireland* [1994] 3 IR 593. In other words, where a traditionally-protected right is restricted by legislation or an administrative decision, the restrictions must (a) be rationally connected to the objective not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportionate to the objective.

228. As to the second limb of this test, Hogan J. said that some flexibility must necessarily be allowed to decision makers, "*not least in cases of this kind where the decision in question had large-scale macroeconomic implications and where it was required to be taken urgently and against the background of an acute emergency*".

229. He noted that the argument before him was that the Minister failed to do a number of things, and that the appellant's constitutional rights *qua* shareholders were impaired to a greater extent than was necessary, thereby failing the second limb of the *Heaney* proportionality test. The appellants maintained that the Minister could have (1) provided for a pre-emptive offer for shareholders; (2) provided for a "B" shares option by which in the event that it transpired that ILP was over-capitalised as market conditions recovered, the existing shareholders would have been given the right to buy out that investment and (3) purchased the shares at the pre-PCAR/PLAR review price of March 2011. He then went on to conduct a detailed examination of these arguments and rejected each of them.

230. The appeal was dismissed. At the end of his judgment, Hogan J. summarised his conclusions. The following is an even briefer summary of his summary:

1. The court could not look behind the judgment of the Court of Justice in *Dowling* insofar as it was concluded that the making of the direction order was essentially outside the scope of the Second Directive, so that the direction order could not be held unlawful on that account. Irrespective of what might have been said earlier in *Pafitis* or the other Greek bank cases dating from the pre-Euro period, the Court of Justice had now given an authoritative and final determination on this issue of EU law in the present case which was adverse to the contentions of the *Dowling* applicants. As the Court of Appeal was bound by the decision of the CJEU, it followed that the applicants' endeavours to reopen or reinterpret the decision of the Court of Justice must fail.
2. The *Dowling* applicants' challenge in the appeal centred on the *manner* in which the recapitalisation was effected, and it followed that the proportionality and reasonableness thereof is in essence governed by domestic law rather than EU law.

3. The direction order must be regarded as amounting, in substance, to a compulsory takeover of the bank by the Minister. In principle, the applicants were constitutionally entitled to receive something close to full value for their shareholding.
4. Given the clear implications of the direction order for the applicants' constitutional rights, the "no evidence" test in the *O'Keeffe* case would be ineffective to secure those constitutional rights.
5. Insofar as any proportionality analysis conducted by reference to the *Heaney* test is concerned, the failure to offer the shareholders pre-emption rights was not unreasonable in the circumstances because of the timescale involved.
6. Further, a pre-emptive offer would have been disproportionately expensive.
7. It could not be said that a failure to offer a B shares option was unreasonable because it denied the Minister the right to share in any upswing in the market valuation if the company's financial state improved.
8. He rejected the argument that the State had created a false market in ILP shares or that the shareholders did not receive what was in substance fair value for their existing shareholding.

The Supreme Court Determination in the *Dowling* litigation

231. Following the judgment of the Court of Appeal, the third and fourth applicants (the appellants herein) applied to the Supreme Court for leave to appeal.

232. In their leave application, they submitted that what was sought to be appealed involved a matter of general public importance and that leave should be granted in the interests of

justice. They asserted that the Court of Appeal erred in its interpretation of several important factual matters and made extraordinary and "novel" legal determinations of its own which had not been made by the High Court. It was submitted that the Court of Appeal failed to address key grounds of appeal including alleged breaches of several EU Directives, and that it failed to engage with the claim that certain evidence had been ignored by the High Court.

233. In addition to setting out the grounds they intended to rely on if leave to appeal were granted, the Supreme Court was requested to make a second preliminary reference to the CJEU with new questions. To that end, the leave application contained some ten questions which the *Dowling* applicants wished the Supreme Court to refer to the CJEU, as follows:

> *"1. In a situation of a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the EU, having regard to the fundamental principles of legal certainty and proportionality of EU law (including the "least restrictive alternative" test thereunder), as pertaining to actions of Member States applying EU law, must any of the Articles 25(1), 29(1), 8(1) and 42 of Directive 77/91 be interpreted as precluding the Member State from imposing on shareholders of a viable holding company of a viable bank oppressive recapitalisation terms which disregard the rights guaranteed under the said Articles of Directive 77/91, such as the terms of the July 2011 Ex Parte Direction Order, while less restrictive, practical and equally effective alternative recapitalisation terms abiding by those Articles exist, as formally recommended by the recapitalised company's Board? If yes (i.e. if the Member State is precluded from imposing such oppressive terms), is then the Member State legally obliged under the principle of proportionality of*

EU law (as applied to actions of Member States) to choose the least restrictive available terms of the recapitalisation - where the least restrictive" means literally what it says - and to ensure that no less restrictive means of the recapitalisation were available?

2. Must the Second Company Law Directive be interpreted as meaning that the more recent CJEU case law on the Directive is not capable of "superseding" the less recent CJEU case law on the Directive, unless that less recent case law has been explicitly resiled from by the CJEU?

3. Must Art. 107 TFEU be interpreted as meaning that the European Commission's decision regarding State aid is not capable of being determinative for the legality of a national measure funded by that State aid or for the compatibility of such a measure with the principle of proportionality of EU law as pertaining to actions of Member States applying EU law?

4. Must Article 122(2) TFEU, which was the legal basis for Regulation (EU) No 407/2010, be interpreted as limiting the power of the Council to grant financial assistance to making such assistance subject to certain conditions, and not to autonomous legal obligations on the recipient Member State as regards its economic policy? Must, therefore, the Implementing Decisions 2011/77/EU and 2011/326/EU be interpreted as being incapable of imposing a legal obligation on Ireland to recapitalise a domestic financial institution on certain specific terms, such as the terms of the July 2011 Ex Parte Direction Order?

5. Must Art. 267 TFEU be interpreted as meaning that it is not the CJEU task thereunder to rule on the compatibility of measures of national law with EU law or to apply EU law to the main action's facts?

6. Must Article 267 TFEU be interpreted as meaning that the CJEU is precluded from extending facts of a case referred to the CJEU under Art. 267 TFEU beyond the facts that the referring court has actually established, or from imputing facts the referring court has not in fact established? If yes, then:
- is the national court in such a case not bound by such facts that have been so imputed by the CJEU?
- is the national court precluded from disregarding in its judgment the fact that the CJEU exceeded its jurisdiction and based its preliminary ruling on a finding of fact not made by the referring court?

7. In a situation of a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, must Article 42 of Directive 77/91/EEC be:
A. interpreted as meaning that a Member State that imposes exceptionally oppressive terms of a recapitalisation of a viable holding company of a viable bank, such as in this case, must ensure as part of the recapitalisation an equal treatment of all the holding company's shareholders who are in the same position, including the Minister for Finance who was a shareholder prior to the recapitalisation and who acts on behalf of the Member State to impose the said recapitalisation terms?

B. interpreted as precluding a Member State that is a shareholder in a viable holding company of a viable bank from forcibly recapitalising that holding company in the following manner:

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

- the State having access ahead of time to non-public information regarding the outcome of the EGM, based on proxy votes sent for the purpose of the EGM; then

- the State forcibly issuing shares to itself, while diluting the other shareholders from a 100% stake to less than a 0.8% stake in the holding company, against the decisions of the EGM; while

- forcibly issuing the shares below the nominal value, against the decisions of the EGM; and while

- forcibly depriving the other shareholders of pre-emption rights, against the decisions of the EGM when less restrictive, practical and equally effective alternative recapitalisation means exist?

8. In the circumstances such as the circumstances of this case, having regard to the principle of proportionality of EU law (including the "least restrictive alternative" test thereunder) as pertaining to actions of Member States applying EU law, does the existence of alternative sources of funds diverted by a Member State to illegal State aid, such as the illegal State aid determined by the European Com mission's Decision on State Aid SA.38373, preclude the

compatibility with the Articles 25(1), 29(1), 8(1) and 42 of Directive 77/91 of the exceptionally oppressive recapitalisation measures funded by State aid, such as the terms of the July 2011 Ex Parte Direction Order, in the circumstances where a lack of funding was used by the Member State as a justification for the said exceptionally oppressive terms. while less restrictive, practical and equally effective alternative recapitalisation means actually existed?

9. In the circumstances, such as the circumstances of this case, does Art. 10 of Directive 2009/101/ EC preclude a company, such as ILPGH in this case, from opposing the Applicant shareholders in court proceedings and from supporting therein the State that took control of the company as a result of a contested exceptional State measure, such as the July 2011 Ex Parte Direction Order, where:

- the company decided at its general meeting prior to the court proceedings in question to oppose the terms of the contested exceptional State measure;

- and the Board of the company made formal submissions to the State to resist- and to offer alternative, less restrictive, practical and equally effective terms to the terms of the State measures in question, such as the formal submissions made by the Board of ILPGH to the Minister for Finance under s. 7(4) of the Credit Institutions (Stabilisation) Act 2010?

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

234. In its determination on the 1 March 2019, the Supreme Court (Clarke C.J., McKechnie and Charleton JJ.) refused the leave application and refused to refer any further question(s) to the CJEU. The determination is some 48 paragraphs long, which may appear relatively short but is longer than usual for a determination.

235. The status of a Supreme Court determination is described as follows in the *Dowling* determination (para. 3):

> *"It should be noted that any ruling in a determination is between the parties. It is final and conclusive as far as the parties are concerned, and is a decision in relation to that application only. The issue determined on the application for leave is whether the facts and legal issues meet the constitutional criteria to enable this court to hear an appeal. It will not, save in the rarest of circumstances, be appropriate to rely on refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, any issue canvassed in the application will in due course be disposed of in the substantive decision of the Court."* (Emphasis added).

236. This raises the question of whether the decision of the "court of last instance" in the *Dowling* litigation, for the purpose of the *Köbler* doctrine, is that of the Court of Appeal or of the Supreme Court. The Supreme Court refused to make any preliminary reference to the CJEU: in respect of that decision to refuse, certainly, the court of last instance is the Supreme Court. One might take the view, however, that the final instance decision on the substantive issues in the case (including on the issues of EU law and how to interpret the

CJEU's decision in *Dowling*) was that of the Court of Appeal, since its judgments clearly deal with those issues on the merits, whereas the Supreme Court arguably dealt with the issues only for the purpose of determining "*whether the facts and legal issues meet the constitutional criteria to enable this court to hear an appeal"*, which is purely a matter of domestic (constitutional) law. However, we consider that the Supreme Court's analysis of the EU law issues, such as it was, underpinned its decision to refuse to refer any question(s) to the CJEU and must also, therefore, be considered the decision of the court of last instance for the purpose of the *Köbler* doctrine.

237. In the determination, the Supreme Court set out a history of the *Dowling* litigation. In the course of this description, it set out the precise terms of the two questions referred by the High Court to the CJEU and commented on the CJEU response as follows (para. 14 of the determination):

"The response of the CJEU, set out in the formal part of the ruling, was unequivocal, that a measure such as the Direction Order made, which had the effect of increasing the share capital of a public limited liability company, without the agreement of the general meeting of that company, was not precluded when adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State. The Court stated that the referring court, having weighed the competing interests, had come to the conclusion that once the Minister's proposal had been rejected at the EGM, the Direction Order was the only means capable of ensuring the timely recapitalisation of ILP that was necessary to prevent the failure of that financial institution and thereby to forestall a serious threat to the financial stability of the EU."

238. At para. 26, the Supreme Court set out some of the questions which the appellants wished to have referred to the CJEU; and they noted at para. 27 that the grounds upon which they would rely if leave were granted included "*[t]he misapplication of EU by the Court of Appeal regarding the CJEU ruling in this case and in Kotnik*: *The applicants submit that the Court misdirected itself in abrogating its fundamental duty to apply EU law, specifically the principle of proportionality of EU law, instead applying the modified proportionality test under domestic law. That the Court exceeded its jurisdiction by inventing several novel interpretations of EU law. That the Court was wrong to decide that there was a legal obligation under EU law for Ireland to recapitalise ILPGH and finally that the Court misapplied EU law in relation to burden-sharing".*

239. From para. 31 onwards, it described its decision on the application for leave to appeal. Most of this is concerned with whether the application met constitutional tests for an appeal to the Supreme Court.

240. At para. 39, the Supreme Court referred to the request for a preliminary reference of further questions and commented as follows:

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

241. The Court added that, in any event, the questions which the High Court had referred involved a consideration of the Second Directive, in particular, Articles 8, 25 and 29 thereof. Furthermore, and *"of importance"* was that the High Court had asked the CJEU

whether the direction order made pursuant to s.9 of the 2010 Act was *"in breach of European Union law"*, a question "*phrased at the most general level".* The Supreme Court noted that the appellants had requested the Court of Justice to re-open the argument because the *Kotnik* decision was given during the currency of the proceedings before the Court of Justice, but that this request was refused. The Supreme Court commented:

"43. As is abundantly clear from the opinion, the court, was not only conscious of its decision in Kotnik, but referred to it on a number of occasions. In so doing, it has to be accepted that the individual factors that case, including those which distinguished it from the instant case, were known to and appreciated by the court in the use and application of the principles to the case. In addition, it dealt specifically with any suggestion that the decision therein given might be irreconcilable with the Pafitis and others (C-441/93). Furthermore, in accordance with established case law each decision of the Court of Justice speaks for itself, but like any body of law, must be seen as part of the corpus. Therefore, it is not sustainable to suggest that the court was not fully aware the contentions put forward by the parties in this context.

44. In its conclusion, the court made it clear that the Second Company Law Directive did not preclude a measure such as the Direction Order where "there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company, without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied any pre-emptive subscription rights". These matters formed the substantive part of the first question asked of it.

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

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

242. The above passage contains a number of reasons for the Supreme Court's refusal to refer questions:

(i) In that court's view, the appellants were seeking to challenge the ruling of the CJEU itself, rather than seeking clarification in connection with its application;

(ii) The CJEU had already clearly answered the question of whether the direction order was in breach of EU law generally (and not merely whether it infringed the Second Directive) and had done so in the negative;

(iii) The CJEU had already taken account of the decision in *Kotnik*;

(iv) The preliminary reference procedure should not be used to re-agitate factual matters which had been determined by the trial court.

243. The appellants disagree with each of the reasons given. We note, however, that there is no question but that reasons were given, whether one agrees with them or not. This is relevant in particular to the appellant's claim that there was a breach of article 6(1) of the European Convention on Human Rights (right to a fair hearing). As we have seen, the decision of the European Court of Human Rights in *Ullens* said that a failure to give reasons in respect of a refusal to make a preliminary reference might constitute a breach of article 6(1).

SECTION 7: THE STRIKE OUT JURISDICTION

244. We now turn to a number of issues raised in this appeal concerning the interaction between the "strike out" jurisdiction in Irish law and the *Köbler* doctrine, which include (although are not limited to) the following:

(1) Does the strike out jurisdiction in Irish law apply to *Köbler* claims?

(2) What is the correct test to be applied when a judge is considering the exercise of the power to strike out a case?

(3) Did the motion judge apply the correct test to the facts?

245. Prior to dealing with the above issues, we will deal with the grounds of appeal relating to the motion judge's decision not to deal first in time with the appellants' motion for judgment in default of defence.

Ought the motion judge have heard the strike out motion prior to the motion for judgment in default of defence?

246. As described earlier, two motions were brought before the High Court. Albeit that the appellants' motion for judgment was first in time, as we have seen, the motion judge determined that the strike out motion should proceed ahead of it. The appellants' objections to the strike out motion on the basis that it was retaliatory and/or precluded by operation of the doctrine of *laches* did not find favour with the motion judge who stated:

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

247. The appellants' use of the phrase "retaliatory" to describe the motion appears to be intended to convey that the motion was issued solely out of motives such as revenge or a

desire to get even with the appellants. This is not a helpful, useful or accurate description of a procedural mechanism which the respondents are entitled to, and have chosen to, invoke. The bringing of a motion to strike out a plaintiff's claim is a serious and considered step taken by a defendant at a point where consideration of the case against them had led them to conclude (rightly or wrongly) that there are grounds for bringing the motion. The bringing of such a motion at the point where a plaintiff has issued a motion for judgment in defence is not necessarily surprising; the plaintiff's motion may be the catalyst for action on the part of the defendant. The bringing of the motion is not therefore automatically "in retaliation"; the timing merely reflects the focus that has been brought to bear on the case by the defendants as a result of the action of the plaintiff. It is a valid, tactical move on the part of a party to litigation; whether it is entitled to succeed or not is, of course, a different matter.

248. It is rational, logical and sensible for a motion judge to hear the strike out motion prior to a motion for judgment. If the strike out motion is unsuccessful, an order for time to deliver a defence would usually be granted and there would be no prejudice to a plaintiff who in the usual course would be given an order for the costs (or expenses) of defending the strike out motion. However, if the motion is successful, the proceedings will end, thereby saving both the defendants' time and court time by hearing the motion for judgment. If, in a rare case, where the bringing of the motion to dismiss is *prima facie* entirely unjustified, it can be dealt with promptly by a motion judge who can make whatever orders are necessary and justified, including costs orders to deal with an abuse of process that may have been caused by the bringing of the entirely unjustified motion. In our view, the motion brought by the respondents in this case does not fit into the latter category. Regardless of whether the motion is or is not successful, it was and is appropriately brought and was therefore

properly considered by the motion judge as arising for determination prior to the motion for judgment in default of defence. There was no abuse of process in relation to the bringing of the motion in these circumstances. There is no substance to the appellants' complaint under this heading. The motion judge was quite correct in proceeding to hear this motion first and his decision to do so was entirely proper.

249. The appellants said in their written submissions that the motion to strike out was barred by *laches, "given that it was issued as a retaliation after the Plaintiffs' motion for judgment had been duly served, following the Defendants' persistent default in delivery of Defence"* (emphasis in the original). In oral submissions, the appellants did not address the issue of *laches*. In any event, this ground must fail as the motion judge was also correct in rejecting the appellants' claim that the respondents had been guilty of *laches* in bringing the motion. The time frame in the present case and the factual circumstances do no warrant the application of the doctrine of *laches*. There may conceivably be a situation where the bringing of a motion after a considerable period of time (including perhaps the failure to comply with previous orders for the filing of a defence) would permit a court to refuse to hear the application as an abuse of process but that would be rare and may involve a consideration of where the balance of justice lay having regard to all relevant circumstances. The circumstances of this application are very far removed from a situation where a court would have to consider intervening in that way. All grounds of appeal relating to this issue are dismissed.

The Decision on the Motion to Strike Out

250. Regarding the motion to strike out, the motion judge noted that the respondents' position in the High Court was as set out in the grounding affidavit of Joanna O'Connor, solicitor

in the Chief State Solicitor's Office. She asserted that the proceedings were an attempt to reopen arguments already made and lost by the appellants concerning the correct interpretation of the Second Directive, and that the issues set out in the statement of claim had already been decided by the CJEU and applied by the Court of Appeal and the Supreme Court. The second appellant's replying affidavit emphasised his reliance on the "*Köbler* Doctrine" of EU law and criticised the alleged failure of the respondents to comprehend its applicability to the present case.

251. The motion judge granted the respondents' motion to strike out the proceedings on the grounds of being frivolous, vexatious or bound to fail. His reasoning is more thoroughly discussed below.

Identifying the issues in this appeal concerning the motion judge's approach to the "bound to fail" jurisprudence.

252. In their notice of appeal, the appellants complain that the motion judge failed to apply the relevant jurisprudence to the strike out motion. The essential components of their complaints are as follows:-

a) The motion judge failed to engage with or even cite all of the case-law upon which the appellants had relied;
b) The motion judge failed to apply the correct jurisprudence regarding the jurisdiction to strike out a plaintiff's case;
c) The exercise of a strike out jurisdiction amounts in the present case to a violation of the appellants' right of access to court (this ground is premised on the basis that as a case based upon the *Köbler* doctrine this type of jurisdiction cannot apply); and
d) The motion judge misapplied the law in striking out the appellants' proceedings.

Did the motion judge ignore or fail to engage with the case-law?

253. Separate to the more substantive point that the motion judge simply did not apply the relevant jurisprudence, the appellants contend that he failed to engage with the authorities upon which they relied to counter the respondents' motion. They submit that the motion judge failed completely to engage with or even advert to the long list of case-law, a textbook and a legal dictionary to which the appellants had referred.

254. In his judgment, the motion judge considered the law pertaining to the striking out of proceedings on the grounds of being frivolous, vexatious or bound to fail. He commenced this section of his judgment by stating that *"there was little dispute between the parties as to the principles which govern the [respondents'] application although, as we shall see, there was complete disagreement as to the application of those principles."* Despite their apparent agreement as to the principles to be applied, the appellants' written submissions to this Court, which were "settled" by the solicitor for the first named company who took the course of adopting the second appellant's written and oral submissions, were replete with phrases such as an *"unprecedentedly serious and severe miscarriage of justice"*, *"blatantly impermissibly defied the binding provisions"*, *"completely ignores" "a travesty of justice"* of *"manifestly fail[ing] to abide by established jurisprudence"*.

255. The appellants are and were entitled to express trenchant criticism of a judgment which they are appealing. The manner and context of some of the language used in the submissions is however inappropriate; this is compounded by the fact that those submissions were "settled" by the solicitor who is an officer of the court. While the solicitor clarified with this Court that he stood by the submissions but not to the extent that any of the language might be inappropriate, it is still surprising to see contained therein the

insistence that the motion judge was required to advert to all the case law cited to him with respect to general propositions which were in fact agreed between the parties. We consider that the appellants fail to understand that it is not necessary or always desirable for a judge to list every case that is referred to her or him in the course of argument. A judge's principal task is to identify the law and then apply the law to the facts as he or she finds them. Where there is agreement, as it appears there was in the present case, as to what the law actually was, then the pertinent issue is whether the judge correctly applied that law to the facts as he found them. As Laffoy J. stated in *O'Donnell v. Governor and Company of the Bank of Ireland* [2015] IESC 14 at para. 16:

> *"Although… the trial judge did not cite all of the authorities to which he had been referred by the parties and did not quote all of the passages from those authorities relied on by the parties, it is quite clear from his judgment that he properly identified the legal principles applicable to determining where the centre of main interests of a debtor is for the purposes of the application of the Insolvency Regulation."*

256. Once, as was the case here, the applicable legal principles concerning the issue in dispute have been identified it is not necessary for a judge to cite every case put forward by the parties. On any given legal principle there may be a large number of cases which implement that principle. Cases which merely restate the principle should not be recited merely for the purpose of demonstrating the principle. Further cases may of course be relevant to demonstrate *how* the principles are being applied.

257. Accordingly, there is no basis for upholding the appellants' appeal based solely on the ground that the motion judge failed to engage with the case law relied upon by them. The motion judge made reference to the primary case law relied upon by both sides and

indicated that he was taking other case law into account. He then proceeded to distil what he understood to be the principles upon which the parties appeared to agree. He made his decision based on his understanding of those principles as they applied to the facts before him. It is important, therefore, to turn to the principles on which the motion judge decided the case and in turn to the application of those principles.

Did the motion judge fail to correctly identify or apply the relevant jurisprudence regarding the jurisdiction to strike out a plaintiff's case?

258. In dealing with the law relating to striking out a claim, the motion judge observed that the parties were in agreement as to the principles but not in respect of their application to the case before him. He referred to the respondents' reliance on *Barry v. Buckley* [1981] I.R. 306 as authority for the proposition that a court, when considering the power to strike out pursuant to its inherent jurisdiction, can take a broader view than that required under O. 19, r. 28 and may hear evidence on affidavit rather than merely having regard to the pleadings. The respondents argued that there was no necessity to hear evidence in any event as the factual assertions in the statement of claim and affidavit had already been assessed and ruled on by the High Court and upheld on appeal. The respondents' position was that there was no dispute on the facts.

259. The motion judge noted that the appellants referred to numerous cases which made it clear that the court's jurisdiction was to be used sparingly and only in clear cases, and that it was an application that the High Court should be slow to entertain. The appellants had cited a number of authorities in order to demonstrate that in an application such as this, where there is conflict of fact, the conflict must be resolved in favour of the party against whom the

application to strike out has been brought. In this regard, the appellants relied on *McCourt v. Tiernan* [2005] IEHC 268 wherein the court held that it *"must treat the plaintiff's claim at its high water mark".* The motion judge cited *dicta* from a number of cases such as *Salthill Properties Limited v. Royal Bank of Scotland plc* [2009] IEHC 207, *O'Keeffe v. Kilcullen* [1998] IEHC 101 and *Ennis v. Butterly* [1996] 1 I.R. 426 to the effect that the court must assume that *"every fact pleaded by the Plaintiff in her Statement of Claim is correct and can be proved at trial".*

260. The second appellant submitted that he had made many assertions in his affidavit which were a combination of factual and legal assertions: this was due to the nature of the case. The motion judge noted that the appellants were adopting the position that, even where the assertions in the pleadings were a combination of factual and legal assertions, these all had to be accepted as correct by the court for the purposes of the defendant's motion.

261. The appellants also submitted that where there are questions of fact and controversial legal arguments to be resolved, the matter cannot be said to be so clear and unassailable that their claim should be struck out and relied on *DK v. AK and Governors of Rotunda Hospital* [1993] I.L.R.M. 710 to that effect.

262. In his judgment, having discussed the *Köbler* doctrine, the motion judge moved to what he said were preliminary issues. He said that the determination by him of the respondents' motion did not require an adjudication of the appellants' case; however, in assessing whether or not the case was frivolous, vexatious or bound to fail, he was required in accordance with the established jurisprudence to engage with the case that was being made as revealed in the pleadings. He agreed that contested facts must be assumed in the

appellants' favour, but he did not accept that this also meant that copious assertions as to the legal position as set out in the appellants' affidavits and statement of claim had to be accepted as correct. His view was that the judgments and determination of the courts spoke for themselves. He said the affidavits of the appellants set out in extraordinary detail the case being made by them. In those circumstances, he held that he had more than sufficient material to assess the merits of the motion according to the established principles set out in the case law. Ultimately, he held that this was a case where he was able to reach a conclusion in accordance with the principles that the appellants' case was bound to fail.

263. To repeat again what the motion judge stated, there was general agreement between the parties as to the relevant applicable legal principles. The area of disagreement was as to the application of those principles to the facts of the case. In this appeal, the appellants' main complaints are that a) the judge did not accept the contents of their affidavits as they say he was obliged to do without question; b) that the inherent jurisdiction only applied, as per *Barry v. Buckley*, "*to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant*"; c) that their case was not one "*entirely devoid of merit*" and, therefore, in accordance with *Delahunty v. Player & Wills (Ireland) Ltd.* [2006] 1 I.R. 304 could not be struck out as there was no abuse of process; d) the jurisdiction was only to be used sparingly and in clear cases with no room for dispute, and that this was not such a case; and e) where the terms of the law and applicable principles were readily ascertainable, and this was not such case.

264. There are two means upon which the Court can strike out proceedings; either under O. 19, r. 28 RSC or pursuant to the inherent jurisdiction of the Court. The differences between

the two are set out comprehensively in *Kevin Tracey v. Irish Times Ltd. & Ors* [2019] IESC 62 at para. 29:

> *"It is well established that the jurisdiction of the courts to strike out proceedings falls under two general headings. First, under O. 19, r. 28, a court may direct a stay or dismiss an action where a statement of claim fails to disclose a reasonable cause of action. Similar considerations may apply where what is pleaded does not amount to a defence. Additionally, proceedings may be struck out if they are frivolous or vexatious. (c.f. the discussion in Tracey v. McDowell, cited earlier). The inherent jurisdiction of the Court to strike out proceedings involves a somewhat broader scope of inquiry, which is not confined to the pleadings. The jurisdiction is to be exercised sparingly, and only in clear cases. If, having considered the case, a court is satisfied that a plaintiff's case must fail, then it is a proper exercise of its discretion to strike out or dismiss proceedings, the continued existence of which cannot be justified, and which may manifestly cause irrevocable damage to a defendant. The order in this case was based on inherent jurisdiction. On the basis of the defence raised under s. 18 of the 1961 Act, he concluded that the appellant's case was 'bound to fail'."*

265. Order 19, r. 28 RSC provides:

> *"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."*

266. The definition of "frivolous or vexatious" was described by Irvine J. in *Fox v. McDonald* [2017] IECA 189:

> *"[t]he word 'frivolous' when used in the context of O. 19, r. 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances.*
>
> *[…]*
>
> *Proceedings which are regularly struck out as 'frivolous' or 'vexatious' are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second time* ***or*** *where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospect of success."* (Emphasis added).

267. Birmingham J. also provided a definition of "frivolous" in *Nowak v. Data Protection Commissioner* [2012] IEHC 499, a case which was relied upon by the motion judge in the instant case. Birmingham J. held that:

> *"frivolous, in this context does not mean only foolish or silly, but rather a complaint that was futile, or misconceived or hopeless in the sense that it was incapable of achieving the desired outcome".*

268. In *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, Ó Caoimh J. approved *Re Lang Michener and Fabian* (1987) 37 D.L.R. (4th) 685 which set out factors which indicate that the proceedings brought are vexatious. This judgment has in turn been approved by the Supreme Court in *Tracey v Burton* [2016] IESC 16. Ó Caoimh J. stated at p. 466 that these factors include:-

"(a) the bringing up on (sic) one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(a) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(b) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(c) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(d) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(e) where the respondent persistently takes unsuccessful appeals from judicial decisions."

269. Delaney, McGrath and Egan, *Delaney and McGrath on Civil Procedure* (4th Edn., Round Hall, 2018) note that:

"There is a degree of overlap between claims that are unsustainable or bound to fail and those that are regarded as frivolous or vexatious. It is also evident that the category of proceedings that will be considered to be frivolous and vexatious is broader and extends to proceedings which, although they have a reasonable prospect of success will not confer any tangible benefit on the plaintiff or are taken for collateral or improper motives."

270. In *Barry v. Buckley,* Costello J. noted that while O. 19, r. 28 does not prohibit the Court from hearing evidence in such an application, he was of the view that the Court can only make an order under this rule where a pleading does not disclose a reasonable cause of action *"on its face."* However, there, the judge moved on to the inherent jurisdiction of

the Court to stay proceedings on these grounds noting that *"the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit to the issues in the case."* Costello J. noted the purpose of this inherent jurisdiction, which is to ensure that an *"abuse of process of the Courts does not take place. So, if the proceedings are frivolous or vexatious, they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail."*

271. Costello J. cautioned that this jurisdiction is to be exercised sparingly and *"only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence."*

272. In *Aer Rianta cpt v. Ryanair Ltd* [2004] 1 I.R. 506, the Supreme Court held that O. 19, r. 28 is only applicable where the Court is being asked to strike out the entire pleadings and not merely part of a pleading. Denham J. held that *"if a court is convinced that a claim will fail"* then the pleading will be struck out.

273. In *Delahunty v Player Wills Ireland Ltd* [2006] IESC 21, a case relied upon by the appellants, the court held that it can only exercise the O.19. r.28 jurisdiction where the actions being pursued "*were entirely devoid of merit*" and that the inherent jurisdiction existed to "*ensure that an abuse of the court's process did not take place*." Other cases such as *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35 and *Sun Fat Chan v Osseous Ltd*. [1992] 1 IR 425 were relied upon by the appellants to stress that the onus of establishing an abuse of process was on the defendants and that the jurisdiction to strike out should only be exercised where it was clear beyond doubt that the plaintiff could not

succeed. If a dispute on the facts existed, the law is such that the issue must be determined by the motion judge.

274. The appellants refer in particular to *Grant v Roche Products (Ireland) Ltd*. which concerned an application by the defendants to have the plaintiff's claim arising from the death of his son struck out as an abuse of process where the defendants asserted that they had already offered the plaintiff the relief sought by him but where they were not accepting liability. The High Court held that the plaintiff was not acting in a manner that could be seen as an abuse of process and the Supreme Court agreed. The appellants highlight the manner in which abuse of process is referred to by the Supreme Court (e.g. the absence of a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceedings). In reality however "*abuse of process may take many forms according to the context or the nature of the proceedings*" as per Murray CJ in *Re Vantive Holdings* [2009] IESC 69.

275. We consider that the description of abuse of process in *Fay v Tegral Pipes Ltd*. [2005] IESC 29, a case referred to by the respondents in their submissions, aptly describes the type of abuse of process that may be at issue in the bound to fail jurisprudence. We caution that this is not an exclusive list and re-iterate that the abuse of process may take many forms. McCracken J., in delivering the judgment of the Supreme Court allowing the appeal and striking out the proceedings, stated:

> "*While the words "frivolous and vexatious" are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the Courts. Such abuse cannot be permitted*

for two reasons. Firstly, the Courts are entitled to ensure that the privilege of access to the Courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes, and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second, and equally important, purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed". (Emphasis in the original).

276. The strike out jurisdiction is centred on the concept of abuse of process of the courts. The Supreme Court (MacMenamin J.) in *Tracey v Burton* took the opportunity presented in that case to refer in the following terms to the entitlement of a court to protect its own processes from abuse:

"*While the jurisdiction to strike out proceedings for abuse of process, in one form or another, is to be exercised sparingly, it is a sanction which cannot be ignored. Similarly, while parties have a right to defend proceedings, it may be necessary to identify the manner in which defendants' rights are best vindicated. A court may, under the Constitution, take whatever proportionate steps are necessary to protect the integrity of its own processes and procedures, and the inherent right of courts, themselves, to manage their own procedures in a manner which balances the rights of litigants with the rights of the public, and other litigants".*

277. Insofar as the appellants seek to submit that it is only where the defendants to an action can demonstrate "manifest irrevocable damage" that the proceedings must be struck out (as

stated in *Tracey v. Irish Times Ltd)*, they appear to misunderstand the position. In that case, MacMenamin J. went on to refer to the "*considerable jurisprudence on this topic*". He stated "*[i]n particular, a claim will be struck out where, on admitted facts or undisputed evidence, it is clearly unsustainable or bound to fail*" citing *inter alia, DK v. King* [1994] 1 IR 166. The bound to fail jurisprudence envisages the court taking necessary and proportionate action to protect its own processes for the purpose of ensuring access to the courts for those members of the public with genuine disputes and not lost causes and, equally important, to ensure that litigants are not subject to the time-consuming and expensive process of being asked to defend at trial those claims which are devoid of merit and therefore bound to fail.

278. For those reasons, it can be said, as Clarke J. memorably stated in *Keohane v. Hynes* [2014] IESC 66 "*bringing a case which is bound to fail is an abuse of process*". He went on to state that **"***[i]f it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings*". Where a case is bound to fail in the sense that its continued existence is unjustified, it may manifestly cause irrevocable damage to a defendant and it is therefore a proper exercise of the court's discretion to strike out the proceedings as an abuse of process. The safeguards, e.g. the high threshold around the exercise of this jurisdiction by the courts, ensures that the measures are proportionate. We shall consider these safeguards further.

279. It is perhaps a little curious that neither the appellants nor the respondents cited the more recent Supreme Court case to consider the strike out jurisdiction in Ireland, *Moylist Construction Ltd. v. Doheny* [2016] 2 I.R. 283. Clarke J.**,** who delivered judgment and with whom Dunne and O'Malley JJ. agreed, set out the governing principles in an application

to strike out proceedings on the grounds of being frivolous, vexatious or bound to fail. Clarke J. notes the difference identified in *Barry v. Buckley* between striking out proceedings under O. 19, r. 28 RSC and the inherent jurisdiction of the Court. He notes that this was analysed in *Salthill Properties of Scotland plc* (cited by the appellants in the present case) which was approved by the Supreme Court in *Lopes v. Minister for Justice* [2014] 2 I.R. 301. Clarke J. notes that an application under O. 19, r. 28 RSC is based on the contention that the case as pleaded does not disclose a cause of action. The inherent jurisdiction set out in *Barry v. Buckley* extends to cases where it can be shown that there *"is no arguable basis in law and in fact for the claim made."*

280. Clarke J. went on to hold, in *Moylist***,** that one should not utilise this inherent jurisdiction where the case brought by the plaintiff is very weak or where it is sought to have an early determination on some point of fact or law. The jurisdiction to strike out proceedings as being bound to fail is to be *"sparingly exercised and only adopted <u>where it is clear</u> that the proceedings are bound to fail"* (Emphasis added).

281. While he cautioned against the overuse of the inherent jurisdiction of the Court to strike out proceedings as being bound to fail, he went on to say, at para. 21:

> *"That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismissal from being ordered. As Denham J. observed in a different context in Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412 at p. 462, '[s]eventeen noughts are still nothing'."*

Clarke J. did however caution against the appropriateness of the use of the inherent jurisdiction to dismiss where, even if there are no factual disputes, the legal issues are nonetheless complex when considering the proper interpretation of documentation. In these cases, Clarke J. held that the complexity of these issues, even if the Court has a fairly clear view on them, makes it difficult to determine within the confines of a motion heard on affidavit, that the plaintiff's case is such that it is bound to fail.

282. The burden of proof in applications of this kind lie with the party bringing the motion. In *Salthill Properties Ltd. v. Royal Bank of Scotland* Clarke J. held:

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

283. In relation to the standard of proof which must be satisfied by the defendant, the Court in *Irish Bank Resolution Corporation Ltd. v. Purcell* [2016] 2 I.R. 83 succinctly summarised the position:

> *"The Court should not require a plaintiff to be in a position to show a prima facie case, merely a stateable case, in an application to strike out. (See Clarke J. in Salthill Properties Ltd v. Royal Bank of Scotland.)"*

284. The appellants repeatedly made the submission that under the applicable case law the Court is legally obliged to accept all the averments made in this regard in his affidavits. As we have already noted, those affidavits contain not only factual matters but also references

to legal decisions, the second appellant's interpretation of those legal decisions, the second appellant's inference from certain facts, and the second appellant's understanding of the law. None of the cases cited by the appellants, whether dealing with motions to dismiss or in relation to summary judgment, state that a court must accept a plaintiff's assertion of the law as being correct. The interpretation of the law is a matter for the courts (parties may of course make their submissions on what they believe the law to be).

285. Indeed, according to the Rules of the Superior Courts, a pleading is to contain a statement in a summary form of the *material facts* on which a party relies for their claim or defence and affidavits are also to be confined to facts. Therefore, an affidavit or a statement of claim should not contain submissions or averments as to matters of law in the first place. That is not to say that sometimes a statement or averment may of necessity contain mixed references of law and fact, an example being a pleading that a claim is statute barred by virtue of a particular subsection of the Statute of Limitations, 1957**.** Here, however, the papers filed on behalf of the appellants depart very far indeed from the basic requirement that the pleadings and affidavits should not contain submissions as to the law and go far beyond what is necessary**.** The appellants are not entitled to transgress far beyond what is permissible in their pleadings and affidavits, and then build upon that transgression to argue that the court is obliged to deal with the case on the basis of what is contained therein.

286. The extent of the duty to accept the facts as asserted by a plaintiff on a motion for the court to exercise its inherent duty was discussed by Clarke J. In *Salthill Properties Ltd v. Royal Bank of Scotland plc*. He did not accept that the courts were entirely prohibited from engaging in any analysis of the facts, saying:

"It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel… to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim".

287. Leaving the *Moylist* decision aside for the moment, the above brief review of the relevant authorities demonstrates that the motion judge did indeed refer to the main case law in this area, and more importantly correctly identified the relevant principles in his approach to this issue. This is subject to the point made in the next paragraph.

288. The one aspect that was not expressly mentioned by the motion judge was the issue of complexity as set out by the Supreme Court in *Moylist*. In that case, Clarke J., having considered an earlier Supreme Court decision, stated:

> *"For the reasons identified by Murray J. Jodifern Ltd. v. Fitzgerald [2000] 3 I.R. 321, and as applied in Keohane, a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex. Leaving aside those cases which might fall into the 'seventeen noughts are still nothing' category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full days hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail."*

289. In *Jodifern v. Fitzgerald* [1999] IESC 88, Murray J. had said that the reasons for such caution were self-evident; the making of an order staying or dismissing the proceedings on the basis of such inherent jurisdiction deprives the plaintiff of access to the courts for a trial of his or her action. The object of the strike out jurisdiction is not to protect a defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a defendant which would result from an abuse of process of the court by the plaintiff. It is not a form of summary disposal of the case on issues of fact or substantial questions of law in substitute for the normal plenary proceedings. Murray J. said it was for this reason that:

> *"a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the plaintiff's claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the court may proceed."*

He went on to say that if, on the basis of undisputed facts, there remains a substantial issue or issues of law as to whether the plaintiff is entitled to some or any of the reliefs sought, the proceedings can hardly be said to constitute an abuse of process.

290. From the foregoing, the underlying principles in relation to the exercise of this jurisdiction are clear. Although not articulated in the precise manner and order that the appellants' sought**,** they were likewise in substance clear to the motion judge. Some of the principles, in particular the extent to which a court can engage with the facts, are disputed by the appellants. Without meaning to disparage the undoubted depth of the legal research undertaken by the second appellant who led the submissions on the part of the appellants, we consider that the relevant principles are perhaps not fully understood by the appellants. In essence these are:

a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;

b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;

c) The burden of proof is on the defendant;

d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;

e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;

f) Bound to fail may be described *inter alia*, as devoid of merit or a claim that clearly cannot succeed;

g) Frivolous and vexatious must be understood in their legal context as claims which are, *inter alia*, futile, misconceived, hopeless;

h) The threshold for the plaintiff successfully to defend such a motion is not a *prima facie* case but a stateable case;

i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;

j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;

k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;

l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss.

Can a motion to dismiss under the inherent jurisdiction be utilised where a plaintiff's claim is made under the *Köbler* doctrine?

291. We turn now to the question of the interaction between the strike out jurisdiction and proceedings involving a *Köbler* claim.

292. The motion judge was unequivocally of the view that the inherent jurisdiction to dismiss as bound to fail extended to a case where the *Köbler* doctrine was the central feature of the case. At para. 162 he held:

> *"The jurisdiction to do so arises from the court's right to control its own processes to ensure that justice is done, and applies to all cases regardless of whether or not they involve consideration of rights under EU law. The proposition that the Irish Courts could in some way be precluded from preventing an abuse of process in cases concerning application of Köbler principles is in my view unstatable (sic)."*

293. The appellants strenuously deny the applicability of the strike out jurisdiction to a *Köbler* claim. In submissions, they contend that the motion judge "*completely misused the jurisdiction existing to avoid a manifest irrevocable damage to a defendant, and, instead, caused himself a gross injustice to the Plaintiffs by violating their basic right of access to court and a fair trial in these unprecedented Köbler-type proceedings that are robustly rooted in irrefutable facts, evidence and the most fundamental provisions of EU law*."

294. The appellants are correct that a case concerning the *Köbler* doctrine in this jurisdiction is unprecedented. Indeed, a remedy under the *Köbler* doctrine is also exceptional and

available only where the court has manifestly infringed the applicable law (see Section 4 above).

295. It is hardly unsurprising that claims concerning the *Köbler* doctrine are exceptional. As is clear from what has been considered in Section 4 of this judgment the doctrine enables a party to obtain redress in a national court where a decision of a court of last instance has manifestly infringed Community law. Where this instance occurs, a citizen is entitled to seek reparation where his or her rights have been affected by this infringement. The reason the *Köbler* doctrine applies only to courts of last instance is because it is only at that point that the party is unable to have the infringing decision of the court corrected by any other remedy.

296. The first question that this Court must consider is whether the exceptionality of a claim under the *Köbler* doctrine prevents a court from striking out the proceedings under the inherent jurisdiction of the Court or under O. 19, r. 28 RSC. A related question is whether the standard of proof is higher for a party seeking to strike out a claim where the claim is of this particular kind.

297. The respondents' submission is that when one considers the legal history of the proceedings, this is a case that is bound to fail. They do not object to the *locus standi* of the appellants to take a case such as this or to the legal right to take a *Köbler* case in this jurisdiction, their submission is simply that the jurisdiction to strike out applies here as in other cases, and that this is a case which is bound to fail.

298. The appellants' primary argument is that the use of the inherent jurisdiction to dismiss their case removes their right of access to the courts. However, that submission fails to take into account that the right of access to the court is not unlimited, nor how the courts have viewed the inherent jurisdiction to dismiss a case as bound to fail in the context of the right of access. An example of this is found in *Goode Concrete v. CRH plc* [2012] IEHC 116 where**,** at para. 36, it was stated:-

"*A plaintiff's right of access to the Courts is not absolute and the Court has jurisdiction to prevent the right being abused by, for example, dismissing a case for inordinate delay or as frivolous, vexatious or bound fail in order to prevent injustice to a defendant (see Barry v Buckley [1981] IR 306).*"

299. In support of their contention that the strike out jurisdiction does not apply to a *Köbler* claim, the appellants point to the fair trial rights contained in article 6 of the European Convention on Human Rights. They refer to the Guide on article 6 of the Convention (produced by the European Court of Human Rights, updated 30 April 2020) that there must be an effective right and *"the parties to the proceedings have the right to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are actually heard, that is to say duly considered by the trial court."* The Guide goes on to say that *"[i]n other words the [court] has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties"* citing *Van de Hurk v. The Netherlands* [1994] App. 16034/90 which is a case relied upon by the appellants. That quote from *Van de Hurk* goes on to say that the duty of the court to examine the matters is *"without prejudice to its assessment of whether they are relevant to its decision".*

300. In general terms those principles are not disputed by the respondents nor indeed could they be. Indeed, it is not necessary to rely on article 6 for such a proposition, as the right to fair procedures in Irish law would require a court to conduct such a proper examination in any event. Of course, the nature and extent of the examination required will vary and be subject to what is relevant for the purpose of the case. As stated above, it is not necessary for every argument to be addressed in detail. Furthermore, those principles do not prohibit a court from ensuring that justice is administered in an efficient manner.

301. The *effect* of the principles set out in the Guide to article 6 concerning the effective right to a fair hearing does not deny to a court the opportunity of carrying out a proper examination of the arguments, submissions or evidence *at a preliminary stage* in proceedings, for the purposes of assessing whether it is a case that is bound to fail and should therefore be dismissed. Nothing in the jurisprudence concerning motions to dismiss on the basis that the proceedings are bound to fail denies to a plaintiff the opportunity to make his or her case. The jurisdiction of the court to dismiss a claim is only available in the limited circumstances set out above where the case is bound to fail. A court must conduct a proper examination of the submissions, arguments and evidence in the course of the motion to dismiss and it is only if the defendant has reached the high threshold required for dismissal can it do so. No authority has been cited for the proposition that the article 6 of the Convention prohibits signatory States from having preliminary procedures which enable unmeritorious cases to be dismissed at an early stage in line with the type of tests set out in the Irish authorities on the strike out jurisdiction.

302. Similarly, the appellants failed to produce any authority of the CJEU suggesting that Member States are precluded from having preliminary procedures which enable

unmeritorious cases to be dismissed at an early stage in line with the type of tests set out in the Irish authorities on the strike out jurisdiction. This principle of national procedural autonomy means in essence that it is the responsibility of Member States, where there are no relevant EU rules, to determine the procedural conditions under which EU rights are to be protected. This right is qualified by the requirements of both equivalence and effectiveness.

303. Apart from relying on the nature of the *Köbler* jurisdiction itself, the appellants did not point to any particular case-law of the CJEU demonstrating that *Köbler*-type actions cannot be dealt with procedurally in national courts in the same manner as cases concerning national law provisions. In principle there is nothing contrary to EU law in the proposition that the usual procedural rules regarding the dismissing of cases on the basis of the inherent jurisdiction apply to a *Köbler* doctrine claim. The principle of equivalence requires that domestic procedures be no more onerous for issues/cases of EU law than issues/cases of domestic law; but it does not *require* the domestic procedures to be *less* onerous. In one of the leading cases on this principle, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland (Case C-33/76)* [1976] E.C.R. I-01989, the CJEU held:

> *"…in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature."*

The CJEU went on to state:

"…In the absence of such measures of harmonisation the right conferred by Community law must be exercised by the national courts in accordance with the conditions laid down by national rules."

304. Craig and de Búrca explain that the principle of equivalence or non-discrimination *"means that the remedies and forms of action available to ensure the observance of national law must be available in the same way to ensure the observance of EU Law."* In *Agrokonsulting (Case C-93/12)* [2013] E.C.R. I-432 the CJEU held:

"first of all, the principle of equivalence, it is apparent from the Court's case-law that observance of that principle requires that the national rule at issue be applied without distinction, whether the action is based on rights which individuals derive from European Union law or whether it is based on an infringement of national law, where the purpose and cause of action are similar. It is for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics."

305. The bound to fail jurisprudence is a well-established principle of Irish law, whether it is based upon the Rules of the Superior Courts or on the inherent jurisdiction of the court. It is a remedy which is available to a defendant at an early stage in proceedings in certain defined circumstances. As we have seen above, part of its rationale was identified in *Fox v McDonald* above as ensuring that a defendant is not asked to defend the same claim for a second time or in order to prevent a plaintiff seeking to avail of the scarce resources of the courts to hear a claim which has no prospect of success. Other cases have identified the manifest prejudice to a defendant in being asked to defend at full hearing a case which is

bound to fail. It therefore serves a useful and legitimate function in litigation, and the threshold for exercising this jurisdiction is set at a high level (as described earlier) in order to ensure that this function is served.

306. The invoking of the strike out jurisdiction to a *Köbler* claim is not discriminatory. Indeed, a *Köbler* claim is broadly similar to other forms of proceeding against the State (or non-state defendants) which involve elements of EU law. Accordingly**,** there is nothing discriminatory or expressly or impliedly contrary to EU law in the invocation of the strike out jurisdiction in this case.

307. The principle of effectiveness articulated in *Rewe-Zentralfinanz* precludes a national procedural provision which make claims virtually impossible or excessively difficult. It is a recognised and accepted principle that each case where the question arises whether a national procedure makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of the provision in the procedure (the bound to fail jurisprudence) in the context of the proceedings.

308. In relation to the right of access to Court, Craig and de Búrca observe that while the CJEU has consistently emphasised the important of access to judicial control and to a judicial remedy for the vindication of EU law rights and have identified it as a fundamental right guaranteed by the ECHR and the Charter of Fundamental Rights, *"the Court has also accepted the imposition of reasonable national restrictions on the fundamental right of access to court"*. The authors refer to *Orizzonte Salute – Studio Infermieristico Associato v. Azienda Pubblica di Servizi alla persona San Valentino – Citta di Levico Terme (Case*

C-61/14) [2015] E.C.R. I-655, a case dealing with court fees as well as giving examples of other types of cases where restrictions were imposed.

309. The most important point is that a person must have an effective, practically possible remedy for a violation of EU law. National rules and procedures should not make the exercise of an EU right impossible in practice. Craig and de Búrca observe that the principle of effective judicial protection is now also enshrined in Article 47 of the Charter of Fundamental Rights. In this case, the appellants have been able to bring proceedings to court which can in principle provide a remedy for the breach or breaches of EU law as established. Their ability to bring those proceedings to a full trial may, in accordance with the bound to fail jurisprudence, only be prevented if the very high threshold is reached which demonstrates that the appellants' claims in this particular case are bound to fail in the sense of being devoid of merit. The burden of proof is on the respondents (as defendants) to establish that high threshold and there are other rules regarding the evidential basis on which a court must proceed; this being so, the procedure does not in any way restrict the appellants access to court or deprive them of an effective remedy. At the risk of repetition, the bound to fail jurisprudence may only limit further access to the court by a plaintiff/applicant where to allow the claim proceed would amount to an abuse of the process of the court.

310. The rationale underlying the existence of the bound to fail jurisprudence applies with equal force to the taking of a case seeking a remedy in EU law as it does to a case where the remedy being sought is that of national law. The overview which this Court has conducted of the relevant jurisprudence, both at domestic and EU level, leads irrefutably to the conclusion that the appellants' *Köbler* claim is not exempt from the strike out

jurisdiction merely by reason of the precise nature of a *Köbler* claim. While significant domestic "carve-outs" from liability were condemned in *Traghetti* and *Ferreira,* as discussed earlier, the Irish strike out jurisprudence is significantly different in nature from the exemptions in domestic law that were condemned in those cases. The strike out jurisdiction does not preclude State liability where judicial error concerned a matter of legal interpretation, or the application of evidential rules (as discussed in *Traghetti)*; nor does it require the formal setting aside of an earlier decision of the court of final instance as a precondition to liability (as discussed in *Ferreira).* On the contrary, the strike out jurisdiction is an exceptional and tightly-controlled procedural mechanism which the courts define as applying only to cases which are unstateable. Nothing in the *Köbler* line of jurisprudence, or in the EU authorities more generally, has been cited in support of the proposition that EU law prohibits domestic legal systems from having procedural mechanisms for the dismissal of unstateable cases.

311. In relation to the slightly different question of whether a different standard should apply to *Köbler* doctrine cases, again we see no reason in principle why this should be so. A court will of course start from the proposition that the *Köbler* jurisdiction exists and must then carefully consider whether it has been established to the requisite high threshold that this particular *Köbler* claim is an abuse of process to the extent that it is bound to fail (or is indeed frivolous and vexatious in the legal sense as set out above). This is not the application of a higher standard but merely the careful application of the strike out jurisdiction to the particular type of claim in question.

312. In the circumstances, we are of the view that the motion judge correctly decided he had jurisdiction to dismiss this case under the inherent jurisdiction of the court. The next question is whether he exercised that jurisdiction correctly.

SECTION 8: WAS THE MOTION JUDGE CORRECT IN STRIKING OUT THE APPELLANTS' CASE?

313. We have concluded above that there is nothing in EU law which prohibits, at the level of general principle, the application to a *Köbler* claim of a domestic procedural mechanism such as the strike out jurisdiction in Irish law. We now turn to the question of whether or not the motion judge was correct in deciding that it was appropriate to exercise that jurisdiction in this particular case.

The keystone of the appellants' claims is their contention that the Irish courts (including the court of final instance) misinterpreted the CJEU decision in *Dowling*

314. Although the appellants' have set out their claims in various different ways, as can be seen from the formulations at 1(A)-(J) of the Plenary Summons (described at paras. 23-36 above), the case is fundamentally very straightforward and is founded upon a single contention from which all the various claims and arguments are derived. This fundamental contention is that the Irish courts in the *Dowling* litigation (including the Supreme Court, which is the relevant court for the purposes of the *Köbler* doctrine) misinterpreted the Court of Justice decision in *Dowling* and accordingly were in error in how they addressed the issues of EU law in the *Dowling* litigation after the case's return from Europe. The appellants' case, no matter how it is formulated, is dependent upon this keystone, namely a particular interpretation of the CJEU decision in *Dowling*. If that keystone is removed,

the remainder of the edifice falls, complex though the case may seem on its face and lengthy though the pleadings are.

315. This brings to mind the comment of former Chief Justice Denham in *Tara v Bula Mines (No.6)* [2000] 4 IR 412 where she described the "*seventeen links"* that had been alleged to found a claim of bias in that case as *"seventeen noughts*". The appellants in these proceedings formulate their claims in ten different ways (A-J in the plenary summons); but in truth there is a single legal issue at the root of each of them. Accordingly, they stand or fall together; either they constitute ten 'noughts' which are bound to fail' or constitute ten stateable claims, in which circumstance the case should be allowed to proceed to trial. Merely because a claim is formulated in different ways and in a verbose manner does not of itself indicate that there is necessarily a multiplicity of issues or any greater substance to the claim than a claim which is simply and succinctly expressed.

316. It is crucial to note that this keystone of the appellants' claim is a matter of law, not fact. It is a legal question, involving an interpretation of the CJEU decision in *Dowling.* We are of course conscious that we are hearing an appeal from a "motion to strike out", and the appropriate burden of proof should be applied to this legal question. The appropriate question is therefore whether the High Court was correct in concluding that the appellants' interpretation of the CJEU decision in *Dowling* is not stateable and thus bound to fail. If, however, the interpretation favoured by the appellants is *stateable* or not bound to fail, it would follow that the proceedings should not have been struck out, because this would at least place the appellants in the starting blocks for a *Köbler* claim, and the issues should be left to a trial judge for determination in due course. In that situation, a trial judge would ultimately have to decide whether the appellants' interpretation of the CJEU decision in

Dowling was not merely stateable, but whether it was correct; whether there had been infringement of the appellants' rights by a court of final instance in the *Dowling* litigation; whether any such infringement was "manifest"; and whether any infringement caused damage which entitles the appellants to reparation.

317. However and conversely, *if* it is absolutely clear as a matter of law that the appellants are *incorrect* in their interpretation of the Court of Justice's decision in *Dowling*, then they are bound to fail in all of their arguments; in those circumstances they would have no infringement of EU law by the Irish court of last instance upon which to base their *Köbler* claim (let alone a "manifest" one) and the proceedings should indeed be struck out, as was the motion judge's view at first instance.

318. In our view, therefore, this motion (and appeal) turns quintessentially on a matter of law, not a matter of fact. The appellants' submission that the caselaw on strike out jurisprudence emphasises that the facts should be taken at their height is therefore not particularly relevant here, because the key matter for determination at this stage is a matter of law, namely whether the appellants' interpretation of the CJEU decision in *Dowling* is bound to fail. On matters of law, there is no principle that the appellants' view of the law must be taken as correct or "at its height" in a strike out application. Of course, where it appears to a court on a strike out motion that the case turns on an issue of law, and the issue of law is complex and needs further argument, then the case may be suitable for trial and unsuitable for strike out; conversely, where the issue of law is not complex and must clearly be determined against the plaintiff/respondent to such a motion, then the case can be struck out. The question of taking facts at their height does not arise; what matters is the degree of clarity

as to the legal point to be determined. All of this has been described in further detail above in our section on the strike out jurisdiction in Section 7 of this judgment.

319. The key question therefore in our view is whether the appellants' interpretation of the CJEU decision in *Dowling* is bound to fail. Within the single overarching question of what the CJEU decided in *Dowling*, some sub-questions may be identified, which encompass the pleaded by the appellants at A-J of their Statement of Claim. We summarise them as follows:

- Did the CJEU confine itself to setting out a general test or description of when a national measure *would fall* outside the scope of the Second Directive (Articles 25(1), 29(1), 8(1) and 42), or did it *actually decide* that the direction order dated the 26 July 2011 fell outside the scope of the Second Directive and/or was compatible with EU law generally?
- Did the CJEU in *Dowling* set out and/or leave intact a general test in EU law that a measure such as the direction order would be compatible with EU law *only* where the measure was the sole and exclusive way of ensuring a recapitalisation, otherwise described as the EU proportionality test?
- Alternatively, did the CJEU set out the relevant criterion for the compatibility of a measure such as the direction order as being whether or not the measure had been introduced by reason of a systemic threat to EU financial stability (a criterion which it considered to be satisfied in the case of the direction order)?
- Did the CJEU envisage that when the *Dowling* case returned to the domestic courts, they would have to apply the EU proportionality test (the "least restrictive means" test)

to the evidence in order to decide whether or not the Direction Measure was compatible with EU law/the Second Directive?

- Did the Irish courts wrongly consider that the European Commission's decision on State aid was determinative of the validity of the direction order?
- To what extent did the CJEU leave the so-called "Greek cases" including *Pafitis* intact? How did the CJEU perceive the interaction between those cases and the *Dowling* decision? Were the Irish courts correct in taking the view that the CJEU decision in *Dowling* had "superseded" the Greek cases and what was meant by the word "superseding" in that context?
- In view of the answers to the above questions, was the Supreme Court correct or incorrect in taking the view a further preliminary reference was not necessary?
- In view of the answers to the above questions, did the Supreme Court fail to comply with article 6(1) of the European Convention on Human Rights?

320. Notwithstanding that those sub-issues may be identified, the question does nonetheless reduce itself ultimately to a narrow legal one: what is the correct interpretation of the CJEU decision *Dowling* and was that decision correctly applied by the Irish courts (and in particular the Irish court of final instance)? We emphasise again that the test to be applied to this question (this being a motion to strike out) is whether the appellants' case, which depends upon their interpretation of the CJEU decision in *Dowling,* is bound to fail.

Res judicata **does not apply in determining this legal question**

321. We also wish to make clear that in providing an answer to the question "What did the CJEU decide in *Dowling*?" in the context of a *Köbler* claim, the principle of *res judicata*

does not apply. The very essence of a *Köbler* claim is that a litigant is entitled to make the argument that the domestic court of final instance "got it wrong" and is entitled to have a fresh determination on the merits as to whether that court thereby infringed EU law. Strange though that may seem to those who are not familiar with the contours of a *Köbler* claim, the whole point of such a claim is that it is permissible at the level of principle for the courts in those proceedings to take the view that the courts in the "base" proceedings (including the Supreme Court) "got it wrong" and that they engaged in an infringement of EU law. The courts dealing with a *Köbler* claim must look afresh at the issue of EU law and assess whether the courts in the "base" proceedings erred in their interpretation or application of EU law and infringed the claimant's rights. That said, there is of course nothing to preclude the courts in a *Köbler* claim from being persuaded by the same arguments as those which persuaded the court of last instance in the original proceedings, and to arrive, independently, at the same conclusion. If it does so, this would not be by the operation of *res judicata* but rather by means of a fresh and independent assessment of the point of EU law in issue for the purpose of the *Köbler* proceedings.

322. In addition to the point that the courts in a *Köbler* claim must look at the EU law afresh and independently rather than on a *res judicata* basis, in the present context, namely that of a strike out motion, there is the added dimension of considering the matter through the prism of whether the appellant's claim is "bound to fail". This means not only that the High Court (and this Court on appeal) in the *Köbler* proceeding must address afresh the question of whether the courts in *Dowling* misinterpreted EU law, but also that we must do so on the basis of the appropriate test, namely the "bound to fail" test. A respondent bringing a motion to strike out a *Köbler* claim must show that the claim is bound to fail. The respondent must persuade the court in the new proceedings that this claim is bound to fail

because it is absolutely clear that the court of final instance in the "base proceedings" was correct in its interpretation and application of EU law.

323. Having made those preliminary observations as to the importance of the addressing the question of what the CJEU actually decided in *Dowling,* and how we (as a "*Köbler* court", so to speak) should examine that question, we proceed now to examine the question of what the CJEU decided in the *Dowling* case.

What is this Court's view of what the CJEU decided (or did not decide) in its decision on the preliminary reference in *Dowling*?

324. Our views on this question are based on our own analysis of the issues having heard the submissions of the parties before in these proceedings and studied the CJEU judgment in *Dowling.*

325. As we have seen, the crux of the appellants' argument is in the following terms:

- That the Court of Justice did not go so far as to decide that the direction order was in accordance with EU law, but confined itself to expressing a general test as to when a domestic measure *would* be in accordance with EU law;
- That the test that should have been applied by the Irish courts was that such a measure would be valid only if there was *no other means* of *recapitalising the institution concerned;*
- That in interpreting the CJEU's decision, one must bear in mind the distinction between "interpretation" of EU law (which the Court Justice does) and "application" of EU law to the domestic law/measure (which the Court of

Justice simply does not do) since to do so would be in breach of the separation of powers as between the CJEU and the domestic courts;

- That the caselaw of the CJEU supports the proposition that, while certain provisions of the Second Directive do not apply to *insolvent* companies (in respect of which an intrusive state measure such as the July 2011 ex parte direction order could have been perhaps the only means of ensuring the recapitalisation), the Directive unequivocally does apply to a recapitalisation of solvent companies, in respect of which less restrictive, practical and equally effective means of the recapitalisation existed. Therefore, the court of trial in *Dowling* should have assessed the evidence to ascertain whether the direction order was in fact the least restrictive method of achieving the objective in question. The court of final instance should have found that the court of trial was in error in this regard. In failing so find it committed a manifest infringement of EU and similarly committed a manifest infringement of EU law in failing to refer further questions to the CJEU.

326. Having considered the judgment of the Court of Justice in *Dowling*, we do not agree with the appellants' interpretation of that decision. In our view, the Court of Justice clearly ruled that there was no reason to conclude that the Irish direction order was in breach of EU law. We are of the view that there is no room for doubt on this score.

327. We accept that at para. 48 of its judgment, the CJEU appears to have wrongly taken the view that the High Court had decided that there was no other means of recapitalising ILP, whereas this finding had not in fact been made by the High Court judge (O'Malley J.). She *had* made findings to the effect that the required capital could not have been raised from

private investors nor from existing shareholders; that the failure to recapitalised by the deadline of the 31 July would have led to a failure of the bank; that this would have had extreme, adverse consequences for Ireland; and that this would have worsened the threat to the financial stability of other member states and the EU. These findings might be thought to come very close to a finding that there was no other means of recapitalising ILP other than the direction order, but the motion judge herself in the course of argument said that she had avoided making such an explicit finding because she considered that this fell within the reasonableness/proportionality assessment that she had left over for her decision upon the cases return from Europe (see paras. 200-201 above).

328. However, it seems to us that on a proper reading of the Court of Justice's decision in *Dowling*, the matter referred to in para. 48 of its judgment did not ground its ultimate conclusion or answer to the questions posed to it. In our view, what is crucial to and underlies the Court of Justice's decision is that the measure in question was taken in circumstances where there was a threat to the financial stability of the State and the financial stability of the EU. O'Malley J.'s findings on these matters were clear and unequivocal; and they were, in our view, fundamental to the Court of Justice's decision.

329. The formal answer to the question posed was answered as follows:

55. In the light of the foregoing, the answer to the questions referred is that Article 8(1) and Articles 25 and 29 of the Second Directive must be interpreted as not precluding a measure, such as the direction order at issue in the main proceedings, adopted in a situation where there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union, the effect of that measure being to increase the share capital of a public limited liability company,

without the agreement of the general meeting of that company, new shares being issued at a price lower than their nominal value and the existing shareholders being denied a pre-emptive right to subscribe." (Emphasis added).

330. To use the language of the common law, the *ratio decidendi* of the Court of Justice's decision is fully set out in that answer. The fact that at one point in its judgment the Court may have erroneously stated that the High Court made one particular finding does not change the position because that error was not connected to the *ratio* of its decision. What was determinative was that "*there is a serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union"* which then freed the Member State from the constraints of the Second Directive.

331. In our view, if the CJEU had wished the domestic courts to adopt the approach advocated by the appellants, it would have said so in clear terms. Its decisions on preliminary references frequently do (but do not always) adopt this type of approach. The CJEU is entirely capable of stating that it is confining itself to propounding a general test and that it falls to the domestic courts to apply it. This was not what happened in this particular case. It chose to answer the question in the particular manner it did, without caveat or qualification as to the need for the domestic courts to engage in further assessment of the evidence in light of a general test it was propounding. It chose to answer the two questions that had been referred to it in a 'rolled up' manner. It repeatedly used the language of *"a measure, such as the direction order…."*, and it is notable that in its formal answer to the questions posed it used the phrase "…*not precluding a measure, <u>such as the direction order at issue in the main proceedings</u>*…". This is a typical use of language by the CJEU when it is signalling a decision of a specific, prescriptive nature; an 'outcome' decision, in the

taxonomy we described earlier in this judgment. Further, the Court's use of language in answering the questions posed stands in significant contrast to that of the Advocate General's opinion who, unlike the Court, explicitly spoke about the need for the domestic court to apply a particular test and discussed the concept of proportionality (see paras. 166-182 above). The Court's judgment should be read in that context also; insofar as it took a different approach and used different language to that of the Advocate General, it supports the view that its approach was deliberately chosen. In short, the Court of Justice clearly indicated its view that the direction order was compatible with EU law, without equivocation or conditionality attached to its decision.

332. The appellants object that the Court of Justice simply does not rule on the validity of domestic measures as such. They castigate the Irish courts in *Dowling* for their alleged ignorance of this point. The appellants repeatedly submit that the Irish courts, in holding that the Court of Justice had in effect pronounced the direction order, a domestic measure, in accordance with EU law, have applied an "*invented novel interpretation of EU law*". However, as we have seen, while the formal position in law is that the Court of Justice claims at the level of principle not to formally rule on whether national measures comply with EU law, this is not the practical reality of the CJEU jurisprudence, as we have discussed earlier in this judgment (see Section 3 above). In some (although of course not all) cases, the reality is that the Court of Justice does in effect and in real terms indicate whether the domestic measure complies with EU law or not. There is, as discussed earlier, a spectrum of the type of answer that the court gives, ranging from "outcome" to "guidance" to "deference" cases, to use the language of one commentator (as set out above). In our view, the decision in *Dowling* was clearly an "outcome" case within that taxonomy; that Court was in effect deciding the outcome by answering the question posed in the precise

manner it did, leaving no room for the domestic court to engage in any further analysis of the EU law issues in the case.

333. The fact that the CJEU has frequently decided whether a domestic measure complies with EU law is widely recognized fact among expert commentators in the area of EU law. It is the appellants who are failing to have regard to the practical reality of how the CJEU operates and the manner in which it responds to preliminary references. The position as expressed by the CJEU in *Dowling* could not be any clearer and left no room for doubt; the CJEU ruled that the direction order was compliant with EU law. If it had any doubts about the matter, it would have said so. If it wished the domestic courts to apply a general test to the evidence upon its return to the Irish courts, it would have said so. The CJEU does not lack the capacity to articulate doubts when it wishes to do so; nor to tell a domestic court when it needs to apply a general test or principle that has been set out by the CJEU. It did not do so in the present and instead ruled in explicit, unconditional terms that the measure was in compliance with EU law. The appellant's argument about what the CJEU does in general has to yield the language actually used by the CJEU in the *Dowling* case.

334. Further, we do not accept the appellants' arguments concerning the position of the Greek cases following the decision in in *Dowling.* The appellants maintain that the Court never "overruled" those cases and that the reasoning therein therefore continues to apply. On the contrary, the entire reasoning of the Court of Justice was based on the fact that the European monetary system had been adopted on a date after those decisions, and that the Second Directive was not designed to deal with situations where there was a systemic threat to that EU financial system. It was not necessary for the Court of Justice to overrule those decisions; it was simply stating that they were not applicable to the situation arising in

Dowling. The appellants' arguments fail to understand the distinction between the need to 'overrule' a decision, and the 'distinguishing' of a previous case. The words of the Advocate General (whose reasoning is not different to the Court on this particular point) bear repeating, although we have already set them out earlier:

> "…*such a view fails to take into account the difference between clarifying or nuancing case law on the one hand, and overturning it on the other (the Court indicates specifically when it intends to depart from its case law). The matter under consideration does not give rise to setting the Pafitis case law aside-on the contrary, it tends to confirm it on principle. It is a simple instance of distinguishing between situations and the relevant case law*".

335. In our view, this is what was meant by Hogan J. when he referred to the *Dowling* decision as 'superseding' the Greek cases. The CJEU did not need to, and did not, engage in an overruling of those cases; the reasoning in those cases continues to apply to *like* cases i.e. cases where there was *no* systemic threat to the economy of a Member State which threatened the financial stability of the Union as a whole.

336. The second appellant in his arguments pointed to the discussion in *Traghetti* (discussed in detail earlier in this judgment at Section 3) which supports the view that an assessment of the evidence in a case involving a point of EU law may fall within the purview of EU law. We do not disagree with this statement at the level of general principle. It is correct to say, as was pointed out in *Traghetti*, that domestic courts of final instance and the Court of Justice *may* have a role in the assessment of evidence, but this is *provided it is an assessment of a matter which is relevant to and necessary for the determination of the EU law issue*. Examples were provided by the Advocate General in *Traghetti*: (1) compliance

with EU rules of evidence such as the burden of proof in questions of discrimination, and (2) the legal classification of the facts for the purpose of an issue such a State aid. However, the key word is "may"; it *may* be a matter of EU law to assess evidence in a particular manner for a particular purpose. All depends upon what the relevant facts are, for the purpose of the particular legal issue in question.

337. As we have explained above, our view is that the CJEU in *Dowling* was explaining that a measure falls outside the Second Directive if it is brought in *by reason of a systemic threat to the European financial system.* In those circumstances, the relevant fact-assessment is whether or not the circumstances of ILP at the relevant time constituted a systemic threat to the European financial system. There were clear findings by the High Court in the affirmative on this point and those are what ground the CJEU decision. What the appellants are doing is inviting us to take the view that the evidence which should have been analysed was evidence relating to a *different* factual issue, namely whether there was another alternative method of recapitalising ILP or whether it was still solvent. For example, some of the pieces of evidence which the appellants say were ignored were the statutory audit reports under the IFRS, the ILP recapitalisation stress test, and formal declarations made by the ILPGH Board concerning the solvency and viability of ILPGH and ILP. However, in our view the CJEU was clearly indicating that this particular issue of fact (the solvency or viability of the company) was not directly relevant to the legal issue under EU law; instead the directly relevant fact was whether or not the measure had been adopted by reason of a systemic threat to the financial system. Again, it bears repeating that if the CJEU had wished the domestic courts to engage in an analysis of whether the direction order was the only means of recapitalising ILP at the time in line with an EU proportionality test, it would have said so. It did not.

338. Accordingly, while we accept what the appellants say at the level of general principle concerning the role of courts (including courts of final instance and the Court of Justice itself) in relation to evidence-assessment and review of fact-finding concerning EU law issues, where we part company with their arguments is in defining what fact-finding was relevant and necessary in the present context.

339. Further, it is worth noting that the Court of Appeal in the *Dowling* litigation specifically decided that the domestic law on proportionality in the context of the domestic issues in this particular case was *Heaney* or *Meadows*- type proportionality (differing from the High Court judge in this regard, who applied the 'ordinary' *O'Keeffe* test); and explicitly said that it did not see any difference between this test of proportionality and the EU law test of proportionality. It then proceeded to apply that test to the evidence (albeit as an exercise of domestic law) and upheld the validity of the direction order. It is manifestly clear, therefore, that even if the Court of Appeal had applied a proportionality test under the rubric of EU law, it would have reached the same conclusion. However, the main point is that in the preceding paragraphs: namely, that the CJEU did not require or anticipate that the domestic courts had to apply a proportionality test under EU law at all, in the particular circumstances which arose.

What are the consequences of our interpretation of the CJEU decision in *Dowling* in the present context? Is the appellants' claim in its various formulations bound to fail?

340. It will be recalled that in order for a *Köbler* claim to succeed, it is not sufficient to show that there was an infringement of EU law rights by a court of final instance causing damage, but that such infringement was "manifest". This is not a superfluous adjective. The CJEU made it clear that it was intended to denote matters of substance and was to ensure that the jurisdiction remained an exceptional one. In *Köbler*, it clarified what factors should inform the question of whether an infringement was "manifest":

> "55. *Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. (now Art. 267 TFEU).*
>
> *56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect Brasserie du Pêcheur and Factortame…).*"

Furthermore, in *Köbler* itself, the Court concluded that while there had been an infringement of EU law by the domestic court of final instance, there had *not* been a "manifest" infringement.

341. The circumstances of the present case stand in stark contrast to those in *Köbler*, *Traghetti* and *Ferreira,* not least because in those cases, each of the courts of last instance failed to make a preliminary reference in the "base" proceedings; in the latter two cases, the final court refused to do so, and in *Köbler*, the court withdrew an earlier reference it had originally decided to make. In the present case, the High Court did in fact make a preliminary reference to the CJEU and all the subsequent court decisions in the *Dowling*

litigation sought to abide by the CJEU's decision in good faith. Further, given the terms in which the CJEU answered the questions posed, it would be impossible to say that the courts' interpretation of it in the remainder of the *Dowling* litigation was a "manifest" disregard of that interpretation. On the contrary, not only was it a good faith interpretation but it was one which, in our view, was entirely correct. This is certainly not the kind of situation which the *Köbler* claim was designed to address, namely a manifest disregard of clear principles of EU law.

342. Accordingly, we are of the view that the appellants' claim that the Irish court manifestly infringed their EU law rights by reason of the manner in which they (or any of them) approached the issues of EU law is bound to fail because it is based on the appellants' misinterpretation of the clear and unequivocal CJEU decision in *Dowling.* Indeed, we not only think that the appellants are bound to fail in their claim that the courts "manifestly" infringed their EU law rights, but that they are bound to fail in any claim that the courts infringed their EU law rights *at all.*

343. For the avoidance of doubt, we take this view in relation to both the Court of Appeal and Supreme Court decisions in their entirety, including not only (a) the manner in which the Court of Appeal dealt with matters on their merits, and (b) how the Supreme Court subsequently dealt with those matters in its determination refusing leave to appeal, but also in relation to (c) the Supreme Court's decision not to refer any further question(s) to the CJEU. We conclude that the appellants are bound to fail in their claim that the Irish court of final instance "manifestly" infringed their EU law rights; we go further and conclude that they are bound to fail in any claim that the court of final instance infringed their EU law rights at all. Our conclusion is based on an interpretation of the law and is a matter

which is eminently suitable for decision on a "strike out" motion because it concerns an interpretation of a single decision of the CJEU which is clear in its terms. Notwithstanding the appellants' copious arguments, and the very obvious lengthy judgment herein to address those arguments, ultimately, it cannot be said that the within case was, in the words of Clarke J. in *Moylist, "too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail".*

344. Given the language used in the CJEU's decision in *Dowling,* we consider that the Court of Justice would view as absurd any suggestion that it had not already given a firm indication of its view as to whether the Directions Order of the 26 July 2011 complied with EU law. Any further reference to the Court of Justice for further clarification of the issue was entirely unnecessary, and it was considered by the Supreme Court to be so in refusing to make a reference. As already discussed, a court of final instance is not under an obligation to make a preliminary reference merely because a party wishes it to do so; there must, in the Court's view, be a relevant question on a point of EU law which has not already been determined by the CJEU's case law and/or to which the answer is not obvious (see Section 3 above and *CILFIT, Commission v France*). The appellants had framed a variety of suggested preliminary reference questions for the Supreme Court but the reality is that all of them are based upon the same interpretation of the CJEU decision in *Dowling,* and the necessity to refer those questions ultimately comes down to an interpretation of the Court of Justice decision in *Dowling*. The appellants favour a particular interpretation of that judgment but this Court is of the view that their interpretation is entirely erroneous; therefore the Supreme Court's decision not to refer any further questions because it took the view that the answers to the questions being proposed were clear and had already been

answered was entirely correct, and the appellants' claim in the present proceedings is therefore bound to fail.

345. We note that the Supreme Court at para. 14 of its determination quoted the passage in the CJEU's judgment which contains the reference to the trial court (being the High Court in its first judgment) having *"weighed the competing interests"*. While this is not correct, we do not consider that the error affects the overall conclusion of the Supreme Court any more than it affected the *ratio* of the CJEU's decision in *Dowling.* Again, we consider that it is an error in the narrative but not one which was crucial to either court's ultimate conclusion. At the risk of unnecessary repetition, we are of the view that both the CJEU and the Supreme Court in *Dowling* considered that the key relevant fact (which was proven to their satisfaction before the High Court judge) was whether there was a threat to the financial stability of the State and in turn the EU as a whole, not whether the measure adopted was (or had been found to be) the least restrictive measure of recapitalising the entity in question.

346. Finally, we wish to say that we reject the appellants' claim that the Irish courts treated the European Commission's decision on State aid as determinative of the validity of the direction order. In our view, this interpretation of the Court of Appeal and Supreme Court judgments is unstateable when one looks at the terms of each of those judgments. The European Commission on State aid was described as part of the history or narrative that led to the making of the direction order, but it is entirely artificial to suggest that the Commission's decision in this regard was viewed as determinative of the validity of the direction order or that the courts did not properly address the arguments derived from the Second Directive and the principle of proportionality. The CJEU itself incorporated an

analysis of *Kotnik* (which concerned State aid) into its analysis in *Dowling*. The Irish courts correctly applied the decision in *Dowling.*

The appellants' claim pursuant to article 6(1) of the European Convention on Human Rights

347. As noted earlier, the appellants plead in their Statement of Claim (in connection with relief "H" sought in the plenary summons) that the manner in which the Court of Final Instance dealt with his case was in breach of article 6(1) ECHR. Specifically, it is argued that the Court failed in its obligation to make a preliminary reference and that this failure constituted the breach of article 6(1).

348. A number of points may be made in this regard. The appellants have failed to engage with the European Convention on Human Rights Act 2003 insofar as it governs the manner in which the Convention may be litigated in this jurisdiction at a domestic level. It is not an answer to the requirements of that legislation simply to say that this claim falls within the umbrella of a *Köbler* claim. No attempt has been made to plead a Convention claim in accordance with the legislation, or to address how this type of claim interacts with the legislation.

349. Secondly, while it is accepted that the European Court of Human Rights has held that, in principle, a failure to refer might in certain circumstances constitute a breach of article 6: *Ullens de Schooten* (discussed above), more precisely it should be noted that what the court said in that case is that it would be a *failure of a court of final instance to give adequate*

reasons that would ground an alleged breach of the "fair hearing" right encompassed by article 6(1). In the present case, we have no doubt that the Supreme Court gave reasons for its decision not to make a preliminary reference. They have been set out earlier in this judgment. Further, the Supreme Court's determination was in accordance with domestic law jurisprudence covering the granting of leave to appeal to the Supreme Court and insofar as a reference to the CJEU was sought was in accordance with the *CILFIT* case law. The appellants do not agree with those reasons or that assessment, but that is a different matter. We are entirely satisfied that this was not a case where the court of final instance failed to engage with the substance of the claim, nor one where it failed to give reasons for its decision, within the meaning of the European Convention jurisprudence. Therefore, insofar as it is necessary to express a view, we are of the view that the article 6(1) claim must fail.

350. Thirdly, we note that the European Court of Human Rights has, as a matter of fact, held the appellants' claim to that Court inadmissible. In his written submissions, dated the 15 January 2021, the appellants pointed to the fact that they had made an application (9th August 2019) to the European Court of Human Rights. The submissions go on to say:

> "*At the time of the hearing before Sanfey J. on 19 and 20 December 2019, it was unclear if said application dated 9 August 2019 would be admitted for adjudication before the ECtHR. At the time of the writing of these submissions, the said ECtHR application has not been declared inadmissible. It is unlikely at this stage that the application will be declared inadmissible, which is highly consequential herein."*(Emphasis added).

351. The ruling of inadmissibility by the European Court of Human Rights led to correspondence from the CSSO to the appellants, which in turn generated reaction from the

latter which ultimately led to this Court being convened on a "for mention" basis in November 2021. The appellants have lodged further submissions arising out of those events. The appellants maintain that the test for inadmissibility in the European Court of Human Rights is different from the test for a strike out in Ireland. Even if he were correct in this regard, upon which we express no view, this Court is of the view described above that (applying the domestic test for "strike out") the appellants' case under article 6(1) is bound to fail in any event. This is the Court's own view irrespective of the European Court of Human Rights' decision to declare his application inadmissible. It is this Court's own view, based on the *Ullens* case and an examination of the manner in which Supreme Court dealt with the appellants' request for a preliminary reference, including the reasons it gave for deciding not to make a preliminary reference to the CJEU. Therefore, it is not necessary to engage any further with the appellants' submissions concerning the implications (or lack of them) arising from the declaration of inadmissibility on the part of the Strasbourg Court.

The appellants' request to this Court to make a preliminary reference to the CJEU

352. Finally, we observe that the appellants in their notice of appeal ask this Court to refer the following questions to the CJEU:

> *A. Should the Köbler doctrine be interpreted as precluding an organ of a Member State, i.e. a national court of the first instance before whom the Köbler-type proceedings have been brought, such as the High Court in this case, from striking out the proceedings, such as these proceedings, on the grounds that the proceedings are allegedly frivolous, vexatious and bound to fail, in the circumstances where said national court has determined that the proceedings are not res judicata and said national court has not*

determined that the proceedings have not been brought for a legitimate purpose as claimed?

B. *Should the Köbler doctrine be interpreted as precluding an organ of a Member State, i.e. a national court of the first instance before whom the Köbler-type proceedings have been brought, such as the Irish High Court in this case, from striking out the proceedings, such as these proceedings, on the grounds that the proceedings are allegedly frivolous, vexatious and bound to fail, in the circumstances where the State's application to strike out the proceedings rests on a claim that the CJEU had jurisdiction in the base case i.e. in the case in which the CJEU has already made a first preliminary ruling under Art. 267 TFEU and in respect of which the Köbler-type proceedings have been then initiated to apply rules of EU law to a particular national case or to rule upon a compatibility of a measure of national law (such as the July 2011 Ex Parte Direction Order) with EU law (which claim made by the State is incompatible with EU law as expressed in the CJEU judgments inter alia in the cases C-484/10 Ascafor and Asidac, C163/10 Patriciello and C-279/06 CEPSA)?*

C. *Must the jurisprudence of EU law established by the CJEU judgment in the case C-173/03 Traghetti del Mediterraneo spa v. Italy be interpreted as meaning that, to exclude all State liability, which is envisaged in the jurisprudence established by the CJEU judgment in the case C-224/01 Köbler v. Österreich, on the grounds that the infringement of EU law attributable to a court of a Member Statarises from the court's assessment of facts or evidence, would be tantamount to rendering meaningless the principle laid down by the CJEU in the Köbler judgment, as it would amount to depriving*

the principle set out in the Köbler judgment of all practical effect with regard to manifest infringements of EU law for which courts adjudicating at last instance were responsible?

D. Must the jurisprudence of EU law established by the CJEU, inter alia, in Ascafor and Asidac C 484/10, Patriciello C-163/10 and CEPSA C-279/06 be interpreted as meaning that, in proceedings brought pursuant to Art. 267 TFEU, the CJEU has no jurisdiction to rule upon the compatibility of measures of national law with EU law or to interpret national legislation or regulations or to apply rules of EU law to a particular case or to give a ruling on the facts in the main proceedings or to apply the rules of EU law which it has interpreted to national measures or situations?

E. Must Article 6(3) TEU be interpreted as meaning that fundamental rights guaranteed by the ECHR constitute general principles of EU law, and that those rights can, therefore, be the subject of claims in Köbler-type proceedings such as these proceedings?

F. Must the fundamental principle of proportionality of EU law be interpreted as applying to actions of a Member State, such as Ireland, which, when forcing a measure of national law, such as the July 2011 Ex Parte Direction Order, was explicitly applying EU law in the form of the Implementing Decisions 2011/77/EU and 2011/326/EU, and that such a Member State must, in such a case, employ means which are the least restrictive/detrimental to persons' rights protected by EU law?

353. In essence, the appellants thereby seek to re-agitate before the CJEU the same issues as hitherto, with only one novel matter, namely whether the strike out jurisdiction in Irish law

is compatible with EU law (specifically the bringing of a *Köbler* claim). We have discussed this in detail in Section 7 and are of the view that the CJEU authorities on the principle of equivalence make it clear and beyond doubt that national systems may employ the same procedural mechanisms for EU claims as for domestic claims, as is done in here with the strike out jurisdiction. The principle of effectiveness incorporating effective judicial protection must not make the application of EU law impossible or excessively difficult. In that regard we note that, while the CJEU in *Traghetti* and *Ferreira* made it clear that the domestic courts are not entitled to introduce conditions (or barriers) to a *Köbler* claim which are more stringent than those permitted by *Köbler* itself, there is nothing in those cases which suggests that a domestic system must allow a case to proceed where it is bound to fail. What was in issue in those cases were very broad domestic 'carve-outs' from *Köbler* liability e,g. (1) in respect of errors in interpreting law or errors in assessing evidence (the domestic legislation in *Traghetti*); (2) preconditions to liability such as having the decision of the court of last instance set aside (the domestic legislation in *Ferreira*). Nothing of that kind arises here. The bound to fail jurisprudence contains many safeguards to ensure that the limitation on the right of access to the courts is limited to what is necessary to protect the courts from an abuse of process. The test for having a case struck out in Ireland is very high (bound to fail) and there is nothing in the jurisprudence of the CJEU that suggests that this high threshold is incompatible with State liability under the *Köbler* doctrine or that Member States are obliged to allow continued access to court where the domestic courts have been satisfied following a full hearing that a particular *Köbler* claim is bound to fail.

354. Accordingly, our decision is not to refer any of the suggested questions to the CJEU because the answer to each of the questions is clear.

SUMMARY OF CONCLUSIONS

355. The following is a summary of our conclusions:

- The jurisdiction to strike out a case as being frivolous, vexatious or bound to fail applies to a *Köbler* claim as it does to other claims. The existence of such a jurisdiction is not incompatible with EU law. The manner in which the test for exercising this jurisdiction is formulated strikes an appropriate balance between the right of access to the courts, the protection of EU law rights, and the need to protect defendants from having to undergo the expense and inconvenience of defending proceedings which are bound to fail. There is nothing in the EU jurisprudence generally or in the *Köbler* line of authority which suggests that this jurisdiction or procedure is incompatible with EU law or with *Köbler* liability in particular.
- The motion judge (Sanfey J.) correctly identified the test to be applied on a strike out motion even though he did not refer to each and every case cited on behalf of the appellants.
- The test for a "strike out" on the grounds of "bound to fail" is a high one; the burden is on the respondent to show that the appellants' case was bound to fail. The jurisdiction should not be lightly exercised. This was recognized by the motion judge.
- The appellants' claim in these proceedings (a *Köbler* claim), although formulated in various ways, fundamentally rests upon an issue of law, namely the correct interpretation of the CJEU decision in *Dowling*. The fact that the appellants' claim been formulated in multiple ways or at great length does not mean that the point is not fundamentally a straightforward one, based upon the

correct interpretation of the CJEU decision, and its application by the Irish courts (and the court of last instance in particular).

- A court is entitled to strike out a case as being bound to fail where the case rests entirely upon one key legal issue and it is clear that the claimant's legal arguments on this legal issue are bound to fail.
- This Court's view is that the CJEU decision in *Dowling* is clear and unequivocal; this is the Court's own view without any application of the doctrine of *res judicata,* a principle which does not apply in the context of any consideration of the decision of a court of last instance which is in issue in a *Köbler* claim.
- This Court is of the view that the *ratio* of the CJEU ruling in *Dowling* was that the direction order of the 26 July 2011 was compatible with EU law (both the Second Directive and EU law more generally). This was stated without caveat, or condition and without the need for the domestic courts to make any further findings of fact.
- The courts in the *Dowling* litigation – including the Supreme Court, which was the court of final instance for the purpose of the *Köbler* doctrine – applied the correct interpretation of the CJEU decision in *Dowling.* More specifically, it was not necessary for them to engage in fact-finding of the kind advocated by the appellants, nor to apply the "least restrictive means" test to the facts. They were not wrong in finding that the CJEU decision in *Dowling* superseded the Greek cases in the sense that the relevant articles of the Second Directive did not apply in the circumstances of threat to the stability of the EU financial system.

- The courts in the *Dowling* litigation – including the Supreme Court, which was the court of final instance for the purpose of the *Köbler* doctrine – did not infringe the appellants' EU law rights let alone "manifestly" infringe them ("manifest" infringement being an essential condition of *Köbler* liability); accordingly, the appellants' case is bound to fail.
- There was no necessity then and there is no necessity now to refer any questions to the CJEU because the answers to the points of law upon which the appellants seek 'clarification' have already been decided and/or are clear under EU law.
- The appellants' claim pursuant to article 6(1) of the European Convention on Human Rights is bound to fail because the Supreme Court addressed the arguments raised by the appellants in accordance with domestic law and EU law and in particular the CJEU decision in *Dowling*.

356. In the circumstance it is our view that the motion judge was correct to strike out the appellant's proceedings and the appeal should be dismissed.

357. Finally, we wish to make the comment that written and legal arguments should be always presented with conciseness and civility. The appellants' pleadings and submissions were repetitive and prolix. Excessive verbosity can create obscurity rather than clarity. What matters is substance and not form. Sometimes brief summaries are appropriate; and sometimes verbose arguments can be reduced to succinct restatements. While the second appellant undoubtedly put a great deal of work into his preparation for the appeal, and cares passionately about the outcome, he would enhance his presentation in the future were he to pay heed to these comments about the parameters of legal argument and written submissions.

358. As regards costs, given that the appellants have been entirely unsuccessful in their appeal, it would appear to follow that the respondents are entitled to the costs of this appeal, to be adjudicated in default of agreement.

359. If the appellants wish to contend for a different form of costs order in this appeal they will have liberty to file in the Court of Appeal office and serve (electronically) on the respondents, submissions concerning the costs issue within 14 days of the date of this judgment. The respondents will have leave to file and serve (electronically) any submissions in response to those submissions within a further 7 days from receipt of the appellants' submissions. The submissions, including appendices, schedules, footnotes etc., are to be no longer than 2,500 words in total.