[2014] IEHC 174.

THE HIGH COURT

[2012 No. 3772P]

BETWEEN

THOMAS PRINGLE

PLAINTIFF

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 4th day of April, 2014.

Decision to which this judgment relates

1. This judgment addresses the appropriate order for costs to be made in relation to the High Court proceedings in this matter. It is pertinent to explain why the decision is being given at this juncture.

2. Because of the importance of the issues raised in the proceedings, the hearing in the High Court was expedited. The hearing concluded on 29th June, 2012. The decision of the High Court was announced on 9th July, 2012 and the judgment was delivered on 17th July, 2012. In the decision as announced and in the judgment and the order of the High Court made on 17th July, 2012, with one exception, the Court refused all of the reliefs sought by the plaintiff in the proceedings. The exception was that the Court ordered that the plaintiff's claim that any purported ratification of the European Stability Mechanism (ESM) Treaty would be invalid, void and of no effect be adjourned pending the referral to the Court of Justice of the European Union (CJEU) of a preliminary reference pursuant to Article 267 of the Treaty on the

Functioning of the European Union (TFEU). Having regard to what happened subsequently, the reference by the High Court to the CJEU did not come to pass.

3. What happened was that on 19th July, 2012 the plaintiff filed a notice of appeal from the order of the High Court, which was perfected on 18th July, 2012, in the Supreme Court. Adopting the summary of what happened next in the defendants' written submissions, following an initial case management hearing before the Supreme Court on 20th July, 2012, the Supreme Court decided to expedite the hearing of certain issues raised by the appeal, namely:

(a) whether the ESM Treaty was incompatible with the Constitution;

(b) whether it was necessary for the Supreme Court to make a preliminary reference to the CJEU regarding the validity of European Council Decision 2011/199/EU and whether Ireland by entering into the ratification by the State of the ESM Treaty would undertake obligations incompatible with EU law; and

(c) whether the Supreme Court should reverse the decision of the High Court and grant the plaintiff an interlocutory injunction pending the determination of the appeal.

The Supreme Court heard submissions on those issues on 24th and 26th July, 2012. On 31st July, 2012 the Supreme Court gave its rulings on each of the three issues on the basis that the reasons for its ruling would be given in judgments delivered later. On the first issue, the Supreme Court found that the ESM Treaty did not involve a transfer of sovereignty so as it make its ratification incompatible with the Constitution. On the second issue, the Supreme Court found that it was necessary to refer three questions of EU law to the CJEU. On the third issue, the Supreme Court

ruled that the appeal by the plaintiff of the refusal of the High Court to grant an interlocutory injunction should be refused.

4. As appears from the order of the President of the Court dated 4th October, 2012, the reference from the Supreme Court was received at the CJEU on 3rd August, 2012. By the order of 4th October, 2012, the request of the Supreme Court that the accelerated procedure provided for in the Statute of the CJEU and in the Rules of Procedure of the Court was granted. Having in the order (at para. 4) recited the jurisdiction of the President to apply an accelerated procedure "where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency", the order stated:

> "5. In support of its request, the referring Court observes that the timely ratification by Ireland of the [ESM] Treaty is of the utmost importance for other members of the European Stability Mechanism and, in particular, for those who are in need of financial assistance.
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> 6. While, in the interim, Ireland and all other Member States which are signatories of the [ESM] Treaty have ratified that treaty, it is nonetheless apparent from the questions referred to the Court in this case that there is uncertainty as to the validity of that treaty.
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> 7. The use of the accelerated procedure in this case is necessary in order to remove as soon as possible that uncertainty, which adversely affects the objective of the [ESM] Treaty, namely to maintain the financial stability of the euro area.
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> 8. Accordingly, in the light of the exceptional circumstances of the financial crisis surrounding the conclusion of the [ESM] Treaty, the request of

the referring Court that the accelerated procedure be applied to Case C – 370/12 should be granted."

5. In the event, the opinion of Advocate General Kokott on Case C – 370/12 was delivered on 26th October, 2012 and the judgment of the Court (Full Court) was delivered on 27th November, 2012. In very general terms, the Court ruled:

(a) that the examination of the first question referred had disclosed nothing capable of affecting the validity of the European Council decision 2011/199/EU amending Article 136 of TFEU with regard to a stability mechanism for Member States whose currency is the euro:

(b) that various articles of the Treaty on European Union (TEU) and TFEU cited, and the general principle of effective judicial protection, does not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the ESM Treaty or its ratification by the participating Member States; and

(c) that the right of a Member State to conclude and ratify the ESM Treaty was not subject to the entry into force of Decision 2011/199.

6. The answer to the third question addressed the concerns raised in the decision and judgment of the High Court in respect of which the High Court indicated a willingness to refer a question to the CJEU for a preliminary ruling.

7. It is disclosed in the written submissions filed on behalf of the defendants that the appeal was listed for further hearing before the Supreme Court on 11th June, 2013. On that occasion the Supreme Court was informed that the plaintiff regarded that the judgment of the CJEU on foot of the reference disposed of all EU law issues on the appeal, and that the plaintiff no longer wished to pursue his appeal regarding the outstanding constitutional law issues raised which had not been determined by the

Supreme Court on 31st July, 2012 and in the judgments of the Supreme Court subsequently delivered on 19th October, 2012. The Supreme Court then dismissed the substance of the appeal but adjourned generally the issues of costs, so as to permit either side to re-enter it for the purpose of applying for costs.

8. On 21st June, 2013 the High Court acceded to the plaintiff's request to re-enter the High Court proceedings for the purposes of hearing an application for costs from the plaintiff. That application was heard by the Court on 19th July, 2013, when the Court had the benefit of written submissions on behalf of both sides and heard oral submissions. This judgment, the delay in delivery of which I regret, is based on those submissions.

Respective positions of the parties

9. Notwithstanding that the plaintiff was effectively unsuccessful on all of the claims in the proceedings before the High Court, the plaintiff has requested that the Court, having regard to the specific circumstances of the case and the relevant legal principles, should exercise its discretion and award costs in favour of the plaintiff against the defendants.

10. The position of the defendants was that the unsuccessful plaintiff has made no case such as would warrant the Court to make such an exceptional order for costs against them and, in any event, no such case could be made out. The defendants advanced an alternative proposition, which was advanced strictly in the alternative and without prejudice to their principal submission which I have just outlined, namely, that the circumstances of the case are not such as would justify the Court making "a *full* order for costs" in the plaintiff's favour. At most, there should be "an apportionment of costs". Finally, and importantly, the defendants, although

successful, did not seek an order for their costs against the unsuccessful plaintiff, because they recognise the public importance of some of the issues raised by the plaintiff. Nonetheless, the defendants' position was that it would not be in the interests of justice to make an order for costs against the defendants in favour of the plaintiff.

The relevant legal principles

11. The authority which gives most guidance to this Court, and which is binding on this Court, on the manner in which this Court should determine whether the plaintiff should be awarded costs of the proceedings against the defendants is the decision of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775. In that case, the High Court had dismissed the plaintiff's claim, but subsequently had acceded to an application for costs by the unsuccessful plaintiff against the defendants. The plaintiff appealed the decision on the substantive matter to the Supreme Court and the appeal was dismissed by the Supreme Court. The defendants appealed the ruling of the High Court in relation to costs to the Supreme Court and that appeal was allowed. Delivering judgment in the Supreme Court, Murray C.J., with whom the other four Judges agreed, outlined the basic law governing the question of costs in civil proceedings as follows (at para. 17):

> "The basic law governing the question of costs in civil proceedings may be found in s. 14(2) of the Courts (Supplemental Provisions) Act 1961 which provides that the jurisdiction of the High Court 'shall be exercised so far as regards pleading, practice and procedure, generally, including liability to costs, in the manner provided by the Rules of Court.' Order 99 of the Rules of the Superior Courts 1986 provides that the costs of and incidental to every proceeding shall be in the discretion of the superior courts and in particular, at

> sub-rule 4, that costs shall follow the event unless the Court otherwise orders. Moreover, the Act of 1961 and the Rules of the Superior Courts 1986 adopt and incorporate the procedure and practice which applied in our courts for a very long time. There has been no fixed rule or principle determining the ambit of that discretion and, in particular, no overriding principle which determines that it must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case."

12. In the *Dunne* case the plaintiff had challenged the validity of a statutory provision (s. 8 of the National Monuments (Amendment) Act 2004) having regard to the provisions of the Constitution and European Union law. The defendants were the Minister for the Environment, Ireland, the Attorney General and a local authority, Dun Laoghaire-Rathdown County Council. Murray C.J. stated in his judgment (at para. 18):

> "Undoubtedly, the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of special and general public importance are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. However, insofar as the High Court may have considered that the two principles to which it referred are, in themselves, the determining factors in a category of cases which may be described as public interest litigation, I do not find that the authorities cited support such an approach."

Having considered the authorities which had been cited, Murray C.J. continued (at para. 25):

> "As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of those elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule."

13. The rationale underlying the basic law was then considered by Murray C.J. (at para. 26) where he stated:

> "The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."

To digress, in support of their contention that the overall interests of justice in the case under consideration here do not require awarding the plaintiff costs against the

defendants, counsel for the defendants referred to the code which has been recently established by legislation in respect of certain environmental cases by the Protection of the Environment (Miscellaneous Provisions) Act 2011 to provide access to justice in environmental cases covered by certain EU Directives at reasonable cost. In particular, they referred to s. 3(1) of that Act which provides, in respect of civil proceedings instituted for the purpose of enforcing the planning code and/or preventing damage to the environment, that Order 99 of the Rules of the Superior Courts shall not apply and that, subject to succeeding sub-sections, in proceedings to which the section applies, "each party (including any notice party) shall bear its own costs". I cannot see that the existence of that legislative provision has any bearing on the issue the Court has to determine here.

14. Returning to the judgment of Murray C.J. in the *Dunne* case, he elaborated on the exercise of the Court's discretion (in para. 27) as follows:

> "Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

15. In considering the facts in the *Dunne* case, in a passage on which counsel for the defendants laid particular emphasis, Murray C.J. (at para. 35) stated:

> "Accepting that the plaintiff brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter, I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. In this case nothing exceptional was raised in the issues of law which were before the court so as to warrant a departure from the general rule."
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> (Emphasis added in the defendants' written submissions).

At that stage, Murray C.J. stated that, having regard to all of the circumstances of the *Dunne* case, the ordinary rule should apply to the costs of the High Court proceedings and that the costs should follow the event. He also held that the plaintiff there should pay the costs of the defendants of the unsuccessful appeal to the Supreme Court.

16. In delivering judgment in the *Dunne* case, Murray C.J., in the context of the principle that any departure from the general rule that costs follow the event is one which must be decided by a court in the circumstances of each case, quoted from the ruling of the Supreme Court, which he had delivered, on the question of costs in *Curtin v. Dáil Éireann* [2006] IESC 27 (Unreported, Supreme Court, 6th April, 2006). In the passage quoted, it had been stated, *inter alia*,:

> "Counsel for all parties referred to previous decisions of this court and the High Court, in which a discretion was exercised to make an order concerning costs which did not follow the general rule. It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are to

> be made to the general rule. For the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions of such a question are always of limited value."

In their submissions, counsel for the plaintiff in this case, referred the Court to decisions of the Supreme Court and of the High Court which pre-dated the decision of the Supreme Court in the *Dunne* case. I am satisfied that those decisions are, indeed, of limited value and I find it unnecessary to consider them. However, I do consider that it is useful to consider the *Curtin* case in more detail.

17. In the ruling in the *Curtin* case it was stated that the appellant, Mr. Curtin, had been refused any of the reliefs which he had sought in the High Court and on appeal in the Supreme Court and that the Supreme Court had ruled against him on a number of discrete issues which had been argued on his behalf. It was made clear that the appellant could not be treated as if he had succeeded in the appeal. Accordingly, the Court went on to consider whether discretion should be exercised to make an order other than the normal order that costs follow the event. In the ruling it was stated:

> "At the core of the jurisdiction of this Court, as a constitutional court of final instance, lie issues concerning the distribution of constitutional powers of government among the three organs of State identified in Article 6 of the Constitution, the Executive, the Legislature and the Judiciary, the limits of such powers and the manner in which they may be exercised.
>
> Fundamental issues of this nature underlay and were interwoven with the several discrete issues raised by the Appellant in his appeal."

In the judgment of the Court on the substantive issue (*Curtin v Dáil Éireann* [2006] 2 I.R. 556), Murray C.J., having stated that on the appeal the Court was asked to

interpret the provisions of Article 35.4.1 of the Constitution regarding the parliamentary procedure for the removal of judges from office, stated that it was "one of the few occasion in the annals of legal history that such a proposal has been considered by a court and the first time since the foundation of the State". In the costs ruling, the task of the Supreme Court was characterised as having been "to address novel but crucial constitutional questions in an uncharted constitutional terrain". Having stated that, before the Court addressed the discrete issues arising between the parties in the *Curtin* case, it was necessary to interpret and define the meaning and ambit of Article 35 as a whole, it was stated in the ruling as follows:

> "For this purpose, the Court, as a constitutional court, had to consider questions that went, at least to some extent, beyond the specific issues raised, and determined, by way of constructive interpretation, how the final adjudication process must be addressed by the Houses of the Oireachtas when and if they come to a final decision. In addressing the broader issues the Court has provided certainty and obviated the risk of later litigation regarding them as well as providing a guide for the Oireachtas as to the procedures to be followed in the future.
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> In doing so the Court has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State, irrespective of the issues in this case. In this sense the case is exceptional and *sui generis*."

The decision of the Court in the *Curtin* case was that the appellant should be refused his application for full costs and be awarded half the costs of the proceedings in the High Court and half the costs of the appeal against the Attorney General. No other order for costs, for or against any other party, was made.

The plaintiff's submissions/discussion

18. It is the plaintiff's contention that these proceedings raised genuine, serious and substantial questions of exceptional public importance in both national and European Union law and that this is reflected in the manner in which the courts which were seised of the case dealt with it, referring in particular to the following circumstances:

(a) that both the High Court and the Supreme Court expedited the hearing of the proceedings;

(b) that the High Court considered that the proceedings raised a question requiring a preliminary ruling by the CJEU and that the Supreme Court considered on its own motion that a question on the validity of Council Decision 2011/199 be referred to the CJEU and that it considered it necessary to refer three questions to the CJEU for preliminary ruling;

(c) that the case was assigned to a Supreme Court of seven Judges;

(d) that the reference was dealt with in accordance with the accelerated procedure of the CJEU for the reasons set out in the order of the President of the Court quoted earlier; and

(e) that the CJEU considered the matters referred to be of such fundamental constitutional importance that the case was assigned to a Full Court of twenty seven Judges, which was historic and unprecedented for a preliminary reference, suggesting that the arrangement was a recognition of the uncharted character of many of the issues arising.

While this Court is concerned with the proceedings up to and including the point in time at which judgment was delivered and the order of the Court made, 17th July, 2012, it is the case that what subsequently transpired, including the foregoing circumstances, does point to the issues raised involving genuine, serious and substantial questions of national and European law at a level of exceptional importance. The order of the President, which was made on the proposal of the Judge-Rapporteur and after hearing Advocate General Kokott, recorded the concern that there was uncertainty as to validity of the ESM Treaty, not merely an necessity to use the accelerated procedure because of the factual implications of the issues, as suggested by counsel for the defendants, although of course ultimately the CJEU did not find any such uncertainty.

19. It is also the plaintiff's case that judicial consideration, at both national and European Union level, of the issues raised, served the public interest, in that it ensured that the measures at issue were scrutinised, and it provided much needed clarity on fundamental issues of a constitutional character concerning the national and European Union legal orders. That submission needs to be considered from two perspectives: the application of national law and the application of European Union law.

20. On the first, the application of national law, the plaintiff submits that clarity has been provided as to the scope and application of the decision of the Supreme Court in *Crotty v. An Taoiseach* [1987] I.R. 713 and other constitutional issues arising from the plaintiff's contention that the ESM Treaty was incompatible with the Constitution and the assertion that the European Stability Mechanism Act 2012 was repugnant having regard to the provisions of the Constitution.

21. On the second, the application of European Union law, perhaps the most precise outline of the issues which were clarified by the CJEU is to be found in the

reference by the Supreme Court to the CJEU and, in particular, the questions raised in the reference which related to:

(a) whether Council Decision 2011/199/EU was valid;

(b) whether having regard to the Articles of TEU and TFEU identified and general principles of Union law (outlined at six bullet points), a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an agreement such as the ESM Treaty; and

(c) whether the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty was subject to the entry in force of Council Decision 2011/199/EU, assuming it to be held valid.

There is absolutely no doubt but that clarity was brought to all of the issues raised by those questions by the judgment of the CJEU. It is also the case that, even though in the events which happened, the High Court did not refer any question for a preliminary ruling on those issues, the High Court proceedings were a step in that outcome.

22. On the application for costs, the Court was referred to correspondence between the plaintiff's solicitors, Noonan Linehan Carroll Coffey, and the Chief State Solicitor, on behalf of the defendants. The plenary summons having issued on 13th April, 2012, the plaintiff's solicitors wrote to the Chief State Solicitor on 2nd May, 2012 suggesting, *inter alia*, that the Irish courts would wish to refer certain questions on the matters raised in the proceedings to the CJEU prior to making a decision on the plaintiff's case, accepting, however, that it would be for the Irish courts to decide whether to make such a reference and to decide the contents of the questions to be

submitted to the CJEU, having heard the views and suggestions of the parties. In that letter, the plaintiff's solicitors set out their suggestions as to certain questions which they thought arose and which they considered the Irish courts might refer to the CJEU, stressing, however, that the questions were at that stage tentative and no way intended to be definitive, final or exhaustive. The prospect of the invocation of the accelerated procedure being utilised on a preliminary reference was also adverted to. One of the matters which the plaintiff's solicitors asked the Chief State Solicitor to address in that letter was whether the defendants would agree that the Irish courts should refer certain issues to the CJEU by way of reference and suggesting "without prejudice" discussions between counsel on each side with a view to identifying the relevant questions and generally expediting the hearing of the case. The response of the Chief State Solicitor was dated 8th May, 2012. I do not regard that response as an outright rejection of the plaintiff's proposal, as submitted on behalf of the plaintiff. The Chief State Solicitor did agree to the two legal teams liaising in relation to identifying issues which might be referred to the CJEU, but that was without prejudice to the entitlement of the defendants to raise a question as to the admissibility of any preliminary reference. In any event, the High Court action proceeded and was at hearing for seven days, and, in due course, the reference was made by the Supreme Court, following an appeal from the decision of the High Court, which was found to be admissible and was determined by the CJEU. The extent to which the proceedings in this jurisdiction could have been truncated if the defendants had adopted a different approach on the reference issue is speculative, but it is probable that they could have been truncated to a certain extent.

23. It is the plaintiff's position that the Court should conclude that the proceedings constitute a case of special and general public importance within the meaning of the

decision in the *Dunne* case. Further, the Court should conclude that the plaintiff, who is a member of Dáil Éireann, initiated and pursued the proceedings as a result of his concern for the interests of the State and of the public good, rather than for any personal gain.

Submissions of the defendants/discussion

24. In outlining the relevant legal principles, some of the submissions made on behalf of the defendants have already been outlined and, in some cases, commented on.

25. It is the defendants' position that, adopting the terminology used in the ruling in the *Curtin* case, there was no "uncharted constitutional terrain" raised by the plaintiff's case. The defendants point out that, having regard to the detailed judgments of the Supreme Court in the *Crotty* case, the constitutionality of the ratification of the ESM Treaty did not involve "uncharted constitutional terrain", as was reflected in the extensive guidance which this Court was able to draw from the *Crotty* judgment, leading to the determination that the ESM Treaty is not incompatible with the Constitution.

26. In replying to that submission, counsel for the plaintiff referred to what had been described as the third limb of the plaintiff's constitutional argument and addressed in paragraph 137 of the judgment of the High Court. That limb was premised on the ESM Treaty being in fundamental contradiction to the Union Treaties and, in particular, to the provisions on economic and monetary union introduced in the Maastricht Treaty, which had been put to, and approved by, the People in a referendum. The plaintiff's argument had been that any fundamental alteration of the substance of the matters on which the People had voted in that referendum, required a

further referendum, Article 29.4.4 of the Constitution being invoked by the plaintiff. Having come to the conclusion earlier in the judgment that the ESM Treaty was not incompatible with the various provisions of the TEU and the TFEU, it was observed (at para. 139) of the judgment that "that debate is for another case and another day", which was not strictly speaking correct. The debate remained in the case and was ultimately resolved by the judgment of the CJEU. The position of counsel for the plaintiff in reply was that this argument was central to the plaintiff's case on the challenge to the constitutionality of the ESM Treaty and was ultimately going to have to be determined by the CJEU.

27. As regards the issues of EU law raised by the plaintiff, while acknowledging that they were clearly important, the defendants' position is that they could not be classified as "uncharted" simply because the CJEU had not, prior to the judgment on the reference from the Supreme Court, previously considered several of the provisions of Title VIII, TFEU, upon which the plaintiff relied, because the provisions in question had been in the E.C. Treaty, and subsequently the TFEU, since the Treaty of Maastrict came into effect in November 1993. Further, the defendants rely on the fact that this Court had rejected the plaintiff's contention of incompatibility, referring to various paragraphs of the judgment of the High Court, and also to the fact that the CJEU ultimately agreed "in very substantial measure" with the interpretation of those provisions by this Court. The defendants further rely on the fact that this Court was able to find that Council Decision 2011/199/EU was valid in accordance with European Union law referring to paragraph 163 of the judgment of the High Court.

28. While the defendants accept that the plaintiff acted properly in the initiation and conduct of the proceedings, which it was stated was a factor in the defendants' decision not to seek costs against him, the defendants' position is that that does not

justify an order that would require the defendants to bear his costs given that he was unsuccessful at each level in the process. Further, the Court was informed that, while the defendants do not doubt the *bona fides* of the concerns that underlay the plaintiff's decision to initiate the proceedings, they do not accept that the plaintiff had a wholly altruistic objective in so doing, submitting that the plaintiff had "a private political interest in the proceedings as a Dáil Deputy politically opposed to the State's ratification of the ESM Treaty and its approval of Council Directive 2011/199". In their written submissions the defendants go to some length to demonstrate why they do not accept that the plaintiff "had no personal political interest in obtaining confirmation from the Court that a referendum was required before the State could ratify the ESM Treaty". I do not consider it necessary to outline how it is suggested that the plaintiff "could have aspired to a potentially greater role as a national parliamentarian", if the CJEU had upheld his challenge to the validity of Council Decision 2011/199/EU, because I think it is inconceivable that the plaintiff would have contemplated the consequence of such an outcome as is suggested by the defendants. Looking at the matter objectively, I am satisfied that the plaintiff's proceedings raised public law issues which are of general importance, in circumstances where the plaintiff has no private interest in the outcome of the proceedings and, in reality, could gain no private personal advantage if his challenge succeeded.

29. The defendants emphasise that on an application such as the application being considered, where an unsuccessful plaintiff seeks costs, an important factor for the Court is to consider whether the plaintiff has been successful in relation to any of the issues raised in the proceedings before the Court. The defendants emphasise, which is the case, that the plaintiff was unsuccessful in regard to each and every one of the

claims made before the High Court, including the claim for interlocutory relief, and was unsuccessful regarding each claim which was pursued in the Supreme Court on appeal.

Conclusion

30. Having regard to the position adopted by the defendants, the Court has to consider two issues. The first is whether the plaintiff, notwithstanding that he was unsuccessful on all of the issues raised in the High Court except the issue which the Court indicated a willingness to refer to the CJEU for a preliminary ruling, should be awarded the costs of the proceedings against the successful defendants. The second issue is whether, if the answer to the first is in the negative, the plaintiff should be awarded part of the costs, which is what I understand the defendants to mean by the phrase "an apportionment of costs". On both of those issues the Court has to determine whether it can conclude that the particular circumstances of the case warrant a departure from the normal rule that costs follow the event. In my view, the particular circumstances are such.

31. The proceedings were entirely concerned with legal issues. As I noted in the judgment of the High Court (at para. 29), the only evidence adduced at the hearing was the evidence of the plaintiff. Such factual basis as there was to the proceedings turned on how the ESM Treaty came into being and how it was to be operated and all of that information was derived from consideration of legal instruments. The legal issues were unquestionably of special and general public importance.

32. As regards the legal issues the determination of which turned on the application of European Union law, those issues were referred by the Supreme Court to the CJEU for a preliminary ruling. Those issues were ultimately determined by the

CJEU (Full Court) on foot of an order of the President of the Court that the accelerated procedure be applied, because it was necessary in order to remove as soon as possible the uncertainty as to the validity of the ESM Treaty. The CJEU rejected claims by the defendants that the first two questions referred for preliminary ruling were inadmissible. The CJEU determined all of the questions. It cannot be gainsaid that all of the questions determined were, as counsel for the plaintiff submitted, not merely of exceptional public importance for Ireland, but also for the European Union as a whole. It would be absurd if this Court were to find otherwise.

33. As regards the issues raised by the plaintiff which involved the application of national law, even if those issues cannot be characterised as "novel" or as traversing "uncharted constitutional terrain" in the manner in which the issues in the *Curtin* case were so characterised, nonetheless, because of the context in which they arose, that is to say, in the implementation of unprecedented measures affecting the European Union as a whole, for example, the amendment of Article 136 TFEU and the entry of the euro zone Member States into the ESM Treaty, the application of legal principles derived from the *Crotty* case and subsequent jurisprudence, was, in my view, more complex than had been encountered by the national courts previously. The complexity was compounded by the fact that the bases of the constitutional challenge by the plaintiff were wholly intertwined with his challenge under European Union law. Given that backdrop to the constitutional challenge, the clarity and certainty which the ultimate outcome of the proceedings has embedded in Irish law must mean that that aspect of the proceedings is of exceptional importance in the Irish legal order.

34. I have no doubt that it is appropriate for the Court in this case to depart from the basic rule that costs follow the event and to exercise its discretion in favour of the

plaintiff. What is more difficult to determine is whether the plaintiff should get full costs or merely a portion of his costs. In the defendants' written submissions, the reality of the imposition of all or some of the costs on the defendants is highlighted. In the context of the defendants' offer not to seek its costs and the plaintiff's dissatisfaction with that offer, it is stated that, accordingly, it is the plaintiff's belief that "the taxpayers" should "also bear his costs" and submit that the circumstances are insufficiently exceptional to justify that situation. As I have already stated, I consider that the circumstances are sufficiently exceptional to justify the Court departing from the basic rule, so that the State bears the burden of all or some of the plaintiff's costs of the proceedings in the High Court. On the question of whether it should be all or some of the costs, having regard to the combination of the following factors:

(a) the unquestionable importance of the legal issues raised in relation to the application of EU law;

(b) the complexity of the legal issues raised in the constitutional challenge because of the context in which they require to be resolved;

(c) the significance of the ultimate resolution of the legal issues both in European Union law and in national law; and

(d) the fact that, unlike the position of the plaintiff in the *Curtin* case, I have found that the plaintiff had no private interest in the outcome of the case;

I have come to the conclusion that the proper exercise of the Court's discretion is to award full costs to the plaintiff against the defendants.

35. While this factor has not influenced the foregoing decision, I consider it appropriate to record that in the High Court the legal teams, solicitors and counsel, on

both sides conducted the proceedings in an exceptionally efficient manner having regard to the urgency of the matter.

Order

36. There will be an order that the defendants pay the plaintiff's costs of the proceedings, including any reserved costs, the costs to be taxed in default of agreement.

Approved.
Mary Lo J
4th April 2014.

No Redaction Needed