APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/42

Binchy J **Neutral Citation Number [2023] IECA 236**

Allen J.

Burns J.

BETWEEN

DENIS RIORDAN

APPELLANT

AND

THE IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 6th day of October, 2023

Introduction

1. This is an appeal by Mr. Denis Riordan against the judgment of the High Court (Heslin J.) delivered on 3rd August, 2022 [2022] IEHC 488 and consequent order made on 25th November, 2022 dismissing his application by way of judicial review for a declaration that there was no fee payable in respect of an appeal to the Irish Financial Services Appeals

Tribunal *("the Appeals Tribunal")* pursuant to s. 31 of the Anglo Irish Bank Corporation Act, 2009 against a determination by the Assessor pursuant to the provisions of that Act.

2. Mr. Riordan – who, as he had in the High Court, acted *pro se* – accepts that the determination of the Assessor is a *"decision;"* and that the decision is one against which an appeal lies to the Appeals Tribunal; and that the determination is an appealable decision in the plain and ordinary meaning of the words. However, he argues that the appealable decision is not an *"appealable decision"* for the purposes of the relevant legislation and the rules of the Appeals Tribunal.

3. The notice of appeal separately references the judge's later written ruling on the allocation of the costs of the High Court proceedings but there is no separate or alternative challenge to that decision. Rather, Mr. Riordan's argument as far as the costs are concerned, is that he should not have been ordered to pay the costs because he should have won his case.

Background

4. The relevant facts are agreed.

5. Mr. Riordan was until 21st January, 2009 a shareholder in Anglo Irish Bank Corporation plc. On 21st January, 2009, on the commencement of the Anglo Irish Bank Corporation Act, 2009, all of the shares – including Mr. Riordan's shares – in the company then known as Anglo Irish Bank Corporation Limited and before that as Anglo Irish Bank Corporation plc and referred to in the Act as Anglo Irish Bank were transferred to the Minister for Finance *("the Minister")*.

6. Section 22 of the Act of 2009 provided for the appointment by the Minister of an Assessor to determine the fair and reasonable aggregate value of the transferred shares and the consequent amount of compensation, if any, payable to persons in respect of those shares. Section 25 sets out the basis on which the determination should be carried out. The object of

the determination of the fair and reasonable aggregate value of the transferred shares was to enable the calculation and payment of fair and reasonable compensation for the acquisition by the Minister of those shares and the Assessor was required to compile a list of the persons entitled to compensation in relation to the transferred shares.

7. On 16th November, 2018 Mr. David Tynan was appointed as the Assessor. The Assessor determined that there was no compensation payable to the shareholders and on 23rd April, 2020 duly reported his determination to the Minister. The Assessor's report was published on 29th April, 2020 and Mr. Riordan was formally notified by the Assessor on 1st May, 2020.

8. Section 31 of the Act of 2009 provides for an appeal against a determination of the Assessor to the Appeals Tribunal.

9. On 27th May, 2020 Mr. Riordan filed a notice of appeal to the Appeals Tribunal against the determination of the Assessor. The notice of appeal was in the form prescribed by the Irish Financial Services Appeals Tribunal Rules, 2008 (S.I. No. 224 of 2008) *("the Rules")*.

10. Separately, on the same day, Mr. Riordan filed a form of notice of application – in the form prescribed by the Rules – asking for a waiver of the appeal fee. Mr. Riordan requested a waiver on the ground that he was *"... a 73 year old retiree and would suffer an injustice if [his] appeal was not heard due to being unable to pay the extremely large Appeal fee."* The form made provision for the applicant to set out *"Reasons supporting the application"* and to identify and list *"Documents attached"* but these sections of the form were left blank.

11. Over the following three weeks or so there was an exchange of correspondence between the Registrar of the Appeals Tribunal and Mr. Riordan in relation to both the notice of appeal and the waiver application, in which the Registrar sought to confirm Mr. Riordan's

standing to appeal and the grounds of his waiver application. It is not necessary or useful to go into the detail. The upshot of it was that in a letter of 15th June, 2020 Mr. Riordan withdrew his application for a waiver of the appeal fee on the grounds that the Rules – made in 2008 – did not apply to his appeal under the Act of 2009 and that no fee was payable in respect of his appeal.

12. In his letter of 15th June, 2020 to the Appeals Tribunal Mr. Riordan argued, variously, that the appeal fee of €5,000 was exorbitant, lacked proportionality, was objectively unreasonable, unconscionable and prohibitively expensive; that it was about 12 times the average industrial wage; that it was forty times the appeal fee payable for an appeal from the High Court to the Supreme Court; that the provision made in the Rules for a waiver of the fee required an applicant to undergo the humiliating and degrading process of a means test; and that he would have no objection to paying a reasonable appeal fee. However, he did not later challenge the validity of the Rules. Rather, the substance of his argument was that the Rules did not apply to his appeal and that as a matter of law he was not required to pay a fee for an appeal pursuant to the Act of 2009. I will come back to the arguments then and later offered by Mr. Riordan as to why he contended that that was so.

13. A further exchange of correspondence failed to advance matters and on 24th June, 2020 the Appeals Tribunal advised Mr. Riordan that his appeal had been struck out in accordance with the provisions of rule 5(2) of the Rules by reason on the non-payment of the prescribed fee.

The High Court proceedings

14. On 21st September, 2020 Mr. Riordan applied to the High Court (Meenan J.) for:-

> *"1. A declaration that at the time of lodging my appeal, in accordance with section 31 of the Anglo Irish Bank Corporation Act 2009, against the*

Assessor's determinations there was no appeal fee payable, as no legislation had been enacted to provide for the payment of an appeal fee.

2. *A declaration that the Irish Financial Services Appeals Tribunal acted ultra vires its powers by demanding the payment of an appeal fee of €5,000 that was not applicable to an appeal brought under section 31 of the Anglo Irish Bank Corporation Act 2009.*

3. *A declaration that the Irish Financial Services Appeals Tribunal violated my constitutional right to fair procedures by failing to give detailed reasons as to why my supplemental submissions on the requirement to pay the demanded appeal fee were mistaken and unfounded.*

4. *An order of certiorari quashing the decision of the Irish Financial Services Appeals Tribunal to strike out my appeal against the Assessor's determinations, Appeal No. 027/2020 DENIS RIORDAN -V- DAVID TYNAN.*

5. *An order of mandamus requiring the Irish Financial Services Appeals Tribunal to reinstate my appeal against the Assessor's determinations, Appeal No. 027/2020 DENIS RIORDAN -V- DAVID TYNAN, for a full hearing."*

15. On 21st September, 2020 the High Court (Meenan J.) directed that Mr. Riordan's leave application should be heard on notice and on 28th June, 2021 the High Court (Hyland J.) granted leave.

16. Mr. Riordan's judicial review application was heard by the High Court (Heslin J.) on 10th March, 2022 and judgment was reserved.

17. I will come back to the detail of the arguments but broadly speaking, Mr. Riordan's argument was that the Rules – specifically the requirement in the Rules for the payment of

the appeal fee – did not apply to his appeal pursuant to s. 31 of the Act of 2009. The Rules, and the fee, he argued, applied only to appeals to the Appeals Board pursuant to Part VIIA of the Central Bank Act, 1942, as amended, which – he argued – his appeal was not. It was accepted on behalf of the Appeals Board that Mr. Riordan's appeal was not an appeal pursuant to Part VIIA of the Act of 1942 but it was submitted that it was clear from the provisions of the Act of 2009 that the procedures provided for in the Act of 1942 and the Rules made pursuant to the provisions of that Act – including the requirement for payment of an appeal fee – applied to any appeal pursuant to s. 31 of the Act of 2009.

18. On 3rd August, 2022 the High Court (Heslin J.) delivered a comprehensive written judgment [2022] IEHC 488 rejecting all of Mr. Riordan's arguments. The arguments in the High Court were broadly the same as those advanced on the appeal and it is convenient to deal with the High Court judge's analysis and conclusions of the elements of the arguments below as they were advanced on the appeal.

The relevant statutory provisions

19. The Central Bank Act, 1942 as enacted comprised 68 sections and ran to something in the order of 50 pages. It has since been extensively amended and extended by 57 Acts and something like 160 statutory instruments. It would be enormously difficult to follow without the administrative consolidation prepared by the Law Reform Commission but is readily navigable with the benefit of the Revised Act: which with all of the notations runs to 276 pages.

20. Mr. Riordan's appeal to the Appeals Tribunal was an appeal pursuant to s. 31 of the Anglo Irish Bank Corporation Act, 2009 so that is the logical starting point. Section 31(1) of the Act of 2009 provides that:-

"31. – (1) An appeal lies to the Irish Financial Services Appeals Tribunal (in this section called 'the Tribunal') against –

(a) the Assessor's determination under section 25 [of the fair and reasonable aggregate value of the transferred shares of each class],

(b) the Assessor's rejection of a person's claim for compensation, or

(c) the Assessor's determination of the sum that a person is entitled to as compensation."

21. Section 31(8) of the Act of 2009 provided that:-

"(8) The provisions (except subsections (1) and (4) of section 57L) of Chapter 3 of Part VIIA (inserted by the Central Bank and Financial Services Authority of Ireland Act 2003) of the Central Bank Act 1942 apply to an appeal under this section, except that references in that Chapter to the Regulatory Authority are to be read as references to the Assessor."

22. Mr. Riordan's arguments as to the correct construction of s. 31(8) of the Act of 2009 are largely based on a deconstruction of Part VIIA of the Act of 1942. To address those arguments it is necessary to look to some extent at the evolution of Part VIIA.

23. The Irish Financial Services Appeals Tribunal was established on 1st August, 2004 by Part VIIA of the Central Bank Act, 1942, which was inserted by the Central Bank and Financial Services Authority of Ireland Act, 2003. Then, as now, Part VIIA was divided into five chapters: Chapter 1, *"Preliminary"*; Chapter 2,*"Constitution and jurisdiction of appeals tribunal"*; Chapter 3, *"Hearing and determination of appeals"*; Chapter 4, *"References and appeals to High Court"*; and Chapter 5, *"Miscellaneous".*

24. By s. 57B – in Chapter 1 – the declared objects of Part VIIA are to establish the Appeals Tribunal as an independent tribunal to hear appeals under that Part and to exercise

such other jurisdiction as is conferred by that Part or by any other enactment or law; to ensure that the Appeals Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair; and to enable proceedings before the Appeals Tribunal to be determined in an informal and expeditious manner.

25. At the time of its establishment, the focus of the jurisdiction of the Appeals Tribunal was on *"appealable decision,"* then defined in s. 57A as *"a decision of the Regulatory Authority made under a designated enactment or designated statutory instrument that has the effect of imposing a sanction or liability of a kind specified in an order made under subsection (2)."* Section 57A(2) then provided that:-

> *"(2) The Government may, by order notified in Iris Oifigúil, specify a sanction or other liability for the purposes of 'appealable decision' in subsection (1)."*

26. It was plainly not intended that an appeal would lie to the Appeals Tribunal against every decision of the Regulatory Authority and the identification of *"appealable decisions"* – coupled with the concept of an *"affected person"* – was a device to identify those decisions of the Regulatory Authority against which an appeal would lie. In the following years the jurisdiction of the Appeals Tribunal was greatly extended and the definition of *"appealable decision"* modified to accommodate to accommodate that extension.

27. Section 57A – in Chapter 1 – in its present form lists a number of definitions, including:-

> *"'affected person' means a person whose interests are directly or indirectly affected by an appealable decision;*
>
> *'appeal' means an appeal under this Part;*

'appealable decision' means a decision of the Bank that is declared by a provision of this Act, or of a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part;

'appellant' means a person who has lodged an appeal;

'the rules' means rules of the Appeals Tribunal made and in force under section 57AI."

28. The present definition of *"appealable decision"* was substituted by s. 11(a) of the Central Bank and Financial Services Authority of Ireland Act 2004, which also deleted what had been section 57A(2) and was later modified by s. 14 of the Central Bank Reform Act, 2010 by the substitution of *"Bank"* for *"Regulatory Authority"*.

29. To understand what a *"designated enactment"* is, it is necessary to go back to s. 2 of the Act of 1942. The present definition, in s. 2(1) as substituted with effect from 1st August, 2013 by the Central Bank (Supervision and Enforcement) Act, 2013, is that:-

"'designated enactments' [plural] means, subject to subsection (2A), the enactments specified in Part 1 of Schedule 2 and the statutory instruments made under any of those enactments;"

30. The original definition, inserted by the Act of 2003, was not materially different. It was that:-

"'designated enactments' means the enactments specified in Part 1 of Schedule 2;"

31. The Central Bank Act 1942, Revised, prepared by the Law Reform Commission, updated to 3 February 2022, shows that Part 1 of Schedule 2 is a table of 53 Acts, starting with the Assurance Companies Act, 1909 and ending with the Counterfeiting Act, 2021. Item 35 is the Anglo Irish Bank Corporation Act, 2009, which was inserted by s. 38(3) of the Act of 2009. Accordingly, the Anglo Irish Bank Corporation Act, 2009 is a *"designated enactment"*.

32. Section 2, sub-s. (2A) of the Act of 1942, as amended, is a list of EU Regulations which are to be taken to be designated enactments. It is not immediately obvious to me why these were not simply listed in a separate schedule, but it may be another throwback to the original drafting of Part VIIA.

33. It is useful at this stage to look at those provisions of Part VIIA of the Act of 1942 which do not apply to an appeal under s. 31 of the Act of 2009. They are:-

> *"57L. –(1) An affected person may appeal to the Appeals Tribunal in accordance with this section against an appealable decision of the Bank. …*
>
> *(4) The Bank is the respondent to every appeal."*

34. The provisions of s. 57L which do apply to an appeal pursuant to s. 31 of the Act of 2009 – and, as required by s. 31(8) of the Act of 2009, reading the references to the Regulatory Authority as references to the Assessor – are:-

> *"(2) An appeal must –*
>
> *(a) be in writing and state the grounds of appeal, and*
>
> *(b) be lodged with the Registrar within 28 days after the [Assessor] notified the affected person of the decision concerned, or within such extended period as the Registrar may allow, after consulting the Chairperson, and*
>
> *(c) be accompanied by the fee (if any) prescribed by the rules.*
>
> *(3) As soon as practicable after an appeal is lodged with the Registrar, the Registrar is required to give a copy of the appeal to the [Assessor]."*

35. Finally, Part VIIA of the Act of 1942 was amended by s. 14(2)(a) of the Central Bank Reform Act, 2010 with effect from 1st October, 2010 by the deletion of *"Regulatory Authority"* and the substitution of *"Bank"* in each place where it occurred.

The High Court judgment

36. It seems to me that the essence of the comprehensive judgment of the High Court is at paras. 56 to 59, where the judge said that:-

> *"56. In short, the definition of 'appealable decision' includes a decision which is said by a designated enactment to be appealable. The 2009 Act is, without doubt, a designated enactment and s. 31(1) of the 2009 Act states that 'an appeal lies to' [the Appeals] Tribunal against the Assessor's determination under section 25 of the 2009 Act.*
>
> *57. Moreover, s. 31(8) of the 2009 Act makes clear that the provisions (except subsections (1) and (4) of section 57L) of Chapter 3 of Part VIIA apply to such an appeal (except that references in Chapter 3 to the Regulatory Authority are to be read as references to the Assessor).*
>
> *58. A central element of the applicant's case is that the determination of the Assessor in respect of which an appeal lies to the Tribunal is not an 'appealable decision'. I am entirely satisfied, however, that on a literal interpretation of the relevant legislation, the applicant's appeal was, without doubt, an 'appealable decision' under the 2009 Act for the purpose of Part VIIA of the 1942 Act, as amended.*
>
> *59. This finding, which flows from a literal interpretation of the relevant provisions in the context in which they are used, is fatal to the case which the applicant seeks to make."*

37. The conclusion that the determination of the Assessor was an *"appealable decision"* disposed of the argument which Mr. Riordan made by reference to the Rules.

38. The judge also pointed to the reference in s. 57L(3)(c) to *"the fee (if any) prescribed by the rules"* and, at para. 86, considered an argument made by Mr. Riordan that the reference to the fee *"(if any)"* meant that *"it was open to the Tribunal to make no rules"*. Although s. 57AI is expressed in permissive terms – *"the Appeals Tribunal may make rules…"* – I am unconvinced that it would have been open to the Appeals Tribunal to have made no rules. However, the fact of the matter is that it did make rules. There was no challenge to the validity of the Rules, rather the argument was that the Rules did not apply to Mr. Riordan's appeal.

39. The High Court judgment shows, at para. 90, that one of Mr. Riordan's arguments was that since s. 31(8) of the Act of 2009 did not expressly include Chapter 1 of Part VIIA of the Act of 1942, reliance could not be placed on the definition in s. 57A – which is part of Chapter 1 – of *"the rules"*. The High Court judge, at para. 92, found that:-

> *"It would utterly frustrate the intention of the legislature were the very rules governing appeals not to apply to such appeals in circumstances where the tribunal which made those rules in accordance with the powers conferred on it, is the only statutory body to which appeals of the present type may be brought."*

The appeal to this court

40. By notice of appeal dated 28th February, 2023 Mr. Riordan appealed against the judgment and order of the High Court on 94 grounds but in his written submissions identified four elements to the case:-

1. Whether the determination of the Assessor in respect of which an appeal lies to the Appeals Tribunal is an *"appealable decision"* as defined in the Act of 1942 and the Rules so as to be subject to an appeal fee;

2. Whether the Appeals Tribunal acted *ultra vires* in demanding payment of the appeal fee; (which is the same issue)
3. Whether the Appeals Tribunal violated his constitutional right to fair procedures by failing to give sufficiently detailed reasons why the argument he made in correspondence was wrong;
4. Orders, damages and costs.

The arguments

41. The first of Mr. Riordan's propositions is that the effect of s. 31(8) of the Act of 2009 is that only the provisions of Chapter 3 of Part VIIA of the Act of 1942 are applicable to an appeal under s. 31(1) of the Act of 2009. Specifically, it is said, the definitions of *"appealable decision"* and *"rules"* – which are to be found in Chapter 1 of Part VIIA – do not apply to an appeal under the Act of 2009.

42. The obvious difficulty with this argument is that Chapter 3 is littered with references to *"appealable decision"* and s. 57L(2)(c) expressly refers to the rules. Mr. Riordan acknowledged – indeed it was the basis of his argument – that the construction for which he contended would render the provisions of Chapter 3 – specifically the rules made in exercise of the power conferred by s. 57AI, and specifically the requirement under the rules for the payment of an appeal fee – *"not implementable"* in the case of an appeal under the Act of 2009 or – by the way, since the substitution in 2010 of *"Bank"* for *"Regulatory Authority"* – at all.

43. Having first submitted – as he had in the High Court – that the effect of s. 31(8) of the Act of 2009 was to apply only the provisions of Chapter 3 of Part VIIA, Mr. Riordan almost immediately moved to the proposition that s. 31 of the Act of 2009 *"effectively applies"* the provisions of Chapter 2. He submitted that the jurisdiction of the Appeals Tribunal to hear

his appeal was to be found in s. 57G(1)(b) which provides that the Appeals Tribunal has jurisdiction to hear and determine *"(b) such other matters, or class of matters, as may be prescribed by any other Act or law."* The proposition that the jurisdiction of the Appeals Tribunal to deal with an appeal under s. 31 of the Act of 2009 was to be found in s.57G(1)(b) of the Act of 1942 was plainly inconsistent with Mr. Riordan's primary submission – which was accepted by the respondent – that the right of appeal was a right conferred by the Act of 2009 and not a right of appeal under Part VIIA. Moreover, the proposition that the provisions of Chapter 2 were effectively applied to an appeal under the Act of 2009 was utterly inconsistent with the argument that the provisions of Chapter 3 – which were applied – were to be construed without reference to the definitions in Chapter 1 of Part VIIA. Clearly if he was correct in this latter argument, it would follow that Chapter 2 of Part VIIA could have no application to such appeals either.

44. Having first submitted that the definition of *"appealable decision"* did not apply to the decision of the Assessor which he was entitled to have appealed and did appeal, Mr. Riordan then moved to the definition of *"appealable decision"* in the hope of showing that it could not apply to the Assessor's determination. I am bound to say that the argument was not altogether easy to follow and was slightly complicated by the fact that on the leave application – presumably in the forlorn hope of simplifying matters – it was accepted by the respondent that the Assessor's determination was not an *"appealable decision."* However, the concession which was made at the leave stage was unambiguously limited to that application and after leave was granted the respondent's position was that it was, after all, an *"appealable decision."*

45. As has been seen, s. 31(8) of the Act of 2009 provides that the provisions of Chapter 3 of Part VIIA, except s. 57L, sub-ss. (1) and (4) of the Act of 1942 apply to an appeal under that section. Highlighting the use of the words *"(inserted by the Central Bank and Financial*

Services Authority of Ireland Act 2003)", and the omission of any reference to the amendment made by the Financial Services Authority of Ireland Act 2004 (which, it will be recalled, supplies the current definition of an *"appealable decision"*). Mr. Riordan contends that the effect of s. 31(8) of the Act of 2009 was to apply to an appeal under that section the definition of *"appealable decision"* as originally inserted by the Act of 2003: that is, a decision that has the effect of imposing a sanction or liability specified by the Government for the purposes of *"appealable decision"*. This, in my firm view, is plainly wrong. While it is true that s. 31(8) did not add to the words in parentheses, after *"inserted by [the Act of 2003]"* the words *"as amended by the Financial Services Authority of Ireland Act 2004"* the fact is that at the commencement date of the Act of 2009 the definition of *"appealable decision"* had been amended by deleting the previous reference to sanction or liability and by repealing what had been section 57A(2). The proposition that the Oireachtas might have intended to create an illusory right of appeal or to have applied to a right of appeal created in 2009 a provision which had been repealed in 2004 is not sensible.

46. Mr. Riordan's next proposition is that the application of Part VIIA of the Act of 1942 to an appeal under s. 31(1) of the Act of 2009 was *"not implementable"* after the substitution of *"Bank"* for *"Regulatory Authority"* in 2010. Section 31(8) of the Act of 2009 requires references in Chapter 3 of Part VIIA of the Act of 1942 to Regulatory Authority to be read as references to the Assessor. However – so the argument goes – the substitution of Bank for Regulatory Authority in 2010 has the effect that s. 31(1) is no longer *"implementable"*. That, with no disrespect, is not sensible either. Contrary to Mr. Riordan's argument, there was no need for an amendment in 2010 to the Act of 2009 to provide that for the purposes of the Act of 2009, references in Part VIIA to the Bank should be read as references to the Assessor. The application to an appeal pursuant to s. 31 of the Act of 2009 of the specified provisions of Chapter 3 of Part VIIA of the Act of 1942 had already been achieved by the effective

substitution of *"Assessor"* for *"Regulatory Authority"* in the Act of 2009. The substitution in the Act of 2010 of *"Bank"* for *"Regulatory Authority"* did not substitute *"Bank"* for *"Assessor"* in the application of Part VIIA to an appeal under the Act of 2009. Mr. Riordan contends that there was no legislation to allow *"Assessor"* to be read for *"Bank"* but this presupposes that the substitution of *"Bank"* for *"Regulatory Authority"* undid the requirement in s. 31(8) that *"Assessor"* be read for *"Regulatory Authority."*

47. A recurring theme of Mr. Riordan's argument is that his appeal is not an appeal under Part VIIA of the Act of 1942. He is quite correct in that and Mr. Lewis S.C. for the respondent does not contend otherwise. The substantive right of appeal against a determination of the Assessor under the Act of 2009 is created by section 31(1). Mr. Riordan's appeal was an appeal under the Act of 2009. The effect of s. 31(8) was to apply to his appeal those provisions of Part VIIA as governed the *"Hearing and determination of appeals"* by the Appeals Tribunal. Mr. Riordan's identification of s. 57G(1)(b) of the Act of 1942 as the source of the jurisdiction of the Appeals Tribunal to hear and determine his appeal is mistaken. On the plain words of the Act of 2009, Mr. Riordan's appeal is an appeal against a decision and not *"such other matter, or class of matters, as may be prescribed by any other Act or law."* More fundamentally, the jurisdiction of the Appeals Tribunal to hear and determine the appeal derives from the Act of 2009 and not the Act of 1942.

48. Mr. Riordan argues that s. 31 of the Act of 2009 did not provide for use of the Rules. That, in my firm view, is plainly wrong. Section 31(8) expressly applies Chapter 3 of Part VIIA of the Act of 1942 to an appeal under that section. The power to make the Rules is conferred on the Appeals Tribunal by section 57AI – which is the last section in Chapter 3 of Part VIIA. This empowers the Appeals Tribunal to make rules, not inconsistent with Part VIIA, for or with respect to any matter required or permitted to be prescribed by the rules or necessary or convenient to be prescribed in relation to the practice and procedure of the

Tribunal, including, specifically – in s. 57AI(2)(g) – the fees payable in respect of lodging appeals with the Appeals Tribunal. As has been seen, s. 57L(2)(c) expressly refers to the Rules, and specifically to the fee (if any) prescribed by the Rules.

49. Mr. Riordan would make much of the fact that the Rules were not updated after the commencement of the Act of 2009 or, as he would put it, that no rules were ever made for the purposes of appeals under the Act of 2009. He argues that his appeal under s. 31 of the Act of 2009 was not brought under Part VIIA and is not an appealable decision as defined by the Act and the Rules.

50. Mr. Riordan points to rule 1(3) of the Rules, which provides that:-

> *"(3) These Rules contain the procedure which applies in any appeal to the Appeals Tribunal from an appealable decision and in any application under Part VIIA of the Central Bank Act 1942."*

And to rule 2 of the Rules, which provides that:-

> *"'appealable decision' has the same meaning as in section 57A of the Act (as inserted by section 28 of the 2003 Act and as substituted by section 11 of the 2004 Act), subject to the provisions of section 57G(1A) of the Act (inserted by section 12 of the 2004 Act);"*

And to the revised definition of appealable decision in s. 57A, which is:-

> *"'appealable decision' means a decision of the Bank that is declared by a provision of this Act, or of a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part;"*

51. Mr. Riordan repeatedly says that his appeal is not an appealable decision – I think that he must mean that the determination of the Assessor is not an appealable decision – as

defined by the Act and the Rules and accordingly that his appeal is not an appeal in respect of which a fee is payable.

52. The immediate – and to my mind insurmountable – difficulty with that proposition is that it fails to take account of the express reference in s. 57L(2)(c) to *"the fee (if any) prescribed by the rules"*. The rules referred to in s. 57L are the *"rules of the Appeals Tribunal made and in force under section 57AI."*

53. What this argument boils down to is that there is a distinction to be drawn between an *"appealable decision"* – to which the Rules apply – and a decision against which an appeal lies to the Appeals Tribunal – to which, it is said, the Rules do not apply.

54. Section 31(1) of the Act of 2009 clearly provides for an appeal to the Appeals Tribunal against the determination of the Assessor. Section 31(8) applies to such an appeal all of the provisions of Chapter 3 of Part VIIA of the Act of 1942, other than sub-ss. (1) and (4) of section 57L. Section 57L(1) confers on an affected person a right of appeal against an appealable decision by the Bank. The disapplication of this provision from an appeal under s. 31(1) of the Act of 2009 is consistent with – and indeed necessitated by – the fact that the decision under the Act of 2009 was not then a decision of the Regulatory Authority and would not now be a decision of the Bank. The disapplication of s. 57L(4) is necessitated by the fact that s. 31(2) of the Act of 2009 confers on the Minister the same right of appeal against a determination of the Assessor as a person who has or claims a right to compensation. The respondent to such an appeal is not the Regulatory Authority or the Bank but the Assessor.

55. It is evident from s. 2(1) of the Act of 1942 – and it is accepted by Mr. Riordan – that the Anglo Irish Bank Corporation Act, 2009 is a *"designated enactment"*. It is evident from s. 31(1) of the Act of 2009 – and it is accepted by Mr. Riordan – that an appeal lies to the

Appeals Tribunal from the determination of the Assessor under s. 25 of that Act of the fair and reasonable aggregate value of the shares of each class, and from the rejection of a person's individual claim, or from the Assessor's determination of the sum which a person is entitled to as compensation. Mr. Riordan accepts that the determination or rejection as the case may be is a *"decision"* of the Assessor.

56. It is the fact, as Mr. Riordan points out, that the Act of 2009 does not, in terms, *"declare"* the decision of the Assessor to be an *"appealable decision"*. The notes to Part VIIA at p. 171 of the Revised Act of 1942 list a large number of Acts and statutory instruments which provide for the making of decisions which are *"designated as"* appealable decisions for the purposes of Part VIIA. What is generally said is simply that the specified decision or direction *"is an appealable decision for the purposes of Part VIIA,"* rather than that it is *"declared to be"* an appealable decision. Mr. Riordan, by way of example, pointed to s. 33AX of the Act of 1942, which provides that a decision of the Bank at the conclusion on an enquiry into the conduct of a regulated service provider *"is an appealable decision for the purposes of Part VIIA"*; to s. 51 of the Credit Union Act, 1997 which provides that a number of identified decisions under that Act *"are appealable decisions for the purposes of Part VIIA of the Central Bank Act 1942"*; and to art. 10 of the European Union (Central Securities Depositories) Regulations 2016 which provides that a decision taken or measure imposed under those regulations *"is an appealable decision for the purposes of Part VIIA of the Act of 1942."* He submits that if the Oireachtas had intended to declare an appeal under the Act of 2009 to be an *"appealable decision"* it could easily have said so. Mr. Riordan acknowledged that although s. 31(1) did not use the word *"decision"*, the determination or rejection of a claim was nevertheless a *"decision"*. Similarly, he acknowledged that the myriad decisions designated, in terms, as *"appealable decisions"* had not been formally *"declared"* to be such. If, as he put it, Mr. Riordan *"would have preferred"* to have seen the

appealable decisions *"declared"* as such, he accepted that those decisions which were simply said to be appealable decisions are *"appealable decisions."*

57. If the words by which the right of appeal is created in s. 31(1) of the Act of 2009 are not precisely those used in the Act of 1942 or the Rules, the right of appeal is created by a designated enactment and s. 31(8) of the Act applies the specified provisions of Part VIIA, *mutatis mutandis*, to such an appeal.

58. Mr. Riordan is correct in his submission that his appeal was not brought under the jurisdiction of the Central Bank Act 1942 but it is governed by the provisions of Chapter 3 of Part VIIA, bar s. 57L, sub-sections 1 and 4. I see no sensible distinction between an appealable decision and a decision which may be appealed. I see no warrant for uncoupling the statutory definitions in Chapter 1 and, in effect, substituting what is contended to be a natural and ordinary meaning for the meaning ascribed by the Oireachtas.

59. To what the High Court judge said, I would add that Mr. Riordan's core argument that his appeal was not an *"appealable decision"* was based on the definition of *"appealable decision"* in the same s. 57A in which the definition of *"the rules"* is to be found. If, for the sake of argument, it could be contemplated that the words *"appealable decision"* might be given a natural and ordinary meaning at variance with the definition in s. 57A, this could not apply to the reference in s. 57L to *"the rules"*, which could only mean the rules as defined.

60. I am satisfied also that the judge was perfectly correct in his conclusion, starting at para. 97, that if Mr. Riordan was correct in his submission that the Rules did not apply to his appeal, this would render unworkable the architecture created by the legislation: for example, the right conferred by s. 57N on a person affected by an *"appealable decision"* to request a statement setting out the reasons for the decision and the corresponding obligation imposed on the Assessor to provide such a statement of reasons; and the power conferred on the

Appeals Tribunal by s. 57X to remit the *"appealable decision"* to the Assessor for reconsideration. As the judge pointed out, the jurisdiction of the Appeals Tribunal to deal with the appeal is premised on the appeal being from an *"appealable decision."* I cannot agree that s. 31 of the Act of 2009, in the provisions made in sub-ss. (2) to (10) for the determination of appeals under that section, provides *"sufficient architecture"* for the determination of an appeal against a decision of the Assessor. Mr. Riordan's argument that it does would deprive s. 31(8) of all meaning and effect.

61. At what appeared to be the end of his oral argument, Mr. Riordan submitted that what his appeal came down to was whether his appeal was an *"appealable decision"* but in answer to a question from the court, confirmed that he was not abandoning his appeal against the finding of the High Court that the rejection by the Appeals Tribunal of his submission to it that his appeal was not an *"appealable decision"* had not been sufficiently reasoned. I think that it is fair to say that the argument was not really pressed but since it was not abandoned, I will deal with it briefly.

62. The High Court judge correctly identified Mr. Riordan's core ground as being that, on the correct construction of the legislation and Rules, no fee was payable in respect of his appeal and his principal additional argument as being that the Appeals Tribunal failed to give reasons as to why the argument which he advanced in his correspondence was wrong.

63. The judge dealt with the reasons argument, starting at para. 111. He observed that:-

> *"The decision in respect of which the applicant claims that the respondent provided inadequate reasons was the decision not to accept his wholly mistaken view as to what the legislation means. It seems to me that as a matter of first principles it would be inimical to justice if an applicant who was utterly wrong in the interpretation of legislation which he proffered to the decision-maker and argued before this court,*

could nevertheless obtain judicial review on the grounds that the decision maker did not make sufficiently clear to him why he was utterly wrong in his interpretation."

64. Having referred to and quoted extensively from the judgment of Clarke C.J. in *Connolly v. An Bord Pleanála* [2018] IESC 31 and the Appeals Tribunal's letter of 18th June, 2020 in response to Mr. Riordan's letter of 15th June, 2020, the judge said, at para. 119:-

"On the topic of merit, it needs to be emphasised that the decision in respect of which the tribunal gave its reasons, was not a merits-based decision. In other words, and wholly unlike many of the scenarios contemplated in Connolly, the relevant decision was not one which the tribunal came to as a result of, say, considering evidence, be that oral or written, and weighing up different or competing factors, criteria, or interests to arrive at a merits-based decision. On the contrary, the question was purely one of legislative construction. The applicant asserted that the tribunal had no power to require, and that he had no obligation to pay, an appeal fee. This was a binary question. Either the applicant was right, or he was wrong. He was wrong. Nor was this case one involving, say, the decision being one which might impact on the applicant's rights or where the decision-maker had been conferred with a margin of discretion in the context of making a value judgment or merits-based decision. It was, instead, the much narrower question of whether the applicant was obliged to pay the fee which every other would-be appellant was required to pay (subject to the waiver or reduction of same)."

65. While Mr. Riordan, in his notice of appeal, asserted that that the judge had erred in law and in fact in his finding that the reasons given by the Appeals Tribunal were more than sufficient, he did not engage with the judge's reasoning, or the authority on which it was based. His substantive argument was that the appeal available to him under s. 31 of the Act

of 2009 had not been *"declared"* to be an *"appealable decision"* and the foundation of his argument that the rejection of the argument he made in his correspondence was that the Appeals Tribunal had not pointed to where it had been *"declared"* that the decision of the Assessor was an *"appealable decision."* Thus, in Mr. Riordan's mind, the only sufficient reason for the rejection of his argument would have been for the Appeals Tribunal to have identified something which was not there.

66. I am satisfied that – as Mr. Lewis put it – the judge's reasoning is unassailable.

Conclusion

67. Mr. Riordan's appeal pursuant to s. 31(1) of the Anglo Irish Bank Corporation Act, 2009 against the determination of the Assessor was an appealable decision for the purposes of Part VIIA of the Central Bank Act, 1942, as amended.

68. The Irish Financial Services Tribunal Rules, 2008 applied to Mr. Riordan's appeal. The Appeals Tribunal was entitled to require Mr. Riordan to pay the appeal fee of €5,000 prescribed by the Rules and Mr. Riordan was obliged to pay that fee.

69. The reasons given by the Appeals Tribunal for rejecting Mr. Riordan's argument as to why the appeal fee was payable were perfectly adequate.

70. Mr. Riordan having failed to pay the appeal fee and having abandoned his application for a waiver, the Registrar of the Appeals Tribunal was entitled to strike out the appeal.

71. I would dismiss this appeal.

72. The Appeals Tribunal has been entirely successful on the appeal and I can think of no reason why it should not be entitled to its costs of the appeal but if Mr. Riordan wishes to contend otherwise, I would give him leave to file and serve a short written submission – not exceeding 1,000 words –within fourteen days of the delivery of this judgment, in the event of

which I would allow the Appeals Tribunal fourteen days to file and serve a response, similarly so limited.

73. As this judgment is being delivered electronically, Binchy and Burns JJ. have authorised me to say that they agree with it.