[2020] IECA 152

APPROVED
NO REDACTION REQUIRED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 152
Court of Appeal Record Nos. 2018/177
2018/365
High Court Record Nos. 2018/72 (COS)
2018/33 (COM)

Baker J
Costello J
Collins J

IN THE MATTER OF PERMANENT TSB GROUP HOLDINGS PLC
AND
IN THE MATTER OF A PROPOSED CAPITAL REDUCTION PURSUANT TO SECTION 84 AND SECTION 85 OF THE COMPANIES ACT 2014 (AS AMENDED)
AND
IN THE MATTER OF THE COMPANIES ACT 2014 (AS AMENDED)

BETWEEN

PERMANENT TSB GROUP HOLDINGS PLC

APPLICANT/RESPONDENT

AND

PIOTR SKOCZYLAS

RESPONDENT/APPELLANT

JUDGMENT of the Court delivered on 10 June 2020

Procedural History

1. On 21 January 2020, this Court determined two linked appeals [2020 IECA 1]. For the reasons set out in the judgment of Collins J, with which the other members of the Court agreed, the Court refused Mr. Skoczylas' appeal against the refusal of the trial judge to recuse himself from hearing the application to confirm a reduction of share capital in Permanent TSB Group Holdings plc ("*the Company*") pursuant to sections 84 and 85 of the Companies Act 2014 and it also refused his appeal against the Order of the High Court confirming the reduction in the share capital in the Company.

2. On 27 February 2020 the Court heard submissions from the parties regarding the costs of the two appeals and of two appeals in respect of the orders for costs made in the High Court. The Court awarded the Company 75% of the costs of the appeals (*"the Cost Order"*). As the Court explained in its ruling (given by Baker J), the terms of the Costs Order reflected the fact that the Company had been substantially successful but also reflected the fact that Mr Skoczylas had succeeded on the issue of the costs of the recusal application he had made in the High Court.

3. After the Court had risen, it was informed that, having considered the Court's ruling on costs, Mr Skoczylas had decided to apply to the Supreme Court for leave to appeal this Court's decision on the appeals and wished to apply for a stay on the Costs Order until his application for leave was considered by the Supreme Court, and, in the event that the Supreme Court granted leave to appeal, a stay pending the determination of his appeal.

4. The Court reconvened later on 27 February 2020 to allow Mr Skoczylas to make his application for such a stay and, having heard the parties, granted a stay on any execution of the Costs Order on the terms sought.

5. It should be observed that the only stay sought by Mr Skoczylas on 27 February 2020 was a stay pending his application for leave to appeal to the Supreme Court and that application was determined by the Court on that date. So far as the Court was concerned, that brought Mr Skoczylas' appeals to a conclusion.

6. However, on 3 March 2020, Mr Skoczylas emailed the Court of Appeal Office stating that

> *"Upon a further reflection and consideration,* ***in accordance with the relevant jurisprudence, I seek to appear before the Court at the earliest opportunity to make an application for an additional stay on the execution of said cost order, until the final conclusion of the so-called Köbler-type proceedings*** *(currently before the High Court, bearing the rec. no. 2019/2991P),* ***which have been in principle sanctioned to be initiated in the High Court by the Department of Justice and Equality,*** *having regard to the CJEU seminal caselaw"* (emphasis in the original)[1]

[1] The papers before the Court are replete with references to the fact that the *Köbler* proceedings have "*in principle been sanctioned*" to be commenced by the Department of Justice. In reality, the "*sanction*" involved a letter from the Department simply expressing the view that the High Court was the appropriate forum for any such proceedings.

7. Mr Skoczylas attached detailed submissions in support of the contention that this "*additional stay*" should be granted and asked for the matter to be listed on one of a number of dates indicated by him, one of which was 12 March.

8. The Court will refer further below to the "*Köbler-type proceedings*" that Mr Skoczylas and a company associated with him, Scotchstone Capital Fund Limited ("*Scotchstone*"), have brought against Ireland and the Attorney General (and which, for brevity, will be referred to in this judgment simply as the "*Köbler proceedings*").

9. The Court listed the further stay application on 12 March at 9.45 am. On 3 March the solicitors for Permanent TSB (who were on notice of the application) indicated that, given that their client was not involved in the *Köbler* proceedings, they considered it appropriate that the application be brought by way of formal notice of motion and affidavit.

10. In response, on 5 March 2020, Mr Skoczylas issued a notice of motion, grounded on his own affidavit, which was made returnable to 12 March, also at 9.45 am. That notice of motion sought a stay on the Costs Order pending the determination of the *Köbler* proceedings, as had previously been flagged by Mr Skoczylas. However, it also sought a stay on the Costs Order pending the determination of a further set of the proceedings brought by Mr Skoczylas challenging the constitutionality of the Credit Institutions Stabilisation Act 2010 ("*the 2010 Act*"). A stay pending the determination of those proceedings had not previously been mentioned by Mr Skoczylas.

11. In circumstances where the Company is not a party to the *Köbler* proceedings and did not appear to be in a position to assist the Court as to the status of those proceedings, the Court directed that the defendants in those proceedings should be put on notice of the stay application and informed of the listing on 12 March. When informed of that direction, Mr Skoczylas expressed vehement objection to it. He had no proper basis for any such objection and, as will appear, the appearance of the State defendants before the Court on 12 March added significantly to the Court's understanding of the status of the *Köbler* proceedings.

12. In advance of 12 March 2020, it became apparent to the members of the Court that due to other commitments that they had on that date, a 9.45 am start might not allow sufficient time to deal with the stay application. The Court therefore directed that the hearing should commence at 9 am. Unfortunately, that was not convenient for Mr Skoczylas because he had made arrangements to fly into Dublin on the morning of 12 March and his flight would not arrive in time to enable him to be in the Four Courts by 9 am. In these circumstances, the Court considered it appropriate to vacate the listing on 12 March. However, Mr Skoczylas objected to that course of action, stating that he had already bought a flight ticket that was non-refundable. In those circumstances, the Court decided to maintain the 12 March listing but it was made clear to the parties that the Court would not be in a position to hear the substantive stay application on that date and that, instead, it would give the necessary directions to allow the application to be heard on a later date.

13. Mr Skoczylas attended in Court on 12 March, as did counsel for the Company and counsel for the State defendants in the *Köbler* proceedings, Mr McCullough. In the

course of the hearing, Mr McCullough explained to the Court that the defendants had issued a motion to strike out the proceedings on the basis that they were unstateable. That motion had issued on 1 August 2019 and, Mr McCullough explained, had been heard by the High Court (Sanfey J) just prior to the Christmas vacation in December 2019, with judgment being reserved.

14. The Court expressed some surprised at this information. It was entitled to be surprised. Mr Skoczylas' lengthy submissions of 5 March 2020, running to 24 closely-typed pages of text, made multiple references to the *Köbler* proceedings but did not mention the State's application to have those proceedings struck out, less still did they disclose the fact that the strike-out application had actually been heard by the High Court. The affidavit that Mr Skoczylas had sworn on 5 March to ground his motion for a stay equally made no reference to that application. Given that he was looking for a stay pending the determination of the *Köbler* proceedings, Mr Skoczylas must have understood the relevance of the fact that an application to dismiss those proceedings had been heard by the High Court and that the High Court's judgment was awaited.

15. In any event, at the hearing on 12 March, the Court fixed 9 am on 28 April 2020 for the hearing of the stay application. It fixed a time for the delivery of the Company's legal submissions and any affidavit it might wish to file and gave Mr Skoczylas liberty to deliver a replying affidavit in the event that an affidavit was filed by the Company. No substantive submissions were made on 12 March 2020 and at no stage during the brief hearing did the Court enter into the merits of the stay application.

16. In the event, no affidavit was filed by the Company. Nevertheless, on 17 April 2020 Mr Skoczylas purported to deliver a further and very lengthy unsworn affidavit.

17. Shortly after the hearing on 12 March, the Court of Appeal was required to suspend normal appeal hearings due to the COVID-19 Pandemic. In these circumstances, the hearing on 28 April 2020 could not proceed.

18. In response to the COVID-19 Pandemic, and in order to ensure the continuing administration of justice, arrangements were put in place for the remote hearing of appeals by the Court of Appeal. Such hearings began in the week commencing 20 April 2020 and in the period since then a large number of appeals have been heard remotely by the Court of Appeal.

19. In the Court's view, Mr Skoczylas' stay application was clearly suitable for remote hearing. The Court was also of the view that, having given its substantive decision on 21 January 2020, it was in the interests of the parties, as well as being in the public interest, that all outstanding issues in the appeals should be finalised. Accordingly, on 29 April the Court notified the parties of its intention to hear the stay application by way of remote hearing on 7 May 2020.

20. While stating that, in principle, he had no objection to a remote hearing of the stay application, Mr Skoczylas indicated that he had several difficulties with the proposed hearing on 7 May. The draft affidavit that he sent on 17 April remained unsworn and he was not in a position to have it sworn by reason of COVID-19 related restrictions. He did not consider the application urgent. He also raised issues about the manner in

which the remote hearing would proceed and the basis on which such hearings were being conducted by the Court.

21. These issues were addressed in detail in a communication sent by the Court of Appeal Office to Mr Skoczylas on 5 May. The Court's intention to hear the stay application by remote hearing was confirmed and explained. As regards Mr Skoczylas' unsworn affidavit, it was explained to Mr Skoczylas that the Court had not given leave for the delivery of any further affidavit by Mr Skoczylas in the event that no affidavit was delivered by the Company. In any event, the draft Affidavit did not comply with the provisions of Order 40, Rule 4 of the Rules of the Superior Courts in that it is not confined to facts but is, in substance, a further legal submission. Mr Skoczylas was therefore not permitted to deliver any further affidavit. However, in order to facilitate Mr Skoczylas, it was indicated that the hearing would not proceed on 7 May and would instead proceed on 11 May.

22. On 7 May Mr Skoczylas sent another lengthy document to the Registrar in which he made a series of assertions to the effect that the Court was engaging in suppressing *"facts, evidence and submissions"* that he had put before the Court. Multiple allegations of bias were made in relation to the manner in which the Court had proceeded, with particular focus on the fact that the Court had directed the defendants in the *Köbler* proceedings to be put on notice of the stay application. That, according to Mr Skoczylas, had involved a court-instigated "*collusion*" between his "*opponents*" in the two sets of proceedings. The hearing on 12 March was said to have been "*a travesty of justice aimed at prejudicing my position in respect of the*

within application." Various statements in the communication made on behalf of the Court on 5 May were said to be "*plainly incongruous and/or false*".

23. Similar levels of invective were levelled against Mr Justice Sanfey who, on 2 April 2020, had given judgment in favour of the defendants on their strike-out application in the *Köbler* proceedings.

24. At paragraph 2 of this document, Mr Skoczylas referenced his "*insuperable inability to participate in the said hearing [the hearing scheduled for 11 May] in light of the basic requirements of justice and a fair trial addressed in this document.*" Later in the document, after once again asserting that "*the basic requirements of justice and a fair trial prevent me insuperably from participating in the remote hearing*" on 11 May, Mr Skoczylas indicated that, if the Court nonetheless proceeded with that hearing, he was relying on certain documents which he identified, including the document of 7 May itself which, he indicated, "*should be treated in lieu of my oral submissions for the purposes of the remote hearing of the motion in question.*" In a further communication on 11 May itself, Mr Skoczylas made it clear that he would be absent from the remote hearing, re-iterated that he was relying on the document of 7 May in lieu of oral submissions and asked that the transcript of the hearing be sent to him following the hearing "*to make clear and transparent what was said at the hearing.*"

25. Mr Skoczylas had not sought, nor been given, leave to make any further submission and much of the content of this "*submission*" effectively repeated the contents of the draft affidavit which the Court had already disallowed.

26. It did not appear to the Court that there was, in fact, any "*insuperable inability*" preventing Mr Skoczylas from participating fully in the remote hearing on 11 May. The technical information necessary for him to do so was provided to him in good time and at no stage was it suggested that there was any technical barrier to his participation. All relevant documents – including the parties' submissions and the authorities – were provided to him electronically in advance. Rather than there being any question of Mr Skoczylas being unable to participate in the hearing on 11 May, it was evident to the Court that Mr Skoczylas was free to participate fully but had elected not to do so.

27. Reference should also be made to a further complaint made by Mr Skoczylas in his submission of 7 May 2020 to the effect that the Court was failing to comply with Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

28. When the stay application was called for hearing by the Registrar on 11 May Mr Skoczylas was not present to present his application. In such circumstances, where an applicant elects not to appear before the Court, without good reason, the application would normally be struck out on the basis of such non-appearance. Mr Skoczylas had no entitlement to any different treatment. Nevertheless, the Court considered that, in the particular circumstances of the COVID-19 Pandemic it would, exceptionally, proceed with the application, treat Mr Skoczylas' document of 7 May 2020 in lieu of his oral submissions to the Court and hear counsel for the Company in response.

29. In the course of the remote hearing, the Court invited submissions from counsel for the Company on Mr Skoczylas' complaint that the Court had failed to comply with Regulation (EC) No 1393/2007. Counsel submitted that the Regulation had no application to the communications between the Court (through the Court Office and Registrar) and Mr Skoczylas because it did not involve the service of judicial or extra-judicial documents. Counsel submitted that the Regulation was not concerned with the notification of a date for hearing. Counsel also observed that communication by email was the method of communication that had been adopted by Mr Skoczylas himself. Mr Skoczylas was, it was submitted, clearly on notice of the hearing. Notably, even though Mr Skoczylas made a further submission to the Court after the hearing on 11 May, he did not take issue with the Company's submissions, which the Court accepts as correct. In the Court's view, there is no merit in the Regulation (EC) No 1393/2007 point.

30. In any event, the remote hearing proceeded to a conclusion. A stenographer attended the hearing for the purpose of preparing a transcript and that transcript was duly sent to Mr Skoczylas. Mr Skoczylas then sent in a further submission to the Court – again without seeking or being given any leave to do so – for the ostensible purpose of "*correcting*" "*false and misleading statements and omissions*" on the part of counsel for the Company. The hearing of Mr Skoczylas' application had concluded and he had no entitlement to make any further submission to the Court at that point (had he participated in the remote hearing, he would of course have had a right of reply to the Company's submissions). In the circumstances, it is unsurprising that the Company objected to the Court having any regard to that further submission.

31. It is worth observing that it is no part of the administration of justice in Ireland for litigants to engage in correspondence with the courts. No more than any other litigant, Mr Skoczylas has no entitlement to engage in any form of ongoing dialogue with the Court or to make further and repeated submissions to the Court whenever he chooses. The manner in which Mr Skoczylas has communicated with the Court in relation to this application is unorthodox and undesirable.

32. Notwithstanding that position, and despite the Company's objection, the Court took the view that, in the very particular circumstances, it would not exclude the document from its consideration.

33. A great deal of material has therefore been put before the Court by Mr Skoczylas in support of his application. With the exception of his unsworn affidavit which the Court did not permit to be delivered, the Court has had regard to this material, to the extent that it considered it appropriate, in reaching its decision on the stay application.

34. It will be evident from the detailed procedural history above that, so far from Mr Skoczylas being treated unfairly or in breach of his rights under the Constitution, the EU Treaties, the Charter or the Convention, he has in fact been given every possible opportunity to make his case for a stay and, for that purpose, has, on multiple occasions, been afforded accommodations not generally made available to litigants.

35. The Court therefore rejects the suggestions made by Mr Skoczylas that he has been treated unfairly or unjustly, that the Court has demonstrated bias in its dealings with

him and/or that the Court has "*suppressed*" "*facts, evidence and submissions*" sought to be put before the Court by Mr Skoczylas. It is quite satisfied that there was and is no basis whatever for such allegations. On the contrary, the history of the proceedings set out above demonstrates in a very concrete manner the extent to which the Court has facilitated Mr Skoczylas. The Court deprecates the inappropriate terms in which it has been addressed by Mr Skoczylas.

36. There is one further observation that the Court considers it necessary to make. It concerns the comments made by Mr Skoczylas about Sanfey J and his judgment of 2 April 2020 in the *Köbler* proceedings. In circumstances where Mr Skoczylas has informed the Court of his intention to appeal that judgment, the Court obviously expresses no view as to its correctness. But regardless of whether that judgment is correct or not, the tenor and effect of Mr Skoczylas' criticisms of it, and of Sanfey J, are inappropriate and unacceptable. Litigants and their legal representatives are, of course, fully entitled to criticise judgments under appeal, and to do so robustly. The Court has no difficulty with that. However, the comments made by Mr Skoczylas – albeit said by him to be advanced "*respectfully*" and subject to the legalistic caveat that nothing he says should be "*misconstrued as an attack on any court or any judge*" – go far beyond any legitimate criticism by questioning the integrity and good faith of the High Court Judge. That is an entirely inappropriate approach for any litigant – whether represented or not – to take.

The Background to the Proceedings

37. The detailed factual background and litigation history is set out in the judgment of Collins J of 21 January 2020 and need not be repeated here. Suffice to say that these proceedings are only one of a number of proceedings which Mr. Skoczylas and his company, Scotchstone have pursued since 2011. The original proceedings, *Dowling & ors -v- The Minister for Finance & ors* (Record No. 2011/239 MCA) took the form of an application made pursuant to the provisions of section 11 of the 2010 Act challenging the lawfulness of a Direction Order made by the Minister for Finance in July 2011 and approved *ex parte* by the High Court in 2011 pursuant to the 2010 Act *("the Section 11 Application")* . In the Section 11 Application, Mr. Skoczylas maintained that the Direction Order and the actions taken on foot of the Direction Order had resulted in unlawful damage to shareholders in the Company including himself and Scotchstone. Collins J's judgment of 21 January 2020 sets out in detail the history of the Section 11 Application. As he explains, that Application has been finally dealt with and the validity of the Direction Order finally and conclusively determined as a matter of Irish law.

38. Mr. Skoczylas has instituted further proceedings against the State. The first (entitled *Scotchstone Capital Fund Limited and Piotr Skoczylas - v- Ireland and the Attorney General, Defendant*, Record Number 2019/2991P) are the *Köbler* proceedings to which reference has already been made above. In those proceedings, the plaintiffs seek damages against the State on the basis of the principles recognised by the Court of Justice of the European Union in Case C-224/01 *Köbler v Austria* (ECLI:EU:C:2003:513). The plaintiffs seek damages from the State on the basis that

the final court of appeal dealing with the Section 11 Application manifestly failed properly to implement EU law resulting in damage to the plaintiffs for which – so it is alleged – Ireland is required to compensate them.

39. The second proceedings are entitled "*Gerard Dowling, Padraig McManus, Piotr Skozczylas and Scotchstone Capital Fund Limited v. Ireland and the Attorney General and the Minister for Finance Record Number 2013/2708P*" ("*the Constitutional proceedings*"). In the Constitutional proceedings, the plaintiffs seek declarations that various sections of the 2010 Act are repugnant to the provisions of the Constitution of Ireland and are of no effect and void. They also seek declarations that the provisions are incompatible with the State's obligations under the European Convention on Human Rights and Fundamental Freedoms and with provisions of various EU Directives. Insofar as the Constitutional proceedings were debated before this Court on the stay application (and Mr Skoczylas' principal focus was on the *Köbler* proceedings), the emphasis was on the constitutional claims, *stricto sensu*, made in those proceedings, rather than on the claims involving the Convention (which could not, in themselves, result in the striking down of any provision of the 2010 Act) or the claims involving the EU directives referred to in the Statement of Claim.

40. As already explained, in this application Mr. Skoczylas seeks a stay on the Costs Order pending the determination of one or other or both of the *Köbler* and Constitutional proceedings. His essential contention is that if he is successful in one or other of those proceedings that it would have been fundamentally unjust for the Company to execute the Costs Order against him in the intervening period.

41. The Court has already granted a stay on the Costs Order pending the determination of Mr Skozcylas' intended application to the Supreme Court for leave to appeal this Court's judgment in these proceedings and, in the event that leave is granted, that stay will extend until the determination of the appeal. If leave is granted and Mr Skoczylas' appeal is successful, it is reasonable to suppose that in such circumstances the Costs Order may be reviewed. In reality, it is only if leave to appeal is refused or, if leave is granted but the appeal does not result in the setting aside of the Costs Order, that the additional stay now sought would become operative. In either scenario, the Costs Order the subject of the stay application would have become final and conclusive within the Irish legal order.

The Importance of Costs in the Administration of Justice

42. The Company here has the benefit of the Costs Order. That order was made by this Court consequent upon its determination of Mr Skoczylas' appeals (and the Company's cross-appeal on costs) and having regard to the principles set out in Order 99 of the Rules of the Superior Courts.

43. The important role of costs in the administration of justice in this jurisdiction, and the policy considerations underpinning Order 99, were explained by the Supreme Court (per McKechnie J) in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535. At paras 19, 20 and 22 he said:

"[19] Inter partes litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth
noting.

[20] A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.

...

[22] There is a second justification, again at the level of principle, for this jurisdiction: it was mentioned in Farrell v. Bank of Ireland [2012] IESC 42, [2013] 2 I.L.R.M. 183, per Clarke J., at para. 4.12, p. 195. This justification is that, in the absence of such a mechanism, both the bringing and defending of proceedings could be used for abusive purposes. In effect, the financial weight of a litigant could determine the extent to which, if at all, a particular claim or defence could be pursued, and, certainly in some circumstances, could exercise an overly controlling influence on the process. Such of course would be inimical to justice and could seriously disable the judicial role, as ultimately issues which should be determined may never even reach the point of adjudication. This would be highly undesirable. Accordingly, it is crucial to have such a means available so that the court, where appropriate, can dissuade, and if necessary even punish, exploitative conduct and unprincipled parties."

That a party who is successful in civil proceedings is ordinarily entitled to an award of costs against the unsuccessful party is now reflected in section 169(1) of the Legal Services Regulation Act 2015.

44. The principles discussed in *Godsil* apply to the *execution* of orders for costs and not merely to the *making* of such orders. To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of costs orders would be an entirely hollow protection for successful litigants if such orders were not, in general, immediately enforceable. A

successful party has a legitimate expectation that where costs are awarded in his favour that he may take all lawful steps to recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such stays are, of course, frequently granted pending appeal. Such a stay has been ordered by this Court but the additional stay now sought by Mr Skoczylas is quite different in nature and scope.

A stay on orders for costs: Order 42

45. Order 42, rule 17 provides:

> *"Every person to whom any sum of money or any costs shall be payable under a judgement or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more order or orders of fieri facias to enforce payment thereof, subject nevertheless as follows:*
>
> ...
>
> *(ii) the Court may, at or after the time of giving judgement or making an order, stay execution until such time as it shall think fit."*

46. Mr. Skoczylas seeks a stay from this Court on the Costs Order pursuant to this Rule until the ultimate conclusion – after the exhaustion of all avenues of appeal – of the *Köbler* proceedings and/or the Constitutional proceedings. In the alternative, he invokes the inherent jurisdiction of the Court.

47. Mr. Skoczylas has not identified to the Court any case where a costs order in one proceedings which have been litigated to conclusion (as will be the case in the event that the Supreme Court refuses Mr Skoczylas' intended application for leave to appeal or, in the event that leave is granted, ultimately refuses the appeal) has been stayed pending the outcome of different proceedings to which the litigant in whose favour an order for costs has been made is not a party. That is, of course, what Mr Skoczylas seeks here.

48. The Company is not a party to the *Köbler* proceedings. Mr Skoczylas seeks to obscure that important fact by the repeated assertion that the Company is an "*emanation of the State*", implicitly inviting the Court to identify the Company with the State defendants in the *Köbler* proceedings. The Court does not consider such an approach to be appropriate. It may be that the Company is an emanation of the State and, if so, that may have important consequences in certain contexts, such as the direct effect of EU Directives. But the Company is not the State. It has many shareholders other than the State and it cannot be regarded as the State in this context. Equally, the Company is not a party to the Constitutional proceedings, though it appears to have brought an application some considerable time ago to be joined as a notice party in those proceedings. That application, it seems, was not pursued, presumably because the Constitutional proceedings were stayed pending the determination of the Section 11 Application.

49. Counsel for the Company submitted that the Court in fact had no jurisdiction to grant a stay in such circumstances, citing in support of that submission the decision of the Court of Appeal of England and Wales in *State Bank of New South Wales v Harrison*

[2002] EWCA (Civ) 363. While recognising the strength of that argument, and while noting the absence of any authority, from any jurisdiction, which supports the contention that it has such a jurisdiction, the Court nonetheless considers that it ought not to decide this application on that ground and leaves the determination of this point to another case. The Court will decide this application on the assumption that the jurisdiction exists and on the basis of the circumstances and arguments advanced in this application.

50. One other threshold argument advanced by the Company requires to be addressed. The Company says that the issue of a stay has already been addressed by the Court, in the terms requested by Mr Skoczylas. There is, the Company says, no basis for interfering with that order or varying it in any way. There is some force to this argument in the Court's view. Initially, no application for a stay was made by Mr Skoczylas. The application that was then made was for a stay pending application for leave to appeal to the Supreme Court (and, in the event that leave was granted, pending the determination of the appeal). A stay in those terms was made by the Court. As already indicated, that appeared to bring the appeals to a conclusion as far as the Court was concerned. It was some days afterwards when Mr Skoczylas indicated a desire to seek a different form of stay, one pending the determination of the *Köbler* proceedings. Some further time elapsed before Mr Skoczylas first sought a stay pending the determination of the Constitutional Proceedings. This piecemeal approach was far from desirable but the Court considers that it should nonetheless proceed to hear this application on its merits.

Matters not at issue in this Application

51. Before considering the substance of the application it is important to emphasise that this Court will not re-visit the merits of its decision on Mr Skocylas' appeals. The Court has given its decision. In the State's constitutional order, that decision is final and conclusive, subject only to the possibility of an appeal to the Supreme Court. The Court has granted a stay on the Costs Order to facilitate an application for leave to appeal to be made by Mr Skoczylas. Mr Skoczylas will therefore have an opportunity to persuade the Supreme Court that this Court's decision was erroneous. Unless and until he does so, this Court's decision stands and Mr Skoczylas views of it are *nihil ad rem* so far as the application now before the Court is concerned.

52. Equally, it is no part of the Court's function on this application to enter into an assessment of the merits of the *Köbler* or Constitutional proceedings. For the purposes of this application, the Court proceeds on the assumption that these proceedings raise arguable issues and have some prospect of success.

53. Finally, in this context, the Company argued that, in his affidavit grounding the application for an additional stay, Mr Skoczylas wrongfully failed to disclose to this Court the fact that the High Court had heard an application by the State defendants to dismiss the *Köbler* proceedings and says that, while not perhaps determinative in itself of the stay application, such non-disclosure is a factor that ought to weigh against the granting of the stay. The Court has already touched on this issue above. While he did not offer any plausible explanation for his failure to inform the Court of the strike-out application Mr Skoczylas vehemently rejects any allegation of

wrong doing. In all the circumstances, Court considers that it should have no regard to this issue in reaching its decision on this application.

Discretion

54. When a court is asked to stay an order, it is called upon to exercise its discretion and to maintain the balance the justice between the parties. It must consider all of the circumstances in the particular case. Its focus should not be unduly narrow. Frequently, the application for a stay will be made in respect of an interlocutory order or a final order which is under appeal. The proceedings have not come to an end and further judicial consideration of the merits of the proceedings are envisaged. In those circumstances, the court must have regard to the possibility of the *status quo* being reversed, whether at the trial of the action (in the case of an interlocutory order) or on appeal.

55. There are many authorities which give detailed guidance as to how the court's jurisdiction should be exercised in this context, including *Redmond v Ireland* [1992] 2 IR 362, *Emerald Meats Limited v Minister for Agriculture* [1993] 2 IR 443, *O' Toole v RTE* [1993] ILRM 454 and *Danske Bank v McFadden* [2010] IEHC 119, all of which were amongst the authorities provided to the Court. The essential task of the court in that context is to try to fashion the order which balances the interests of the parties, pending hearing or appeal, in a way that gives rise to the least risk of injustice and seeks to avoid irreparable harm to either party in the period before the rights of the parties are finally determined.

56. Different considerations arise when a stay is sought on a final order. In such a scenario, the rights of the parties *have* been finally determined. The court is concerned on the one hand to uphold the rights of the successful litigant and on the other hand to temper the immediate impact of the final decision which may fall very heavily on the loser. In such a case the court is not undoing or undermining the outcome of the litigation. It is affording the losing party a reasonable opportunity to reorder his or her affairs in light of the final conclusion of the litigation. Where, for instance, a court makes an order for possession of a dwelling, it may (and frequently will) impose a stay on the order for a period to allow the occupier time to make alternative accommodation arrangements. Equally, a court that makes such an order may grant a stay to allow a period within which the occupier can seek to engage with the successful party, for instance by agreeing a schedule to discharge the liability in respect of which the possession order was made. Such stays are typically measured in weeks or at most a number of months.

57. Thus, while the court still retains a discretion to stay a final order, the starting point must be to uphold the vindicated rights of the successful litigant; it is essentially affording the unsuccessful litigant a degree of mercy, it is not protecting his or her interests from any possible future harm arising from the successful litigant enforcing the rights established by the litigation.

Mr Skoczylas' Submissions

58. Mr Skoczylas argues that if the plaintiffs are successful in either the *Köbler* or Constitutional proceedings that will invalidate the premises on which the Direction

Order was upheld and the judgement of this Court. He submits at paragraph 50 of his submissions of 7 May 2020 that the Direction Order would be deemed illegal if the 2010 Act were declared unconstitutional or incompatible with EU law. At paragraph 31 he asserts:

> *"Both the constitutional proceedings and, separately, the Köbler type proceedings, if successful, will invalidate and/or render erroneous the premises, on which this Court said judgment was based:*
>
> - *The constitutional proceedings, if successful, will render the 2010 Act, pursuant to which the said Direction Order was made, unconstitutional and/or incompatible with E.U. law; and*
> - *The Köbler proceedings, if successfully, will render invalid and/or erroneous in law and/or in fact the premises, on which the Courts decided that the said Direction Order was not unlawful."*

59. He purports to deduce from this submission that success in either proceeding would "*render the judgment of this court a miscarriage of justice*". At paragraph 41 of his submissions of 7 May he argues:

> *"... the reality is that the judgment of this Court made on 27 February[2] will amount to a miscarriage of justice, if I (and the other plaintiffs) succeed ultimately in the constitutional proceedings and/or the Köbler type proceedings, and the premises of the July 2011 ex parte Direction Order and of the Court's judgments determining the lawfulness of that Direction Order*

[2] This is a reference to the Judgement of Collins J of 21 January 2020.

are invalidated and/or rendered erroneous. In such a case, State damages might be able to balance to some extent the injustice resulting from the costs order in question; however, they would not be able to undo the irreparable damage and injustice caused by any bankruptcy and its far reaching consequences, which the premature execution of that cost order would cost me in such a case..."

60. However – and significantly – Mr Skoczylas accepts that, even if he was to be successful in the *Köbler* proceedings and/or the Constitutional proceedings, such an outcome would not "*lead to an automatic overturning*" of the decision of this Court (paragraph 48 of submissions of 7 May). In such a scenario, it would – so Mr Skoczylas submits – be necessary to apply to this Court to revisit and set aside its final judgment in these capital reduction proceedings on the basis of the outcome in the other litigation. In this regard he relies upon what is known as the *Greendale* jurisdiction (paragraph 41 of submissions of 7 May). He says that it would then be open to the Court to set aside the Costs Order, even in respect of his unsuccessful appeal against the refusal of the High Court judge to recuse himself from hearing the application to confirm the reduction of the share capital. In this regard, Mr Skoczylas submits:

"Firstly, the balance of justice regarding the costs order in question would be different, if the main challenge herein against the cancellation of the "deferred shares" were adjudicated in my favour. Then, all of - or at the very least the majority of – the costs would have to be awarded against the State respondent. That outcome will be indeed called for, if the plaintiffs in the

constitutional and/or Köbler type proceedings prevail. In such a case the premises of this Court's judgment regarding the challenger to the cancellation of the deferred shares will be rendered invalid and/or erroneous in law and/or in fact.

Secondly, ...the whole application for recusal would have to be looked at in a different light, including in respect of the very statement by Haughton J. that triggered that application. [If the plaintiffs are successful in the two proceedings] the judgment of Haughton J. and of the Court would amount to miscarriages of justice, with the respect of interlinked implications for determinations regarding the recusal application" (Paragraph 51F i) & ii) of the submissions of 7 May 2020)

61. Mr Skoczylas asserts on the basis of these arguments that, pending the final outcome of all these proceedings, execution of the orders for costs would be premature. He says that he will *"inevitably"* be adjudicated bankrupt if the court does not stay execution of the orders for costs and the stay must extend to the conclusion of the litigation and the setting aside of the orders for costs in order to avoid him suffering this irreparable harm. In this context he says:

"...an irreparable harm can be caused to me by the inevitable bankruptcy that would ensue, if the respondent were allowed to prematurely execute the costs order in question, despite the fact that the underlying judgment of this Court can turn out to be a miscarriage of justice (which may need to be set aside), if the plaintiffs in the constitutional and/or Köbler type proceedings

ultimately succeed in any of those proceedings. Such irreparable harm would result from the far reaching multi-faceted consequences of a bankruptcy, such as, inter alia, a ban on being a director of a company for a period, which, in this case, would mean that my company, Scotchstone Capital Fund Limited, a party to a number of related core proceedings, would have to close down and be thus prevented from prosecuting said proceedings. My professional standing– both short term and long term – would be in such a case irreparably damaged, too." (At paragraph 44 B of Mr Skoczylas' submissions of 7 May)

62. He restates these arguments elsewhere in his 7 May submissions and reiterated these points in his submissions on 12 May (at paragraphs 33 and 34).

Discussion

63. Mr. Skoczylas' essential argument is that, notwithstanding the outcome of his appeals, it would be premature to permit the Company to execute the orders for costs. If the Company is free to execute the orders for costs against him this may cause him irreparable harm, which cannot be fully compensated by an award of damages against the State in either the *Köbler* or the Constitutional proceedings.

64. As already explained, the irreparable harm that Mr Skoczylas says he would suffer in the absence of a stay is that he would be made bankrupt on the application of the Company. The consequences of that would, he says, extend beyond merely financial consequences and would harm his standing and reputation and would be "*disastrous*

and have irreversible consequences for my career going forward" which would not be remedied by an award of damages.[3] It is also said that his bankruptcy, were it permitted to occur, would impact on the ability of Scotchstone to pursue *(inter alia)* the *Köbler* proceedings and the Constitutional proceedings because – so it is said – Mr Skoczylas would in such circumstances be banned from acting as a director of that company which, as a result, *"would have to close down and be thus prevented from prosecuting said proceedings."* [4] That, Mr Skoczylas later explains, is because he is *"Scotchstone's controller and sole director."* [5] Should he or Scotchstone be unable to continue the litigation as a result of possible bankruptcy, that would lead to a "*highly unjust*" outcome.[6]

65. Of course, Scotchstone is not a party to these proceedings and the Costs Order is not directed to it. Scotchstone is a separate legal person to Mr Skoczylas. In the circumstances, the Court considers that Mr Skozcylas may not rely upon the claim of Scotchstone, even if it is a company in which he is the major shareholder and sole director, to support his own personal claim.

66. But, in any event, whether one looks at the impact on Mr Skoczylas only or looks beyond that impact to consider the impact on Scotchstone also, the arguments advanced by Mr Skoczylas are clearly premised on the risk of, and implications of, him being adjudicated bankrupt.

---

[3] Submissions of 12 May, at paragraph 34.
[4] Submissions of 7 May, at paragraph 44B.
[5] Submissions of 12 May, at paragraph 33.
[6] *Ibid*, at paragraph 34.

Risk of bankruptcy

67. Courts frequently make orders for costs, against both individuals and companies, which they may be unable to discharge. If those costs orders are executed by the successful party, it is possible – though not inevitable – that the ultimate outcome will be the bankruptcy or liquidation of the party subject to the order for costs. This possibility of itself does not afford a reason to stay orders for costs against impecunious litigants. The cost of litigation in the Superior Courts is undoubtedly high. If the courts were to adopt the approach to stays on orders for costs as advocated by Mr. Skoczylas, it would result in inevitable, possibly indefinite, stays on final costs orders in very many cases. In cases where individuals would be unable to meet the orders for costs made against them, the court would be constrained to stay execution on foot of those orders to avoid the possibility of the person being adjudicated a bankrupt where that unsuccessful litigant was engaged in other litigation which might result in a change in his fortunes. In principle there would be no difference between staying a final order for costs to await the outcome of other litigation and awaiting the outcome of other events which might enable the judgment debtor to discharge the costs at a future date. Given the crucial role of costs in the administration of justice as set out in *Godsil*, that cannot be a correct approach.

68. It follows that the court must assess each individual case on the basis of the facts and circumstances presented to it. The mere fact that one method of execution may be bankruptcy is not of itself a sufficient reason to stay execution. As a threshold requirement, the party seeking the stay must put sufficient evidence before the court to enable the Court adequately to assess the prospect of an application in bankruptcy

being pursued and an order of adjudication being made and the implications for the individual litigant in the event of such an adjudication. The mere fact that proceedings may be commenced which may lead to the adjudication of a debtor bankrupt does not lead to the conclusion that this is the only and inevitable result of such proceedings. In this jurisdiction a number of outcomes short of bankruptcy are possible and the court must presume that the judges who may deal with petitions for the adjudication of debtors or insolvency arrangements will deal with the applications appropriately and fairly.

69. Here, the Company says that Mr Skoczylas' centre of main interests ("*COMI*") is not in Ireland but in Germany. The evidence before the Court certainly establishes that Mr Skoczylas resides in Frankfurt am Main. The evidence does not indicate (and Mr Skoczylas does not assert) that he has any place of business in Ireland or any links with it other than his shareholding in the Company and his involvement in the many pieces of litigation arising from the making of the Direction Order. If it be the case that Mr Skoczylas' COMI is in Germany, then it would seem to follow that only the courts of Germany could open insolvency/bankruptcy proceedings in respect of Mr Skoczylas and the Irish courts would have no competence to do so.[7]

70. The Company raised the COMI issue in its submissions of 26 March 2020. Despite that, in his submissions of 7 May 2020 Mr Skoczylas made no reference to the issue. He does, however, refer to it in his submissions of 12 May. At paragraph 44 of those submissions of 12 May 2020 Mr. Skoczylas states:

[7] Regulation (EU) No. 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (recast)

"Certain assertions on behalf of the Respondent regarding a process/logistic (sic) of my possible bankruptcy are incorrect. Those incorrect assertions, including assertions relating to my purported centre of main interest, which are included in the transcript, are incorrect. I am not correcting here in detail those incorrect assertions, because those assertions are irrelevant for this application."

71. Given that Mr Skoczylas' stay application rests significantly on the proposition that, absent a stay on the Costs Order (beyond the stay already granted) he will be bankrupted and that such bankruptcy will have significant consequences for him, including as regards his capacity and/or the capacity of Scotchstone to pursue the *Köbler* and Constitutional proceedings, the location of his COMI can hardly be thought to be "*irrelevant for this application*". While Mr Skoczlas has asserted that what the Company has said on that issue is "*incorrect*", he has not chosen to identify where, on his argument, his COMI is located and has not put before the Court any evidence to the effect that it is in Ireland.

72. In these circumstances, the Court is not in a position to assess how imminent or grave or reasonable Mr. Skoczylas' stated apprehension that the Company may succeed in having him adjudicated bankrupt may be as a matter of fact. No evidence of the applicable bankruptcy/personal insolvency law and practice in Germany has been put before the Court by Mr Skoczylas and the Court simply is not in a position to form a view whether Mr Skoczylas would be adjudicated bankrupt (or subject to any equivalent personal insolvency regime) in the circumstances at issue here.

73. Even if the Court were to proceed on the basis that Mr Skoczylas has his COMI in Ireland, it would not follow that Mr Skokzylas had established that, as a probability, he is at risk of bankruptcy, still less that there is any imminent risk of such adjudication. In the absence of agreement as to the amount of costs properly payable by Mr Skoczylas on foot of the Costs Order (which agreement appears improbable), the Company would be required to have the costs quantified before it could proceed to take any steps to recover them from Mr Skoczylas. That process – now referred to as "*adjudication*" rather than "*taxation*" – is governed by Part 10, Chapter 4 of the Legal Services Regulation Act 2015. That process is likely to take some time. There is then an appeal available to the High Court. Even when the costs are quantified, and assuming that they are not discharged by Mr Skoczylas, it is not inevitable that bankruptcy would follow. Following the enactment of the Personal Insolvency Act 2012, there are now personal insolvency regimes available in this jurisdiction that do not involve bankruptcy. In addition, there are circumstances in which a bankruptcy petition may be refused or adjourned even where a liability is shown to exist. That being so, and even assuming that Mr Skoczylas' COMI is in Ireland, it does not appear appropriate to assume – as Mr Skoczylas effectively asks the Court to assume – that his bankruptcy will inevitably follow if and when the Costs Order becomes enforceable.

74. Similar uncertainty presents itself as to the *consequences* of bankruptcy for Mr Skoczylas. There is, quite simply, no information available to the Court as to the consequences (if any) of adjudication as a bankrupt in Germany, particularly for Mr

Skoczylas' ability to continue to prosecute the *Köbler* proceedings or the Constitutional proceedings.

75. It is, however, notable that in his submissions to this Court Mr Skoczylas does not make the case that his personal adjudication as a bankrupt would prevent him personally from pursuing that litigation. Even if that was asserted by Mr Skoczylas, there is, again, a significant deficit in the evidence before the Court on this issue. The Court has not been informed of the position in German law. Even if Irish bankruptcy law were applicable, Mr Skoczylas' trustee in bankruptcy would be in a position to continue to prosecute the litigation. None of these issues have, however, been addressed by Mr Skoczylas.

76. As regards the assertion made by Mr Skoczylas that his company, Scotchstone, would be prevented from pursuing the litigation in the event that he is adjudicated bankrupt, the Court has already made it clear that, in its view, Mr Skoczylas cannot seek to rely on the interests of Scotchstone in this context. But, in any event, that assertion has not, in the Court's view, been shown to be plausible. It appears from the pleadings in the *Köbler* and Constitutional proceedings that Scotchstone is a Maltese rather than an Irish company. There is no evidence before the Court that would allow it to conclude that, in the event that Mr Skoczylas were to be adjudicated bankrupt (whether in Germany, in this jurisdiction or elsewhere) that would necessarily lead to him being prohibited from acting as director of Scotchstone as a matter of Maltese law. But, even if that were to be assumed (and the Court sees no reason to do so) there is nothing to suggest that the company would not be in a position to appoint alternative directors to carry on the litigation its behalf. Thus,

even if it were appropriate for the Court to have regard to the position and interests of Scotchstone on this application, Mr Skoczylas has not put before the Court any material that persuades it that Scotchstone's capacity to prosecute the Köbler and Constitutional Proceedings would be impacted if Mr Skoczylas is, at some point in the future, adjudicated bankrupt.

77. There is a further, and significant, point. The Court is asked to stay the Costs Order pending the conclusion of the *Köbler* and Constitutional proceedings because (so it is said) Mr Skoczylas would otherwise be at risk of being adjudication as a bankrupt, with consequent damage to him as already discussed. But if that risk is there in any event, the fundamental premise of this argument is undermined.

78. It is evident that at least one costs order has already been made against Mr Skoczylas (the Company suggests that more than one such order has in fact been made). In his submissions of 12 May 2020 Mr Skoczylas says that "*there are no other executable costs orders that could cause my bankruptcy*". But the Costs Order is not currently an "*executable*" order either. The extant costs order(s) will, presumably, become executable in due course following taxation/adjudication. There is one order that, Mr Skoczylas acknowledges, is in the process of taxation. While Mr Skoczylas says that the costs sought on foot of that order are "*hugely excessive*", the evidence does not suggest that he has the resources to discharge those costs, even if very significantly reduced on taxation.[8] That being so, it seems that there is an existing risk that Mr Skoczylas may face the possibility of being adjudicated bankrupt on foot of an

[8] Evidence of Mr Skoczylas' financial resources and income referred to at paragraph 30A of his submissions of 12 May.

existing cost order(s) which are beyond the reach of any stay this Court might have power to grant on this application.

79. For these reasons, the Court considers that Mr Skoczylas has failed to make out a critical plank of his application, namely that a stay on the Costs Order is necessary to protect him from the risk of bankruptcy. To the extent that such a risk may arise from the Costs Order, a similar risk exists already. Furthermore, Mr Skoczylas has failed to make out his assertion that, in the event that he were to be made bankrupt, that would impact adversely on the continuing prosecution of the litigation by his trustee in bankruptcy who ought to be in a position to pursue the *Köbler* proceedings or the Constitutional proceedings. That assertion is also central to the stay application.

The implications of success in the Köbler proceedings and/or the Constitutional proceedings and the application for a stay

80. Another central plank of Mr Skoczylas' case for a stay is his contention that, if he is successful in the *Köbler* and/or Constitutional proceedings, the premises for the substantive order made by this Court affirming the Confirmation Order made by Haughton J in the High Court would be "*impugned and rendered erroneous*" and "*deemed fatally flawed*".[9] Such an outcome would, he says, render the Court's judgment "*ex post facto, a miscarriage of justice*".[10] Mr. Skoczylas accepts, however, that succeeding in either the *Köbler* proceedings or the Constitutional proceedings will not in itself lead to the "*overturning*" of the Court's judgment. Something more

[9] Submission of 5 March 2020, at paragraphs 20 and 22.
[10] *Ibid*, paragraph 7.

is required if such an outcome is to have any impact on the validity or enforceability of the orders made by this Court. In that regard, Mr Skoczylas submits that the orders of the High Court and of this Court would have to be set aside pursuant to what is referred to as the *Greendale* jurisdiction.

81. First, it is important to emphasise that the Company is not a party to either the *Köbler* or the Constitutional proceedings, though it has an application pending to be joined to the constitutional proceedings. No reliefs are (or could be) sought against the Company in either proceedings. This will have implications for any attempt by Mr Skoczylas to rely on a future success in either proceedings against the Company and to his arguments that the orders made in these proceedings amount to a miscarriage of justice or ought otherwise to be set aside. The Company emphasises that it did not enact the 2011 Act or make the Direction Order. On the contrary, it was at all times subject to and bound by the Direction Order. It says that it acted lawfully at all times and as it was required in law to do. It was not responsible for any alleged infringement of Mr Skoczylas' EU or Constitutional rights.

82. Second, if Mr Skoczylas is successful in the *Köbler* proceedings his remedy would appear to be an award of damages to compensate him for the loss occasioned to him by the failure of a final court of appeal manifestly to apply EU law in proceedings in which he was a party. It is not to overturn the decision of the court whose erroneous failure to apply EU law gave rise to the claim in the first place. Still less does it give rise to a claim against the litigant who benefited from the error of the court.

83. Notably, the only substantive remedies sought in the *Köbler* proceedings are a declaration that Ireland is obliged to "*make good damages caused to the Plaintiffs by infringements of EU law*" and "*reparation of damages caused to the Plaintiffs*". In other words, the *Köbler* proceedings are proceedings for damages. Even if, in such proceedings, the court has jurisdiction to grant other relief – and no argument was made to the Court that such was the case nor does it appear to be suggested by the case-law put before the Court – no such relief is in fact sought in any event.

84. It appears to the Court that the foundational premise of the *Köbler* jurisdiction is that, where an infringement of EU law occurs that is attributable to a decision of a court of final jurisdiction, the availability, in principle, of non-contractual damages against the Member State is necessary precisely *because*, by reason of the principles of *res judicata,* legal certainty and the finality of litigation, that decision cannot be reviewed or corrected. The Court of Justice in *Köbler* was careful to emphasise that recognising the potential liability in damages of a Member State in such circumstances did not undermine those principles. Furthermore, where the (onerous) conditions for *Köbler* liability are established, and an award of damages made, in principle such an award is intended to fully compensate the claimant for all their recoverable loss arising from the infringement, not to undo the judgments and orders constituting and/or flowing from that infringement (assuming that to be possible). If it were otherwise, *prima facie* such a claimant would obtain a double remedy.

85. As this is a matter which may at some future date fall to be decided by another court it is sufficient for present purposes to note that it is not at all clear that success for the plaintiffs in the *Köbler* proceedings would of itself mean that the orders made by this

Court in these proceedings (assuming that those orders are not varied by the Supreme Court) ought, retrospectively, to be regarded as invalid or as representing a miscarriage of justice or otherwise liable to be set aside. To the contrary, no CJEU authority to that effect has been identified by Mr Skoczylas and, equally, he has not identified any principle of Irish law that would permit orders that are, by virtue of the express provisions of Article 34 of the Constitution, "*final and conclusive*", to be set aside or varied on the basis of EU law (the argument based on *Greendale* is addressed separately below).

86. Third, if Mr Skoczylas obtains a declaration that the impugned provisions of the 2010 Act are unconstitutional (and/or that they are contrary to EU law), there is a separate complex issue to be resolved as to the implications of any such declaration(s) to the validity of acts taken pursuant to the provisions prior to the declaration of invalidity or unconstitutionality, particularly in light of the effect of those acts on the rights and interests of third parties. As this is an issue which may have to be decided at a future date by another court, it is sufficient for the purposes of this application to observe that it by no means inevitably follows that the judgment and order of this court will be invalidated solely by reason of any possible declarations made in the Constitutional proceedings.

87. As regards the so-called *Greendale* jurisdiction, in *Greendale Developments Limited (No. 3)* [2000] 2 IR 514 the Supreme Court recognised that in exceptional circumstances a final judgment or order could be rescinded or varied. Denham J said:

"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order would be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

88. This jurisdiction is wholly exceptional and the party invoking it bears a very heavy burden. It is not for the purposes of reviewing the merits of the final judgment. It arises where there has been a fundamental denial of justice through no fault of the parties concerned and when no other remedy such as appeal is available: see, in addition to *Greendale, L.P. v M.P.* [2002] 1 IR 219 and the recent decisions of the Supreme Court in *Nash v DPP* [2017] IESC 51 and *Bates v Minister for Agriculture, Fisheries and Food* [2019] IESC 35. It is only engaged when the issue raised goes to the administration of justice in respect of a particular hearing or decision.

89. None of the submissions made to it on this application persuade the Court that the *Greendale* jurisdiction is capable of extending as far as Mr Skoczylas contends or that *Greendale* provides a basis on which, notwithstanding the provisions of Article 34, the orders made by this Court in these proceedings (including the Costs Order) could be unravelled in the event that the *Köbler* proceedings or the Constitutional proceedings were to succeed.

90. Thus, on the basis of the arguments made to it and the materials put before it on this application, it does not appear to the Court that this second central element of Mr Skoczylas' application – the proposition that success for him in the *Köbler* proceedings and/or the Constitutional proceedings necessarily requires (or even permits) the orders made by the Court in these proceedings to be revisited and unravelled – has been made out or that any arguable basis for it has been established. As stated, the Court has reached that view on the basis of the arguments made to it and the materials put before it on this application and it may be that, on fuller argument, another court might be persuaded to reach a different conclusion. This Court must, however, decide the application before it on the basis of the materials and arguments before it.

91. What is clear, however, is that in the event that Mr Skoczylas were to succeed in the *Köbler* proceedings and/or the Constitutional proceedings, he might obtain an award of damages that would be sufficient to enable him to discharge the costs payable by him on foot of the Costs Order. A stay pending the determination of those proceedings would preserve the possibility of him doing so, while protecting him against enforcement action – and especially any application to have him adjudicated bankrupt – in the interim period. That would, Mr Skoczylas says, cause little or no prejudice to the Company.

92. This argument may appear to have superficial force. However, in the Court's view, it significantly undervalues the interest of the Company in being able to enforce the Costs Order if and as soon as that Order becomes final and conclusive (which will

happen in the event that the application for leave to appeal is refused or, if granted, in the event that the appeal does not result in the setting aside of the Costs Order). Any litigant that has the benefit of a final order for costs has an obvious interest in its enforcement. Here the Company clearly has incurred very significant costs in the spider-web of litigation that has taken place since the making of the Direction Order. With only some very limited exceptions, it has not been permitted to recover those costs from Mr Skoczylas even though he has, to date, largely been unsuccessful in that litigation. In these circumstances, the Company's claim to be permitted to enforce the Costs Order as soon as it becomes final and conclusive appears to be especially compelling.

93. That is particularly so when one considers the likely duration of any additional stay. The position in relation to the *Köbler* proceedings is that the High Court has held that they should be struck out. Mr Skoczylas has indicated an intention to appeal that decision. Such an appeal will take some time to be heard and determined. If successful, the proceedings will have to go back to the High Court for hearing (if the appeal is unsuccessful then, subject only to the possibility of a further appeal, that is the end of the *Köbler* claim). The State defendants have not filed a defence and it would be some time before the proceedings are ready for hearing. However the proceedings are determined, that determination is very likely to the subject of a further appeal, whether to this Court or to the Supreme Court. All of that will take a period of time more likely to be measured in years rather than in months.

94. The Constitutional proceedings are also far from hearing, though a defence has been delivered by the State defendants. The proceedings were stayed pending the

determination of the Section 11 Application but, despite the fact that this stay obviously ceased to operate in March 2019, when the Supreme Court refused leave to appeal from the substantive decision of this Court, no further steps have since been taken to advance those proceedings. Again, it appears that the period of time to the final determination of the Constitutional proceedings is more likely to be measured in years rather than in months.

95. Also relevant in this context is the fact that neither the *Köbler* nor Constitutional proceedings allege any wrongdoing on the part of the Company. As it observed in its submissions to the Court, it was at all times bound by the 2010 Act and by the Direction Order made under it.

96. The Company also makes the point that these proceedings are remote from the Section 11 Application. Mr Skoczylas' purpose in opposing the Company's application for the Confirmation Order in the High Court, and for appealing that Order to this Court, was, the Company says, a collateral one: a concern (which the Company says was misplaced) that, if he did not object, it might be taken to undermine his opposition to the Direction Order. While the Court is reluctant to characterise Mr Skoczylas' purpose as a collateral one, it was nonetheless a notable feature of his appeal – commented on by Collins J in his judgment – that Mr Skoczylas failed to engage with the Articles of Association of the Company and the rights attached to shares thereunder and instead sought to re-open arguments and issues that had, by the time the appeal came on for hearing before this Court, been finally determined against Mr Skoczylas. No attempt was made by Mr Skoczylas to

engage with the issues that, according to the authorities, were relevant to whether the reduction in capital should be opposed or not.

Conclusions

97. On the basis of the foregoing analysis, the Court is not persuaded that the balance of justice lies in favour of granting the exceptional order sought by Mr Skoczylas. In the Court's judgment, the material before the Court does not show that, absent a stay, any irreparable harm is likely to be caused to Mr Skoczylas. In particular, Mr Skoczylas has failed to put before the Court the material necessary to enable it to form a view as the likelihood that, absent a stay, he would be made bankrupt or, even if that were to occur, what the consequences would be. Mr Skoczylas has also failed to persuade the Court that success in the *Köbler* proceedings and/or the Constitutional proceedings would likely result in the Costs Order being set aside. In addition, whatever the risk of bankruptcy for Mr Skoczylas, he appears to be exposed to that risk already, given that at least one order for costs has already been made against him and the evidence before the Court does not give any reason to believe that Mr Skoczylas will be in a position to discharge those costs when quantified.

98. The Company is presumptively entitled to enforce the Costs Order if and when that Order becomes final and conclusive. In the Court's view, none of the arguments advanced by Mr Skoczylas, individually or collectively, are sufficient to warrant a departure from that position. It would, in the Court's view, be a significant injustice to the Company to suspend the Costs Order – potentially for many years – to permit Mr Skoczylas to pursue proceedings against the State, in respect of alleged wrongs

for which the Company bears no responsibility in law. Even if, as Mr Skoczylas asserts, he is at risk of being adjudicated bankrupt on foot of non-payment of the costs payable under the Costs Order, that is a risk faced by every unsuccessful litigant who lacks the means to pay the costs of a successful opponent. In the event that he is bankrupted, that may have reputational consequences for Mr Skoczylas but the Court cannot protect him from those consequences – consequences which he ought to have understood and considered in deciding to appeal against the Recusal and Confirmation Orders made by the High Court – without doing an obvious and material injustice to the Company.

99. For these reasons, Mr Skoczylas' application for an additional stay on the Costs Order is refused.

100. Given that the Court has refused Mr Skoczylas' application, it appears to the Court that the Company is presumptively entitled to the costs of the application. That is only a provisional view, however, and if Mr Skoczylas wishes to contend that some different costs order ought to be made then he may, within 10 days of this judgment, make written submissions to that effect, such submissions not to exceed 1,500 words. Any such submissions should be sent to the Company's solicitors at the same time as being sent to the Court of Appeal Office and the Company will then have a period of 10 days to respond, again subject to a 1,500 word limit. If he considers necessary to do so, Mr Skoczylas should then have a further period of 7 days in which to furnish any observations on the Company's response, such observations not to exceed 1,000 words. In the absence of any submissions within the time indicated, the Court will

proceed to make an order in the terms indicated. If the issue of costs is contested, the Court will issue its ruling electronically after considering the submissions made to it.