



THE COURT OF APPEAL

Record No. 2014/1015

Neutral Citation [2022] IECA 21

Haughton J.

Binchy J.

Pilkington J.

**IN THE MATTER OF PERMANENT TSB GROUP HOLDINGS PUBLIC
LIMITED COMPANY**

AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

AND IN THE MATTER OF SECTION 205 OF THE COMPANIES ACT 1963

AND IN THE MATTER OF SECOND COUNCIL DIRECTIVE 77/91/EEC

AND IN THE MATTER OF DIRECTIVE 2001/34/EC OF THE EUROPEAN

PARLIAMENT AND OF THE COUNCIL

AND IN THE MATTER OF DIRECTIVE 2009/101/EC OF THE EUROPEAN

PARLIAMENT AND OF THE COUNCIL

AND IN THE MATTER OF DIRECTIVE 2004/25/EC OF THE EUROPEAN

PARLIAMENT AND OF THE COUNCIL

AND IN THE MATTER OF DIRECTIVE 2004/39/EC OF THE EUROPEAN

PARLIAMENT AND OF THE COUNCIL

AND IN THE MATTER OF ARTICLE 63 OF THE TREATY ON THE

FUNCTIONING OF THE EUROPEAN UNION

AND IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE

FUNCTIONING OF THE EUROPEAN UNION

BETWEEN/

**GERARD DOWLING, PADRAIG MCMANUS, JOHN PAUL MCGANN, TIBOR
NEUGEBAUER, PIOTR SKOCZYLAS, MURIEL SCORER AND GEORG HAUG**

PETITIONERS/APPELLANTS

- AND -

**ALAN COOK, JEREMY MASDING, EMER DALY, MARGARET HAYES,
SANDY KINNEY, RAY MACSHARRY, PAT RYAN, KEVIN MURPHY, DAVID
MCCARTHY, BERNARD COLLINS, ROY KEENAN, THE MINISTER FOR
FINANCE OF THE REPUBLIC OF IRELAND**

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of January 2022

1. The appellants in this appeal are the third, fourth and fifth named of the petitioners referred to above. They are all shareholders in Permanent TSB Group Holdings plc (“Holdings”). The first to eleventh respondents (the “Director Respondents”) in this appeal were at the relevant time all directors of Holdings. The appellants appeal from a judgment of Laffoy J. in the High Court delivered on 23rd August 2013, in which she refused interlocutory reliefs sought by the appellants within High Court proceedings (Record no. 2013 36 Cos), which proceedings are brought by way of a petition pursuant to s. 205 of the Companies Act, 1963.

2. By these proceedings, the petitioners seek a range of reliefs against the Director Respondents, the first of which is that “It be declared that the powers of the first eleven named respondents while directors of ILPGH are being and/or had been exercised in a manner oppressive to the members of ILPGH, including the petitioners, and/or in disregard of their interests as members”. The second relief sought is that it be declared that the affairs of Holdings have, by virtue of the conduct of the Minister for Finance in his capacity of 99.2% majority shareholder of Holdings, been conducted in a manner oppressive to the members of Holdings, including the petitioners. There then follows a series of claims for declarations arising out of the reorganisation and recapitalisation of Holdings pursuant to direction orders made by the court (on the application of the Minister for Finance) on 26th

July 2011 (the “2011 Direction Order”) and 28th March 2012 (the “2012 Direction Order”), pursuant to the Credit Institutions (Stabilisation) Act 2010. More specifically, the petitioners seek orders that the terms of the said direction orders be declared incompatible with various provisions of European Union law and are oppressive to the members of Holdings and in disregard of their interests as members of Holdings. Six of the fifteen reliefs claimed by petitioners seek orders of this kind. The petition was filed in the High Court Central Office on 25th January 2013.

3. An important feature to the background to these proceedings is that, at the time of their issue, and at the time of the hearing of the application before Laffoy J., there were then in existence separate proceedings also brought by some (but not all) of the petitioners herein and other parties, seeking reliefs of a very similar kind, as respects the 2011 and 2012 Direction Orders (and in any case to the intent of having those orders quashed or set aside). Those proceedings, and other proceedings arising out of the same events are referred to by the trial judge in the judgment under appeal as the “Related Proceedings”, a term I will adopt in this judgment in reference to the same proceedings. The proceedings challenging the lawfulness of the 2011 Direction Order resulted in a reference to the Court of Justice of the European Union, following the decision of which the petitioners were unsuccessful in the High Court in both sets of proceedings. The petitioners appealed both decisions of the High Court, and were unsuccessful in their application for leave to appeal to the Supreme Court relating to the 2011 Direction Order (from a decision of O’Malley J. of 31st July 2017), while an appeal from the decision of Peart J. of 28th June 2012 relating to the 2012 Direction Order has been heard, and judgment is pending.

4. By Notice of Motion dated 3rd April 2013, the petitioners sought the following interlocutory orders, which are the subject of the judgment of Laffoy J. from which the appellants appeal:

- 1) That the first eleven named respondents or any of them be precluded from being represented in the within proceedings at the expense of Permanent TSB Group Holdings plc or Permanent TSB plc or any of its subsidiaries;
- 2) That the first eleven named respondents or any of them be precluded from utilising the resources of Permanent TSB Group Holdings plc or Permanent TSB plc or any of its subsidiaries to aid their defence in the within proceedings;
- 3) That the first eleven named respondents reimburse any monies that Permanent TSB Group Holdings plc or Permanent TSB plc or any of its subsidiaries has paid on behalf of or for the first eleven respondents or any of them regarding the within proceedings.

5. This motion was grounded on the affidavit of the fifth named petitioner, Mr. Skoczylas dated 3rd April 2013. (At this point I should say that Mr. Skoczylas represented himself at the hearing of this appeal, and the other appellants adopted his submissions). In this affidavit, Mr. Skoczylas complains that the Director Respondents are misusing and misappropriating the resources of Holdings, and its subsidiary, Permanent TSB plc (the “Bank”) in connection with the defence of these proceedings by the first eleven named respondents. He asserts that the provision of such assistance is unlawful. He quotes a passage from an affidavit sworn on 21st March 2013, by Holdings’ then secretary, Mr. Ciaran Long, sworn in the context of a different application in these proceedings, in which Mr. Long acknowledges that the Chief Legal Officer of the Bank represents the first to eleventh named respondents, and in which Mr. Long states that under the Articles of Association of Holdings and the Articles of Association of the Bank, the first to eleventh named defendants are entitled to be indemnified by Holdings and the Bank in regard to such proceedings. Mr. Long states, at para. 5 of that affidavit:

“[...] I do not accept that the fact that the Chief Legal Officer of the Bank represents the first-eleventh named Respondents who at relevant times have been the Directors of the Bank and Directors of Group Holdings is inappropriate and illegal. Under the Articles of Group Holdings and under the Articles of the Bank the first-eleventh named Respondents are entitled to be indemnified by Group Holdings and the Bank in regard to proceedings such as this. Mr. Skoczylas is of the view that the first-eleventh named Respondents who are being sued as Directors, not shareholders, should instruct a new firm of Solicitors who who [sic] would not be familiar with all the litigation, bear the costs of the Solicitors reading themselves into the proceedings which refer back to other proceedings in which the Chief Legal Officer would be on record for Group Holdings and/or the Bank, discharge their costs and when they are successful in the proceedings that Group Holdings and the Bank would have to pay the Solicitors’ fees on foot of the indemnities. I as Company Secretary of Group Holdings and the Bank am of the view that the most economic and cost effective way of dealing with the matter is to have the Group Chief Legal Officer of the Bank represent the first-eleventh named Respondents as he has represented Group Holdings and the Bank in four other cases involving some or all of the Petitioners arising out of two Direction Orders and the issues are substantially the same in the four cases. This issued [sic] was raised by the Petitioners as Defendants in the Section 160 Application. Mr. Justice Cooke did not consider this fact to be relevant in his Judgement in which he granted the first- eleventh named Respondents an Interlocutory Injunction against the Petitioners.”

Mr. Skoczylas expresses his disagreement with the proposition that the Director Respondents are entitled to any such indemnity in respect of their costs from Holdings or the Bank, and on the basis that Mr. Long has acknowledged that the first to eleventh named

respondents are being represented by the Chief Legal Officer of the Bank, the petitioners issued the motion seeking the reliefs described above.

6. Mr. Long swore an affidavit in opposition to this application on 22nd April 2013. Three further affidavits were then exchanged between the parties, being an affidavit of Mr. Skoczylas of 26th April 2013, an affidavit of Mr. Long sworn on 3rd May 2013 and an affidavit of Mr. Skoczylas sworn on 8th May 2013.

7. In his affidavit of 22nd April 2013, Mr. Long deposes that the provision of legal representation to the first to eleventh named respondents by Holdings and the Bank (through the Chief Legal Officer of the Bank) is not causing either Holdings or the Bank any loss or expense because all costs or expenses associated with the provision of those services are defrayed by a Directors and Officers Liability Policy (the “Policy”) underwritten by Chartis Insurance Ireland Limited. Mr. Long exhibits a letter, dated 19th April 2013, from the insurers confirming that they will provide indemnity under the Policy to the Director Respondents in respect of the costs incurred by them in defending the proceedings, while being represented by the Chief Legal Officer of the Bank and counsel instructed by him.

8. Mr. Long also refers to Article 139 of the Articles of Association of Holdings which expressly provides for an indemnity to the directors of Holdings in the following terms:

“Subject to the provisions of and so far as may be permitted by the Acts, every Director, Chief Executive, Auditor, Secretary or other officer of the Company shall be entitled to be indemnified by the Company against all costs, charges, losses, expenses and liabilities incurred by him in the execution and discharge of his duties or in relation thereto including any liability incurred by him in defending any proceedings, civil or criminal which relate to anything done or omitted or alleged to have been done or omitted by him as an officer or employee of the Company and in which judgment is given in his favour (or the proceedings are otherwise disposed of without any finding

or admission of any material breach of duty on his part) or in which he is acquitted or in connection with any application under any statute for relief from liability in respect of any such act or omissions in which relief is granted to him by the Court. ...

To the extent permitted by law, the Directors may arrange insurance cover at the cost of the Company in respect of any liability, loss or expenditure incurred by any Director, officer or the Auditors in relation to anything done or alleged to have been done or omitted to be done by him or them as Director, officer or Auditors.”

9. Mr. Long avers that there is an identical Article in the Articles of Association of the Bank, and he exhibits both Articles and then further avers:

“In circumstances where the directors have an entitlement to an indemnity from Group Holdings and the Bank, it is a matter for Group Holdings, the Bank and the insurer to instruct appropriate legal representation for the Director Respondents. The Chief Legal Officer is employed to provide legal services to Group Holdings and the Bank and having represented both Group Holdings and the Bank in other proceedings where substantially similar complaints have been raised against Group Holdings and the Bank, is the most appropriate and economic choice of legal representative.”

10. Mr. Long further deposes that both Holdings and the Bank have a vital interest in these proceedings, by reason of certain of the reliefs sought by the petitioners whereby they indirectly attack the validity of the 2011 and 2012 Direction Orders. Accordingly, Mr. Long argues, the s.205 proceedings [i.e. these proceedings] could have profound consequences for Holdings and the Bank such that Holdings and the Bank would be entitled to pay for the costs of the Director Respondents in resisting the petition, even if it were the case that such costs were not being met by the Policy.

11. Mr. Skoczylas swore an affidavit of 8th May 2013 in reply to the affidavit of Mr. Long of 3rd May 2013. In this affidavit, Mr. Skoczylas acknowledges the Policy but contends that

this is no answer to this application. Firstly, he says that the Policy will not cover the cost to Holdings and/or the Bank that arises by reason of staff and other resources of Holdings and/or the Bank being diverted to address these proceedings. This includes not just staff within the legal department of the Chief Legal Officer, but also the time spent upon the matter by the secretary of both Holdings and the Bank, namely Mr. Long, and staff working within his department. Moreover, Mr. Skoczylas argues, it is clear from the terms of the Policy that such expenses are not covered, and he goes further and argues that some of the actions of the Director Respondents to which the petition relates are outside the liability period covered by the Policy. Mr. Skoczylas also argues that the provision of the assistance concerned by Holdings and the Bank to the first to eleventh named respondents is contrary to statute and common law.

12. Insofar as the Director Respondents rely upon the Articles of Association of Holdings and the Bank, Mr. Skoczylas submits that those Articles are, on their face, subject to restrictions, and in particular are contingent upon the directors being successful in the proceedings. Furthermore, he argues, that the Articles of Association do not permit Holdings to pay, upfront, any expenses that may be reimbursed by an insurer, and he claims that these proceedings are being “bankrolled” by Holdings.

13. Mr. Long addressed these issues in his further affidavit of 17th May 2013. Mr Long avers that the costs incurred by the Director Respondents in these proceedings will be reimbursed by the insurers under the Policy as the costs are incurred, so that neither Holdings or the Bank will have to pay the costs in the first instance, and await reimbursement from the insurer. He also addresses the arguments made by Mr. Skoczylas that the Policy does not cover these proceedings, and he refers to a letter from the insurers, AIG (who succeeded to Chartis as indemnifiers of the Policy), being a letter dated 3rd May 2013, which was provided expressly in response to the affidavit of Mr. Skoczylas of 26th April 2013 (this letter

was actually exhibited by Mr. Long to his affidavit of 3rd May 2013). In this letter, the insurer confirms:

- (1) AIG will pay the defence costs of the insurable parties (i.e. the Director Respondents) as and when such fees are incurred and the relevant fee notes are presented for discharge;
- (2) These proceedings are covered by the Policy from 25th January 2013;
- (3) There is a standard form “wrongful act exclusion”. This applies in the event that a director should admit the commission of a wrongful act or that a court should determine that there has been a wrongful act on the part of a director. However, until such an event occurs, a full indemnity is provided;
- (4) The policy holder is required under the Policy to act on behalf of all insureds in relation to matters relevant to the Policy. Accordingly, AIG expects the company secretary of the policy holder to be the person who will liaise with the insurer during the course of the proceedings. It is a prerequisite of all policies of insurance that the policy holder provides and exhibits full cooperation with insurers, and such cooperation is expected in these proceedings.

Judgment of the High Court

14. Having summarised the background to the application, and the application itself, the trial judge noted that the application was not made on the basis that it was an interlocutory application which would endure only until the determination of the s. 205 proceedings. Accordingly, the petitioners were seeking permanent orders in the terms sought. Laffoy J. noted that the petitioners proffered no undertaking as to damages. She noted that the position of the Director Respondents as regards the first two orders sought was that they were not necessary because, on the evidence, the Director Respondents were not being represented at

the expense of or by utilising the resources of either Holdings or the Bank or any of their subsidiaries.

15. The trial judge then went on to summarise the reliefs sought in the petition. She noted that the reliefs sought at paras. 3, 4 and 5 of the petition relate to the 2011 Direction Order. She stated:

“The relief sought in paragraph (3) is that the July 2011 Direction Order ‘be declared incompatible with the said provisions of European Union law’, which on a plain reading one is entitled to construe as a challenge to its validity, and that it is oppressive to the members of Holdings and in disregard of their interests.”

She noted that similar relief was sought in relation to the 2012 Direction Order. She also noted that at para. 13 of the petition, the petitioners seek an order referring fifty two questions outlined in a schedule to the petition to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the functioning of the European Union.

16. At para. 28, the trial judge stated:

“The reliefs sought on this application, as formulated, are expressly directed at the Director Respondents only and only the Director Respondents were before the Court to respond to the application. However, in reality, the first two orders sought on the application, if granted, will preclude both Holdings (of which the Minister is a 99.2% shareholder) and the Bank from assisting the Director Respondents in the defence of the s. 205 Proceedings. As already noted, neither Holdings nor the Bank is a party to the s. 205 Proceedings or the application.”

17. At para. 32, the trial judge summarised the principal ground relied upon by the petitioners on this application as follows:

“The principal ground on which the petitioners advanced this application, as deposed to in Mr. Skoczylas’ grounding affidavit, was that what the Director

Respondents are doing ‘is an expropriation of the resources of the company that they control for their personal benefit and convenience’. That ground was expanded on in a document entitled ‘Summary Oral Submissions of Piotr Skoczylas’ furnished to the Court at the hearing of the application in which, having asserted that Holdings ‘is not the fiefdom of the Director Respondents’, it was asserted that –

- (a) Holdings must not participate in funding the defence of the Director Respondents in any way;
- (b) Mr. MacCarthy, as Chief Legal Officer of Holdings, and his team must not act on behalf of the Director Respondents;
- and
- (c) Mr. Long, as Group Secretary of Holdings, and his team must not aid the defence of the Director Respondents.

Further, it was the petitioners’ case that it is inappropriate for Mr. Long to swear affidavits on behalf of the Director Respondents in the s. 205 Proceedings.”

18. The trial judge noted that the retention by the Director Respondents of Mr. MacCarthy and counsel instructed by him in relation to the s.205 Proceedings was ratified by the Board of Directors of the Bank (my emphasis) at a meeting held on 25th January 2013. She further noted (later in her judgment) that the petitioners took exception to the fact that this resolution was passed by the Board of Directors of the Bank, and not Holdings since the petition relates to the latter company, and not the former, and that this was a deliberate strategy on the part of the Director Respondents to the petition to exclude Mr. Skoczylas, a director of Holdings, from what should have been a discussion and decision to be taken by Holdings, and not the Bank. The trial judge went on to record that the Director Respondents opposed the application on two grounds: firstly, that the legal costs of the defence of the petition are being borne by an insurer, AIG, pursuant to a lawful Directors and Officers Liability Policy,

and, secondly, that in the unique circumstances of these proceedings, and in particular the vital interest which Holdings and the Bank have in the outcome of the same, both Holdings and the Bank would be entitled in any event to fund the defence of the Director Respondents. At para. 38, the trial judge, in summarising the arguments of the Director Respondents stated:

“The dispute between the petitioners and the Director Respondents is not a shareholder dispute. The claims against the Director Respondents relate to decisions taken by them in relation to the recapitalisation of the Bank and the July 2011 Direction Order and the March 2012 Direction Order. In particular, it was emphasised that the Director Respondents have no personal interest in the shares in Holdings and the decisions taken by them were decisions of the Board as a whole, taken *bona fide* in the interests of Holdings and the Bank, which affected all shareholders equally.”

19. The trial judge then went on to summarise the response of the petitioners to the grounds of opposition of the Director Respondents. She noted that Mr. Skoczylas maintained that the Director Respondents were misrepresenting the position as regards the insurance cover and in particular that he asserted that the wrongful acts committed by the Director Respondents occurred outside of the insured period (i.e. they were after 27th July 2011) and were not covered by the Policy. As regards the second ground, Mr. Skoczylas submitted that the s.205 Proceedings are not about the recapitalisation of the Bank.

20. The trial judge then went on to consider the principles applicable to applications of this kind, before proceeding to determine the relevance of the Policy to this application. She noted that of the authorities relied upon by the parties, with one exception (a decision of her own in the case on in *Re Charles Kelly Limited; Kelly v. Kelly & Anor.* [2011] IEHC 349, which decision was affirmed by this Court, since the hearing of this appeal, per Haughton J. [2021] IECA 244), all of the authorities relied upon by the parties were decisions of the courts of the United Kingdom. Of those, the most recent, and the decision upon which she

placed greatest reliance, was that of in *Re a Company No. 001126 of 1992* [1993] BCC 325. That case involved a petition brought under s.459 of the Companies Act 1985, the then equivalent of s. 205 in the United Kingdom. The application before the court was one brought by the company for approval to incur expenditure in representation in a s.459 petition, to which action the company was a respondent but where no reliefs were sought against the company, as the dispute was one between the shareholders. Lindsay J., having analysed the authorities extrapolated a number of principles to be applied in the consideration of such matters, and the trial judge quoted from his decision (at p. 333) as follows:

“As a body they suggest to me the following.

Firstly, there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company’s active participation in or payment of its own costs in respect of active participation in a s.459 petition as to its own affairs is *ultra vires* in the strict sense.

Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.

Thirdly, the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J. in *Ex Parte Johnson*).

Fourthly, that in considering that test the court’s starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.

Fifthly, if a company seeks approval by the court of such participation or expenditure *in advance* then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely.”

21. The trial judge noted that the oldest authority relied upon by the parties was *Pickering v. Stephenson* (1872) LR 14 Eq 322, which was approved in a more recent decision of Hoffman J. in *Re Crossmore Electrical and Civil Engineering Limited* [1989] 5 BCC 37 in which Hoffmann J. stated:

“It is a general principle of company law that the company’s money should not be expended on disputes between shareholders: see *Pickering v. Stephenson*...”

22. The trial judge noted that the relief being considered by Lindsay J. in *Re a Company* was different to that being sought in this application, in that on this application the petitioners seek orders to prohibit the assets of Holdings or the Bank being used to fund the Director Respondents’ defence of the s.205 proceedings, whereas in *Re a Company* the company in the position of Holdings was seeking to be permitted to participate actively in similar proceedings and to fund that participation out of the company’s assets. Nonetheless, the trial judge was of the view that the principles identified by Lindsay J. were appropriate to the resolution of the application in this case, adapted so far as necessary. She then went on to apply those principles, at para. 52, as follows:

1. The trial judge noted that it was not argued that the Articles of Association of either Holdings or the Bank are limited in a manner which would render funding by either company of the Director Respondents’ defence of the s. 205 proceedings *ultra vires*;
2. Aside from the possibility of being *ultra vires*, which she noted could not be ruled out in every case, the trial judge noted that there is no rule of Irish law relied upon by the parties which would necessarily and in all cases preclude a company from

funding the defence of s.205 proceedings against its directors on the grounds that such funding would be improper;

3. Whether such funding is necessary or expedient in the interests of Holdings as a whole is the proper test to apply in determining whether the funding of the Director Respondents' defence of the s.205 proceedings is proper, or, as contended for by the appellants, improper;

4. As far as the fourth principle is concerned, the trial judge did not think that one necessarily starts with the sort of "rebuttable distaste" described by Lindsay J. in *Re a Company* in circumstances where the situation is the converse of that that arose in *Re a Company*, in which case the company was seeking to be permitted to participate in the proceedings.

23. The trial judge then concluded as follows, at para. 52, p. 26 of the judgment:

"On this application, I consider that the Court's function is to assess all of the evidence and make a determination as to whether, in the particular circumstances of this case, the Court can conclude, on the balance of probabilities, that in their response to the petitioners' contention that the use of the resources of Holdings by the Director Respondents to fund their defence would constitute a misfeasance, the Director Respondents have met the necessity or expediency test.

It is probably not an exaggeration to state that the s. 205 Proceedings are unique having regard to the existence of the Related Proceedings and the connection between some of the reliefs sought on the petition and the objective of the Related Proceedings. What cannot be gainsaid is that, in the overall context of all of the proceedings before the Court, the s. 205 Proceedings are very unusual. The fact is that Holdings and the Bank are participating in the 2011 application, albeit for a 'limited and specific role', unless, in sequence of the appeal to the Supreme Court which is pending, that role is

broadened. The Bank, which is the only asset of Holdings, was a notice party on the 2012 Application which, for present purposes, it is assumed will be the subject of an appeal to the Supreme Court. Irrespective of the contention of Mr. Skoczylas to the contrary, the reliefs which the petitioners seek in the s. 205 Proceedings are framed in a manner which would appear is intended to impugn the validity of the July 2011 Direction Order, which is the subject of the 2011 Application, and of the March 2012 Direction Order, which is the subject of the 2012 Application. In those circumstances, it has to be expedient and it is probably necessary that Mr. MacCarthy, who has appeared for Holdings and the Bank on the 2011 Application and for the Bank on the 2012 Application, should appear for the Director Respondents in the s. 205 Proceedings.”

24. The trial judge then resumed with consideration of the fifth of the principles referred to by Lindsay J., noting that it was not directly relevant insofar as in this case the company concerned was not seeking approval from the court for participation or expenditure in advance of the s.205 proceedings. However, the trial judge noted that the petitioners, by this application, are seeking not interlocutory relief, but orders of a permanent nature. This was most particularly the case as regards the third order sought. The trial judge held:

“If it were the case that the petitioners were merely seeking to preclude the Director Respondents from obtaining financial assistance from Holdings or the Bank in aid of the defence of the proceedings pending the determination of the s. 205 Proceedings, it would be necessary for the Court to determine whether the balance of justice favoured the grant or refusal of such a prohibitory order. I cannot see how the balance of justice would favour granting such an order, given that liability for costs would have to be determined by the trial judge in due course. If it is the case that the petitioners are successful as against the Director Respondents in the substantive

proceedings, insofar as it is necessary to do so, an application may be made to the trial judge at that stage for an order directing the Director Respondents to reimburse Holdings or the Bank as the case may be, as happened in the case of *Charles Kelly Limited*.”

25. The trial judge went on to say that even if this application is treated as one seeking interlocutory prohibitory injunctions, there could be no injustice to the petitioners in refusing the application. At para. 53, she stated:

“On the other hand, if the petitioners are unsuccessful and costs are awarded against them in favour of the Director Respondents, and the orders sought have been granted on an interlocutory basis, but without any undertaking as to damages having been proffered by the petitioners, the Director Respondents could suffer injustice by being without a remedy. If the circumstances were such that the Director Respondents would have required to have been funded by Holdings or the Bank but could not be so funded because of the existence of the prohibitory orders, and if they incurred loss in consequence in respect of which they would have no remedy against the petitioners, the Director Respondents would have been treated unjustly by the making of the prohibitory orders. However, all of that is hypothetical if the Director Respondents’ position that they do not have to have recourse to either Holdings or the Bank to fund their defence of the s. 205 Proceedings because they have insurance cover is correct.”

26. As regards the application of the Policy, the trial judge considered the arguments advanced by the petitioners as to why this could not be relied upon by the Director Respondents in answer to this application. She noted the primary argument advanced by Mr. Skoczylas was that the Policy is a limited “run-off” policy that does not cover any wrongful act committed after 27th July, 2011”, and in the submission of Mr. Skoczylas, most of the wrongful acts were committed after that date. The trial judge noted that there was a

dispute as to the accuracy of this contention, but in any case she determined that it was not the function of the court, in the absence of the insurer concerned, to construe the terms of the Policy, and that it would be entirely inappropriate for the court to purport to do so. What she considered was appropriate was to have regard to the unequivocal commitment on the part of the insurer, AIG, in its letter of 3rd May 2013 that:

“Until there is a judicial determination against all or some of the Director Respondents, or an admission of a wrongful act by the beneficiary of the indemnification under the Policy, full indemnity will be provided so that the costs of the defence of the s.205 proceedings will not be borne by Holdings, even in respect of the involvement of Mr. MacCarthy and his legal team. If it ultimately transpires that the trial judge determines that some or all of the Director Respondents have committed wrongful acts and, as between AIG and Holdings, the indemnity is withdrawn, at that stage the petitioners may apply to the trial judge for such order as may be appropriate for the proper protection of the assets of Holdings.”

27. Finally, the trial judge considered and took into account other arguments advanced on behalf of the petitioners. These included an argument that the representation of the Director Respondents by Mr. MacCarthy involved a conflict of interest; that the resolution passed by the Bank on 29th January 2013 gave rise to a conflict of interest; and that it was the board of Holdings (and not the Bank), of which Mr. Skoczylas was a member at that time, that should have made that decision. The trial judge considered that it was open to the petitioners to advance those arguments in the course of the hearing of the s.205 proceedings, if they wished to do so. She did not consider it appropriate for her to address those arguments for the purpose of this application.

28. The trial judge also considered an argument advanced by Mr. Skoczylas that the petitioners would be prejudiced if the Director Respondents are aided by Holdings because

that would involve Holdings and its subsidiaries being engaged, *de facto*, in the s.205 proceedings against the wishes of the petitioners, who have not joined Holdings to the proceedings. The trial judge noted the reliance by the petitioners on the decision of Clarke J. in *Fitzpatrick & Others v. F.K. & Others* [2007] 2 IR 406. However, the trial judge determined that this was not relevant because neither Holdings nor the Bank are parties to the proceedings in any capacity, and in any event this argument is irrelevant if it is the case that the Director Respondents are not being aided by Holdings, but are relying on the Policy, which she considered to be the case.

Notice of Appeal

29. In their notice of appeal delivered on 11th November 2013, the appellants identify eight grounds of appeal. In their written submissions on this appeal, they reduce those grounds to four key issues as follows:

- 1) Is it lawful for the Director Respondents to use the resources of Holdings, i.e. resources comprising salaried full time employees of Holdings to assist the Director Respondents in their defence of these proceedings in circumstances where neither Holdings nor the Bank are parties to these proceedings?;
- 2) Did the trial judge err in taking into account the existence of the Policy, thereby disregarding the following principle articulated in *Regal (Hastings) v. Gulliver* [1942] 1 All ER 378: “[The] general principle that in this court, no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; [which the appellants submit requires the consent of the company concerned in general meeting] that the rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled in my judgment to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact, by reason of

the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.”?

- 3) Did the trial judge err in failing to recognise that the position of the Director Respondents was either unsupported by evidence or supported only by what the appellants contend is inadmissible hearsay evidence? This ground relates to the claim advanced by the Director Respondents that any costs associated with the defence of the proceedings are covered by the Policy, and will therefore not cause any loss to Holdings or the Bank. It is the contention of the appellants that the evidence of the Director Respondents in relation to this issue is erroneous, misleading and false, as well as being hearsay.
- 4) Did the trial judge err in failing to recognise that the Board of the Bank acted *ultra vires* in approving the use of the resources of the Bank and Holdings, by the Director Respondents, for the purposes of defending these proceedings?

Affidavits filed after High Court decision

30. Mr. Skoczylas swore an affidavit dated 18th July 2019, relying upon O. 86A, r. 4(b) of the Rules of the Superior Courts. That order provides:

“[F]urther evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.”

This affidavit runs to thirty pages of dense typescript. The vast majority of this affidavit has nothing at all to do with anything that happened subsequent to the delivery of the decision of the High Court. Indeed, one has to get to para. 23, the end of the eight page of the affidavit to discover the event that Mr. Skoczylas relied upon to file this affidavit, and that is that very soon after the decision of the High Court, Mr. MacCarthy (the Chief Legal Officer of the Bank) filed an application in the Companies Registration Office to register as a sole trader

under the name of Bloom Solicitors. Mr. Skoczylas then goes on to refer to the involvement of Mr. MacCarthy in an entity known as First Citizen Finance, an entity in which other former officers of Holdings are involved. He then describes how Bloom Solicitors is now solicitor on record for Holdings and separately, the Director Respondents, in eight High Court proceedings and seven appeals. In a short paragraph, in bold type for emphasis, Mr. Skoczylas states: “Mr. MacCarthy thus continues to represent the ILPGH Director Respondents in the s. 205 proceedings as a solicitor, now behind the *façade* of the sole trader ‘Bloom Solicitors’.” He then goes on to refer to bills issued by Bloom Solicitors that were referred for taxation and states that they have managed to generate enormous fees from Holdings and the Bank. He refers to bills of costs presented for taxation by Bloom Solicitors and does so in the most critical of terms. He asserts that Bloom Solicitors are, at the expense of Holdings and/or the Bank, advising the Director Respondents in the defence of these proceedings. The remainder of this affidavit requires no comment at all because it does not relate to matters relevant to this appeal, that occurred after the delivery of the High Court judgment.

31. The delivery of this affidavit necessitated the delivery of replying affidavits, which were delivered by Mr. MacCarthy, who swore an affidavit of 16th January 2020, and a Mr. Jeremy Masding, Chief Executive of Holdings and the second named respondent, sworn on 20th January 2020. Mr. Masding takes exception to allegations made by Mr. Skoczylas in his affidavit, which include allegations as to the commission of criminal offences, which Mr. Masding strenuously refutes. Mr. Masding avers that Holdings and the Bank have incurred huge cost and expense in dealing with the litigation in which Mr. Skoczylas in particular, but also the other appellants, have repeatedly raised the same issues. He refers to the judgments already delivered both by the High Court and by the Court of Appeal in which Mr. Skoczylas has been unsuccessful. He avers that it is evident from those judgments that

the allegations of wrongdoing advanced by Mr. Skoczylas have no basis whatsoever and should be withdrawn by him and by the other petitioners.

32. In his affidavit, Mr. MacCarthy describes how, having reached the age of sixty on 25th April 2013, he was entitled to retire from the Bank, but was given a one year rolling contract. He decided to retire from the Bank in early June 2013, and, having given the required six months' notice, the Bank set about recruiting his replacement, a Mr. Andrew Walsh, who commenced employment with the Bank in September 2013. Mr. MacCarthy retired from the Bank with effect from 31st October 2013.

33. Mr. MacCarthy avers that he took up employment with First Citizen Finance in November 2013. Mr. MacCarthy describes how, in September 2013, he registered as a sole trader under the name of Bloom Solicitors. He avers that he provides legal services to Holdings as an independent sole trader, but that so far as these proceedings are concerned, his fees are being paid by the insurers, AIG. Mr. MacCarthy rejects the allegation that Bloom Solicitors is a *façade* as claimed by Mr. Skoczylas. He avers that (at the relevant time) he was leaving the employment of the Bank and starting at the next phase of his own career.

Submissions of the Appellants

34. In his oral submissions to the Court, Mr. Skoczylas emphasised again and again that the petitioners are not seeking to prevent the Director Respondents from availing of Directors and Officers Liability insurance in accordance with the terms of the Policy. While I will come back to this point, this assertion is somewhat at odds with the length to which Mr. Skoczylas has gone to try and persuade the Court that the Policy does not provide the indemnity which the underwriters have agreed in correspondence to provide to the Director Respondents. It can hardly be for the petitioners to argue that the insurers are not obliged, under the terms of the Policy to indemnify, when the insurers themselves have agreed to do so.

35. Mr. Skoczylas submitted to the Court that the petitioners are not seeking injunctive relief to prevent the Director Respondents from availing of the Policy or otherwise. He submits that all the petitioners seek from the Court are declaratory reliefs in light of the express admission (as he characterises it) that the Director Respondents are using the resources of Holdings and/or the Bank in the defence of these proceedings. The reference to such admissions I take to be a reference to the averment in the affidavit of Mr. Long of 21st March 2013, referred to at para. 5 above, and possibly also a reference to the statement in Mr. Long's affidavit of 22nd April 2013 (in connection with this application) that: "the circumstances of these proceedings are so unique that having regard to the vital interest which Group Holdings and the Bank have in the proceedings, they are entitled to fund the defence of the Director Respondents to the proceedings."

36. Mr. Skoczylas further submitted that the Director Respondents are fiduciaries and as such must not enrich themselves at the expense of the company, and must not put themselves in situations where their personal interests and those of Holdings and/or the Bank are in conflict. By availing of the services of Mr. MacCarthy, and others operating within the internal legal department of Holdings and/or the Bank, and corresponding services of Mr. Long, the company secretary, and those working within his sphere, the Director Respondents are obtaining benefits at the expense of the company which they are not entitled to obtain without the sanction of the company in general meeting. Furthermore, the fact that neither Holdings nor the Bank may be at a loss owing to the operation of the Policy (which is not a fact that Mr. Skoczylas concedes) is not a factor which the Court may take into account, having regard to the principles enunciated in *Regal (Hastings) v. Gulliver*, a decision upon which Mr. Skoczylas placed great emphasis in his written submissions to this Court, on appeal, but which (so far as is apparent from the papers before this Court) he does not appear to have referred to at all in the court below.

37. In his written submissions, Mr. Skoczylas submits that the trial judge erred in the following respects:

- 1) Disregarding the admissions made by Mr. MacCarthy and Mr. Long that the Director Respondents have used the resources of Holdings in their defence of the s. 205 proceedings;
- 2) In determining the application on the basis that any expenses incurred by Holdings in the defence of the proceedings would be reimbursed by the Policy and in particular by accepting what was stated in the letters received by AIG. It was submitted that nothing in those letters exonerates the Director Respondents from breaching the “inflexible” and “inexorable” prohibition of the use of the resources of a company for the personal benefit of the Directors. Moreover, the trial judge fell into error in failing to have regard to the terms of the Policy which states that it does not cover the salaries of employees of the insured. The appellants refer to the definition of “defence costs” in the Policy in which it is stated that those costs “shall not include remuneration of any insured, cost of their time or costs or overheads of any company.” The appellants also rely on other provisions of the Policy which they argue have the effect either of entitling the insurer to refuse cover – if, for example, the directors are found in the s.205 proceedings to have committed a wrongdoing, or to decline cover altogether, for example, on the basis that the events concerned occurred outside the period to which the insurance relates.
- 3) In receiving into evidence the affidavits sworn by Mr. Long (which exhibit the letters from the insurers) which the appellants contend is inadmissible hearsay.
- 4) In disregarding the duties of directors both under common law and under the Companies Acts. The trial judge had evidence before her as to the breach of

their duties by the directors which she failed to take into account in arriving at her decision.

- 5) In failing to apply the principles identified as far back as *Pickering v. Stephenson* and restated in cases such as *Re Crossmore Electric and Civil Engineering Limited* (see quotation from the judgment of Hoffman J. at para. 21 above), in *Re a Company* and *Regal (Hastings) v. Gulliver*.
- 6) The appellants take issue with the test applied by the trial judge in para. 52 of her judgment (see para. 22 above), in which the trial judge applied the “necessity and expediency test” referred to in *Re a Company*. The appellants submit that there can be no question of applying that test for the purpose of authorising the use of the resources of a company for the personal benefit of its directors.
- 7) The appellants further submit that the trial judge fell into error in concluding that “the petitioners on this application appear to be attempting to pre-empt the decision which would normally be made by the trial judge as to who should bear the burden of the costs of the s.205 proceedings”. The appellants submit:

“Respectfully, the learned trial judge either failed to understand those reliefs [i.e. the reliefs sought on this application] or patently misrepresented them and turned them into the false, conjured notion quoted above, in order to justify her manifestly erroneous judgment. Indeed, by law, the reliefs sought herein should be granted irrespective of ‘who should bear the burden of the costs of the s.205 proceedings.’”
- 8) The appellants also took issue with the analysis of the trial judge in para. 53 of her judgment (see para. 25 above). It is submitted that “it is clear that directors as company agents are ‘inflexibly’ and ‘inexorably’ prohibited from using company resources for their personal benefit. Thus, to allege that an injustice

could have been done to the Director Respondents by precluding them from utilising the company resources for personal benefit is manifestly incongruous and patently flies in the face of the law.” There are other passages in which the written submissions prepared by Mr. Skoczylas assert that the trial judge selectively used in *Re a Company* as a basis for her judgment, and that she also “cherry picked” from that judgment to justify her conclusions.

- 9) The appellants further submit that the trial judge fell into error in suggesting that an interlocutory order could have been sought pending the determination of the proceedings, having regard to the outright prohibition on directors using the resources of a company for their personal benefit.

Submissions of the Director Respondents

38. In summary, the Director Respondents submit that there was no error in the judgment of the High Court for the following reasons:

- (1) The Director Respondents are not being represented at the expense of or using the resources of Holdings or the Bank. The defence costs of these proceedings are being indemnified under the Policy.
- (2) There is no basis in law or in equity for granting the reliefs sought, even if the indemnity under the Policy did not exist at this stage in the proceedings.
- (3) These proceedings are very different to the usual type of s. 205 proceedings. The reliefs sought by these proceedings, which were initiated prior to the conclusion of the 2011 Direction Order proceedings and 2012 Direction Order proceedings, were of vital concern to Holdings and the Bank and for that reason, those companies would be entitled to fund the defence of the Director Respondents in these proceedings.

- (4) These conclusions are reinforced in circumstances where the challenge brought to the 2011 Direction Order has failed.

Indemnity under the Policy

39. The Director Respondents refer to the correspondence received from the insurers which they submit make it plain that indemnity in respect of the costs of these proceedings is being provided by the insurers, and the High Court was correct to hold that in the absence of the insurer and the policy holder (Holdings) it was not open to the court to enter upon interpretation of the Policy. The appropriate course for the court to take was to have due regard to the unequivocal commitment of the insurer as set out in its letter of 3rd May 2013.

40. Without prejudice to that position, the Director Respondents make detailed submissions as regards the interpretation of the Policy in response to those of the appellants. In response to a submission on the part of the appellants, the Director Respondents submit that the Policy is consistent with Article 139 of the Articles of Association of Holdings, and Article 141 of the Articles of Association of the Bank, which provide for an indemnity to the directors of each company in respect of all costs incurred in the execution and discharge of their duties, including any liability incurred in defending any proceedings in which judgment is given in favour of the director or the proceedings are otherwise disposed of.

41. In so far as it is contended that the authorities prohibit consideration of the fact that indemnity is being provided under the Policy, the Director Respondents rely upon the express statutory provision for such policies, now to be found in s. 235 of the Companies Act 2014, but prior to that to be found in s. 200 of the Companies Act, 1963 (as amended by the Companies Act 2003). Section 235 of the Companies Act 2014, so far as relevant, provides:

“235. (1) Subject to the provisions of this section, the following provision shall be void, namely, any provision:

(a) purporting to exempt any officer of a company from; or

(b) purporting to indemnify such an officer against;

any liability which by virtue of any enactment or rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company.

(2) Subsection (1) applies whether the provision concerned is contained in the constitution of a company or a contract with a company or otherwise.

(3) Notwithstanding subsection (1), a company may, in pursuance of any such provision as is mentioned in that subsection, indemnify any officer of the company against any liability incurred by him or her—

(a) in defending proceedings, whether civil or criminal, in which judgment is given in his or her favour or in which he or she is acquitted; or

(b) in connection with any proceedings or application referred to in, or under, section 233 or 234 in which relief is granted to him or her by the court.

(4) Notwithstanding subsection (1), a company may purchase and maintain for any of its officers insurance in respect of any liability referred to in that subsection.

(5) Notwithstanding any provision contained in any enactment, the constitution of a company or otherwise, a director may be counted in the quorum and may vote on any resolution to purchase or maintain any insurance under which the director might benefit.”

Holdings and the Bank would be entitled to fund the defence of the Director Respondents

42. The Director Respondents submit that the trial judge correctly applied the principles summarised by Lindsay J. in *Re a Company* and in concluding that having regard to the vital interests of Holdings and the Bank in these proceedings, they would be entitled both to pay for the costs of the Director Respondents in defending the proceedings, and to decide that

the Chief Legal Officer should act as legal representative of the Director Respondents in the proceedings. The Director Respondents argue that there is a significant distinction between these proceedings and the kind of proceedings that were more usually brought pursuant to s. 205 of the Act of 1963 (the equivalent now being s. 212 of the Companies Act 2014). The nature of the reliefs sought by these proceedings would, if granted, impact upon the vital interests of the companies, as distinct from their shareholders and directors. The decisions taken by the Director Respondents were subsequently vindicated by the decision of O'Malley J. in the 2011 Direction Order proceedings (*Dowling & Ors. v. Minister for Finance & Ors.* [2014] IEHC 418), and in her decision she concluded that without the recapitalisation of Holdings – the approval of which by the Director Respondents has given rise to these and the Related Proceedings – Holdings would have failed. That being the case the trial judge was correct to conclude that it was expedient and necessary that Mr. MacCarthy, who appears for Holdings and the Bank in the Related Proceedings, should also appear on behalf of the Director Respondents, even if there was no indemnity under the Policy.

Interlocutory prohibitory injunctions

43. The Director Respondents submit that the trial judge was correct in her alternative analysis, that the orders sought are in the nature of interlocutory prohibitory injunctions, even though the appellants sought to characterise the same as declaratory relief. The analysis of the trial judge in this regard was correct, i.e. if the orders sought were granted, on an interlocutory basis, the Director Respondents would be treated unjustly in being required to fund themselves the costs of the defence of these proceedings, in circumstances where there was no undertaking as to damages, and the Director Respondents might not recover from the appellants the costs incurred by them in defending the proceedings.

44. Finally, the Director Respondents submit that it is unclear why the appellants are pursuing this appeal in circumstances where Mr. MacCarthy has retired from his position as Chief Legal Officer at the Bank, but continues to provide the legal services privately under the style of his firm Bloom Solicitors, in circumstances where the fees of Bloom Solicitors are being paid for by AIG under the Policy. This removes any argument that the resources of Holdings and/or the Bank are being deployed in the defence of the proceedings. The Director Respondents are critical of the allegations made by Mr. Skoczylas in his affidavit regarding the legitimacy of Bloom Solicitors.

Decision

45. This is an appeal from a decision made on an interlocutory application which involved the exercise by the trial judge of her discretion. It is well established that in such appeals, this Court should be slow to interfere with such orders of the High Court save in cases of clear error or where the justice of the case so requires. The appellants have failed on this appeal to identify any such error on the part of the trial judge or to demonstrate that the justice of the case requires the setting aside of the order of the High Court. In fact, it is difficult to imagine a more clear cut case of such a failure. The Articles of Association of both Holdings and the Bank expressly provide for indemnity of directors in respect of costs or expenses incurred by them in connection with court proceedings brought against them in their capacity as directors. While there are qualifications to those indemnities, those qualifications do not fall for consideration until the conclusion of the proceedings. In other words, the trial judge was entitled, in the exercise of her discretion, to have regard to those indemnity provisions, and, for the reasons that follow, the Policy.

46. Section 235 of the Companies Act 2014, and its equivalent in the Companies Act, 1963 (as amended) (s. 200 thereof) makes express provision authorising companies to take out policies of insurance in respect of liabilities of any of its officers incurred in respect of

negligence, breach of duty or breach of trust in relation to a company. The Policy is such a policy. Mr. Skoczylas in his submissions to this Court places great reliance upon *Regal (Hastings) v. Gulliver* to argue that the trial judge should not have had any regard to the existence of the Policy. There are a number of problems with this argument. Firstly, so far as I have been able to ascertain, he did not rely upon this case in his submissions to the High Court. Secondly, as is apparent from the extract quoted by Mr. Skoczylas, the principle referred to in the case is one derived from the relationship of principal and agent, and while directors of a company will from time to time act as agents of the company, it is far from clear to me (and there was no argument about this issue) that the Director Respondents, acting as a board in making a decision to retain the services of the Chief Legal Officer of the company on their own behalf could be considered to be acting in an agency capacity.

47. Moreover, and more fundamentally, insofar as the appellants argue that reliance on the Policy is prohibited by *Regal (Hastings) v. Gulliver*, this argument, in my view, is misconceived. The principle relied upon by the appellants could hardly apply to a Directors and Officers Liability Policy, authorised by law and by the Articles of Association of the company, which is taken out by a company expressly to protect directors and officers from actions taken by them in their capacity *qua* directors and officers without recourse to the assets of the company, recourse to which is prohibited. Such an interpretation of *Regal (Hastings) v. Gulliver* would operate contrary to s. 235(4) of the Companies Act 2014, and would defeat the whole purpose of a lawfully procured Directors and Officers Liability Policy.

48. So, therefore, I am satisfied that the Director Respondents are entitled to rely upon the Policy in response to the application made to the trial judge in order to demonstrate that, so far as legal costs are concerned, Holdings will not be put to any expenditure because the company is being indemnified pursuant to the Policy. While Mr. Skoczylas has advanced

several arguments to the contrary, all of these arguments are unambiguously rebutted by the correspondence received from the insurer, and the trial judge was quite correct to hold that it was no function of the court to interrogate this correspondence or the Policy. More than that, it is open to the insurers, for whatever reasons of their own, to provide indemnity even in circumstances where there may be doubt as to their obligation to do so (and I am not saying that that is the case here). It is not at all unusual for insurers to provide indemnity in circumstances where a strict interpretation of a policy might not require them to do so.

49. Mr. Skoczylas also argued that indemnity may be refused where there is a finding or an admission of wrongdoing on the part of a director. That may be so, but in circumstances where the insurer in this instance was agreeing to pay the costs incurred by Holdings as they arise, the trial judge was quite entitled within her discretion to consider the application before her on the basis that indemnity was forthcoming, rather than on the basis that something might happen in the future to bring about a rescission of cover.

50. Finally, so far as the Policy is concerned, the appellants claim that the trial judge fell into error by relying upon hearsay evidence advanced by the Director Respondents to the effect that the cost of these proceedings will be indemnified to Holdings pursuant to the Policy. This is a reference to the letters provided by AIG, and relied upon by the Director Respondents.

51. I have considerable doubt as to whether or not these letters constitute hearsay at all. In *The Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2010] IEHC 152, Edwards J. stated: “Where the document is produced by a party who proposes to rely upon the statements it contains, not as evidence of their truth by way of an exception to the hearsay rule, but to show for some legitimate purpose that the statements (whether or not they be true) were in fact made, then the document is properly to be characterised as non-hearsay original evidence (otherwise original evidence).” See also McGrath on *Evidence* (3rd edn,

Round Hall 2020) where the learned author says at para. 5-40: “A statement may be relevant and admissible because it contains words, sometimes referred to as ‘operative words’ that have a particular legal effect simply because they have been uttered. The classic example is a deed tendered as evidence of the assurance of property. Another is a statement establishing contractual relations and, if a dispute arises as to whether a contract was concluded between two parties, evidence may be given of any statement relied upon as constituting an offer or acceptance for the purpose of showing that a contract came into being.” So, therefore, it must at least be arguable that the letters received from AIG are letters having legal effect, providing evidence as to AIG’s understanding of its contractual obligations to Holdings under the Policy.

52. Furthermore, it is not clear to me that this issue was argued in the High Court. So far as I can see, it is not suggested in the written submissions of Mr. Skoczylas to that court that the letters constitute hearsay (even though he addresses the content of the AIG letters in some detail in those submissions), and nor is this issue addressed in the judgment under appeal. It was the subject on only very limited submissions before this Court. In any case, in light of what I have say in the next paragraph, it is not necessary to decide this issue one way or another for the purpose of this judgment, and I mention the above merely to illustrate that it is far from clear that the letters received from AIG are, as a matter of law, hearsay, as contended by Mr. Skoczylas.

53. Even if it is the case that the AIG letters are hearsay, it is well established that the court is entitled, on an interlocutory application, to receive hearsay evidence (see McGrath on *Evidence*, paras. 5-382 and 5-383). Accordingly the trial judge was entitled to rely on the evidence provided by Mr. Long as to matters within his own knowledge, and the letters from AIG in support of the averments of Mr. Long, by way of exception to the rule against

hearsay. It was not necessary for the Director Respondents to procure a separate affidavit from the author of the letters from AIG.

54. So far as costs other than legal costs are concerned, it was submitted on behalf of the appellants that there are costs associated with the work undertaken by Mr. Long, as company secretary, and his staff in connection with these proceedings, for example, in cooperating in the preparation and delivery of affidavits. It cannot be gainsaid that Mr. Long must have spent some time in addressing such matters, and that it is likely that he had the assistance of his staff in doing so. If the proceedings are continued, more time (and corresponding expense to Holdings) may well be spent by non-legal staff of Holdings in the conduct of these proceedings. However, the insurers have pointed out that it is the obligation of the policy holder (Holdings) to cooperate fully in any proceedings covered by the Policy, and such cooperation is a precondition to indemnity. Of course this is a normal feature to insurance policies generally. If an insured person fails to cooperate with his/her insurers, this will very likely result in a declinature of indemnity. Since the Policy is one expressly authorised by statute, and since indemnity in respect of such claims is expressly authorised by the Articles of Association of the companies, it is difficult to see how a standard condition of indemnity, i.e. cooperation with the insurers – which may cause Holdings some degree of administrative expense could be regarded as in any way unlawful or be prohibited by law. That of course is not a matter for decision on this appeal; I make the point only because it lends further support to the view that the trial judge was entitled, in the exercise of her discretion, to have regard to the requirements of the insurers as regards indemnification under the Policy.

55. The trial judge was further entitled to have regard to the vital interests of both companies in these proceedings. At the time these proceedings were advanced, both the 2011 Direction Order proceedings and the 2012 Direction Order proceedings were ongoing.

A favourable determination for the appellants in these proceedings in their claim for the reliefs mentioned at para. 4 above could well have had a significantly detrimental effect on those other proceedings. As I have already noted above, O'Malley J. held in the 2011 Direction Order proceedings that, as likely as not, the failure to implement the 2011 Direction Order would bring about the collapse of Holdings and the Bank. It would be difficult to imagine a more vital interest for a company in proceedings. Indeed in those circumstances it is difficult to see how the trial judge could have reached a conclusion other than that, even without the Policy, Holdings should put its legal team at the disposal of the Director Respondents in these proceedings, not least on account of their familiarity (i.e. that of the internal legal advisors) with the Related Proceedings.

56. The appellants also take issue with the application by the trial judge of the test applicable to interlocutory injunctions. The appellants argue that the relief they seek is declaratory and not injunctive relief. I have no hesitation in rejecting that submission. First, two orders sought on this application are in the terms of a prohibitory injunction: "That the first eleven named respondents or any of them be precluded from...". This is clearly the language of an injunction restraining the actions thereafter described. In my view the trial judge was entitled, and indeed correct, to consider the application for such orders, *inter alia*, in the light of principles applicable to interlocutory injunctions.

57. So far as the third relief is concerned, whereby the appellants seek orders requiring the Director Respondents to reimburse any monies that Holdings or the Bank has paid on behalf of the Director Respondents in connection with these proceedings, the trial judge stated that in seeking such an order the appellants were seeking to pre-empt the costs orders that may be made at the conclusion of these proceedings. The appellants argue that this is incorrect, but I find it unnecessary one way or another to engage with this point. It would be wholly inappropriate to make an order of this kind on an interlocutory application. Such an order

could only be made following a full hearing and a determination, firstly, that Holdings and/or the Bank had paid money on behalf of the Director Respondents in connection with these proceedings, and secondly that such payment was unlawful.

58. The appellants also complain that the trial judge fell into error in failing to recognise that the Board of the Bank acted *ultra vires* in approving the use of the resources of the Bank and Holdings by the Director Respondents. Even if this submission is correct so far as the resources of Holdings are concerned, this does not avail the appellants in any way. It does not establish that the resources of Holdings are being used impermissibly or without the authority of Holdings in the proceedings. The most that can be said about this point is that it is one that the appellants may be able to use to their advantage at the substantive hearing of these proceedings.

59. Finally, I find it necessary to comment on certain language used by Mr. Skoczylas in his written submissions to the Court. On p. 43 of his written submissions, apropos the conclusion of the trial judge that “the petitioners on this application appear to be attempting to pre-empt the decision which would normally be made by the trial judge as to who should bear the burden of the costs of the s. 205 proceedings”, Mr. Skoczylas states that “the learned trial judge either failed to understand those reliefs or patently misrepresented them and turned them into the false, conjured notion quoted above, in order to justify her manifestly erroneous judgment.” Two paragraphs further on, Mr. Skoczylas continues:

“To make things worse (without prejudice to the foregoing), by granting the Director Respondents an ability to the use the Company resources for their personal benefits, the learned trial judge unjustly ignored the very precedent that she selectively used as a basis for her judgment (while ignoring the whole plethora of common law precedents cited above), i.e. *Re A Company No. 001126 of 1992*. The trial judge cherry-picked from that judgment by failing to heed its determination...”

60. The use of language such as “misrepresented”, “selectively” and “cherry-picked” to describe conclusions of the trial judge clearly implies that the trial judge was deliberately contriving a decision contrary to law, or alternatively was in some conscious way, contrary to the interests of Mr. Skoczylas, biased in the way she formulated her decision. Mr. Skoczylas seems to have difficulty in distinguishing between sincere and proper criticisms of the judgment of the trial judge (whether well founded or not) on the one hand, and impugning her integrity on the other. The use of this very kind of language by Mr. Skoczylas was deprecated by this Court a short while before this appeal came on for hearing, in a judgment of this Court handed down on 10th June 2020 in proceedings entitled *Permanent TSB Group Holdings Plc v. Piotr Skoczylas* [2020] IECA 152. At para. 36 of the judgment in that appeal it is stated:

“There is one further observation that the Court considers it necessary to make. It concerns comments made by Mr. Skoczylas about Sanfey J. and his judgment of 2 April 2020 in the *Köbler* proceedings. ... 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. This is an entirely inappropriate approach for any litigant – whether represented or not – to take.”

61. In this case too, Mr. Skoczylas prefaced many of his remarks with words like “respectfully” and “learned trial judge”, and he made many other trenchant criticisms of the

decision under appeal, which he is entitled to make, whether or not they are found to be correct. But, as stated above, language that questions the integrity or good faith of a judge without any foundation, goes far beyond legitimate criticism, and left unchecked, is damaging to the administration of justice as a whole. I cannot therefore let this judgment pass without deprecating in the strongest possible terms the use of such language by Mr. Skoczylas, to describe the decision of the trial judge in this matter. It is only fair to observe that the comments made by Mr. Skoczylas in his submissions in this case were made in written submissions filed long before the delivery by Collins J. of the judgment referred to above, and so it would not be fair to suggest that he made the remarks that he did in this case having already been subjected to censure for making remarks of a similar kind in another case. Nonetheless, Mr. Skoczylas has now had it drawn to his attention on two occasions that language of the kind referred to above that is used, without justification, in such manner as to impugn the integrity and good faith of a judge is both inappropriate and unacceptable, and it is to be hoped that he will refrain from the use of such language in the future.

62. It follows from all of the above that I have been satisfied that the decision of the trial judge to refuse the reliefs sought was one taken well within the margin of her discretion on an application for interlocutory relief, and that this appeal should be dismissed. As this judgment is being delivered electronically, my provisional view is that the costs of the appeal should follow the event and that the appellants should pay the costs of the respondents, to be adjudicated in default of agreement. If any party wishes to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by each side in relation to the appropriate order for costs. Parties should note that in the event that they are unsuccessful in altering the provisional order for

costs which I have indicated, that they may be required to pay the costs of the additional hearing. Haughton and Pilkington JJ. have expressed their agreement with this judgment.