THE COURT OF APPEAL

APPROVED

Neutral Citation: [2023] IECA 197

Record Number: 2014/871, 2014/872, 2014/873, 2014/874

High Court Record Number: 2012/116MCA

Haughton J.

Binchy J.

Pilkington J.

IN THE MATTER OF IRISH LIFE & PERMANENT PLC AND IN THE MATTER OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2020, AND IN THE MATTER OF AN APPLICATION BY THE MINISTER FOR FINANCE FOR A DIRECTION IN RELATION TO IRISH LIFE & PERMANENT PLC PURSUANT TO SECTION 9 OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010 AND ANCILLARY ORDERS

BETWEEN/

GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS, SCOTCHSTONE CAPITAL FUND LIMITED, JOHN PAUL MCGANN, GEORGE HAUG, TIBOR NEUGEBAUER, AND J. FRANK KEOHANE

APPELLANTS

-AND-

THE MINISTER FOR FINANCE

RESPONDENT

-AND-

PERMANENT TSB PLC (FORMERLY IRISH LIFE AND PERMANENT PLC)

NOTICE PARTY

JUDGMENT ON COSTS AND STAY APPLICATION

JUDGMENT of Mr. Justice Robert Haughton delivered on the 31st day of July, 2023

Introduction and Preliminary matters

1. The substantive judgment of this court on these appeals was delivered herein electronically on 8 November 2022 (Haughton J., with whom Binchy and Pilkington JJ concurred) ("**the Principal Judgment**"). The Principal Judgment affirmed the decision of the trial judge (Peart J.) that the appellants do not have *locus standi* under s. 11 of the Credit Institutions (Stabilisation) Act, 2010 (as amended) ("**the 2010 Act**") to seek to set aside a Direction Order made on 28 March 2012 pursuant to s. 9 of the 2010 Act ("**the March 2012 Direction Order**") and ancillary orders whereby the Notice Party (as in the Principal Judgment also referred to herein as "**ILP**") was directed to sell its life assurance business, Irish Life Limited and its subsidiaries ("**Irish Life**"), to the respondent for the sum of €1.3Bn, such sale to be completed not later than 30 June 2012. Peart J. accordingly dismissed the appellants' applications, and in its Principal Judgment this court affirmed those orders.

2. In a further judgment delivered *ex tempore* by Peart J. on 8 August 2012 ("**The Costs Judgment**") it was ordered that the applicants (the appellants herein) do pay to the respondent and Notice Party the costs of the proceedings, to include all reserved costs, to be taxed in default of agreement. At a further hearing before Peart J. on 26 August 2012 the appellants' application for a stay was refused. The appellants' appeal in respect of the Costs Judgment, and the refusal of a stay, are the subject of this judgment.

3. Further, in a Notice of Motion dated 22 December 2022, three of the appellants, Piotr Skoczylas, John Paul McGann and Tibor Neugebauer (who since the Principal Judgment have been the only active appellants) sought *inter alia* an order that the members of this court recuse themselves from adjudicating further in these proceedings on grounds of objective bias ("**the Recusal Application**"). Having heard the parties in a Ruling delivered on 25 April 2023 ("**the Recusal Judgment**") this court rejected that application, gave directions for the hearing of the balance of outstanding matters, and reserved the costs of the Recusal Application to the further hearing of the appeal.

4. Accordingly this judgment deals with the following matters: -

(1) The appellants' appeal in respect of the Costs Judgment in the High Court.

(2) The costs of the appeal.

(3) The costs of the Recusal Application.

(4) The appellants' application for a stay pursuant to the said notice of motion dated 24 November 2022 at relief no.3 in which they sought –

> "… an order to stay these proceedings and to stay any order in this case, pending the conclusion of the ongoing cases rec. no. 2013/2708P and 2013/2709P (the "Constitutional Proceedings") in respect of the inconsistency of the Credit Institutions (and Stabilisation) Act, 2010 (the "2010 Act") with the Constitution and the incompatibility of the 2010 Act with EU law and the ECHR."

The Constitutional Proceedings were heard over 3 days in the High Court (Bolger J.) in June 2023 and judgment has been reserved. In the alternative a stay is sought in respect of costs only pending possible further appeal to the Supreme Court.

(5) The costs of the costs/stay hearing leading to this judgment.

5. This judgment should be read with the Costs Judgment, the Principal Judgment, the Recusal Judgment, and a further ruling of this court delivered herein on 13 December 2022 refusing an application to review the Principal Judgment ("**the Review Ruling**"[1]).

6. It is appropriate to mention here that in the final paragraph of the Principal Judgment I stated, in relation to the costs of the appeal, the following: -

> "As has become usual where judgment is delivered electronically, I will indicate the order that I would propose to make in relation to the costs of these appeals. As the Minister and the notice party were "entirely successful" in these appeals within the meaning of that term in s.169(1) of the Legal Services Regulation Act, 2015 they are entitled to their costs of the appeals, such costs to include all reserved costs, and such costs to be adjudicated by a legal costs adjudicator in default of agreement. In the event that any party wishes to contend for some other order as to costs of the appeals that party should so notify the Court of Appeal office within 21 days from the date of electronic delivery of this judgment and a short hearing will be arranged."

7. Pursuant to the directions given in the Recusal Judgment on 25 April 2023 written submissions on the outstanding issues were received from Mr. Skoczylas, from the respondent, and from the Notice Party. At a hearing held on 11 July 2023 the court heard from Mr. Skoczylas, whose submissions, both written and oral, were adopted by the appellants Mr. McGann and Mr. Neugebauer, and the court heard from counsel for the respondent and Notice Party. The structure and content of Mr. Skoczylas' oral submissions were based in large part on a 12 page

[1] No costs issue arises in respect of the Review Ruling as it was decided against the appellants without recourse to the respondent or notice party on the basis that it did not meet the threshold for review.

email received by the court on the morning of the hearing, and which set out the extracts from authorities which he relied upon, in addition to his written submission.

8. With regard to the parties named as appellants in the title hereof, only Messrs. Skoczylas, McGann and Neugebauer have actively pursued their appeals in respect of the Costs Judgment, and seek their costs of the appeal and Recusal Application, and a stay. In essence they seek –

(1) that the High Court costs orders be set aside and that they be awarded their costs of the High Court or alternatively that no orders be made;

(2) that they be awarded the costs of the appeals or alternatively that no orders be made;

(3) that they be awarded the costs of the Recusal Application;

(4) further and in the alternative that no costs be awarded to the Notice Party;

(5) without prejudice to the foregoing, that this court's final orders, or at any rate any orders awarding costs against the appellants, be stayed until the ultimate adjudication of the Constitutional Proceedings, or alternatively pending the outcome of any application to the Supreme Court for further leave to appeal from this court.

9. The Respondent and Notice Party oppose all the orders sought, and seek their costs orders in respect of the appeal and the Recusal Application only against the three active appellants. My understanding from this is that, notwithstanding that Scotchstone Capital Fund Limited pursued the appeal and was represented by a solicitor (who adopted Mr. Skoczylas' arguments), costs of the appeal are not being pursued against that company. The respondent and Notice Party also resist any stay, or at any rate any stay beyond the point at which the appellants might apply for leave to further appeal to the Supreme Court.

10. With regard to the other named appellants:

1) Mr. Dowling: He pursued the appeal. However no further costs are sought against him by the respondent or Notice Party. Accordingly the High Court order in respect of him is to be affirmed, but no further costs order is made against him.

2) Mr. McManus: The same applies as with Mr. Dowling.

3) Scotchstone Capital Fund Limited – see above. There has been no further step taken by or on behalf of the company following the Principal Judgment, and no further costs appear to be sought against it. Accordingly the High Court order in respect of it, including the costs order, is affirmed, but no further costs order is made against it.

4) Mr. Haug is deceased and at the appeal hearing the appeal in his name was struck out[2], and this should be recorded in this court's final perfected order.

5) Mr. Keohane. He did not appear to prosecute his appeal, and it was struck out without any further costs no order[3], and again this should be reflected in this court's perfected order.

The Costs Judgment

11. The trial judge commenced by noting the provisions of O. 99 R.S.C. as it then existed, and that there could be exceptions to the normal rule that costs would follow the event "*... where the litigation is what can be termed truly public interest litigation where no private interest of the litigant is in play ...*". However, while noting that the unsuccessful applicants were eight shareholders of Irish Life and Permanent Group Holdings ("**ILPGH**") – the public limited company which wholly owned ILP - and that there were approximately 130,000 other private shareholders (other than the Minister for Finance), Peart J. found that the applicants did not

[2] Principal Judgment para.24.
[3] Principal Judgment para.25.

represent the other shareholders and that "*this is not any sort of class action*", and that the litigation was not "*in the public interest in its wider sense*". He stated (at p. 7) that:-

> "The gain if any to be derived from any success in the proceedings was a success to be enjoyed if indeed any could derive by the applicants and a number of other shareholders in ILPGH. The general public had nothing to gain directly by the applicants' success".

12. The trial judge also rejected an argument that the impugned direction order, and the July 2011 Direction Order, were a fraud on the applicants, considering that that had never been argued.

13. The trial judge then addressed an argument that the 2010 Act was "*draconian legislation*". He stated (p. 7-8) that:

> "The fact that the legislation is new and even perceived as draconian in order to meet the very serious economic and financial state of the country is not something that the Court should have regard to unless there might be some obvious public benefit to be gained from the Court's judgment, most obviously if the Court had been required to clarify or interpret some sections where there was ambiguity. I do not consider that to be the case in the present instance."

14. The trial judge also rejected an argument that, as the applicants had suggested, the issue of *locus standi* should have been decided at the outset as a discrete issue, which would have shortened the case by a number of days. He was not persuaded by this and stated (at p. 8):-

> "The reasons are that given the very tight timeframe within which the proceedings and the issues raised had to be concluded it would not have been practicable to hear a preliminary issue as to locus standi and then if necessary to proceed to hear the remaining issues all by the 30th June 2012."

15. Finally, Peart J. addressed the argument that the Notice Party should not recover its costs. It appears that it was joined as a notice party on its own application at the direction stage, by order of Kearns P. The applicants argued that it need not have been joined because the respondent was capable of defending the proceedings without the assistance and involvement of another legal team. Peart J. was of the view that "*there can be no doubt that I.L.P. had an important interest to protect from its point of view and that it was appropriate that it should have its voice heard and be joined for that purpose*". In deciding to award the Notice Party its costs against the applicants Peart J. relied on the *Spin Communications t/a Storm FM v. Independent Radio and TV Commission* [2000] IESC 56 where Keane C.J. stated: -

> "The court is not concerned with a case in which, it may be, that at the end of the High Court proceedings, because perhaps a multiplicity of notice parties were brought in, not all of whose presence was necessary, the court may exercise its discretion by declining to order costs except in favour of one representative notice party as it were who has really carried the whole burden of the argument and in circumstances where the presence of other notice parties may have been entirely superfluous.
>
> That is not this case. This is a case in which the notice party, as indeed the High Court judge accepted, is a party with a vital interest in the outcome of the matter. As Chief Justice Finlay said in the O'Keeffe v. An Bord Pleanála case, where you have a party such as the Notice Party in the present case who is vitally interested in the outcome of the proceedings, they must be joined as a party and will be joined by the Court if the applicant does not join them. In those circumstances, it seems to me that once the notice party is there, once he is in the proceedings protecting his interests, he may find himself in precisely the same position as the respondent. He may find himself in the position that he has been there, of necessity, to protect his interest, to advance arguments that may not have been advanced by the IRTC and

to have had the benefit of his own counsel and solicitor to protect his interest. It would be quite unjust that he should have to pay his costs because the applicant company has no assets, where he has been brought there as a necessary party.

I am very far from setting down any general rule because it is always a matter for the High Court in the exercise of its discretion to decide whether a party is entitled to costs at the end of the hearing. But there appears to be nothing in the present case to suggest that if the IRTC and the notice party are successful in these proceedings they would not both be awarded their costs as both having a vital interest in the outcome."

16. On that basis Peart J. determined that the respondent and Notice Party were entitled to be awarded their costs by the applicants.

Legal Principles relating costs

17. The core principles relating to costs are now contained in sections 168 and 169 of the Legal Services Regulation Act, 2015 (("**the 2015 Act**"), and O. 99 of the Rules of the Superior Courts as recast by S.I. 584 of 2019 ("**the Recast**" RSC). These provisions apply to the appeal costs and the Recusal Application.

18. Order 99, rule 2(1) of the Recast RSC provides –

"The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

While this preserves the discretion of the court, Recast O. 99, r. 3(1) now provides –

"The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in s. 169(1) of the 2015 Act, where applicable."

19. Section 168 of the 2015 Act, so far as relevant states: -

"(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, …

(2) Without prejudice to *subsection (1),* the order may include an order that a party shall pay –

(a) a portion of the other party's costs,

(b) costs from all and to a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) Interest on costs from or until a specified date, including a date before the judgment.

(3) …"

20. Of importance is s. 169(1) of the 2015 Act, the subsection mentioned in the Principal Judgment as the basis for the court's proposal in relation to costs: -

"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

21. Unsurprisingly the respondent and Notice Party argue that as they were *'entirely successful'* they are entitled to their costs of the appeal and Recusal Judgment. Mr. Skoczylas in his submissions relied on *'the nature and circumstances'* of the proceedings, which he argued were exceptional, of public importance, novel, complex, and in the public interest; I will address these contentions later in this judgment.

22. Mr. Skoczylas also relied on sub. clause (f) because in a letter dated 30 May 2023 sent to the Chief State Solicitor's office and Arthur Cox, the solicitors on record for the respondent, he made an open offer on behalf of himself and Scotchstone Capital Fund Limited to settle this and all related litigation for a payment of €196,725, such offer expiring on 12 June 2023. Arthur Cox solicitors replied on 21 June 2023 on behalf of the respondent declining the offer of settlement.

23. The costs provisions of the 2015 Act have been considered by this court, and in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, at para. 19, Murray J. summarised the principles under the new costs regime as follows: -

"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0.99, r.2(1)).

(b) In considering the awarding of costs of any action, the Court should *'have regard to'* the provisions of s.169(1) (0.9, r.3(1)).

(c) In a case where the party seeking costs has been *'entirely successful in those proceedings',* the party so succeeding *'is entitled'* to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to *'order otherwise'* the court should have regard to the *'nature and circumstances of the case'* and *'the conduct of the proceedings by the parties'* (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is *'partially successful'* in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been *'entirely successful'* the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (0.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).”

24. In that appeal *Chubb* had not been *“entirely successful”* in the proceedings, which prompted Murray J. to comment on the interaction between s. 168(2) and s. 169(1). At para. 37 he stated –

“Chubb, not having been *‘entirely successful’* in its proceedings has no entitlement under s.169(1) of the 2015 Act to its costs. The Court has, however, the power under s.168(2)(a) to make an order in its favour to the extent that it was *‘partially successful’* in the proceedings, just as it has the power to make an order on the same basis in favour of [the respondent]. That power extends to awarding *‘costs relating to the successful element’* of the proceedings. The difference between the two provisions is important: the party who prevails entirely has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order for costs in respect of the successful aspect of its claim if, having regard *inter alia* to the criteria specified in s.169(2), it is appropriate to award them. Issues will arise in other cases as to what exactly *‘entirely successful’* means. Depending on the precise construction placed on that phrase, the pre-existing position that a party who won *‘the event’* but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all its costs, may have been changed by the Act.”

25. In *Higgins v. Irish Aviation Authority* [2020] IECA 277, in a further judgment of this court, Murray J. identified the appropriate sequence of examination to be conducted by the court: -

“9. Both parties referred in their submissions to ss. 168 and 169 of the Legal Services Regulation Act 2015. In this case, the application of these provisions when viewed in the light of O.99. r.3(1) RSC involves the Court in addressing four questions:

(a) Has either party to the proceedings been *'entirely successful'* in the case as that phrase is used in s.169(1)?

(b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a)-(g), all of the costs should not be ordered in favour of that party?

(c) If neither party has been *'entirely successful'* have one or more parties been *'partially successful'* within the meaning of s. 168(2)?

(d) If one or more parties have been '*partially successful*' and having regard to the factors outlined in s.169(1)(a)-(g) should some of the costs be ordered in favour of the party or parties that were *'partially successful'* and if so, what should those costs be?"

Murray J. added: -

"10. In answering these questions, it is particularly important to bear in mind that whether a party is *'entirely successful'* is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is *'entirely successful'* all of the costs follow *unless* the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s. 169(1). If *'partially successful'* the costs of that part on which the party has succeeded *may* be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 r.2(1) a party who is *'partially successful'* may still succeed in obtaining *all* of his costs, in an appropriate case.

26. The respondent and notice party therefore assert that they have a right to the costs of the appeal and Recusal Application *unless* there is a reason not to order them. They say that this is a presumptive entitlement, or the default position, and that the onus is on the appellants to persuade the court otherwise. I agree with this submission in so far as the appellants bear the onus of persuading the court to exercise its discretion '*otherwise'*. It was not denied that by the

appellants that the respondent and Notice Party were entirely successful in both matters. This was also not an appeal in which it could be argued (nor was it) that the appellants were in some way *'partially successful'.* It follows that the onus was on the appellants to persuade this court to depart from an award of costs to them pursuant to s.169(1), and Mr. Skoczylas' arguments in that regard are considered later in this judgment.

27. Obviously the 2015 Act and Recast Rules did not apply at the time of Costs Judgment. The position then prevailing, including the circumstances in which an unsuccessful claimant might nonetheless be awarded costs, was addressed by the Supreme Court in *Dunne v. The Minister for the Environment, Heritage and Local Government and Others* [2008] 2 I.R. 775, a decision cited by Mr. Skocylas in his submissions. That was a case in which the High Court had dismissed the plaintiff's claim in a substantive matter but made a costs award in his favour. The plaintiff's appeal in relation to the substantive issues was dismissed by the Supreme Court, reported at [2006] IESC 49, and the Supreme Court later gave its decision in respect of the costs appeal. Murray C.J. confirmed that the basic law governing the question of costs in civil proceedings was to be found in s. 14(2) of the Courts (supplemental provisions) Act, 1961, and O. 99 of the RSC 1986 as they then stood. He stated –

> "17. Order 99 of the Rules of the Superior Courts 1986 provides that the costs of and incidental to every proceeding shall be in the discretion of the Superior Courts and in particular, at sub-rule (4), that costs shall follow the event unless the court otherwise orders. Moreover, the Act of 1961 and the Rules of the Superior Courts 1986 adopt and incorporate the procedure and practice which applied in our courts for a very long time. There has been no fixed rule or principle determining the ambit of that discretion and, in particular, no overriding principle that determines that it must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of cases. In *Hewthorn & Co. v. Heathcott* [1905] 39 ILTR 248, Kenny J. stated: -

'*It is well settled law, as is shown by the authorities cited to me, that when costs are in the discretion of a judge he must exercise that discretion upon the special facts and circumstances of the case before him and not be content to apply some hard and fast rule*.'

18. Undoubtedly, the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of special and general public importance are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. …"

28. Later in his judgment in discussing the case law that was argued before the court, Murray C.J. stated: -

"24. … I did not find that there is anything in *Synott v. Martin* which would support the contention that the public interest element coupled with issues of general public importance govern or determine the exercise of a court's discretion on the issue of costs. On the contrary, the judgment indicates that there are other factors which may also have to be taken into account according to the circumstances of the case.

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

26. The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by

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

27. Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. …"

29. In his submissions as to public interest litigation and exceptional importance Mr. Skoczylas placed particular reliance on two further judgments, firstly *Curtin v. Dáil Eireann* [2006] IESC 27, and secondly the decision on costs of a Divisional Court of the High Court in *Collins v. Minister for Finance* [2014] IEHC 79.

30. In *Curtin* the applicant Circuit Court judge sought judicial review of the procedures of a joint committee of Dáil Éireann established to investigate allegations of misbehaviour. The applicant was unsuccessful in the High Court, and his appeal was dismissed by the Supreme Court. The Reporter's note at the end of the report briefly sets out what the Supreme Court did in relation to costs: -

"On the 6th April, 2006, the Supreme Court … held, in granting the applicant half his costs in the High Court and Supreme Court against the tenth respondent [the State] and making no order for costs in respect of the other respondents, that the court would exercise as the case was exceptional and *sui generis* as the court had to interpret and define the meaning of the ambit of Art. 35 of the Constitution. The court, as the constitutional court, would not

treat the applicant as having succeeded but had to address issues which went beyond the specific issues raised and determined, by way of constructive interpretation, how the final adjudication process must be addressed and has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State."

31. It seems to me that *Curtin* is of little assistance to this court in the present case because it concerned the ambit of Art. 35 of the Constitution, whereas the present proceedings did not engage with or require this court to interpret any provision of the Constitution, albeit that the appellants have challenged the constitutionality of the 2010 Act in the Constitutional Proceedings.

32. Perhaps of more assistance is the judgment of the Divisional Court of the High Court in *Collins,* although it also concerned a constitutional challenge. In *Collins* the court had rejected the challenge by the plaintiff, who was a member of Dáil Éireann, to the *vires* of certain ministerial orders made pursuant to the Credit Institutions Financial Support Act, 2008, and also rejected the plaintiff's challenge to the constitutionality of that Act. In addressing costs, the court considered *Dunne* and other relevant case law in relation to the awarding of costs to unsuccessful litigants in constitutional cases, and at paras 13-18 it summarised certain principles which it considered emerged from that case law: -

"13. First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include *Norris v. Attorney General* [1984] IR 36 (homosexuality) *Roche v. Roche* [2006] IESC 10 (the constitutional status of human embryos) and *Fleming v. Ireland* (2014)(assisted suicide).

14. Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government. Examples here include *Horgan v. An*

Taoiseach [2003] 2 IR 468 (what constituted participation in war for the purposes of Article 28) and *Curtin v. Dáil Éireann* [2006] IESC 27 (aspects of the judicial impeachment power).

15. Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include *TF v. Ireland* [1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989), *O'Shiel v. Minister for Education* [1999] 2 IR 321(aspects of the State's duty under Article 42.4 to provide for free primary education), *Enright v. Ireland* [2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) *and MD (a minor) v. Ireland* [2012] IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females).

16. Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in *Curtin.* This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge. …

17. Fifth, as Murray C.J. pointed out in *Dunne*, the fact that the litigation has not been brought for personal advantage and that the issues raised "are of special and general public importance are factors which may be taken into account." As *Dunne* itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s. 8 of the National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.

18. Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both *Horgan* and *Curtin* the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as *Roche v. Roche* and *Fleming v. Ireland* - full costs were awarded to the losing party in this Court."

33. It is important to note that most of the principles enunciated in *Collins* relate to cases where constitutional issues are raised. Undoubtedly there will be non-constitutional cases which are of such public interest or so exceptional that a court is entitled to exercise its discretion in departing from the normal rule as to costs, but these are likely to be few in number.

34. In this regard I have found of particular assistance the recent decision of this court in *Lee v. The Revenue Commissioners* [2021] IECA 114. In his judgment Murray J. stated –

"6. Fourth it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the enactment of the Legal Services Regulation Act 2015. The essential factors guiding it were, I think, well summarised recently by Simons J. in *Corcoran and anor. v. Commissioner of An Garda Siochana and anor*. [2021] IEHC 11 at para. 20. Having referred to the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation, Simons J. continued:

> *In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant*

deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.'

7. As this description suggests, the '*public interest'* cases in which the court absolves the losing party from the cost consequences that usually follow the failure of their litigation may cover a wide terrain. In their purest form, they will involve significant issues of Constitutional or European law of general importance that have been pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage. In some such cases the public interest in the underlying issue has been such as to justify the grant to the unsuccessful claimant of orders for the payment by the successful respondent of a proportion, or all, of their costs. The circumstances in which orders of this kind have been made are comprehensively examined in the decision of the Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79.

8. At one point the view was adopted that this exceptional jurisdiction was not available to a claimant whose case was brought in part to obtain a personal advantage (see the discussion at paras. 18-21 of *Harrington v. An Bord Pleanála* [2006] IEHC 223). However, since then costs orders have been made in favour of losing parties who brought litigation in order to advance a personal interest (see *Curtin v. Clerk of Dáil Eireann* [2006] IESC 27 : *Kerins v. McGuinness* [2017] IEHC 217), and the same jurisdiction has been invoked to justify making no order as to costs in such circumstances (see *HID v. The Refugee Applications Commissioner* [2013] IEHC 146). There is, in practical terms, a sliding scale guided by the importance of the issues, the number of other cases in which those issues are likely to arise and the strength of the claimant's case, the application of that scale being influenced in any given situation by the nature of the claimant's interest in the action A citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest and which raises substantial issues will have to surmount a lesser burden in obtaining

their costs than a similarly positioned litigant who proceeds to litigate an issue which affects their personal or proprietary interests. A litigant in the latter category may be exempted from costs in a case where a claimant in the former situation obtains some or all of them. Each may find themselves bearing costs if their claim turns out to be insubstantial or if it revolves around legal issues that are discrete (rather than general) in their application."

35. Murray J. also cited with approval the judgment of Clarke J. (as he then was) in *Cork County Council v. Shackleton* [2007] IEHC 334. There the proceedings were in reality between the applicant Council and the notice party developer, with the property arbitrator Mr. Shackleton being named as a respondent. The proceedings were determined in favour of the County Council, but the notice party sought its costs. These were refused, but Clarke J. also declined to make an order for costs in favour of the County Council. He regarded it as a *"test case"* which would benefit other local authorities, developers and property arbitrators grappling with the same issue. It was also a case which arose from difficult issues of interpretation of legislation which Clarke J. considered *"of widespread and general application"* which he said was *"opaque"*. Murray J. in *Lee* quoted with approval the following passages from the judgment (which had been cited with approval in the Supreme Court decision in *O'Keefe v. Hickey & Ors* [2009] IESC 30): -

"10. … Clarke J. expressed the essential basis for his decision as follows (at para. 16):

'I am satisfied that the court retains discretion to consider whether there should be some departure from the normal rule in respect of costs. The circumstances concerned, in my view, stem from the fact that this litigation was necessitated by the introduction of legislation which is extremely difficult of construction and where one of the parties to the litigation is a public authority which is answerable to the very ministry who introduced that legislation in the first place.'

11. Clarke J. explained the principle in issue as follows (paras. 13 and 14)

'where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.

However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry (sic) and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the Court to weigh in the balance in considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland was in substance responsible.' "

36. To these principles should be added that an appellate court should be slow to interfere with the exercise of discretion by a trial judge in relation to costs. In *Delany & McGrath on Civil Procedure* 94th Edn., 2018, the authors state –

"23-150 Thus, the power of the Supreme Court to interfere with the discretion of a trial judge in relation to costs will be exercised 'sparingly'[4]and weight will be given to the views

[4] *Ryanair Plc v. Aer Rianta cpt* Supreme Court, 26 October 2001 at 5 *per* Keane CJ: *Mangan v. Independent Newspapers (Ireland) Limited* [2003] 1 IR 442, 447, [2003] 2 ILRM 33, 38 *per* McCracken J.

of the trial judge. An example of this approach can be seen in *O'Connor v. Nenagh Urban District Council*[5] where the trial judge had ordered that the notice party recover costs against an applicant who failed in his application for judicial review. Denham J. stated that there was no doubt that their notice party would have been affected if the relief sought in the judicial review proceedings had been granted and that it was appropriate that the notice party had been joined. She stressed that the Supreme Court will give great weight to the views of the trial judge in relation to the award of costs and said that as no compelling reasons had been established as to why costs ought not to follow the event, she would not interfere with the exercise of his discretion in this regard."

The authors go on to state: -

"24-281 However, as emphasised by MacMenamin J. in *Child and Family Agency v. O.A.*[6] *'A judge is not at large in considering a costs application, may not apply a policy on costs awards, and must exercise his or her discretion in each case within jurisdictional criteria established in law.'* Thus, an appellate court will set aside a costs order if it reaches the conclusion that a trial judge has erred in principle, failed to take relevant factors into account or otherwise improperly exercised its discretion.[7]"

37. It follows therefore that this court should not lightly interfere with the discretion exercised by Peart J. in the Costs Judgment, but should do so if it is concluded that he erred in principle or failed to take relevant factors into account or otherwise improperly exercised his discretion. The onus of proof is on the appellants to so satisfy this court.

38. I will refer later in this judgment to the legal principles applicable to deciding whether a successful notice party should get its costs (or full costs) when I come to address that issue.

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[5] [2002] IESC 42. See also *Howard v. Commissioners of Public Works in Ireland* [2000] IESC 48.
[6] [2015] IESC 52, [2015] 2 ILRM 145, 147.
[7] See *Spencer v. Kinsella* [1999] IESC 16.

The appellants' arguments

39. In arguing that the applications in the High Court to set aside the 2012 Direction Order were of exceptional public importance Mr. Skoczylas referred to the respondent's submission on the appeal before this court in which it was stated that the 2012 Direction Order was of "*systemic importance to the State*", given "*the necessity 'in the public interest, to maintain the stability of those credit institutions and to the financial system in the State*'". He referred to a statement in the grounding affidavit supporting the *ex parte* application to approve the Direction Order that "*the Direction Order will also ensure that there is absolute clarity regarding the State's intention to restore financial stability and restructure ILP in alignment with the public interest and the purposes of the [2010] Act.*"

40. Core to Mr. Skoczylas' submission was that this court should follow pronouncements in relation to Direction Orders and the extraordinary nature of the 2010 Act made in related proceedings concerning the July 2011 Direction Order (which compelled ILPGH to issue 99.2% of the company shares to the Minister for Finance in return for an investment of €2.7bn). In her principal judgment on the challenge to the validity of the July 2011 Direction Order O'Malley J. stated, at para. 1.7: -

> "The [2010] Act, which has been described as 'an extraordinary piece of legislation' (Fennelly J. in *Dowling v. Minister for Finance* [2013] IESC 58, 'unique, unprecedented and stringent' Finlay J. in *Dowling v. Minister for Finance* [2012] IEHC 89) permits of a truly radical encroachment on the legal rights of shareholders and …
>
> 38.33 An application to set aside a Direction Order is undoubtedly in the nature of public law proceedings, and more akin to judicial review than to any other proceedings the courts are accustomed to. However, the court is dealing here with an Act unlike any other state enforced in the State. Amongst its most remarkable features is the fact that the Minister can bring about a permanent alteration in the legal rights of entities and persons, whether or not

he or she has a dispute of a legal nature with such entities or persons, by making an *ex parte* application to the court. Pursuant to s. 53, the order takes effect regardless of statute, common law, the rules of equity, codes of practice made under statutory authority and contracts that would otherwise be legally binding."

Also in those proceedings, in addressing a different *locus standi* point to that which arose in the present proceedings, Feeney J. regarded the 2010 Act as *sui generis* ([2012] IEHC 89, at para. 25), and O'Malley J. agreed with this characterisation at para. 38.37 in her principal judgment. In her later judgment, delivered on 31 July 2017 and reported at [2017] IEHC 520, which was her second substantive judgment and followed on the ruling of the CJEU following the preliminary reference by her, she stated at para. 2 –

"2. … As is made clear in the first judgment, the effects of a Direction Order can be extremely wide-ranging, and there is no doubt but that they were radical in this case."

41. In her third judgment concerning the July 2011 Direction Order, O'Malley J. dealt with costs – see *Dowling v. Minister for Finance* [2017] IEHC 832. At para. 36 she opened with the following: -

"36. It is my view that this case was one of exceptional public importance. The unprecedented nature of the Act, the incursions authorised into the established legal rights of shareholders, and the complexity of reconciling the existing EU and Irish jurisprudence and the new measures, coupled with the sheer scale of the stakes for the State, the public interest and the private interests are sufficient indicators of that."

42. In that case the applicants had sought their costs citing the exceptional nature of the legislation, the public importance of the proceedings, the desirability of clarity on vital issues of EU law, the importance accorded to the matter by the Grand Chamber of the CJEU, the fact that it was necessary to seek a preliminary ruling in that case, the claimed status of the case as a test case,

and the applicability of the principles established in the case to future situations involving emergency measures of a similar nature. O'Malley J. agreed and did not accept the argument advanced by the respondent Minister to the effect that litigants acting in their own interests could not come within the "*public interest*" category – she felt that the case "*transcends the interests of the applicants*", was "*extremely important*" to the State and clarified the scope of EU company legislation in circumstances brought about by the financial crisis (para. 51). She considered that there had been a public benefit in terms of domestic law, and analysis of the proper approach of a court to the exercise of the powers conferred on the Minister (para. 52). Accordingly, she decided to grant the applicants a proportion of their outlay and legal costs, but not the full amount as "*this was undoubtedly a 'material interest' case*" (para. 54). She granted Mr. Skoczylas 40% of allowable outlay, and 20% of allowable outlay to Mr. Dowling and Mr. McManus, and 30% of legal costs were awarded to Scotchstone Capital Fund Ltd which had been represented by a solicitor and junior counsel who were present in court over several weeks of hearing, and also attended before the court of justice.

43. Mr. Skoczylas also relied on the fact that the Court of Appeal, in hearing the appeals from the substantive decision of O'Malley J. in relation to the July 2011 Direction Order, affirmed the decision of O'Malley J. insofar as it concerned costs incurred in the High Court – see judgment of Hogan J. – notwithstanding that the court affirmed the substantive decision to dismiss the challenges to that direction order.

44. Mr. Skoczylas also submitted that the present case was complex, and resulted in lengthy/elaborate judgments in the High Court, and in this court, and he asserts that the decisions on *locus standi* were novel and ground-breaking, with "*extremely far-reaching consequences for shareholder property rights across the EU*".

Discussion

45. In my view Mr. Skoczylas' attempt to draw an analogy between the substantive challenge to the 2011 Direction Order, and the judgments in that case, with the present case, is misplaced. It is true that both Direction Orders were made under the 2010 Act and related to the recapitalisation of ILP, as a result of commitments given by the State to the European Commission, the ECB and the IMF (the 'Troika"), but in other respects the two Direction Orders were very different in character. As I pointed out in the Principal Judgment:

> "100. But there are many differences. The July 2011 Direction Order is directed at the State recapitalising ILP to the tune of €2.7 billion through a mechanism of the Minister subscribing for share in ILPGH, and it was, necessarily, directed to both ILP and ILPGH.
>
> 101. In contrast, the March Direction Order is later in time (albeit that the June 2011 Direction Order initially directed a sale of Irish Life on the open market), is directed only at ILP, and concerns the sale of an ILP asset, Irish Life, with the objective of increasing liquidity in its own funds, rather than recapitalisation *per se.* It is significantly less radical that the July 2011 Direction Order, being directed at conversion of an ILP asset to cash, and the potential for diminution in value of the appellants' shareholdings in ILPGH is of a lower order of magniture.
>
> 102. Secondly, the challenge in the main proceedings to the July Direction Order under the 2010 Act is now at an end. ….
>
> 103. The limited relationship between the challenges to the July 2011 Direction Order and the March Direction Order was noted by Clarke J. in the course of the appeal of refusal to grant an injunction, [2013] IESC 37:
>
> > "11.11 To put it at its most neutral, it is far from clear as to whether it could be established as a matter of law and fact, that the existence of the 2011 Direction Order with its consequent effect on the shareholding in [ILPGH] had any real effect on the

validity of the 2012 Direction Order or the outcome of any possible challenge to the order."

While it is undoubtedly true that the 2010 Act has been described as "*draconian legislation*", I am not persuaded that the impact of the 2012 Direction Order was remotely comparable to that of the July 2011 Direction Order which involved a capital injection of €2.7billion, and did not involve sale of an asset for value. I am not persuaded that the effect, if any, of the March 2012 Direction Order on appellants was of any real or material significance. Indeed, the better argument may be that, in completing the recapitalisation of ILP (now PTSB) the effect of the sale of Irish Life to the Minister was to their benefit.

46. A further significant difference is that, as found by Feeney J., the applicants had *locus standi* to challenge the July 2011 Direction Order notwithstanding that they were not on paper members of ILPGH, their shares were being held in a nominee company. The way was therefore cleared for them to proceed with their challenge *qua* beneficial shareholders in ILPGH, the company to which that direction order was directed. By contrast it was found in the present proceedings both in the High Court and in this court that, as a matter of statutory construction of s. 11 of the 2010 Act, the applicants, who were not in any shape or form members of ILP, did not have *locus standi* to seek to have the March 2012 Direction Order directed to that company set aside or varied.

47. As to whether the present proceedings are complex, while it is true that the judgment in the High Court was lengthy, this was largely because of complexity in the factual background and because it also comprehensively dealt with the substantive challenge to the March 2012 Direction Order, rather than any complexity in deciding the *locus standi* issue as such.

48. It is important to point out that neither the High Court nor this court found there to be any ambiguity in the wording in s. 11. As I stated at para. 130 of the Principal Judgment –

"130. It is important here to emphasise my conclusion that the plain and ordinary meaning of the phrase under construction is clear and unambiguous, and clearly demonstrates that the intention of the Oireachtas was to allow only a body/company/institution the subject of a Direction Order made by the High Court *ex parte* under s. 9, or a member of that institution, a statutory right to apply to set aside, or seek variation in certain limited circumstances, of that Direction Order. I find that the phrase 'under consideration' is not amenable to any literal meaning other than that which I have identified. The question of absurdity, or utilising the approach permitted by s. 5 of the Interpretation Act, 2005 to resolve an ambiguity, does not, in my view arise. Accordingly it is not appropriate for the court to adopt a purposive approach, or look to the long title or other provisions of the 2010 Act, as an aid to interpretation."

49. I nevertheless went on to consider the possible outcome in the event of a purposive approach to construction of s.11 being adopted. Having found that it would not assist the appellants, I proceeded to address many other arguments raised by Mr. Skoczylas/the appellants in their written and oral submissions, all of which were rejected. Again it is this, rather than any complexity in the core issue of whether the appellants had *locus standi* under s.11, that accounts for the length of the Principal Judgment.

50. It is quite clear that the present challenge was not brought as a class action – it was only brought by the applicants on their own behalf, and not on behalf of the remainder of the 130,000 odd private shareholders in ILP. The trial judge was correct in his comment that the applicants "*do not in any sense represent the other shareholders*". While Mr. Skoczylas suggests that, had the challenge succeeded, those other shareholders would have benefitted from the outcome, that is not sufficient to render it a class action or clothe it with public interest benefit. Those other

private shareholders did not choose to challenge the March 2012 Direction Order, and may have taken a very different view of it to that taken by the appellants.

51. It is clear that these proceedings were brought by the appellants for personal gain and advantage, and not for any public interest. In addressing the balancing exercise suggested by Simons J. in *Corcoran*, the first factor is whether legal issues of general importance were raised in the proceedings. I believe they were of importance, to the applicants and to the respondents, and more generally to the State as it sought to recapitalise ILP in accordance with commitments given to the Troika. Having said this the importance to the applicants related solely to the value of their own shareholdings and had nothing to do with the public interest which arguably went the other way. Moreover for reasons given earlier the level of importance could not be compared with the challenge to the validity of the July 2011 Direction Order.

52. The second factor is whether "*the legal principles are novel, or, alternatively well established*". The issue of *locus standi* had been considered by Feeney J., but in a different context, and it is fair to say that whether the applicants in the present proceedings had *locus standi* under s. 11 was novel in the sense that it had not arisen before. However novelty of itself does not elevate what would otherwise be private benefit litigation to litigation that serves the public interest. In this regard the third factor "*the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak*" is apposite. The appellants case for *locus standi* was in truth a weak one, and fell at the first hurdle upon a literal or "*plain/ordinary meaning*" construction of s. 11.

53. The fourth factor is "*whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues*". The answer must be "*no*" as the 2010 Act was temporary legislation, and expressed to be so, and while it was extended it has now lapsed. It is of course conceivable that similar legislation may be enacted in the future to enable the State to undertake emergency measures, subject to

approval or supervision by the courts, but any such emergency measures will have to be considered on their own terms and in the light of the substantive judgments of the High Court, the CJEU and the Court of Appeal on the 2010 Act in the context of the July 2011 Direction Order. I do not consider that an order for costs against the appellants in this case will have any or any appreciable deterrent effect on persons contemplating a challenge to State action or court approval under future similar legislation.

54. The final factor mentioned by Simons J. is "*of whether the issues touch on sensitive personal rights*". Mr. Skoczylas argued at all stages that the 2012 Direction Order encroaches on his property rights insofar as the forced sale of Irish Life to the respondent for €1.3bn adversely affected the value of his shareholding in ILPGH, and that the denial of *locus standi* to challenge the validity of the Direction Order infringed his property right *viz*. the right to litigate which is a personal right under the Constitution. As to the first of these, as I held in the Principal Judgment (see paras. 121 – 123) that the entirety of the beneficial interest in ILP was held by ILPGH which was the sole "*member*" of ILP, both legally and beneficially. The appellants, as shareholders in ILPGH did not hold any beneficial interest in ILP, or the assets of ILP such as Irish Life. While ultimately the s. 11 challenge, if successful, might have had an impact on the value of the appellants' shareholdings, I do not consider that the proceedings touched on "*sensitive personal rights*" in the sense meant by Simons J.

55. In his judgment in *Lee v. The Revenue Commissioners* Murray J. spoke of "*public interest*" litigation in its purest form involving "*significant issues of Constitutional or European law of general importance that had been pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage*". He accepted, based on the Supreme Court decision in *Curtin*, that even where the litigation advances a personal interest the same jurisdiction may be invoked to justify making no order as to costs, and he described "*a sliding scale guided by the importance of the issues, the number of other cases in which those issues*

are likely to arise and the strength of the claimant's case", the top of the scale being "*a citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest…*".

56. Although the appellants have challenged the constitutionality of the 2010 Act in the Constitutional Proceedings, in truth in the present proceedings issues of constitutional and EU law are not engaged and they were not brought as public interest proceedings, but rather were brought for private and personal advantage.

57. As I stated earlier, I do not believe that the decision in *Curtin* assists the court or the applicants. It was a case which concerned the overall architecture of the Constitution and the separation of powers between organs of the State – in that sense it was exceptional and *sui generis*, even though the proceedings were brought for personal benefit. Moreover, while the Divisional Court in *Collins* usefully set out principles in relation to the awarding of full or partial costs to a claimant who unsuccessfully raises a constitutional challenge, the facts of that case are so different from those that prevail in the present proceedings that it is otherwise of limited assistance to the appellants. The plaintiff there was a member of Dáil Éireann who sought to challenge the *vires* and constitutionality of the procedure whereby the Minister for Finance issued promissory notes in excess of €30bn to the Irish Bank Resolution Corporation and the EBS in June and December 2010 without a prior separate vote taking place in Dáil Éireann. The Divisional Court rejected the challenge, and the Supreme Court dismissed the appeal. In making a partial order for costs in favour of the losing plaintiff it was critical that the plaintiff did not act for personal advantage, and was a public representative, factors which are not present in the present proceedings. In *Collins* the issues had never previously been judicially considered, and the Divisional Court considered that it was *"in the public interest that the points once raised should be determined"* (para. 6). It is not quite true to say that s. 11 had not been previously considered – it had been considered in the judgment of Feeney J. reported at [2012]

IEHC 89 in the context of the July 2011 Direction Order. Leaving that aside, the issue in *Collins* was clearly of far-reaching importance and public interest, and the plaintiff had nothing to gain personally. The facts do not bear comparison with the present case.

58. In my judgment the appellants have singularly failed to satisfy the onus on them to show that this is public interest litigation, or of such systemic or other importance as to justify departure from the normal rule as to costs. In my view, the trial judge was entitled to conclude that these are not public interest proceedings, and that the normal rule as to costs should apply, and that decision is entitled to appropriate deference. I cannot discern any failure to take into account relevant facts, or any error of principle. I would therefore affirm the Costs Judgment.

Costs of the appeal

59. In relying on s. 169(1) of the 2015 Act, and in submitting that this court should have regard "*to the particular nature and circumstances of the case*" in departing from the primary rule that the successful party is entitled to their costs of the appeal, Mr. Skoczylas relied essentially on the same arguments in relation to public interest and the exceptional nature of the legislation and the litigation, and the novelty and "*ground breaking*" nature of the judgment, as he relied on in seeking to overturn the Costs Judgment.

60. I have already considered and rejected his submissions in the context of the Costs Judgment, and it seems to me that the same reasoning applies, but with more force, to the appellants' pursuit of this appeal in circumstances where the *locus standi* point had already been lost after full debate and the delivery of a lengthy and considered judgment in the High Court.

61. In his written and oral submissions, Mr. Skoczylas characterised parts of the Principal Judgment related to whether or not the appellants had any beneficial interest or property rights in ILP as "*extraordinary and ground-breaking, with extremely far-reaching consequences for shareholder property rights across the EU. The court has thus diverged completely from the established jurisprudence as to what a 'beneficial ownership' means under the law …*" It

appears from this and similar submissions that the appellants take issue with the correctness of that judgment, or elements of the reasoning, and suggest that this diverges from existing jurisprudence and renders the judgment of public interest or particular importance. That may, or may not, be a basis for seeking leave to further appeal. However from a costs perspective it cannot elevate the appeal to one of exceptional public interest or be a basis for this court departing from the normal rule as to costs set out in s. 169(1) where a party is entirely successful.

Offer of Settlement

62. Mr. Skoczylas also relies on s. 169(1)(f) - "*whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer*"- as a basis for departing from the usual order.

63. In a lengthy letter dated 30 May, 2023 sent by Mr. Skoczylas to the Chief State Solicitor and to Arthur Cox (solicitors on record for the respondent) on behalf of himself and Scotchstone Capital Fund Limited, of which company he is a director, and covering all of the litigation involving him and "the Irish State or its emanations" he proposed –

> "…that all the litigation between the parties be withdrawn, upon a payment by the State (or any of its emanations) to me of €183,000 plus 7.5% inflation, i.e. **€196,725**, altogether, so that, upon that payment, the parties will not have any claims against each other. I note that €196,725 amounts to about 25% of the still contested claims in my detailed 255 – page Bill of Costs issued on 17 September 2020 in respect of three costs orders made in my favour in 2012 and 2017, to be discharged in my favour by the Minister;…".

He describes the offer as "a genuine *minimum* requirement". In the penultimate paragraph Mr. Skoczylas states that he "…stand[s] ready to engage constructively in out of court settlement discussions or….ADR" but adds "this offer expires at noon on Monday, 12 June 2023". In his final sentence he states:

"Failing a settlement, the litigation will – in the most optimistic scenario for the State – cost the taxpayers in the coming *years* ***many more millions of Euros***, without any realistic prospect of recovering any money." [emphasis as in the original]

64. Having taken the respondent's instructions Arthur Cox replied by letter dated 21 June 2023, refusing the offer and explaining:

"We further note that your letter details groundless complaints and claims, and many inaccuracies including with respect to the expenses incurred by the Minister in defending your campaign of litigation. Many of these have been addressed extensively in the various sets of proceedings which you have advanced or have otherwise been comprehensively addressed by our client. Accordingly the Minister does not propose to engage in any detailed response in respect of those matters but this should not be taken as any acceptance of any of those complaints or claims as it is not.

Contrary to the assertion contained in your letter, you are not *"a victim in the litigation."* The reality is that you, as the plaintiff, have issued a multitude of legal proceedings against our client over the last twelve years and you have substantively failed in every one of these cases, before the High Court, the Court of Appeal, the Supreme Court and the Court of Justice of the European Union ("**CJEU**"). Each of the judgments delivered by these courts have vindicated our client and concluded that the Minister acted lawfully. Nonetheless, you have persisted with your campaign of litigation, including more recently embarking on applications seeking judicial recusals, making Greendale type applications, seeking reviews of costs adjudications etc., all of which have also been unsuccessful.

The Minister is concerned with the common good and not paying monies to individuals for unsuccessful legal campaigns. In the circumstances, our client's position is that a settlement which would involve the payment of monies would not be acceptable or warranted and

would not be in the public interest. The appropriateness of the Minister's position is especially so in circumstances where, as a result of your unsuccessful campaign, the Minister has secured numerous costs orders against you, the quantum of which is significantly in excess of the payment now being sought by you.

If you are concerned with the expenditure of public funds, as your letter suggests, it is within your gift to bring your unsuccessful legal campaign to an end. However, if you choose to persist with this campaign, as you have threatened unless money is paid to you, the Minister will have no choice but to continue to resolutely and successfully defend this campaign as he has done to date."

65. In all the circumstances this robust response was not unreasonable. In my view it delivers cogent reasons for the respondent declining to settle on the basis of any payment of monies, and cogent reasons why the consideration of the settlement offer under s.169(1)(f) does not persuade me to depart from the normal rule that costs should follow the event.

66. There are other difficulties with the open offer. Firstly it was made very late in the day, and gave a very limited time for a response. Secondly, it is not made on behalf of any appellants other than Mr. Skoczylas and Scotchstone Capital Fund Ltd. Thirdly there does not seem to be any other attempt to break down the figure sought, or to relate it (or part of it) to the present proceedings, where Mr. Skoczylas and his co-appellants have been unsuccessful on every occasion. Fourthly at all times Mr. Skoczylas has not had legal representation. Acting as a lay litigant he is only entitled, at best, to outlays and expenses. Leaving aside the costs in the High Court (and we are here dealing with the costs of the appeal, where s. 169(1)(f) has application), the essential work undertaken was that Mr. Skoczylas himself prepared and filed a notice of appeal and written submissions and books for the substantive appeal, and a "Speaking Note" for the appeal, and he attended the two day appeal hearing and advocated on his own behalf, and in addition will have attended direction hearings. He will have incurred some expenditure

on photocopying and filing/stamping. However, no attempt has been made by Mr. Skoczylas to relate his offer to any *outlay or expenditure* that he may have incurred on this appeal. Even taking into account the other litigation, and in particular the costs and expenses awarded by O'Malley J. at the conclusion of the proceedings before her in relation to the July 2011 Direction Order, it appears difficult to reconcile the figure sought in the offer with any potential recovery of outlays and expenses.

67. I am satisfied that the open offer relied on by Mr. Skoczylas is not a reason to depart from awarding costs to the "entirely successful" parties.

Notice Party Costs – the principles

68. It remains to consider whether the Notice Party should be entitled to its costs, or full costs, in the High Court and of the appeal. The relevant authority in relation to the awarding of costs to notice parties is *O'Connor v. Nenagh Urban District Council* [2002] IESC 42, where the Supreme Court upheld the decision of the High Court (Johnson J.) to award costs to a notice party. Denham J. speaking for the court, held that she would not interfere with the exercise of the trial judge's discretion, and in so doing she noted a number of relevant points in the following terms: -

"(a) whereas there was an element of public interest, the application as originally drafted sought specific remedies potentially detrimental to the notice party;

(b) the notice party was a necessary party;

(c) the notice party participated fully in the trial;

(d) the notice party was an entirely innocent party and acted in good faith at all times;

(e) the notice party was successful in the proceedings;

(f) no compelling reasons have been established as to why costs should not follow the event;

(g) the learned trial judge exercised his discretion in accordance with law."

This passage, which guides the approach this court should take to this issue, was cited with approval by Clarke J. (as he then was) in *Telefonica 02 Ireland Limited v. Commission for Communication Regulation and Others* [2011] IEHC 380. However Clarke J. went on to make pertinent observations, which are relied on by the appellants, to the effect that notice parties cannot assume that even if they have a right to be heard and are effectively successful they will necessarily be awarded their costs, or all of their costs: -

> "3.6 As pointed out by Herbert J., a party who has a legitimate interest to protect and who is, therefore, a necessary party to judicial review proceedings, will ordinarily be entitled to be joined. Likewise, such a party will ordinarily be required to at least take some steps to place their position on the record. It should not, however, be assumed that simply because a party has a right to be heard, that person is necessarily entitled to the costs of fully participating in the litigation most particularly where the party concerned does not really have anything substantial to add to the argument on the questions which the court has to decide. There is, in my view, a difference between being entitled to be heard and being necessarily entitled to the costs of being heard and, in particular, the costs of being fully involved in proceedings. It should not be assumed that a notice party who sits around for the duration of a lengthy judicial review hearing which is being fully defended by the respondent, is entitled to the full costs of such representation even though what is added to the case either in evidence, written submission, or oral submission, is marginal in the extreme. Each case needs to be judged on its own facts. It is, however, important to note that the mere fact that a notice party has an interest to protect does not necessarily justify doubling the costs of defending judicial review proceedings where the case made by both the respondent and the notice party is substantially the same. That argument applies with even greater force where more than one notice party may be involved.

3.7 Even where the notice party has something to add it is, in my view, incumbent on the notice party to consider whether their involvement necessarily justifies full representation in all aspects of the case. If their contribution is factual then it might be done by the filing of an affidavit. If there is one additional point which can, perhaps, best be made by a notice party, then there are ways in which the making of that point can be secured without incurring the full costs of the litigation."

I have taken these observations into account in considering this issue.

Application of the principles

69. Applying the points considered relevant by Denham J. in *O'Connor* to the Costs Judgment and the Notice Party's costs on this appeal, I find as follows:

(a) whereas there was an element of public interest, the application as originally drafted sought specific remedies potentially detrimental to the notice party

There can be no question but that the s.11 application to set aside or vary the 2012 March Direction Order, which was directed to the Notice Party, sought a remedy potentially detrimental to it, and the appeal had the same objective.

(b) the notice party was a necessary party

It was not a 'necessary' party in the sense that the s.11 applications could have proceeded without it. However it had a vital interest, and it is of significance that when it applied to be joined as a notice party its application was not opposed by the appellants – while they did not consent, they did not object and effectively acquiesced in the joinder. It is also of note that Kearns P. did not place any conditions on such joinder, in relation to costs or otherwise, nor is there any suggestion that the appellants sought to have any conditions applied. Equally no application was made in advance of the appeal to place conditions on the Notice Party's participation.

(c) the notice party participated fully in the trial

It participated at trial, contributing extensive affidavit evidence, and making written and oral submissions. It also participated on the appeal with written and oral submissions.

(d) the notice party was an entirely innocent party and acted in good faith at all times

While Mr. Skoczylas has in various submissions suggested that the Minister acted deliberately by directing the 2012 March Direction Order solely at ILP, and thereby acted "fraudulently" circumventing the need for any general meeting of ILPGH to approve the sale of Irish Life, this allegation of fraud has never been made out. Moreover it is an allegation that seems to have been directed primarily at the respondent rather than the Notice Party. I am satisfied that the Notice Party was an innocent party and acted in good faith at all times in the protection of its interests as a Notice Party in these proceedings.

(e) the notice party was successful in the proceedings

The Notice Party was entirely successful in the High Court, and on appeal in this court.

(f) no compelling reasons have been established as to why costs should not follow the event

The appellants argue that there was a full alignment of interest between the respondent and Notice Party, and therefore the respondent could have made all the arguments without the necessity for the presence of the Notice Party or the incurring of further costs. I do not believe this to be so; for reasons elaborated in the ensuing paragraphs I do not think there was an identity of interest between respondent and Notice Party, and in particular the Notice Party was better place to tender certain evidence.

(g) the learned trial judge exercised his discretion in accordance with law

The learned trial judge cited and relied on the judgment of Keane J. in *Spin communications* and was clearly aware of the legal principles applicable to notice party costs orders, and he exercised his discretion in accordance with law.

70. Accordingly I am satisfied that the Notice Party is entitled to retain the costs awarded in the High Court, and to be awarded its costs of the appeal. There are a number of key reasons for this which deserve emphasis. Firstly, the confirmation of the March 2012 Direction Order was of the central importance to the Notice Party. Secondly, significant evidence was tendered by the Notice Party in the affidavits sworn by Messrs. Cooke, McCarthy and O'Reilly. Thirdly counsel on the Notice Party's behalf participated extensively in the appeal, making written and oral submissions which were of assistance the court.

71. Whilst undoubtedly there was an overlap of interest between the respondent and the Notice Party, their interests were not identical. The respondent on behalf of the State had responsibility to recapitalise ILP in accordance with commitments given to the Troika. The Notice Party's primary concern was to ensure that ILP was fully and properly capitalised in accordance with regulatory capital requirements, and also focussed on obtaining the best price for the sale of Irish Life. As Mr. Cooke averred, it was also concerned at the risk to the employment of the 1,800 people who worked in the bank, and the risk that it might lose its banking licence if the March 2012 Direction Order was not implemented, and if Irish Life was not sold by the end of June 2012.

72. There is in my view a further reason why the notice party should be awarded its full costs of the appeal. In support of the substantive appeal Mr. Skoczylas on 18 July 2019 swore a further affidavit, which was duly served on the respondent and notice party. That affidavit, running to 34 pages and with substantial exhibits, sought to make additional points, such as: that ILPGH and ILP were at all times viable and solvent companies; that the respondent was acquiring Irish Life for €1.3bn when, as Mr. Skoczylas asserted, the "*embedded value*" of Irish Life was at the time €1.8bn; that by avoiding a general meeting of ILPGH to consider the sale of Irish Life the respondent breached ESM Rules for public companies; and that the Minister resold Irish Life within months with significant benefits for the State "*at the expense of minorities*".

73. The respondent and Notice Party objected to the introduction by Mr. Skoczylas of this affidavit, and in the Principal Judgment I dealt with this objection at paras. 20 – 22, repeating the view that I had expressed at the appeal hearing that the court –

> "... would consider Mr. Skoczylas' further affidavit *de bene esse*, and Mr. Ryan's affidavit on the same basis, and would take them into account insofar as they were relevant, and I have sought to do that in preparing this judgment."

74. The Notice Party felt, justifiably in my view, compelled to file a replying affidavit and this was sworn by Mr. Conor Ryan, Company Secretary, on 17 January 2020. The thrust of that affidavit was that the issues raised by Mr. Skoczylas in his new affidavit had been dealt with directly or indirectly in the judgments of Ms. Justice O'Malley and/or the Court of Appeal and CJEU in the proceedings relating to the July 2011 Direction Order. In that affidavit Mr. Ryan also addressed the viability and solvency of ILPGH and ILP at the relevant times based on their financial statements, and based on financial statements approved and adopted since the hearing in the High Court, and responded to Mr. Skoczylas' contention that Irish Life was sold at an undervalue. His averments would have been particularly relevant to the merits of the appeal had this court not dismissed it on grounds of lack of *locus standi*. Both the respondent and Notice Party also had to address Mr. Skoczylas' new affidavit in their written and oral submissions to this court.

75. This in my view further justifies the Notice Party being awarded its full costs of the appeal because it was entitled to respond fully to the new evidence and arguments which were closely connected to its financial statements and the value of its (former) asset Irish Life. While Clarke J. in *Telefonica* cautioned that notice parties cannot assume that, even if they have the right to be heard and are successful, they will necessarily be awarded their costs, in my view ILP was an obviously interested party which did in fact add substantially to the evidence and argument on the questions that the court had to decide, both in the High Court and on appeal, and there is

nothing in his commentary that would justify the Notice Party receiving anything other than its full costs in the High Court.

The Recusal Application costs

76. The respondent and Notice Party were "*entirely successful*" in opposing the appellants' Recusal Application. In the Recusal Judgment the court held that the application constituted an abuse of the process, because the appellants had an opportunity to raise the issue of bias as part of their application to review the Principal Judgment. This court held at para. 41 of the Recusal Judgment: -

> "The court has come to the view that it was incumbent on the applicants to have raised objective bias in that application, and that not to do so was an abuse of the process."

The court proceeded, at para. 48: -

> "It is plain from this that what the applicants seek is a declaration of objective bias which they will then use as a springboard to seek to set aside the Principal Judgment. There is thus an additional element to their application. It is a collateral attack on the Principal Judgment. This renders the present motion more obviously abusive, and not simply a matter that could have been raised at an earlier stage in the proceedings."

In para. 51 of the Recusal Judgment the court added –

> "… This is now the second application on which the applicants were attempting to have [the Principal Judgment] set aside. In the circumstances it is a form of oppression for the Respondent and Notice Party to have to consider and respond to an application that could and should have been brought at an earlier point in time, and to have to engage the legal teams for that purpose. It should also be recalled that the Respondent and Notice Party felt compelled to respond to the Review Application, and a replying affidavit was filed, even though the Court did not need to consider it or require reply submissions because the threshold for a Greendale application was not met."

While considering that the Recusal Application was an abuse of process, the court nevertheless went on to consider whether the standard for objective bias had been made out and found that it had not been established.

77. In the circumstances there can be no basis for the appellants to be granted the costs of the Recusal Application, and those costs should also be awarded to the Respondent and Notice Party.

Application for a stay

78. The stay sought by the appellants at relief number 3 in the notice of motion which they issued in November 2022 is "*an order to stay these proceedings and to stay any order in this case, pending the conclusion of the …"* Constitutional Proceedings.

79. It is however hard to understand how the court could order any stay in respect of the substantive order of the High Court in these proceedings in which Peart J. dismissed the s. 11 application. Peart J. himself refused to grant a stay, and accordingly the order of Kearns P. approving the March 2012 Director Order on foot of the *ex parte* application made by the respondent pursuant to s. 9 of the 2010 became effective. Following the judgment of Peart J., Irish Life was sold by ILP to the respondent for €1.3bn and that sale was completed on 29 June 2012. Then, on 19 February 2012 the respondent signed an agreement to resell Irish Life to Canada Life for €1.3bn, and that sale was completed later in 2013 following regulatory approval. Mr. Skoczylas and others attempted, unsuccessfully, to obtain interlocutory relief to prevent that sale – see decision of the High Court (Laffoy J.) reported at [2013] IEHC 299, and the decision of the Supreme Court reported at [2013] IESC 37 dismissing an appeal (Clarke J. *nem dis.*).

80. Accordingly a stay of this court on its order dismissing the appellants' appeal would be of no material effect, as the section 11 proceeding already stood dismissed by order of the High Court. It would not be appropriate for this court, having regard to the judgment that it reached, to contemplate any stay of the High Court judgment.

81. The court was advised that the Constitutional Proceedings were heard in the High Court (Bolger J.) for three days on 20 June 2023 and that the trial judge indicated that it might be "*some time*" before she gave judgment. Mr. Skoczylas has already indicated that if he is unsuccessful in those proceedings he is likely to appeal the outcome. As matters stand, the 2010 Act continues to enjoy a presumption of constitutionality. Even if Mr. Skoczylas were to be successful in his constitutional challenge to the Act, it is hard to see how that could have consequences for the implementation of the March 2012 Direction Order where Irish Life has been sold by ILP to the Minister, and sold on to Canada Life, and where the business of Irish Life has been conducted within Canada Life for the past 10 years.

82. In short, conceptually I cannot see how this court could justify granting a stay in respect of its dismissal of this appeal, or how such a stay could have any effect, and it must be refused.

83. The appellants also seek a stay in relation to any costs awarded against them by this court, pending the ultimate determination of the Constitutional Proceedings. It is not clear when judgment will be delivered in the High Court, and it is reasonable to anticipate that if the appellants are unsuccessful they will appeal the outcome to this court (or directly to the Supreme Court). The delay to ultimate determination is therefore likely to be significant, and given that the Respondent and Notice Party have now been successful in these proceedings in the High Court and this court, and in the Recusal Judgment, I am not satisfied that the appellants have provided any good reason why the successful parties should be kept out of their costs. As the Supreme Court observed in *Godsil v. Ireland* [2015] 4 IR 535, costs serve an important function in ensuring efficient and appropriate litigation. I agree with the submission of counsel for the Notice Party that that purpose would not be served by the granting of an indefinite stay on costs orders in this appeal where the proceedings have been finally disposed of.

84. However, noting Mr. Skoczylas's indication that the appellant's are considering applying for leave to further appeal the Principal Judgment to the Supreme Court, it would seem appropriate

to grant a short stay in respect of the costs orders made by this court, limited to a period of 21 days from the date of perfection of the order. However the stay should be in relation to execution only, and should not prevent the respondent and Notice Party proceeding to have costs adjudicated by a legal costs adjudicator. Thereafter it will be a matter for the Supreme Court if leave to further appeal is granted.

Costs/stay hearing

85. Finally, it was the appellants who chose to pursue their appeal of the Costs Judgment and stay motion, and sought to contest the proposal of this court that the respondent and Notice Party should be awarded their costs of the appeal, notwithstanding that they lost in both courts. That choice necessitated the further exchange of written submissions and the oral hearing on the costs and stay issues. As the respondent and Notice Party have been successful on all fronts they must also be entitled to the further costs associated with the costs submissions and hearing.

86. Accordingly, I would make the following orders: -

(1) Orders striking out the appeals of Mr. Haug (deceased) and Mr. Keohane, with no further order.

(2) An order dismissing the appeals of all the other named appellants (Messrs. Dowling, McManus, Skoczylas, McGann and Neugebauer and Scotchstone Capital Fund Limited) bearing Court of Appeal Record Numbers 871, 872, 873 and 874 of 2014.

(3) An order affirming the further order of the High Court that "the Applicants do pay to the Respondent and the Notice Party the costs of the proceedings (to include all reserved costs)" amended only to provide that such costs be adjudicated by a Legal Costs Adjudicator in default of agreement (rather than being taxed).

(4) An order that the appellants Piotr Skoczylas, John Paul McGann and Tibor Neugebauer do pay the Respondent and Notice Party the costs of the appeal, including all reserved costs, to be adjudicated by a Legal Costs Adjudicator in default of agreement.

(5) That the appellants Piotr Skoczylas, John Paul McGann and Tibor Neugebauer do pay to the respondent and Notice Party the costs of the Notice of Motion herein dated 22 December 2022 including the hearing of the Recusal Application on 22 March 2023 (to include all reserved costs).

(6) That the appellants Piotr Skoczylas, John Paul McGann and Tibor Neugebauer do pay to the respondent and the Notice Party the costs of the costs hearing held in this court on 11 July 2023 (to include the costs of written submissions) such costs to be determined by a Legal Costs Adjudicator in default of agreement.

(7) An order that there be a stay on execution only in respect of all costs herein ordered to be paid by the appellants Piotr Skoczylas, John Paul McGann and Tibor Neugebauer at (4), (5) and (6) above to the Respondent and/or the Notice Party for a period of 21 days from the date of perfection of this order.

Binchy and Pilkington JJ have indicated their agreement with this judgment and the orders to be made.