APPROVED **[2023] IEHC 38**

THE HIGH COURT

2013 No. 2708 P

BETWEEN

GERARD DOWLING
PADRAIG MCMANUS
PIOTR SKOCZYLAS
SCOTCHSTONE CAPITAL FUND LIMITED

PLAINTIFFS

AND

IRELAND
THE ATTORNEY GENERAL
THE MINISTER FOR FINANCE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 January 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to amend a court order. The application is made pursuant to the so-called "*slip rule*" under Order 28, rule 11 of the Rules of the Superior Courts. The relevant order had been pronounced orally in court on 17 January 2023 and perfected, i.e. drawn up, the following day. In brief outline, the order was to the effect that the substantive hearing of these proceedings should be adjourned pending the hearing and

determination of an application by the solicitor acting on behalf of the corporate plaintiff to come off record.

2. The other remaining plaintiff in the proceedings, Mr. Piotr Skoczylas, submits that the court order, as perfected, does not accurately reflect the events at the hearing on 17 January 2023. Mr. Skoczylas has applied to have the court order corrected. A similar application has been made in related proceedings, High Court 2013 No. 2709 P, by two of the plaintiffs in those proceedings.

PROCEDURAL HISTORY

3. The within proceedings were instituted by way of plenary summons on 14 March 2013. In broad outline, the proceedings consist of a constitutional challenge to certain provisions of the Credit Institutions (Stabilisation) Act 2010. The hearing of the constitutional challenge had been deferred pending the determination of various other proceedings which sought to set aside certain directions purportedly made by the Minister for Finance pursuant to the Credit Institutions (Stabilisation) Act 2010.

4. The first and second named plaintiffs in the within proceedings have since settled their claim. Accordingly, the only two remaining plaintiffs are Mr. Skoczylas and Scotchstone Capital Fund Ltd ("***the corporate plaintiff***" or "***the company***").

5. The general rule is that a corporate entity is only entitled to be represented in legal proceedings by a lawyer who has a right of audience. A director or shareholder is not normally entitled to represent a company in legal proceedings. See, generally, *Allied Irish Bank plc v Aqua Fresh Fish Ltd* [2018] IESC 49, [2019] 1 I.R. 517.

6. The solicitor currently on record for the corporate plaintiff in these proceedings is Mr. Doran O'Toole. Mr. O'Toole had filed a notice of change of solicitor in the Central Office of the High Court on 10 October 2022, indicating that Doran W. O'Toole & Company had been appointed to act as solicitors for the company. A number of weeks later, Mr. O'Toole issued a motion on 28 October 2022 seeking to come off record. Order 7 of the Rules of the Superior Courts allows a solicitor to apply to the court for an order declaring that the solicitor has ceased to be the solicitor acting for a party in proceedings.

7. This motion to come off record has been allocated to the Chancery List, rather than to the Non-Jury List, of the High Court. The motion to come off record has been listed for hearing, for three hours, on 15 March 2023.

8. The substantive hearing of the proceedings had been fixed for a three-day hearing commencing on 17 January 2023. These proceedings were to be heard with a related case, *McGann & Others v. Ireland, Attorney General and Minister for Finance* High Court 2013 No. 2709 P. I will refer to this latter case as the "***second set of proceedings***" where convenient. Both matters were assigned to me for hearing by the judge in charge of the Non-Jury List.

9. The summary which follows does not purport to be a *verbatim* record of the hearing on 17 January 2023 but rather is by way of a summary only. If the parties wish to take up a transcript of the digital audio recording ("*DAR*") of the hearing, they are entitled to do so pursuant to Order 123 of the Rules of the Superior Courts.

10. As is normal, the hearing on 17 January 2023 commenced with the taking of appearances on behalf of the various parties. Mr. Skoczylas represents himself. Mr. Skoczylas described himself as the "*lead litigant*" and explained that he

would be making detailed legal submissions, which the corporate plaintiff and two of the plaintiffs in the second set of proceedings intended to adopt. Mr. Tibor Neugebauer and Mr. John Paul McGann each confirmed that they intended to adopt the legal submissions of Mr. Skoczylas.

11. The defendants are represented by solicitor and counsel.

12. The solicitor currently on record on behalf of the corporate plaintiff, Mr. O'Toole, then addressed the court as follows. In brief, Mr. O'Toole outlined that he had issued a motion for leave to come off record; that there was no solicitor/client relationship between him and the corporate plaintiff; and that he had been unable to comply with his obligations as a solicitor under the money laundering regulations.

13. At this point, I invited the other parties to address me on whether, logically, the motion to come off record should be dealt with first, i.e. prior to the substantive hearing of the proceedings. Mr. Skoczylas submitted that it should not. Mr. Skoczylas stated that the motion to come off record was not before me; that it was being opposed on many levels; and that there was a complaint before the LSRA (Legal Services Regulation Authority) in respect of the solicitor. Mr. Skoczylas submitted that there is "*a lot to be said*" at the hearing of the motion to come off record.

14. Mr. Skoczylas further submitted that the practice adopted and endorsed by the courts (including the Court of Appeal and the Supreme Court) to date has been that he makes submissions and that these submissions are then adopted by the company and the other plaintiffs. Mr. Skoczylas explained that he is a director of the company and is authorised to represent the company in judicial proceedings, even though in Ireland he does not have an ability to represent the

company in court (because he is not a solicitor). Mr. Skoczylas further submitted that to vacate the hearing date would unnecessarily delay this case by another year or more in circumstances where it would have no impact on the contents of the hearing because his submissions will not change: "*they will be what they will be*", and his submissions will be adopted by the company. Mr. Skoczylas stated that in the worst case scenario, the company would be unrepresented.

15. Mr. Skoczylas indicated that Mr. O'Toole is representing the company in a "*limited technical capacity*"; that this means that the company is adopting Mr. Skoczylas' submissions; and that Mr. Skoczylas cannot engage "*full*" representation in a highly complex constitutional case. (Mr. Skoczylas explained, at a later point, that there has been an application for legal aid).

16. Mr. Skoczylas submitted that there were two options: one, the company would be adopting his submissions through the solicitor; the other, that the company would be unrepresented.

17. Mr. Skoczylas further submitted that to adjourn the hearing would be completely unacceptable because it would delay the (substantive) hearing significantly for no good reason at all. It was submitted that the hearing date for the motion to come off record had been fixed for March 2023 in the knowledge that the substantive hearing was listed for January 2023, to facilitate that hearing by allowing the company to be represented in a limited technical capacity. It was submitted that it is very unlikely that Mr. O'Toole would (be permitted to) come off record because he has to stay on record to facilitate the substantive hearing.

18. Counsel on behalf of the defendants made submissions to the effect that when the corporate plaintiff had been represented by a solicitor in previous proceedings, the solicitor then on record had adopted the submissions made by

Mr. Skoczylas. Counsel submitted that there were two options: first, if Mr. O'Toole were happy to adopt Mr. Skoczylas' legal submissions, the position would be as before; secondly, the case could proceed without the company.

19. In response to a question from the court, counsel stated that the issue of legal representation was between Mr. O'Toole, Mr. Skoczylas and the corporate plaintiff, and not a matter in which the defendants were involved. Counsel said he took the point that it was a difficult position from the point of view of the solicitor, but that if, on the other hand, the solicitor was in a position to adopt the legal submissions of Mr. Skoczylas, then the case could proceed on that basis. Counsel emphasised that it was not a matter for the defendants to say what the solicitor should do.

20. Mr. O'Toole confirmed that he could not adopt Mr. Skoczylas' legal submissions on behalf of the company.

21. Mr. Skoczylas then made an objection that Mr. O'Toole was being allowed to make submissions in respect of the motion to come off record, which was not before the court, without allowing him to reply. Mr. Skoczylas stated that Mr. O'Toole's submissions were based on falsehoods.

22. Having heard these various submissions, I made a decision that the substantive hearing should be adjourned generally until the motion to come off record had been "*dealt with*". I explained my rationale in a short *ex tempore* ruling as follows.

23. A solicitor who is on record in proceedings has very serious obligations both to the court and as a matter of general professional practice. They also have particular obligations under various pieces of legislation including money laundering legislation. It is essential, therefore, that if a solicitor wishes to come

off record that they have an opportunity to do so. I emphasised that I had nothing to say—one way or another—as to whether or not Mr. O'Toole has any basis for coming off record. I simply do not know.

24. I went on to express the view that if the case were to proceed that day, in its current set up, Mr. O'Toole would be forced to act on behalf of a client in circumstances where he says he has good reason to come off record. I also expressed the view that it would render the hearing of the motion on 15 March 2023 in the Chancery List entirely nugatory if the case proceeded on 17 January 2023 because the very thing which Mr. O'Toole seeks to avoid, in other words having to represent the company in circumstances where he says there is good reason he should not do so, will have come to pass. This would put Mr. O'Toole in a very unfair position as an officer of the court. I again emphasised that I was making no adjudication on the merits of the application to come off record, saying that I simply do not know whether he (Mr. O'Toole) will be allowed to come off record but that he was entitled, as a matter of fair procedures, to have his application "*heard and determined*" before he is foisted into a hearing.

25. On that basis, I directed that the proceedings be adjourned generally, with liberty to re-enter, and that the application to re-enter can be made in the ordinary way once the application to come off record has been dealt with.

SLIP RULE APPLICATION

26. The requirement to pass and perfect an order is provided for under Order 115 of the Rules of the Superior Courts.

27. Following the pronouncement of the order in court on 17 January 2023, same was perfected, i.e. drawn up, the following day, 18 January 2023. An order to similar effect was perfected in the second set of proceedings.

28. The perfected orders in these proceedings (and the second set of proceedings) were circulated to the parties the same day (18 January 2023). Mr. Skoczylas contacted the registrar by email stating that the perfected orders are erroneous, and do not reflect what happened at the hearing. Mr. Skoczylas requested that the proceedings be listed before me for the purpose of an application to have the orders corrected pursuant to Order 28, rule 11.

29. This correspondence was brought to my attention by the registrar, and I made a direction, pursuant to Order 28, rule 11(b)(ii), that the matter be listed before me on Monday 23 January 2023 for the purpose of hearing the "*slip rule*" application.

30. The application was duly made by Mr. Skoczylas and by two of the plaintiffs in the second set of proceedings, namely Mr. Tibor Neugebauer and Mr. John Paul McGann. I will refer to these three individuals as "***the moving parties***". Mr. Skoczylas expressly requested that I listen to the digital audio recording of the hearing on 17 January 2023.

31. The defendants do not consent to the application to amend the perfected orders.

32. Prior to the hearing on 23 January 2023, Mr. Skoczylas had helpfully prepared and circulated a document which identified and marked-up the requested amendments. The key amendments sought are identified in that document as follows:

> "Whereupon and upon reading the Pleadings herein and having heard from the ~~Second~~ Third Named Plaintiff in Person

and the Solicitor for the Fourth Named Plaintiff and Counsel for the Defendants

And the Court being informed that the First Named Plaintiff and the Second Named Plaintiff have settled their claim as against the Defendants

And upon ~~application of~~ *ex parte* submissions made without prior notice on his own behalf by Mr. Doran O'Toole the Solicitor on record for the Fourth Named Plaintiff regarding his Notice of Motion to come off record which was not before the Court

IT IS ORDERED *suo motu* that the proceedings herein and the related proceedings bearing *Record Number: 2013 No. 2709 P Entitled: Mc Gann & Ors -V- Ireland & Ors* do stand adjourned generally with liberty to re-enter said proceedings pending the hearing ~~and final determination~~ in the High Court of the Notice of Motion filed on the 28th day of October 2022 for the Solicitor for the Fourth Named Plaintiff to come off record said Notice of Motion listed in the Chancery List for hearing on the 15th day of March 2023

And the parties have liberty to apply"

33. For ease of exposition, these proposed amendments will be addressed thematically. The first set of amendments relate to what might be described as the duration of the adjournment. It is submitted on behalf of the moving parties that the adjournment was only to be until the date of the *hearing* of the motion to come off record (15 March 2023). It was further submitted that were the adjournment to extend to the final determination of any appeal to the Court of

Appeal against the High Court's decision on the motion to come off record this could result in the proceedings being delayed for years.

34. In my *ex tempore* ruling on 17 January 2023, I had directed that the application to re-enter the proceedings could be made once the application to come off record has been "*dealt with*". At an earlier point, I had used the phrase "*heard and determined*".

35. The order as perfected uses the more formal phrase "*pending the hearing and final determination*" of the motion, rather than the phrase "*dealt with*". The formal wording provides more precision, but does not alter the intent of the oral order. My intention had been that the substantive hearing should be adjourned until such time as the motion to come off record had not only been heard by a judge in the Chancery List, but had also been ruled upon, i.e. determined. The phrase "*hearing and determination*" would allow for the possibility that the judge hearing the motion might reserve judgment, i.e. the motion might not necessarily be ruled upon on 15 March 2023.

36. I had not intended, however, to address the position that might obtain in the event of an appeal to the Court of Appeal against whatever decision the High Court might make on the motion to come off record. The current wording of the order is somewhat ambiguous in this regard; in particular, the phrase "*final determination*" might, on one view, capture an appeal. Accordingly, the order will be amended to read "*pending the hearing and determination by the High Court*" of the motion.

37. The second set of amendments relate to the nature of the intervention—to use a neutral term—made by Mr. O'Toole on 17 January 2023. The moving parties submit, correctly, that Mr. O'Toole did not make a formal application for an

adjournment on that date. Rather, the possibility of an adjournment was raised by me, and the parties were asked to address me on whether, logically, the motion to come off record should be dealt with first, i.e. prior to the substantive hearing of the proceedings.

38. The fourth paragraph of the order will accordingly be amended so as to read as follows:

> "And the Court being informed by Mr. Doran O'Toole, the Solicitor on record for the Fourth Named Plaintiff, that he has issued a Notice of Motion seeking to come off record which motion is listed for hearing in the Chancery List on the 15th day of March 2023"

39. I have carefully considered the proposed wording advanced by the moving parties, and have concluded that that wording does not accurately reflect the events at the hearing on 17 January 2023. It is not accurate to describe Mr. O'Toole as having made "*ex parte* submissions". The term "*ex parte*" has a very specific meaning and refers to applications which are made to the court in the absence of the other parties to the proceedings. An obvious example is an application for leave to apply for judicial review under Order 84 of the Rules of the Superior Courts. It is not apt to describe an *inter partes* hearing such as that which took place on 17 January 2023.

40. The inclusion of the phrase "*without prior notice on his own behalf*" in the perfected order is neither necessary nor appropriate. Mr. Skoczylas has been on notice, since 19 December 2022, of the fact that there is a motion to come off record listed for hearing on 15 March 2023 and has filed a number of affidavits in response. If and insofar as the moving parties wish to make the point, in any

appeal to the Court of Appeal, that Mr. O'Toole had not told them in advance that he would be bringing the existence of the motion to the attention of the court on 17 January 2023, they are entitled to do so.

41. The inclusion of the term "*suo motu*" in the perfected order is neither necessary nor appropriate. This is not a term which is used with any frequency by the Irish Courts. If and insofar as the moving parties wish to make the point, in any appeal to the Court of Appeal, that no formal application for an adjournment was made on 17 January 2023, they can do so by reference to this written judgment. Moreover, they are entitled, if they so wish, to take up a transcript of the hearing pursuant to Order 123 of the Rules of the Superior Courts.

42. The amended order will state that the motion to come off record "*is listed for hearing in the Chancery List on the 15th day of March 2023*". It is not necessary, therefore, to include express words to the effect that the motion to come off record was "*not before the court*" on 17 January 2023. This is implicit. Indeed, it is precisely because the motion was not before the court on 17 January 2023—and could not, therefore, be adjudicated upon on that date—that an adjournment had been necessary.

43. The third set of amendments seek to correct an error in the numbering of the plaintiffs. Mr. Skoczylas is incorrectly described as the "*second*" rather than the "*third*" named plaintiff. This proposed amendment is allowed.

44. Finally, it should be explained that the principal purpose of a perfected order is to record the operative or curial part of the order pronounced by the court orally. A perfected order will also record details such as, *inter alia*, the date of the hearing; whether it took place in person or remotely; whether each of the individual parties were in attendance, and, if so, whether they appeared in person

or were represented by solicitor and/or counsel; and a schedule of any affidavits relied upon. However, a perfected order is not intended as a substitute for a transcript of the hearing nor as a record of the reasoning of the court. It is not necessary, therefore, for a perfected order to contain a detailed recital of all of the events at a hearing.

TIME-LIMIT FOR APPEAL TO COURT OF APPEAL

45. Mr. Skoczylas expressed a concern that the process of amending the perfected orders should not be unnecessarily delayed. Mr. Skoczylas pointed out that the time-limit prescribed for the lodging of an appeal runs from the date of perfection, 18 January 2023, and that almost one week had already lapsed since that date. Mr. Skoczylas emphasised that the parties had not yet made a decision on whether or not to appeal.

46. To ensure that the parties are afforded a reasonable opportunity to prepare and lodge an appeal, if they so wish, a paragraph will be added to the amended orders along the following lines:

> "For the purpose of the time-limit prescribed for an appeal, this order is deemed to have been perfected on 30 January 2023 (i.e. the date of the amendment of the order)"

COMMUNICATIONS BY EMAIL

47. Following the hearing of the "*slip rule*" application on 23 January 2023, a number of emails were received by the registrar from Mr. Skoczylas with a request that they be brought to my attention. It is a fundamental principle that justice be administered in public and in the presence of the other parties to the

proceedings. Accordingly, any communications to a registrar should be confined to purely administrative matters and should not address the merits of the case.

48. None of these emails have been taken into account in the preparation of this judgment. On 25 January 2022, I directed the registrar not to forward any further such emails to me.

CONCLUSION AND FORM OF ORDER

49. For the reasons explained herein, the order in these proceedings will be amended to read as follows:

> "This three-day matter coming on for hearing onto Court this day by way of remote Court in the presence ~~Second~~ of the Third Named Plaintiff in Person and the Solicitor for the Fourth Named Plaintiff and Counsel for the Defendants
>
> Whereupon and upon reading the Pleadings herein and having heard from the ~~Second~~ Third Named Plaintiff in Person and the Solicitor for the Fourth Named Plaintiff and Counsel for the Defendants
>
> And the Court being informed that the First Named Plaintiff and the Second Named Plaintiff have settled their claim as against the Defendants
>
> ~~And upon application of Mr. Doran O'Toole the Solicitor on record for the Fourth Named Plaintiff~~
>
> And the Court being informed by Mr. Doran O'Toole, the Solicitor on record for the Fourth Named Plaintiff, that

he has issued a Notice of Motion seeking to come off record which motion is listed for hearing in the Chancery List on the 15th day of March 2023

IT IS ORDERED that the proceedings herein and the related proceedings bearing *Record Number: 2013 No. 2709 P Entitled: Mc Gann & Ors -V- Ireland & Ors* do stand adjourned generally with liberty to re-enter said proceedings pending the hearing and ~~final~~ determination by the High Court of the Notice of Motion filed on the 28th day of October 2022 for the Solicitor for the Fourth Named Plaintiff to come off record said Notice of Motion listed in the Chancery List for hearing on the 15th day of March 2023

And the parties have liberty to apply

For the purpose of the time-limit prescribed for an appeal, this order is deemed to have been perfected on 30 January 2023, i.e. the date of amendment"

50. Corresponding amendments will be made to the order in the second set of proceedings, i.e. High Court 2013 No. 2709 P.

51. Both sets of proceedings will be listed before me, remotely, on 30 January 2023 at 10.30 o'clock to address any issues which arise from this judgment. The parties will also be at liberty to apply to take up the transcript pursuant to Order 123 of the Rules of the Superior Courts.

POSTSCRIPT

52. Following the circulation of this judgment in "*unapproved*" or "*unsigned*" form on 27 January 2023, the matter was listed before me on 30 January 2023. An

order was made on that date giving the parties liberty to take up transcripts of the hearings on 17 January and 23 January 2023, with a direction that the costs of so doing be borne by the defendants. No order as to costs was made in respect of the "*slip rule"* application itself.

53. Pursuant to the liberty to apply provided for in the original orders of 17 January 2023, the proceedings will be listed for case management before the judge in charge of the Non-Jury List on 1 February 2023.

54. The intent of my order on 17 January 2023 had been that the substantive hearing of the proceedings should be deferred pending the hearing and determination by the High Court of the motion to come off record. This does not preclude the making of an application, in advance of 15 March 2023, to have a new date allocated for the substantive hearing (provided that the new date falls after 15 March 2023). Put otherwise, it was not the intent of my order to preclude the parties from now taking the step of applying to have a new date fixed for the substantive hearing. I emphasise, however, that it is ultimately a matter for the judge in charge of the Non-Jury List to decide whether or not a date should be fixed at this time.