THE HIGH COURT

[2024] IEHC 691

[Record Nos. 2013/2708 P and 2013/2709 P]

IN THE MATTER OF THE CREDIT INSTITUTIONS (STABILISATION) ACT 2010

BETWEEN

PIOTR SKOCZYLAS, SCOTCHSTONE CAPITAL FUND LIMITED, JOHN PAUL MC GANN AND TIBOR NEUGEBAUER

PLAINTIFFS

AND

IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR FINANCE

DEFENDANTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 3rd day of December 2024

1. In my judgment of 13 May 2024 following on a four-day hearing in June 2023, I held that the plaintiffs' claims that the Credit Institutions (Stabilisation) Act 2010 (hereinafter referred to as 'the 2010 Act') was unconstitutional and/or inconsistent with European law, had no basis in fact or in law. I dismissed the plaintiffs' claims for 26 separate declaratory reliefs.

2. On 25 July 2024 I heard a substitution application made by the first plaintiff, Mr. Skoczylas, a costs application made by the plaintiffs against the State and by the State against the plaintiffs and a separate costs application by the plaintiffs against ILPG. Following on the conclusion of that hearing on 25 July 2024, and the court having indicated that it would reserve judgment and deliver a written decision on a date after 15 October 2024 (in order to facilitate Mr. Skoczylas' personal situation), the plaintiffs brought a further motion before the court seeking, pursuant to the *McInerney Homes* principle, an order reopening the proceedings and an amendment/reversal of the judgment of 13 May 2024 in light of the decision of the CJEU in *Commission v. Ireland* Case C-465/20 delivered on 10

September 2024 (hereinafter referred to as the '*Apple'* case). The plaintiff also sought an order pursuant to the slip rule of O. 28, r. 11, correcting what was referred to as a *"falsehood"* in the judgment of this Court of 13 May 2024.

3. I address each of those applications below.

i. <u>Substitution application</u>

4. When the matter came back before the court on 13 June 2024 for final orders including costs, Mr. Skoczylas sought short service to bring a motion substituting him as plaintiff in lieu of the second plaintiff, Scotchstone Capital Fund ltd (hereinafter referred to as 'the company') which he said was required by the decision of the Supreme Court in *McCool Controls and Engineering v. Honeywell Control Systems* [2024] IESC 5 as he is a 100% beneficial majority shareholder of the "A" voting shares, and an 80% beneficial majority shareholder of all the shares in the company. He averred on affidavit to the company having transferred 5,220 of its 5,225 shares in ILPG on 2 October 2023, and the company having assigned its interest in this litigation to him as the company's majority beneficial shareholder on 17 November 2023. The dates of both transfers, and the date of the Supreme Court decision on which Mr. Skoczylas relied, postdate the hearing of this case in June 2023 and pre-date the judgment of the court in May 2024. At no time prior to the delivery of the judgment was the court's attention brought to either the transfers or the decision of the Supreme Court on which Mr. Skoczylas now seeks to rely.

5. Mr. Skoczylas maintained he did not need the leave of the court to bring a motion even though judgment on the substantive case had been delivered and the only outstanding matter appeared to be costs. The State defendants did not oppose him bringing the motion and, in those circumstances, the court gave him leave to bring his motion and indicated that the court would deal with costs on the same date. Both matters were heard by the court on 25 July last. The State did not oppose the application.

6. At all times since delivery of the judgment in the substantive issue, Mr. Skoczylas has made it clear that he intends to appeal this Court's judgment either to the Court of Appeal or by way of an application for a leapfrog appeal to the Supreme Court, as he is entitled to do.

7. I do not consider it appropriate to allow a substantial alteration to the identity of the parties at this point in the case, such as is sought by Mr. Skoczylas, by substituting an individual for a company and in circumstances where the same individual is already a named,

and very involved, plaintiff in the proceedings as Mr. Skoczylas is. I am also cognisant of Mr. Skoczylas' stated intention to appeal to the Court of Appeal or to the Supreme Court. It would be more appropriate for the appellate court to be asked to deal with any substitution application at the appropriate point in time and it is a matter for that court how they might address it.

8. I refuse the substitution application as I do not consider it appropriate for this Court to make such an order at this stage in the proceedings after judgment has been delivered and in circumstances where Mr. Skoczylas in effect seeks to remove the company from the proceedings and replace it with himself and where Mr. Skoczylas is already a named plaintiff.

ii. <u>Costs applications inter partes: heard 25 July 2024</u>

9. The State sought their costs as the successful party to the proceedings. The plaintiffs contend that the court should exercise its exceptional jurisdiction to award costs to the losing party and rely on the decision of this Court in *Collins v. Minister for Finance* [2014] IEHC 79 and the decisions of the Supreme Court in *Dunne v. Minister for the Environment* [2007] IESC 60 and *Curtin v. Dáil Éireann* [2006] IESC 27. The plaintiffs also rely on the decision of O'Malley J. in *Dowling v. Minister for Finance* [2017] IEHC 832 where the State was directed to pay a proportion of the plaintiffs' allowable outlay, a decision described by Mr. Skoczylas as *"joined at the hip"* with this one. Separately, the plaintiffs say the amendments to the 2010 Act in 2011 constitute an event, as per s. 169 of the Legal Services Regulation Act 2015, and rely on the decision of the Supreme Court in *Godsil v. Ireland* [2015] 4 IR 535.

10. The event that occurred here, insofar as s. 169 refers to an event, was the State's success in defending the entirety of the plaintiffs' claims. The situation in *Godsil* was different where intervening legislation was found to be an event that rendered the proceedings moot. No such legislative intervention occurred here that affected this litigation or its outcome. The 2010 Act was amended in 2011 including relating to some provisions that the plaintiffs claimed were unconstitutional in their challenge to the pre-2011 legislation. Ultimately, the plaintiffs were unsuccessful in persuading the court that some of the legislative provisions in the 2010 Act prior to the 2011 amendments were unconstitutional.

11. The plaintiffs also rely on the following in contending that the court should exercise its exceptional jurisdiction to deviate from the usual costs rule:-

(a) The exceptional nature of this litigation.

(b) The previous settlement entered into by previous co-plaintiffs in 2018/2019 leading to them being let out of the proceedings.

(c) Three written settlement offers made by Mr. Skoczylas.

(a) The exceptional nature of the litigation

12. Mr. Skoczylas said this was an exceptional case both for the plaintiffs and for Ireland, describing it in his submissions as a decision of *"unique and, indeed, of exceptional public importance"* and *"the most consequential case in the history of Ireland"*. He urged the court to take a similar approach to that adopted by O'Malley J. in 2017 when she awarded outlay to the plaintiffs having regard to the fact that the case was considered *"to be extremely important by the executive of this State"* and *"very significant in clarifying (along with Kotnik) the scope of EU company legislation in the circumstances brought about by the financial crisis"* (at para. 51). She held at paras. 52 and 53:

> *"52. Having regard to the nature of the legislation, and the unprecedented nature of the interference with the property rights of the applicants, I consider that there has been a public benefit in terms of domestic law, in the analysis of the proper approach of a court to the exercise of the powers conferred on the Minister. It will be noted that, in the section of the first judgment dealing with the test to be applied to the statutory criteria of reasonableness and necessity, I did not accept the formulation urged by the Minister but rather adopted a somewhat more stringent approach.*
>
> *53. While this legislation has lapsed, it is, as I have already said, not inconceivable that future emergencies (not necessarily of a financial nature) may bring about legislative incursions relating to fundamental rights."*

O'Malley J. granted the plaintiffs a portion of their outlay and costs, having taken into account the fact that this was undoubtedly a *"material interest"* case (at para. 54).

13. Mr. Skoczylas contended that the within proceedings were a continuum of the same claim. However, those submissions do not account for the passage of time and the current consequences of previous decisions in related litigation for the relevant jurisprudence, the details of which I set out in my substantive judgment. That includes decisions of this Court, the Court of Appeal, the Supreme Court, the CJEU and the European Court of Human Rights. The law that O'Malley J. had to determine was unclear, evidenced in part by that court's decision to refer a question of law to the CJEU which was heard before a Grand Chamber,

signifying the significance afforded to the issues by the CJEU at that time. By the time the legality of the legislation fell to be determined by this Court, many previously open questions of law, particularly European law, had been clarified and closed out. To the extent that this Court had to determine questions of law pertaining to the constitutionality of the 2010 Act, they were determined by reference to now well-established principles of constitutional law.

14. Like in *Dunne*, no truly novel or previously unexplored legal point arose in my judgment, unlike the other decisions on which the plaintiffs sought to rely (*Collins* and *Curtain*). This case was clearly viewed as a matter of importance, and possibly even exceptional importance, to the plaintiffs, as most litigation is for the individuals involved, but it does not follow from that subjective view that the case involved points of novel, exceptional importance to the public. It was not a test case, as claimed by the plaintiffs, nor could it have been as the legislation was amended in 2011 which meant that the plaintiffs' claims related only to the pre-amendment provisions of the 2010 Act and how those provisions had affected the plaintiffs within that legislative vacuum.

15. Each of the plaintiffs claimed damages from the State. That in itself does not preclude their case from falling within the exceptional circumstances in which an unsuccessful plaintiff might secure some or all of their costs or avoid a costs order against them, but it is a factor to be considered by the court in assessing a costs application. The Supreme Court acknowledged in *Dunne* that a private interest is something that may be taken into account. Mr Skoczylas referred to and relied on three open letters he had written to the State defendants in 2017, 2020 and 2023 offering to settle his litigation, including this case and some outstanding orders for outlay and costs, for a significant sum of money (expressly referred to in the letter of 2023, a point to which I return below). Mr. Skoczylas' willingness to compromise his proceedings in advance of running the constitutional challenge in consideration of a monetary settlement, is more consistent with a private interest claim for compensation arising from individual, shareholder rights, than a claim asserting issues of public importance in the interests of the population at large that require a decision of the court including the extensive declaratory reliefs that were sought here. I take that into account as one of the relevant factors in my finding that this case does not fall within the exceptional circumstances in which costs should be awarded to or against an unsuccessful plaintiff.

(b) Prior settlement by other previous plaintiffs

16. The plaintiffs asserted that two of their previous co-plaintiffs chose to settle with the State back in 2019 by paying what the plaintiffs believe was a substantial sum in costs. They had very little detail grounding their belief and therefore sought an adjournment in order to subpoena the two former co-plaintiffs to give sworn evidence about those arrangements with the State. The plaintiffs contended that s. 169(1)(f), in referring to a party having made an offer to settle the proceedings, covers any other party including their previous co-plaintiffs who may have entered into a settlement agreement. I do not accept that submission as s. 169(2) refers to the *"party"* (to which subs. (1)(f) refers), i.e. *"a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings"*. This does not include another party who may have been part of the same proceedings in the past and before the resolution of the proceedings in which one party was successful and one was not. Neither does the reference to *"offer"* in subs. (1)(f) include a settlement agreement because an offer is a different creature to an agreement, albeit an agreement will have originated in an offer. An offer does not become an agreement until it has been accepted within a relationship where the parties intended to create legal relations, thereby evolving from an offer into a binding agreement.

17. If the plaintiffs' submission was correct, s. 169(1)(f) could entitle any party to proceedings to obtain details of the terms and circumstances of any agreement entered into by any third party who had previously been party to the same proceedings. I do not believe that was the intention of the Oireachtas in enacting that section.

18. It is possible that the plaintiffs may be entitled to information about previous costs discharged during the history of this litigation insofar as it could impact on the costs that are claimed to have been incurred by the State in dealing with the proceedings brought by these plaintiffs. The provision of such information (if it were found to be something to which the plaintiffs were entitled) could only occur within the adjudication process and/or the process of calculating the portion of the State's costs that a costs order made at this stage would cover. I make no finding of any such entitlement within any adjudication process as I am simply observing the <u>possibility</u> that a party participating in an adjudication of costs process might be entitled to information about a contribution made by a third party to the costs of the party in whose favour a costs order was made. Whether or not that entitlement exists, it is not relevant to the determination to be made by this Court on the costs orders to be made.

19. Mr. Skoczylas suggested that the costs paid by his former co-plaintiffs back in 2019 could have been of an amount that would mean the State has no outstanding costs for which he and his co-plaintiffs could now be made liable, including apparently in respect of the lengthy hearing that took place after their co-plaintiffs were let out of the proceedings. That seems to display a misunderstanding of how costs are incurred and calculated but, in any event, the plaintiffs will be entitled to participate in any adjudication of costs process in the usual way and will be free to make whatever case they are entitled to make about any *pro rata* reduction of costs, within that process. Mr. Skoczylas' claims have no relevance for this Court's exercise of its jurisdiction to deal with the State's application for a costs order in respect of the costs it incurred, including the costs of the four-day hearing of June 2023 and the further two days hearing that has taken place since then on 13 June 2024 and 25 July 2024, in defending these proceedings in which the plaintiffs have been entirely unsuccessful.

(c) Settlement offers made by Mr. Skoczylas

20. A party to proceedings is entitled, in principle, to seek to rely on s. 169(1)(f) in relation to any offer they made to settle the proceedings and the court must have regard to the terms and circumstances of any such offers. The more usual application of s. 169(1)(f) arises where a successful party previously made an offer to settle proceedings and later succeeded in defending the claim in full or secured an award of damages less than the settlement offer that had been made. It is unusual for the losing party who secured no reliefs from the court, such as the plaintiffs here are, to seek to rely on a previous offer they made to settle proceedings in consideration of a payment of a sum of money to them.

21. Mr. Skoczylas, in his submissions to this Court, relied on his letters sent to the State defendants on 15 June 2017, 2 September 2020 and 30 May 2023 in which he urged the State to engage in settlement negotiations to bring the litigation (including but not limited to this case) to an end. All three letters referred to the large sums of money already spent by the State in defending the proceedings and the additional money Mr. Skoczylas said the State would be required to spend on the litigation, which Mr. Skoczylas claimed would continue for many years, including his intention to *"seek additional references to the CJEU",* as referred to in his letter of 2 September 2020. The most recent of those letters was written approximately a month before the hearing of this constitutional challenge commenced, where Mr. Skoczylas sought the sum of €196,725, in consideration of which he said all litigation between him and the State would be withdrawn and that this would also resolve

his costs orders of 2012 and 2017. Mr. Skoczylas referred in that letter to his inability and that of his company or the other litigants to pay costs incurred by the State as he said that he and the company were *"completely impecunious and entirely unable financially to discharge any adverse cost orders"*.

22. Had the State accepted Mr. Skoczylas' offers and paid the money he sought in May 2023, it would have avoided the expense of defending his constitutional challenge (albeit would have still had to deal with the claims of the other plaintiffs). However it is difficult to see the logic to rewarding Mr. Skoczylas for seeking such a settlement by awarding costs to him or declining to award costs against him, or punishing the State by awarding costs against them, or declining to make a costs order in their favour, because they chose not to accept his offer and instead proceeded to successfully defend Mr. Skoczylas' challenge by reference to well established legal principles.

23. Mr. Skoczylas' settlement offers do not bring this matter within the exception to the general principle of s. 169(1), that the party who is entirely successful is entitled to costs against the party who lost.

Conclusions on the inter partes costs application heard 25 July 2024

24. The State has been successful in defending the plaintiffs' claims by reference to the findings already made by other courts in related litigation and well-established principles of European and constitutional law and is entitled to their costs against the plaintiffs. The plaintiffs do not come within the exceptions to the usual costs rule that costs follow the cause, whether within s. 169 or the caselaw binding on this Court. It did not involve points of novel and/or exceptional importance to the public. I, therefore, make a costs order in favour of the State defendants against the plaintiffs to be adjudicated upon in default of agreement. I will put a stay on execution pending the resolution of an appeal from the decision of this Court to the Court of Appeal and/or the Supreme Court as may be.

iii. The plaintiffs' cost application against ILPGH

25. Separate and in addition to the costs applications against the State, the plaintiffs assert an entitlement to costs against ILPGH arising from costs they incurred in responding to ILPG's 2013 application to be joined to these proceedings as a notice party. The plaintiffs filed a number of affidavits responding to that 2013 application and participated in the motion which was adjourned in 2013, by consent *"until the adjudication of the appeal number 125/2013"* as per a letter from the plaintiffs dated 11 October 2013 in response to

correspondence from ILPG. That 2013 application was never resurrected or re-entered by either party. Counsel for ILPG advised this Court that they decided not to reactivate their application in order to avoid incurring further costs.

26. The plaintiffs say that ILPG abandoned their application which they said gave rise to their entitlement to costs in accordance with s. 169(4) as they claimed the application of ILPG to be joined as a notice party constituted a *"proceeding"* within subsection (4). ILPG disputes that and argued that there was no *"event"* such as to give rise to any costs liability pursuant to section 169. They claimed their adjourned application to be joined as a notice party was entirely different to what was an actual application to be joined as notice party in a separate aspect of these proceedings that was heard by Charleton J. in 2013 who, having determined the application against ILPG, granted the plaintiffs their costs of ILPG's unsuccessful application.

27. In principle, a party who brings an application and chooses not to pursue it within a reasonable period of time, may be made liable for another party's costs of dealing with the application, in accordance with section 169(4). The subsection allows the court a discretion whether to direct such costs or not.

28. The manner in which the plaintiffs purported to bring their costs application against ILPG before this Court was unsatisfactory. Whilst the plaintiffs are lay litigants, Mr. Skoczylas (whose submissions were adopted and relied on by Messrs McGann and Neugebauer) has cited and relied on the compliments paid to him by other courts on the quality of the presentation of his papers. He told this Court that he did not have to bring a motion in respect of costs against ILPG and asserted his right to make such a costs application orally. I do not agree. It is not appropriate that the court would be asked to make a costs order against a non-party to proceedings, even one who had commenced an application to be joined as a notice party over ten years ago and then chose not to proceed with it, by reference to the contents of written submissions and by emailing the non-party from whom costs are sought some days after the costs matter was listed before this Court on 13 June 2024 and before the hearing of the costs application.

29. In addition, I find the lapse of time from when the last engagement between the plaintiffs and ILPG took place in 2013, militates against the granting of the costs that are sought. The plaintiffs could not contend (nor did they suggest) that ILPG had only recently abandoned their application to be joined as a notice party, in circumstances where the last

engagement from ILPG was in 2013. The plaintiffs conducted a four-day constitutional challenge before this Court in June 2023 with all of the pre-hearing steps that that involved. If they wished to seek their costs against ILPG in respect of ILPG's abandoned application to be joined as a notice party back in 2013, they should have attended to that well before June 2024.

30. I, therefore, make no order in relation to the plaintiffs' costs in engaging with the application brought by ILPG to be joined as a notice party to these proceedings, which ILPG abandoned sometime after the consent adjournment of 2013. I make no order in relation to the costs of either the plaintiffs or ILPG in dealing with this aspect of the proceedings.

iv. <u>The Slip Rule</u>

31. Order 28, rule 11 provides that:

> *"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal".*

In my judgment of 13 May 2024, at para. 46, I stated that the plaintiffs *"attempted to rely on what they say is the fact that ILPGH was solvent, that was previously found by O'Malley J. not to be so."* The reference was to the judgment of O'Malley J. in *Dowling v. Minister for Finance* [2014] IEHC 418. Mr. Skoczylas in his written submission of 3 October 2024, adopted by the other plaintiffs, stated:

> *"Revealingly, O'Malley J actually found in her judgment in Dowling [2014] IEHC418: '5.1 … it [the Bank in question]* ***<u>was not insolvent</u>*** *and it owned a profitable asset in Irish Life' and '5.13 … The company [ILPGH] accounts showed it to be* ***<u>solvent</u>****.' Notably, I emphasised those facts repeatedly before Bolger J, drawing her attention to the respective judgments and evidence – all to no avail; I could have equally not wasted time making the respective submissions before this Court.* ***The falsehoods ought to be corrected."*** (his emphasis)

32. In fact, the references at paras. 5.1 and 5.13 of O'Malley J.'s judgment, quoted by Mr. Skoczylas, were a discussion of the evidence that the plaintiffs (including Mr. Skoczylas) had put before the court and did not constitute the findings of the court. This is clear from the full content of paras. 5.1 and 5.13, which state:-

> *"5.1 The applicants point to certain significant positive factors relating to the bank's finances that did not apply to other credit institutions. It had not become involved in NAMA (since it had not lent extensively to property developers). Unlike AIB and*

Bank of Ireland it was not, prior to the events in question, a recipient of State capital – these two banks had received €11 billion between them. It had not come under State control, as had happened to Anglo Irish, EBS and Irish Nationwide. (Ulster Bank had come under the control of the United Kingdom authorities.) It was not insolvent and it owned a profitable asset in Irish Life. (In 2010 Irish Life made an operating profit of €200 million, while the bank made an operating loss of €400 million.) It is argued that it was never bankrupt or on the brink of bankruptcy.

…

5.13 The applicants have consistently maintained that the company was, during these years, undervalued by the market. Dr Azarmi points to the fact that on the 30th June, 2011 the company's equity had a book value of just under €2 billion. It was, after all, the owner of the profitable Irish Life Assurance business. The company accounts showed it to be solvent. Some independent analysts were publicly giving their view that its share price was undervalued. Mr Skoczylas and Dr Azarmi also point to various positive statements made by officers of the company and note that none of them have been the subject of criminal prosecutions for making false statements."

33. The point is reiterated in O'Malley J.'s judgment in the second substantive decision of *Dowling v. Minister of Finance* [2017] IEHC 520 at paras. 70 and 71 where she said:

"Submissions relating to the findings in the first judgment

70. The applicants repeat their submission, which they have maintained throughout, that the Company was at all times solvent, viable and operating normally. They say that it had adequate Tier 1 capital. In their view it simply suffered, as did all banks at the time, from temporary illiquidity.

Discussion

71. The concentration by the applicants on the technical definition of solvency involves disregarding the reality of the Bank's situation and the exposure of the State to the risks created by that situation. The Bank was, presumably, paying its debts as they fell due. However, the evidence adduced in the application for the Direction Order, set out in paragraphs 29.1 to 29.22 of the first judgment, was in my view sufficient to ground the finding that a failure to recapitalise would on the balance of probabilities have led to a failure of the Bank."

34. There is no basis to the plaintiffs' application pursuant to the slip rule and I refuse the application.

v. Application to reopen the proceedings

35. This Court has jurisdiction to reopen its own judgment between the time of delivery and the perfection of the court's order, which is the current status of the court's involvement in this matter. The jurisdiction is confirmed by the decision of the Supreme Court in *Re McInerney Homes Ltd* [2011] IESC 31, where O'Donnell J. (as he was then) acknowledged that a judgment could be revisited *"in exceptional circumstances"* (para. 74) and upheld the view of Clarke J. in the High Court that the case before them was such an exceptional case. He stated, at para. 62:

> *"Once the trial judge observed that he himself had assumed that there was no longer any prospect of NAMA acquiring the loans, and that that assumption was based upon the somewhat artificial way in which the banks had approached the matter, then, in my view, he was entitled, and indeed arguably obliged, to reopen the matter. If indeed it was the case that the NAMA acquisition of the loans of Bank of Ireland and Anglo was imminent, then it could be said that the hearing, and indeed the judgment, had proceeded almost on a basis of common mistake and that justice required that the matter should be reconsidered."*

A similar approach was adopted by Fennelly J. where he stated, at para. 23:

> "[The High Court] *had considered the matter in its first judgment on a basis which would be totally undermined if NAMA were to take over the loans. Crucially, in my view, no order had been made up following the first judgment. The matter, once raised, was fundamental. The learned judge was quite right to reopen the hearing*".

36. The Court of Appeal more recently in its decision in *Moyne v. Todd & ors* [2024] IECA 172 set out the law on a court of first instance reversing its own judgment and stated at paras. 8-10:

> *"8. In In Re McInerney Homes [2011] IESC 31 O'Donnell J held;*
>
> *'It is only in exceptional circumstances where justice requires that course that the Court should reopen proceedings after the delivery of judgment and before the formal order is made.' In the High Court in the same case, Clarke J had held that such a reopening could only happen when there were 'strong reasons' for so doing.*

9. In SZ (Pakistan) v Minister for Justice and Law Reform [2013] IEHC 95 Hogan J held that McInerney is 'authority for the proposition that the Court cannot lightly and without grave reason reopen a final judgement.'

10. The position was reviewed by Simons J in G. v A Judge of the District Court [2023] IEHC 386 (where the judge referred to the 'limited circumstances' in which such a review was appropriate) and by Cregan J in Gaultier v Reilly [2023] IEHC 558 (where court referred to the need for 'strong reasons' and 'exceptional circumstances' in the context of an attempt to have it revisit its judgment).

37. This Court has jurisdiction to reopen its judgment in which final orders have not yet been made, but only in exceptional circumstances and for strong reasons. In effect, and in accordance with the decision of O'Donnell J. in *McInerney Homes*, I would need to be satisfied of the existence of a common mistake in my judgment or that I had proceeded on the basis of an assumption that turned out to be incorrect.

38. Mr. Skoczylas, with whom the other plaintiffs agreed, asserted that the decision of the CJEU in the *Apple* case establishes facts that challenge the basis on which the judgment of this Court was reached. In the *Apple* case, the CJEU found that Ireland's renouncement of substantial tax revenue by the lowering of Apple's tax liabilities, giving rise to a loss of State resources, constituted unlawful State aid. The CJEU upheld the Commission's finding that Ireland was required to recover the aid granted to Apple for the period 2003-2014. Mr. Skoczylas said this came to approximately €13 billion, a figure that was not disputed by the State.

39. Mr. Skoczylas made the following points which he said arise from the *Apple* judgment:-

- Because Ireland granted illegal State aid to Apple at the same time as it enacted the 2010 Act, it could not lawfully allocate State aid to recapitalise ILP.
- The illegal State aid granted to Apple meant that the effects of the 2010 Act were not proportionate to its objectives and the *Heaney* test of proportionality was not, in fact, satisfied.
- Had Ireland not renounced the substantial monies it illegally granted to Apple, the severity of the financial crisis and the consequent need to recapitalise ILP would have been lessened.

Those points are summarised in Mr. Skoczylas' affidavit where he stated, at p. 15:

> *"The impact of the CJEU judgment on this case: the argument that enacting the contested unprecedently draconian provisions of the 2010 Act was necessary, due to the lack of financial resources by the State during the recent financial crisis, has been now comprehensively defeated – indeed, Ireland effected an illegal allocation of State aid within Ireland, while utilising the contested unique draconian (and unlawful) provisions of the 2010 Act."*

40. In the course of his extensive written and oral submissions, Mr. Skoczylas made various claims which are variations on the summary of his points set out above. He said the loss of State resources, in the amount of €13 billion and possibly more, contributed to the financial instability in Ireland at the time the 2010 Act was enacted, and to the *"threat to the stability of certain credit institutions in the State, and to the financial systems generally"* which is identified in the recitals to the Act as part of the unprecedented financial crisis in the State at the time it was enacted in 2010. He said that had Ireland availed of the monies it should not have allowed to Apple, it would have had the flexibility to deal with the financial crisis without enacting the 2010 Act, i.e. that the Act would not have been necessary. He said in his oral submissions that it was *"self-evident"* that the loss of €13 billion to the State contributed to the financial crisis and to the need for aid from the Troika and had the State retained those monies, that recapitalisation of the banks could have been affected in a less draconian manner and recapitalisation of ILP would not have been necessary. He did not claim that the financial crisis or the need to recapitalise the banks would have been entirely avoided.

41. The State opposed the application to reopen the proceedings and asserted that it was not open to the court to second guess how the State could or might have used the Apple monies had they been available to the State at the time. Counsel for the State said the cost of recapitalising the banks was far in excess of €13 billion (a claim not challenged by Mr. Skoczylas) and that recapitalisation was funded by the State's own resources and not just from the monies borrowed from the Troika. The State submitted that the *McInerney* principles require evidence from which the court could identify exceptional circumstances and that no such evidence had been submitted by the plaintiffs. Mr. Skoczylas claimed that the plaintiffs did not need to adduce evidence at this stage, and it was sufficient for them to identify cogent reasons to reopen the case. This submission was not supported by any

authority identified by him. He said that the court should reopen the matter and then proceed to hear evidence, including expert evidence which he said he could not assemble in the short time he said was available to him to make this application. I note in that regard that no application was made to the court to delay giving judgment and making final orders to allow such evidence to be obtained, even though Mr. Skoczylas had been fully accommodated by the court in July when he requested that judgment not be delivered until after 15 October due to his personal issues.

Decision on the application to re-open

42. The *McInerney Homes* principle sets a high bar for the court to exercise its exceptional jurisdiction to reopen a judgment before final orders are made, which can and should only be exercised in exceptional circumstances. I have not been satisfied that the delivery of the CJEU *Apple* decision since I gave judgment in May 2024, establishes such exceptional circumstances. In *McInerney*, O'Donnell J. referred to the assumptions on which the trial judge had proceeded which were later found to have been less than accurate. In my judgment of 13 May 2024 I proceeded on the basis that, at the time the 2010 Act was enacted, the Irish State and the EU was facing an unprecedented, serious financial crisis that rendered it necessary to implement the 2010 Act in the common good and on public policy grounds. That was similar to how the High Court and the CJEU had previously approached related issues. That was not an assumption that has been rendered less accurate or more fragile by the CJEU *Apple* judgment or the fact that the State unlawfully deprived itself of €13 billion between 2003 and 2014, a period of seven years before and four years after the enactment of the 2010 Act. Mr. Skoczylas' submissions around what might have occurred had the State had possession of the €13 billion Apple money back in 2010 or how that might have alleviated the financial crisis are speculative and devoid of any evidential or legal basis.

43. It is clear that there was a national, a European and a worldwide serious financial crisis in 2010. The basis for the decision of the CJEU in *Dowling*, on which this Court relied in its judgment, is no less reliable or authoritative now post the CJEU *Apple* decision. There is no merit to Mr. Skoczylas' submissions that the premises of the CJEU decision in *Dowling*, provided by the Irish High Court, are now, in the light of the CJEU *Apple* decision, partly wrong, partly misleading and partly incomplete, as he claimed.

44. The decision of the CJEU in *Apple* does not undermine the findings of this Court in its judgment of 13 May 2024 on proportionality or otherwise. The fact that Ireland illegally

granted State aid to Apple between 2003 and 2014 does not mean it must now be retrospectively found not to have been permitted to grant an entirely different State aid in 2010, a State aid which had been approved by the European Commission, to recapitalise ILP.

45. The plaintiffs have not established cogent reasons to reopen this Court's judgment for a fresh hearing with further evidence. Even if they had, I do not consider cogent reasons that currently have no evidential basis could satisfy the high bar of exceptional circumstances required by the *McInerney* jurisprudence. It is a matter of fact that a sum of €13 billion should have been retained by the State between 2003 and 2014 but it is speculative for the plaintiffs to claim that the State could or should have used that money in a way that would or could have avoided the need that arose quickly and with little previous warning over the preceding years, in 2010, to adopt the *"extraordinary piece of legislation"* (as per Fennelly J. in *Dowling v. Minister for Finance* [2013] IESC 58) that was the 2010 Act.

vi. <u>Additional submissions on inter partes costs</u>

46. Mr. Skoczylas sought to use the application to reopen this Court's judgment in the light of the CJEU *Apple* decision, to raise other points during the hearing on 9 October 2024 relating to the substantive *inter partes* costs issue already heard by this Court on 25 July 2024. Mr. Skoczylas claimed he needed to raise the issue of costs again due to the delivery of the decision of the Court of Appeal in *Skoczylas v. Minister for Finance* [2024] IECA 201 on 30 July 2024, after the costs hearing by this Court had ended on 25 July 2024. He described the decision as an *"important judgment"* relating to the cost of using lay expertise. The decision of the Court of Appeal was about what is or is not a recoverable expense in a cost adjudication process. It was an appeal from the decision of the High Court that the adjudication of Mr. Skoczylas' costs did not err in determining that the expenses of SCLLP, a limited partnership that provided services to Mr. Skoczylas relating to his litigation, were not recoverable. The Court of Appeal found no error in the decision of the High Court. The decision was about the adjudication of Mr. Skoczylas' costs and has nothing to do with the applications for costs made in these proceedings. Even if I had awarded the plaintiffs their costs/expenses, what could be claimed in those costs or expenses would remain a matter for adjudication and would not have been a matter for this Court in dealing with the costs application. The issues in what can or cannot be claimed is only a matter for this Court in

an appeal from an adjudication decision and what is currently before me is not such an appeal.

Indicative view on costs on the applications heard 25 July 2024

47. My indicative view is that the State is entitled to the costs of the substitution application by Mr. Skoczylas and the costs of the application made by all of the plaintiffs and by the State for their costs, to be adjudicated upon in default of agreement, with a stay on the execution of the costs order pending the resolution of an appeal from the decision of this Court to the Court of Appeal and/or the Supreme Court as may be. As the second plaintiff company did not participate in either application, the costs of those applications should only be against the plaintiffs who did so participate, namely Mr. Skoczylas, Mr. McGann and Mr. Neugebauer. I will put the matter in at 10.00am on 14 January 2025 to hear any submissions any party may wish to make in relation to those costs. If any party wishes to make written submissions, they should be lodged with the court at least 48 hours in advance of the matter coming back before me.

Indicative view on costs on applications heard 9 October 2024

48. I have refused the reliefs sought by the plaintiffs in the notice of motion of 17 September 2024 and heard by this Court on 9 October 2024. My indicative view on the costs of the application to re-open the decision, the application pursuant to the slip rule and the application arising from the decision of the Court of Appeal on the adjudication of costs, in accordance with s. 169 of the Legal Services Regulation Act 2015, is that the State, having succeeded in resisting all of the reliefs sought, is entitled to their costs against the plaintiffs who brought the applications, namely Mr. Skoczylas, Mr. McGann and Mr. Neugebauer, to be adjudicated upon in default of agreement and with a stay on the execution of the costs order pending the resolution of an appeal from the decision of this Court to the Court of Appeal and/or the Supreme Court as may be. If any party asserts that a different costs order should be made in respect of the costs of these applications, I will allow them to make further submissions when the matter is back in on 14 January 2025. Any written submissions should be lodged with the court at least two days before the matter is back in before me.

The plaintiffs represented themselves.

Counsel for the defendants: Ailbhe O'Neill SC

Counsel for ILPG: Shane Cranley BL