AN CHÚIRT UACHTARACH
THE SUPREME COURT

[S:LE:IE:2013:000062]

O'Donnell J.
McKechnie J.
Charleton J.

BETWEEN

PERMANENT TSB PLC, ALAN COOK, JEREMY MASDING, KEVIN MURPHY, DAVID MCCARTHY, BERNARD COLLINS, RAY MACSHARRY, MARGARET HAYES, EMER DALY, SANDY KINNEY, PAT RYAN, AND ROY KEENAN

PLAINTIFFS/RESPONDENTS

AND

PIOTR SKOCZYLAS, SCOTCHSTONE CAPITAL FUND LIMITED, GERARD DOWLING, PADRAIG MCMANUS, GEORG HAUG, JOHN PAUL MCGANN, TIBOR NEUGEBAUER, AND MURIEL SCORER

DEFENDANTS/APPELLANTS

Judgment of O'Donnell J. delivered the 5th day of November 2019.

1 These proceedings represent a small skirmish in a lengthy litigation war. There have been substantial battles in the High Court, the Court of Appeal, this court, and in the Court of Justice of the European Union ("CJEU"). In the Irish Courts alone there have been at least 13 different sets of proceedings between these or related parties.

2 Each of the appellants are shareholders in Permanent TSB Group Holdings plc (formerly known as Irish Life and Permanent Group Holdings plc) ("the group holding company"). The first appellant, Piotr Skoczylas, has been a shareholder in the group holding company since March 2011, and was formerly one of its directors. Mr. Skoczylas is a managing director and fund manager of the second appellant, Scotchstone Capital Fund Ltd. ("Scotchstone"), which also has a shareholding in the group holding company. Some of the appellants, namely Gerard Dowling, Padraig McManus, and Muriel Scorer, notified the court in advance of the hearing that they did not wish to participate in the appeal. At the hearing, the court was informed that the fifth appellant, Georg Haug, is deceased. Mr. Neugeberger attended in court as did the father of Mr. Mc Gann. Mr. Skoczylas indicated that these individuals were adopting the position advanced by him, and subsequently Mr. Neugeberger wrote to the court indicating he adopted Mr. Skoczylas's submissions. Mr. Skoczylas made submissions on his own behalf. He has shown himself to be a well-prepared and knowledgeable litigant who has put comprehensive submissions before the court. The legal issue for determination in this appeal is not affected by the absence of any of the other appellants. Any reference to Mr. Skoczylas and his submissions should be understood as encompassing any individual shareholder who adopts his submissions.

3 The first respondent, Permanent TSB plc (formerly Irish Life and Permanent plc) ("the bank") is a wholly owned subsidiary of the holding company. The bank was until 2012 the owner of a life assurance business carried out through Irish Life Group Ltd. and its subsidiaries ("the Irish Life Group"). The second to twelfth respondents are each serving or former directors of the group holding company and the bank.

4 The detailed background to this matter is set out in the judgment of O'Malley J [2014] IEHC 418, from which this perhaps oversimplified account is drawn, which is sufficient to identify the net legal issues to be determined in this matter. The broad background to this matter is that the bank was the successor to a well-known building society. At the time of its conversion to a bank, depositors with the society became shareholders in the bank and then the holding company. It appears, however, that Mr. Skoczylas and Scotchstone acquired their shareholding in the group holding company at a time when the banking system in Ireland was in distress and the share price had dropped to a few pence. While the bank differed from some of the other financial institutions in the Irish market in that it was part of a group which included a profitable insurance company, and the bank had not had to engage with the National Asset Management Agency ("NAMA"), because it was not as exposed to lending to developers, it was clearly affected by the collapse of liquidity in the market. In early 2011 it, together with other banks, was the subject of a prudential review by the Central Bank of capital and liquidity requirements, PCAR and PLAR respectively, with a view to deleveraging the banking system and reducing the banks' reliance on short term funding, pursuant to Ireland's obligations under the Programme for Support, known colloquially as "the bailout". In the case of the bank, this resulted in a decision by the Central Bank of 31 March 2011 requiring the bank to raise an additional €4 billion by the end of July 2011 to be achieved in part by asset disposal, but principally would require a very substantial introduction of fresh capital in the region of €2.3 billion. The Minister for Finance was prepared to provide that amount in return for an allotment of shares which would have diluted the existing shareholders' interests and made the Minister the owner of the clear majority (more than 99%) of the shares in the group holding company. This proposal was, however, rejected by the shareholders at an EGM on 20 July 2011 at which Mr. Skoczylas was prominent. Accordingly, the group was the subject of the first of three direction orders made at the suit of the Minister for Finance in respect of the bank and the group holding company under s. 9 of the Credit Institutions (Stabilisation) Act 2010 ("the 2010 Act"), each of which has been challenged by Mr. Skoczylas. The 2010 Act was enacted, inter alia, to make provision, in the context of the National Recovery Plan 2011-2014 and the European Union/International Monetary Fund Programme of Financial Support for Ireland, for the stabilisation and preservation or restoration of the financial position of certain credit institutions. The direction orders made in respect of the group included two which are of relevance to these proceedings. :-

(a) A direction order made by the High Court on 26 July 2011 ("the 2011 direction order") providing, *inter alia*, for the subscription by and allotment to the Minister for Finance of new shares in the group holding company, making him the owner of 99.2% of the capital in the company, giving him control of the group holding company, and thus of the bank, and

(b) A direction order made by the High Court on 28 March 2012 ("the 2012 direction order") requiring the bank to sell its shareholding in the Irish Life Group to the Minister for Finance for the sum of €1.3 billion.

5 Mr. Skoczylas and other shareholders in the group holding company have sought to challenge these interventions, and the manner in which the group responded to the Minister's approach by the Minister in a number of different proceedings, thirteen in total to date. These include a series of injunction proceedings, constitutional challenges and proceedings under s. 205 of the Companies Act 1963 ("the 1963 Act") alleging oppression of minority shareholders, but for present purposes it is sufficient to refer to three sets of proceedings in particular.

6 On 26 July 2011, Mr. Skoczylas and others initiated a challenge to the 2011 direction order. That was the subject of a comprehensive judgment by O'Malley J. in the High Court (see *Dowling v. Minister for Finance* [2014] IEHC 418), which led to a reference to the CJEU, and a judgment by that court in *Dowling v. Minister for Finance* ((Case C-41/15) (ECLI:EU:C:2016:836)). It should be recorded that O'Malley J. gave a decision in which she applied the answer by the CJEU to the questions referred and dismissed the plaintiff's claim (see *Dowling v. Minister for Finance* [2017] IEHC 520), and an appeal against that decision was dismissed by the Court of Appeal. This court in turn refused leave to appeal against the decision of the Court of Appeal by determination dated 1 March 2019 (see *Dowling v. Minister for Finance* [2019] IESCDET 55). These have been referred to as the main proceedings.

7 On 20 February 2012, proceedings were commenced (High Court Record No. 2012/1696 P) seeking an injunction directing that Mr. Skoczylas be immediately appointed as a director of the group holding company. An interlocutory injunction was refused by Murphy J. on 27 February 2012, with no order as to costs.

8 On 28 March 2012, proceedings were issued in the High Court (Record No. 2012/116 MCA) challenging the 2012 direction order made on that day. On 28 June 2012, the High Court (Peart J.) dismissed the application made by the first named appellant and others to set aside the direction order (see *Dowling v. Minister for Finance* [2012] IEHC 436).

9 On 10 and 11 January 2013, while the first set of proceedings which were to be heard by O'Malley J. were in being, and were being actively pursued, the appellants took the unusual step of sending notices to all the respondents pursuant to s. 160(7) of the Companies Act 1990 (as amended) ("the 1990 Act") stating that they intended to make an application under s. 160(2) of the 1990 Act in respect of the director respondents. Section 160(2) provides, in brief, that in any proceedings, or as a result of an application under the section, where a court is satisfied that any of the matters listed in s. 160(2)(a) to (i), it may of its own motion or as result of the application make a disqualification order against the person for such period as it sees fit. The Notices set out the provisions of s. 160(7) which required ten days' notice of intention to make an application for disqualification and stated "TAKE NOTICE that as part of the intended proceedings in the High Court against you as a director, the undersigned members of Permanent TSB Group

Holdings plc (formerly Irish Life & Permanent Group Holdings plc) intend *inter alia* to seek relief against you pursuant to section 160 (2) of the Companies Act 1990". The reference to the intended proceedings against the directors appears to be a reference to proceedings under s. 205 of the 1963 Act, but that is not clear. Around the same time, Mr. Skoczylas also sent details of the notices to executives of Canada Life which was then in negotiations to purchase the Insurance business.

10 On 18 January 2013, one week later, the respondents issued a notice of motion in plenary proceedings which they commenced on that day (High Court Record No. 2013/569 P) seeking an interlocutory injunction restraining the appellants from issuing proceedings to seek reliefs under s. 160 of the 1990 Act. The respondents obtained an interim injunction in the High Court on the same day, which was continued pending the hearing of the motion. On 4 February 2013, Cooke J. granted the interlocutory injunction sought by the respondents, giving his reasons in a written judgment (see [2013] IEHC 42). It is against that judgment and the order which was perfected on 5 February 2013 that this appeal is brought. It should be said that in the period between the commencement of the proceedings and the hearing of the interlocutory application, the appellants also issued a further set of proceedings on 21 January 2013 pursuant to s. 205 of the Companies Act 1963 (as amended) ("the 1963 Act") in which they sought reliefs on the strength of alleged oppression by the respondent directors as minority shareholders in the group holding company. Those proceedings have been the subject of a number of interlocutory motions and appeals.

The proceedings in the High Court

11 The grounds upon which the interlocutory injunction was sought were the following: -

(1) The s. 160(7) notices sent to the respondents were invalid or inadequate;

and

(2) An application in respect of the respondents under s. 160(2) of the 1990 Act would be an abuse of process and would be bound to fail, because it would be brought with the ulterior motive of bringing pressure on the respondents in pursuit of the appellants' campaign to obstruct the restructuring of the group, and with the collateral purpose of obtaining indirect support for or rulings upon matters already canvassed in the existing proceedings.

Judgment of the High Court

12 At the outset, Cooke J. considered that the application could be decided on the first ground only, and, accordingly, that it was unnecessary to make any assessment of the second issue. He referred to the judgment of Fennelly J. in the Supreme Court in *Director of Corporate Enforcement v. Byrne* [2009] IESC 57, [2010] 1 I.R. 222, at p. 257, as follows:-

> "One other procedural detail is important. Section 160(7) of the Act obliges the Director to give at least ten days notice to the person of his intention to apply for a disqualification order. This provides him with an opportunity to respond, as he did

in the present case. This provision illustrates the general principle that any person who is to be the subject of an application under the section must be given clear notice of that fact and of the grounds on which the application is to be made. I emphasise the matter here because it has a bearing on the finding of want of commercial probity made by the learned trial judge in the present case. The applicant, by his notice, stated that he intended to make the application pursuant to paragraphs (b), (d) and (e) of Section 160(2), but also stated that the application was to be brought having regard to the Inspector's report. In fact, both the draft notice of motion sent with the Director's prior notice and the notice of motion actually sent were based exclusively on the contents of the Inspector's report."

13 Cooke J. considered that the principles in *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) [1983] I.R. 88 were applicable, and that the respondents had established a fair issue to be considered in the main action, and a *prima facie* case that no valid notice for the purpose of s. 160(7) of the 1990 Act had been given by the appellants, because the appellants had not set out the grounds under s. 160(2) on which they intended to bring the application. He also considered that s. 160(7) required that there be a genuine and fully formed or settled intention to initiate the s. 160(2) procedure. It was clearly arguable that the validity of the notices was seriously in question as a genuine or valid discharge of the statutory obligation in s. 160(7) of the 1990 Act, having regard to the evidence in the affidavit sworn by the first appellant, Mr. Skoczylas, that the appellants had not yet decided on what grounds the s. 160(2) applications could be brought. Accordingly, he decided that the first limb of the *Campus Oil* test was satisfied.

14 As to whether damages were an appropriate remedy, he considered there was a clear and obvious risk to the respondents in the form of reputational damage and detriment to the commercial operation of the group, and the appellants had not shown that they would be able to discharge any award of damages that might be made should an injunction be refused. On the other hand, the postponement of the introduction of any application under s. 160(2) would have minimal, if any, consequence for the appellants. The balance of convenience also lay in the respondents' favour. The claims and allegations raised in the proposed s. 160(2) application had already been raised and put in issue in other proceedings, and the appellants had already had access to court to vindicate their interests as directors and shareholders.

15 It is notable that in coming to this decision, Cooke J. distinguished two authorities. On the question of the validity of the s. 160(7) notices, he considered the decision of the Court of Appeal in England and Wales *in Secretary for State for Trade and Industry v. Langridge* [1991] Ch. 402. In that case, the Court of Appeal in England and Wales had to consider the provisions of s. 16(1) of the Company Directors Disqualification Act 1986, the equivalent provision to s. 160(7). In that case, it was considered that the provision was directory in character and not mandatory, and any non-compliance with the statutory requirement to serve ten days' notice was a procedural irregularity which did not render the Secretary of State's application for a disqualification order either void or voidable. On

the question of the test to be applied for the test of an interlocutory injunction, he rejected the analogy drawn by the appellants with an application to restrain a winding-up order. In *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12, Keane J. (as he then was) held that the Campus Oil principles were not relevant to the grant of an application for an injunction to restrain the presentation of a winding up order. He observed "[d]ifferent considerations entirely apply where, as here, the object of the application is to prevent the respondent from exercising his right of access to the courts, whether by way of ordinary process or a winding-up petition". He continued: -

> "The constitutional right of recourse to the courts should not be inhibited, save in exceptional circumstances, and this applies as much to the presentation of a petition for the winding-up of a company by a person with the appropriate *locus standi* as it does to any other form of proceedings. The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In the context of winding-up petitions, I have no doubt that it should be exercised only where the plaintiff company has established at least a *prima facie* case that its presentation would constitute an abuse of process. In many cases, a *prima facie* case will be established where the plaintiff adduces evidence which satisfies the court that the petition is bound to fail or, at the least, that there is a suitable alternative remedy. It would not be appropriate to apply the principles laid down by the Supreme Court in *Campus Oil Ltd. v. The Minister for Industry and Energy (No. 2)* [1983] I.R. 88 in cases of this nature where it is the creditor's right to have recourse to the courts, rather than any right of the plaintiff company, which is under threat."

16 However, Cooke J. considered that the s. 160 proceedings in this case were unusual, in that an interlocutory injunction restraining such proceedings did not in fact deprive the appellants of access to the court for the assertion or vindication of rights and claims which they professed to pursue. He also considered that in an ordinary case, the defendant's proprietary interests as a creditor of the plaintiff in a winding-up situation justified the higher threshold to be met in an application to restrain a defendant from presenting a winding-up petition to wind up the plaintiff company. By contrast, the appellants in the present case had "no equivalent personal interest in obtaining the disqualification of the personal plaintiffs".

17 In the aftermath of the grant of an interlocutory injunction, Mr. Skoczylas and the other appellants appealed to the Supreme Court. However, they took the unusual step of bringing their own application to restrain further prosecution of the case in the High Court pending the determination of this appeal. This application was consented to by the plaintiffs. The apparent thinking behind this course was that Mr. Skoczylas wished to avoid the substantive matter being determined in the High Court in advance of any appeal with the possibility that that would render the appeal moot, believing, perhaps, that his appeal stood a good prospect of success on the legal issues which he wished to advance. This course had its own internal logic, and in fairness to Mr. Skoczylas he has written to the Supreme Court seeking an early hearing of his appeal, and he clearly feared that the

appeal would be rendered moot if the substantive hearing proceeded but the course he took of seeking to restrain the further prosecution of these proceedings was in my view misguided. Apart from the inconsistency of seeking an order doing the very thing of which he complained – the restraint of proceedings – this course created a stalemate at the High Court level. However, where a party is restrained by an interlocutory injunction pending trial, the best remedy may well be to seek an early trial of the substantive issues. In such a case, and indeed in this case, such a claim could be heard quite promptly, since the essential questions were matters of law with perhaps limited issues of fact: did the proceedings under s. 160 require notice under s. 160(7), and, in any event, were such proceedings an abuse of the process? Furthermore, if Mr. Skoczylas succeeded in defeating these claims, he would be able to pursue the s. 160 claim and pursue a claim under the undertaking as to damages. This course would also have been more satisfactory from the overall point of view of both public policy and the courts. It would mean that the legal issue would be addressed on its merits, rather than refracted through the prism of the law relating to the interlocutory injunctions, whether by reference to a test of an arguable case, as the plaintiffs contended, or a *prima facie* case as Mr. Skoczylas argues. There was undoubtedly a risk that if the case was resolved at the level of the High Court, an appellate court might take the view that the case was moot or moot otherwise than in respect of costs, but, if so, this was because the substantive issue had been resolved, or at least the matter had proceeded to the point where the question was of the substantive merits. Litigation is not, or at least is not meant to be, a simple point scoring exercise where the courts are required to adjudicate and reward marks on every conceivable issue which the parties wish to dispute. The function of litigation is to permit the administration of justice, and to resolve disputes between parties with finality in accordance with law. The pragmatism of the law means that, although there is quite elaborate law on the principles to be applied for the grant of an interlocutory injunction, everything is subsidiary to the ultimate determination of the issue at the trial. If, therefore, a plaintiff obtains an interlocutory injunction but fails at the trial, a court will assess damages on the undertaking as to damages on the basis that the interlocutory injunction ought not to have been granted, even if it was granted in accordance with the relevant principles. The determination of the substantive outcome overrides the interlocutory determination which is, by definition, temporary. If, therefore, the resolution of the substantive issue had the effect of possibly rendering an appeal on the interlocutory injunction moot, or limiting it to a question of costs, that is not in any way a defect in the system: the question of the correctness of the grant of the interlocutory injunction would have become subsumed, as it is intended to be, in the question of the substantive merits of the case. It would have been far preferable for this matter to be determined in short course in the High Court, and, if necessary, the substantive issue appealed to this court, or, in due course, the Court of Appeal, rather than create an artificial stalemate at the trial court level and then await the hearing of this appeal many years after the event. However, that course was not taken, and the court must now address the legal issues that arise on the appeal.

Access to the courts

18 Prominent in Mr. Skoczylas' argument is that he contends that the injunction was impermissible because it had the effect of denying him his constitutional right of access to a court, and, moreover, for an extended period of seven years. There is no doubt that there is a constitutionally protected right to have access to court to litigate claims flowing from the obligation imposed on the courts to administer justice under Article 34 of the Constitution. However, the contention that the injunction was impermissible because it denied access to the courts, particularly for seven years, requires more careful consideration. First, for the reasons set out above, the situation which ensued occurred partly because of Mr. Skoczylas's own tactical choice in the fact that he himself sought the type of order which he now contends is impermissible, restraining the further prosecution of the case in the High Court. If he had not sought to do this, then the matter could have both come to a full hearing and, possibly, been disposed of on appeal by now. Furthermore, the injunction was issued solely on the basis of non-compliance with the requirement under s. 162(7) of the 1990 Act for ten days' notice to be given to the respondents. It follows that he could have issued such a notice without prejudice to his contention that it was not necessary as a matter of law and commenced the s. 160 proceedings. Furthermore, s. 160 is an unusual jurisdiction which, particularly when arising between private parties, arises as an ancillary order consequent upon the determination of some factual dispute. In this case, as the trial judge pointed out, there were already proceedings in being in which the factual issues which were sought to be ventilated in the s. 160 proceedings would be dealt with. Finally, and perhaps most importantly, Mr. Skoczylas and the other appellants had access to court, both for the purposes of defending the application in the High Court for an interlocutory injunction and now for the purpose of prosecuting this appeal. The issue therefore cannot be dealt with simply in terms of an order restraining access to court generally, for a period of seven years.

19 It is true, however, that the effect of the interlocutory injunction is to prevent Mr. Skoczylas and any other party bound by it from seeking to litigate the claim he wishes to litigate (a s. 160 order disqualifying the respondents), in the manner he wishes to so (without serving a notice ten days in advance specifying the grounds of the application). For reasons which I will address later, this is by no means an irrelevant consideration, but it is very far removed from a blanket prohibition on access to court. The right to litigate claims in an adversarial system means that a party normally has a right to choose the manner in which he or she does so. But that right is not unlimited. Claims brought can be struck out in court if incorrectly commenced, if the court has no jurisdiction, if the claim discloses no cause of action, if the claim is, in the well-worn, if technical, phrase "frivolous and vexatious", or is otherwise an abuse of process. A claim may be dismissed *in limine* and without addressing the substantive issues on the grounds of a statute of limitations or *laches*. Even when a claim proceeds, it may be limited by restrictions on time, evidence, the questioning of witnesses, and the content and length of submissions. All of this restrains access to litigate claims to a greater or lesser strength without breaching the constitutional right. It is an important feature of most if not all methods permitting a restriction of the claim, or even its dismissal *in limine*, that the process normally involves an application to court and a decision by a court or under its supervision, meaning that

the party normally has access to the court to argue that issue before an order is made with the effect of precluding further litigation of a particular claim.

20 As will become apparent later in this judgment, I am not by any means discounting a litigant's interest in prosecuting a lawful claim of his or her choice in the manner in which he or she thinks best, but the question must be approached as whether the order made in this case is a permissible restriction on that right or interest, rather than a blanket restriction on access to court.

21 The issues in this appeal appear to be the following:

(1) What test should the High Court apply on an application to restrain the issuance of proceedings seeking the disqualification of a director under s. 160 of the 1990 Act (or its successor)?

(2) Applying such a test, should the appellants have been restrained from issuing proceedings either because of a failure to serve a valid notice under s. 160(7) setting out the matters relied upon, or as an abuse of process, or both?

22 At the outset of that consideration it may be useful, however, to consider that, at the time of the application, s. 160 of the 1990 Act provided as follows (with amendments denoted by italics): -

"160. Disqualification of certain persons from acting as directors or auditors of or managing companies

(1) Where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of five years from the date of conviction or such period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order –

(a) he shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978;

(b) he shall be deemed, for the purposes of this Act, to be subject to a disqualification order for that period.

(1A) Without prejudice to subsection (1), a person who–

(a) fails to comply with section 3A(1) of the Companies Amendment Act 1982, or section 195(8) of the Principal Act, or

(b) in purported compliance with the said section 3A(1) or 195(8), permits the first-mentioned statement in the said section 3A(1) or, as the case may be, the first-mentioned notification of the said section 195(8) to be accompanied by a statement signed by him which is false or misleading in a material respect,

shall, upon the delivery to the registrar of companies of the said first-mentioned statement or notification or, as the case may be, the said statement or notification accompanied by a statement as aforesaid, be deemed, for the purposes of this Act, to be subject to a disqualification order for the period referred to in subsection (1B).

(1B) The period mentioned in subsection (1A) is–

(a) so much as remains unexpired, at the date of the delivery mentioned in that subsection, of the period for which the person concerned is disqualified under the law of the other state referred to in section 3A(1) of the Companies (Amendment) Act 1982, or section 195(8) of the Principal Act from being appointed or acting in the manner described therein, or

(b) if the person concerned is so disqualified under the law of more than one other such state and the portions of the respective periods for which he is so disqualified that remain unexpired at the date of that delivery are not equal, whichever of those unexpired portions is the greatest.

(2) Where the court is satisfied in any proceedings or as a result of an application under this section that–

(a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or

(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or

(c) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or

(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or

(e) in consequence of a report of inspectors appointed by the court or the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or

(f) a person has been persistently in default in relation to the relevant requirements; or

(g) a person has been guilty of 2 or more offences under section 202(10); or

(h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act 1982, to the company and the name of which, following the taking of other steps under that section consequent on

the sending of that letter, was struck off the register under subsection (2) of that section; or

(hh) a person has contravened section 4 or 5 of the Competition Act 2002 or Article 101 or 102 of the Treaty on the Functioning of the European Union; or

(i) a person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking and the court is satisfied that, if the conduct of the person or the circumstances otherwise affecting him that gave rise to the said order being made against him had occurred or arisen in the State, it would have been proper to make a disqualification order otherwise under this subsection against him;

(3)

(a) For the purposes of subsection (2)(f) the fact that a person has been persistently in default in relation to the relevant requirements may (without prejudice to its proof in any other manner) be conclusively proved by showing that in the five years ending with the date of the application he has been adjudged guilty (whether or not on the same occasion) of three or more defaults in relation to those requirements.

(b) A person shall be treated as being adjudged guilty of a default in relation to a relevant requirement for the purposes of this subsection if he is convicted of any offence consisting of a contravention of a relevant requirement or a default order is made against him.

(3A) The court shall not make a disqualification order under paragraph (h) of subsection (2) against a person who shows the court that the company referred to in that paragraph had no liabilities (whether actual, contingent or prospective) at the time its name was struck off the register or that any such liabilities that existed at that time were discharged before the date of the making of the application for the disqualification order.

(3B) A disqualification order under paragraph (i) of subsection (2) may be made against a person notwithstanding that, at the time of the making of the order, the person is deemed, by virtue of subsection (1A), to be subject to a disqualification order for the purposes of this Act, and where a disqualification order under the said paragraph (i) is made, the period of disqualification specified in it shall be expressed to begin on the expiry of the period of disqualification referred to in subsection (1B) to which the person, by virtue of subsection (1A), is subject or the said period of disqualification as varied, if such be the case, under subsection (8).

(4) An application under paragraph (a), (b), (c) or (d) of subsection (2) may be made by–

(a) the Director of Public Prosecutions; or

(b) any member, contributory, officer, employee, receiver, liquidator, examiner or creditor of any company in relation to which the person who is the subject of the application–

(i) has been or is acting or is proposing to be proposed to act as officer, auditor, receiver, liquidator or examiner, or

(ii) has been or is concerned or taking part, or is proposing to be concerned or take part in the promotion, formation or management of any company.

and where the application is made by a member, contributory, employee or creditor of the company, the court may require security for all or some of the costs of the application.

(5) An application under paragraph (e) or (g) of subsection (2) may be made by the Director of Public Prosecutions.

(6) An application under paragraph (f) of subsection (2) may be made by–

(a) the Director of Public Prosecutions; or

(b) the registrar of companies.

(6A) In addition to the persons who in pursuance of subsections (4), (5) and (6) may make such an application, an application under subsection (2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) may be made by the Director.

(6B) An application to which paragraph (hh) of subsection (2) applies may be made by the competent authority (within the meaning of the Competition Act 2002).

(7) Where it is intended to make an application under subsection (2) in respect of any person, the applicant shall give not less than ten days' notice of this intention to that person.

(8) Any person who is subject or deemed subject to a disqualification order by virtue of this Part may apply to the court for relief, either in whole or in part, from that disqualification and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit.

(9) A disqualification order may be made on grounds which are or include matters other than criminal convictions notwithstanding that the person in respect of whom the order is to be made may be criminally liable in respect of those matters.

(9A) In considering the penalty to be imposed under this section, the court may as an alternative, where it adjudges that disqualification is not justified, make a declaration under section 150.

(9B) The court, on the hearing of an application for a disqualification order under subsection (2), may order that the persons disqualified or against whom a declaration under section *150 is made as a result of the application shall bear–*

(a) the costs of the application, and

(b) in the case of an application by the Director, the Director of Public Prosecutions, a liquidator, a receiver or an examiner (in this paragraph

referred to as 'the applicant'), in addition to the costs referred to in paragraph (a), the whole (or such portion of them as the court specifies) of the costs and expenses incurred by the applicant–

(i) in investigating the matters the subject of the application, and

(ii) in so far as they do not fall within paragraph (a), in collecting evidence in respect of those matters, including so much of the remuneration and expenses of the applicant as are attributable to such investigation and collection.

(10) A reference in any other enactment to section 184 of the Principal Act shall be construed as including a reference *to this section."*

23 The introduction of a detailed scheme for a formal application for disqualification of a director by the 1990 Act, as subsequently amended, together with the establishment of the Office of the Director of Corporate Enforcement, has made applications for disqualification more commonplace. The existence of this statutory scheme undoubtedly had a beneficial effect in improving corporate governance. Section 160 was an omnibus provision covering a range of instances. In most cases, it appears to be envisaged – and this was the normal course – that an order for disqualification would be sought as ancillary to other matters revealing facts considered to justify such an order. Therefore, the section contemplates an order being made after conviction in criminal proceedings, or after civil proceedings, and provides for a court making such an order of its own motion. The section also contemplates a formal application being made by a public officer (now the Director of Corporate Enforcement) after matters emerged in a liquidation administration, or inspection under the Companies Act, or other formal inquiry. The proceedings here did not fall into any of the above categories. Instead, they were self-standing proceedings, in which the applicant would, it appears, seek to establish, for the first time, facts sufficient to justify a disqualification order which was of course the only order which could be made under the section. It appears that the section is broad enough to permit such proceedings, but it is relevant that these proceedings were very unusual and must have appeared so when threatened by the correspondence sent by Mr. Skoczylas.

24 From the evidence subsequently adduced, I infer, perhaps wrongly, that the sending of a general notification under s. 160(7) of the 1990 Act occurred because Mr. Skoczylas, as the overall tactician in the litigation, was seeking, or at least considering, further weapons to deploy in his battle with the group holding company. It is apparent from the evidence that the group of shareholders issuing the notices had not formed a fixed intention to actually commence proceedings, or decided on what grounds, if any, they would be brought. Nevertheless, the issuance of a formal notice under s. 160(7) without any specifying information must have appeared a simple step that would be a useful salvo in the battle, bringing additional pressure to bear upon the board members and therefore the people who would decide both in relation to his participation in the company, and the litigation more generally. On the other hand, the receipt of such a general notification may well have been viewed with considerable disquiet on the part of the group holding

company and its advisors and the board members themselves. Not only did it appear to open another front on the already extensive legal battle, but, moreover, it now appeared to make the dispute, already a bitter battle with a substantial company and the State, a personal dispute. The directors of a substantial company, which was in effect State-controlled, were entitled to be conscious and protective of their reputations, and disturbed by the prospect of becoming involved in proceedings seeking their disqualification as directors, which would undoubtedly attract publicity, and which would have an effect not only on the discharge of their functions as directors of the companies, but also any other business of which they might be, or seek to become, a director, as well as impacting on their reputation more generally.

25 It is perhaps not particularly surprising, therefore, that the respondents reacted almost immediately with a pre-emptive strike. Nor would it be surprising if Mr. Skoczylas resented becoming embroiled in an injunction application in relation to proceedings not yet commenced, and which, on the evidence, he had not finally decided to initiate. It is possible, but by no means certain, that if these proceedings had been conducted on a more professional and dispassionate basis by Mr. Skoczylas then the matter may not have spiralled in the way it did, and the proceedings may not have proliferated, and escalated, in the way they did. But the parties rapidly became entrenched and these proceedings became yet one further bitter skirmish, consuming considerable resources in the ongoing battle between the parties.

Test for interlocutory injunction restraining proceedings for disqualification

26 Mr. Skoczylas argued that the High Court judge was incorrect to apply the well-known Campus Oil principles in considering the application for interlocutory injunction. Instead, he argued that the appropriate test was that set out in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd*. [1996] 1 I.R. 12. In those proceedings, the plaintiffs sought an interlocutory injunction to restrain the presentation of petition threatened by the defendant to wind-up the plaintiff company in respect of a debt. As set out at paragraph 15 above, Keane J. (as he then was) considered that the *Campus Oil* principles were not relevant here: “different considerations entirely apply where, as here, the object of the application is to prevent the respondent from exercising his right of access to the courts, whether by way of ordinary process or a winding-up petition”.

27 Mr. Skoczylas argued that the logic of this judgment applies by analogy in the present circumstances, where it is sought to restrain an application for disqualification.

28 As set out at paragraph 13 above, the judge distinguished *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12 because the injunction did not deprive the defendants of access to the courts for the assertion or vindication of rights or claims which they profess to pursue because those matters were capable of being determined in other actions that had been launched by the defendants, most appropriately the s. 205 petition. He also considered that in *Marubeni Komatsu*, the defendants’ proprietary interest as a creditor of the plaintiff justified the higher threshold to be met to restrain the defendant from presenting a petition to wind up the plaintiff company. By contrast, the

defendants in the present case had “no equivalent personal interest in obtaining the disqualification of the personal plaintiffs”.

29 The *Campus Oil* principles are well-established, and provide a well understood and broadly effective method of dealing with applications for interlocutory injunctions, which almost by definition may involve considerable urgency, speed and the amassing and presentation of much conflicting information. The key intent of the principles first set out in the speech of Lord Diplock in *American Cyanamid Ltd. v. Ethicon* [1975] A.C. 396, adopted with approval by this court in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 was to allow the court hearing an application for an interlocutory injunction to avoid what could be complex, lengthy, and necessarily unsatisfactory disputes about factual matters which were advanced only on affidavit evidence, as a prelude to the grant of an interlocutory injunction. Instead, recognising that such disputes would be resolved at the trial, the test focussed on the most fair way of holding the situation between the parties pending that full hearing. As has been recognised, the principles in *Campus Oil* are not a “one size fits all”, but rather are subject to exceptions which are as important, and arguably as extensive, as the principles themselves. The logic of the *Campus Oil* approach is predicated upon there being a trial of the action, and they work most effectively in civil disputes between parties, often involving claims for damages. The principles are less well adapted to circumstances which may involve disputes about public law or which involve interests that are ephemeral, or where, in any event, it is unlikely that there will be a full trial of the action. In those and other circumstances, it is possible that rigid application of the *Campus Oil* principles may lead to an injustice: the low threshold of arguability combined with a claim of a loss which cannot be quantified or compensated for the award of monetary damages (or even a claim that the defendant will be unable to satisfy any award for damages) can lead to the grant of an injunction in a weak case which may nevertheless be decisive as between the parties. For these reasons, it is important that the principles are applied with sensitivity, and that it is recognised that there are exceptions where the principles do not apply, either because the underlying logic is absent, or because of the specific circumstances of the case.

30 In *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12, Keane J. identified one such exception: an application to restrain the presentation of a petition to wind up the plaintiff company. This decision is not challenged. Rather it is contended that the exception is limited to winding-up petitions, and does not extend to an application such as this to restrain an application to disqualify a director.

31 I cannot accept this submission. First, it is apparent that the principle identified by Keane J. in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12 was of broader application and extended to applications to restrain the issuance of proceedings more generally. It is the case that winding-up petitions are distinguishable from ordinary plenary proceedings in an important respect. The presentation of a petition must be advertised, and, furthermore, once the process is initiated it normally cannot be withdrawn by the petitioner without leave of the court and without giving the opportunity

to any other interested party to seek to support the petition. The advertising of a petition can therefore have very serious consequences for a company, and the fact that some time may elapse before the petition is opened in court, and may be challenged, can be damaging to the reputation of a company and its commercial viability. These are important matters, and explain in part why there was a developed jurisprudence in applications to restrain the presentation of a winding-up petition.

32 Nevertheless, it is plain that Keane J. considered that the principle was one of more general application. That is particularly because of the interest he identified, namely, the right of a litigant to access to a court to prosecute claims. With great respect to the decision of the High Court judge, I consider that the approach he took placed too little value on this important interest which has constitutional protection. The fact that factual issues in dispute between the parties can be ventilated in other proceedings is a relevant, but not, in my view, a dispositive factor. Generally speaking, it is not for the court to choose the form of action brought by a plaintiff, so long as that does not involve such duplication as to amount to harassment or an abuse of the process. The commencement of separate proceedings in an application for an interlocutory injunction undoubtedly inhibits the right of access to court of a litigant, and therefore must be carefully scrutinised. Normally the interests of the parties are met by a court hearing and determining those proceedings, and if necessary it may involve applications for orders dismissing the proceedings. Nor can it be said that the fact that the applicant for disqualification in this case does not have the same interest as a creditor may have in petitioning to wind-up a company. It is a sufficient distinguishing feature in this case. The interests of a creditor in winding up a company may be minimal. Furthermore, an application to disqualify a director may be made by the Director of Corporate Enforcement and it would be difficult to argue that a court would be justified in requiring no more than the *Campus Oil* arguability test before granting an interlocutory injunction restraining such an application.

33 Finally, there are good reasons of policy why a *prima facie* case should at least be shown before an interlocutory injunction is granted to restrain the commencement of proceedings, including, in this case, an application for the disqualification of a director. In the normal course of events, when proceedings are commenced, all relevant issues are determined within those proceedings, including any preliminary application to dismiss or strike out those proceedings *in limine*. The commencement of a separate set of proceedings seeking an injunction restraining the presentation or prosecution of other proceedings which must be determined before the substantive proceedings themselves be commenced and prosecuted, let alone determined, is in principle an undesirable proliferation of proceedings arising out of the same matter, which accordingly requires to be justified. Where moreover, the separate proceedings necessarily involves an application for an interlocutory injunction, there is a further legal dispute which is at some distance, both in time, and in terms of the legal test to be applied, from the substantive dispute between the parties. I am satisfied that experience has shown that there are indeed cases where justice may require that orders are made restraining the commencement or further prosecution of separate proceedings principally because of the

damage that the existence of proceedings can cause in some cases. However, since it involves the multiplication of proceedings, and the delay in the resolution of proceedings which have been commenced, it is a jurisdiction which is to be invoked rarely, and, when invoked, subjected to careful scrutiny by the courts. In such circumstances, it is appropriate to require at least a *prima facie* case before the grant of an interlocutory injunction, not least because that assessment should in most cases go a long way towards resolving all issues between the parties. If the Campus Oil standard of arguability was applied, it might become too easy to obtain an interlocutory injunction, and too tempting to do so. For all these reasons, I consider therefore that the *Marubeni Komatsu* test should apply.

34 Applying the *Marubeni Komatsu* test, has it been established on a *prima facie* basis, that the s. 160(7) notice given by the appellants was invalid? Mr. Skoczylas argues that s. 160(7) merely requires that notice be given of the proceedings, and does not require any more detail. This argument faces at least two difficulties. First, it admittedly runs counter to the observations of Fennelly J. in *Director of Corporate Enforcement v. Byrne* [2009] IESC 57, [2010] 1 I.R. 222, set out above. In that judgment, he said that s. 160(7) illustrates "the general principle that any person who is to be the subject of an application under the section must be given clear notice of that fact *and of the grounds on which the application is to be made*". (Emphasis added) It is suggested by Mr. Skoczylas that this is obiter, and should not be followed. However, quite apart from the respect which is due to the observations of Fennelly J. on such matters, it is clear that the reasoning was closely related to his views on the resolution of the particular case. Quite apart from such an interpretation being consistent with the general principle of basic fairness, it is also consistent with common sense. While it will be necessary to consider shortly the reasons for a notice requirement, it would make little sense to have a requirement of notice of the fact of proceedings without giving some indication of the circumstances relied upon, including the relevant sub-paragraphs of s. 160(2) of the 1990 Act. As Fennelly J. observed in the extract already quoted, the giving of at least ten days' notice to the person of the intention to apply for a disqualification order provides the person "with an opportunity to respond", as indeed occurred in that case. Plainly, it is not possible to respond in any way to an indication of an intention to bring proceedings at some point after the expiry of the ten-day notice period without any indication of the basis upon which such proceedings will be brought.

35 It should be said that no particular formality is proscribed by the section or required by an interpretation of it consistent with the general obligation of fairness. As already discussed, in many cases, the application will follow on from a detailed factual dispute and the degree of detail required in any s. 160(7) notice may not be extensive. However, in a case such as this, where proceedings come out of the blue, I have no doubt that the plaintiffs have established a strong *prima facie* case that a notice under s. 160(7) was required to contain more than a notification that proceedings would commence, to identify the relevant subsections of s. 160(2), and to identify, at least in general terms, the matters relied upon.

Would defects in the s. 160(7) notice invalidate any proceedings?

36 Mr. Skoczylas relied in this regard on the decision of the Court of Appeal in England and Wales in Secretary for *State for Trade and Industry v. Langridge* [1991] Ch. 402. In that case, the Court of Appeal of England and Wales by a majority (Balcombe and Leggatt L.JJ., Nourse L.J. dissenting) reversed the decision of the High Court judge (Mummery J.) and held that a failure to comply with the ten-day notice requirement contained in an application for a disqualification order under s. 16 of the Company Directors Disqualification Act 1986 did not invalidate the proceedings.

37 The facts of that case were somewhat unusual. While s. 16 of the Company Directors Disqualification Act 1986 is similar to s. 160(7) of the 1990 Act in requiring a ten-day notice before the commencement of proceedings, the language is slightly different. It provided: -

> "A person intending to apply for the making of a disqualification order by the court having jurisdiction to wind up a company shall give not less than 10 days' notice of his intention to the person against whom the order is sought; and on the hearing of the application the last-mentioned person may appear and himself give evidence or call witnesses."

38 More significantly, however, the structure of the section also differed. There was a limitation period which provided that an application for disqualification could not be brought two years after the date upon which a company was deemed to have become insolvent. It was not clear, however, whether the date on which the notice was given, or the date on which the proceedings were issued, could be included in that calculation. In the event, it was determined after the issuance of the notice in this case that ten clear days' notice were given. This had the effect that, in the particular case, the last day for service of a notice if proceedings were to be commenced before the expiry of the two-year limitation period was 10 April 1989. In fact, a letter of that date giving notice of the intention to apply for a disqualification order was served on the respondent, but on the following day, 11 April 1989. It followed, therefore, that the notice was inadequate. Mummery J. accordingly struck out the proceedings, but also granted an order under the Act extending the limitation period for the commencement of disqualification proceedings.

39 On appeal, the majority of the Court of Appeal overturned the decision in the High Court. There was no doubt that the notice was defective in that ten clear days' notice had not been given, and accordingly that s. 16(1) of the Company Directors Disqualification Act 1986 had not been complied with. The question was, however, the consequences of such non-compliance, and, in particular, whether it could be said that the requirement was directory or mandatory. Balcombe L.J. adopted a statement in De Smith's *Judicial Review of Administrative Action* (4th edn., Stevens and Sons Ltd., 1980) at pp. 142 to 143: -

> "Although 'nullification is the natural and usual consequence of disobedience,' breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were

introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

40 Balcombe L.J. considered that the notice requirement was "an unparticularised letter… before action", conferring only a limited benefit on the recipient. A recipient might be able to produce clear evidence of mistaken identity or seek to challenge by way of judicial review the lawfulness of a decision to seek a disqualification order against him, but as he vividly put it "beyond that the importance of the notice seems to be to limit the shock to the intended respondent which he might otherwise sustain if the first intimation he has of the application is when the proceedings are served on him". In such circumstances, he concluded that the requirement was directory, and that therefore non-compliance did not invalidate the proceedings. Nourse L.J., for his. part preferred the reasoning of both Harmon and Mummery JJ., who were judges experienced in the practice of the Companies Court, and concluded that if the failure to comply with the provisions of s. 16(1) would render the consequential application to the court a nullity. However, he considered that the trial judge was also entitled to treat the department's lack of knowledge of the requirements of ten clear days' notice as a good reason to extend the limitation period, given the lack of prejudice to Mr. Langridge.

41 It is clear that this was a finely balanced case. It is not for this court to express any view on its correctness as a matter of the law of England and Wales. For my part, however, I do not consider it would be appropriate to apply the conclusion of the majority in *Secretary for State for Trade and Industry v. Langridge* [1991] Ch. 402 in the different circumstances of an application for an order under s. 160 of the 1990 Act. In the light of the judgment of Fennelly J. in *Director of Corporate Enforcement v. Byrne* [2009] IESC 57, [2010] 1 I.R. 222, it would not be correct to describe a notice under s. 160(7) as a mere "unparticularised letter before action". Furthermore, I do not think that, as interpreted, the notice can be treated as merely intended to limit the shock to the intended respondent which might otherwise arise on the service of proceedings. As observed by Fennelly J., the notice period would permit the recipient to respond to attempt to persuade the moving party that some or all of the application was without merit, and in an appropriate case to commence proceedings such as this, or, as contemplated in *Langridge*, judicial review in a case where the moving party was exercising a public law function. These are substantial and important matters. Furthermore, in considering whether the Oireachtas must be deemed to have intended that a procedural provision was mandatory or merely directory, it is relevant to consider the importance of the procedural requirement at issue. It is, however, important to frame this question in the correct way. The issue is not whether, from the vantage point of the court, it is apparent that the procedural requirement is of importance or benefit, but rather whether the drafter, and therefore the Oireachtas, may have considered it to be so even if the court were itself to take a different view, because the relevant question for the court is whether the Oireachtas should be understood to have intended that invalidity should attach if the provision was not complied with.

42 In this case, given the importance that Irish law generally accords to fair procedures and the good name and reputation of citizens, I can see no reason to think that the Oireachtas considered the notice requirement to be trivial or unimportant. Section 160 of the 1990 Act as originally drafted, and as it subsequently evolved, was an amalgam of a number of different parts, which meant that an application for disqualification could be brought in very different circumstances, and even by different applicants. Furthermore, since the application could have a very significant consequence for an individual's career, livelihood, and reputation, it is unsurprising that some formal and precise steps were required. Accordingly, I would conclude that there is no reason to depart from the general principle that nullification was the natural and usual consequence of disobedience to a formal requirement of the statute. Looked at from the other perspective, why would the Oireachtas have included the requirement of notice if non compliance with it had no effect? This is particularly so given the fact that the consequence of such nullification would not prevent the bringing of an application which was properly notified. Accordingly, I agree with the conclusion of Cooke J. that the defect in the s. 160(7) notices delivered meant that any proceedings commenced would in turn be defective, and invalid.

Was the invalidity of the s. 160(7) notices a sufficient basis for the grant of an interlocutory injunction?

43 Cooke J. limited his consideration to the question of the validity of the notices, and having concluded that they were invalid, granted an injunction. Although he applied the *Campus Oil* test, it is apparent that in fact he resolved the issue of law in the same way as I would, and, accordingly, that such conclusion would be sufficient to satisfy the higher standard of *a prima facie* case as Keane J. observed in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12, a plaintiff could satisfy this standard by demonstrating that proceedings were bound to fail. It might be thought, therefore, that a conclusion that a statutory requirement had not been complied with, would satisfy this test, and accordingly that an injunction should issue without more.

44 However, the fact that a defendant may have a strong procedural point is not normally a ground for granting an injunction restraining the issuance of the proceedings. In most cases, it will be sufficient to notify the moving party of the defect and of the intention to apply to strike out the proceedings (unless they are withdrawn) and of an intention to fix the moving party with the costs of any such applications which are necessary. In other circumstances, it may be preferable indeed to allow the point to be taken at a later stage with more serious disruption of the applicant's litigation strategy. But since it is possible to bring an application within the proceedings to have them dismissed, *in limine* as invalidly commenced, a question arises as to why it would be necessary to grant an interlocutory injunction in advance in separate proceedings to restrain the commencement of the proceedings at all? The provisions of O. 50, r. 6 RSC, echoing in this regard statutory provisions which can be traced to the Judicature Acts, if not beyond, provide that the court may grant an injunction by interlocutory order in all cases in which "it appears to the court to be just or convenient to do so". Normally, if there is a remedy at law, which can fully protect the parties legal interest, it will be unnecessary, and therefore inappropriate, to grant an injunction, whether permanent or interlocutory. In

the case of injunctions restraining winding up petitions, there are good reasons to permit such injunctions. For the reasons already identified, the advertising of a petition may have serious and irreversible consequences for a company which might otherwise survive. If, therefore, it can be demonstrated that the petition is baseless or is otherwise an abuse of process, injunctions may be granted. While the interests of a party against whom an invalidly constituted proceedings have been brought may certainly be said to justify an application to bring an end to proceedings once commenced, since a party should not be put to the time and expense and suffer the reputational damage involved in defending proceedings which are fundamentally flawed. It cannot be said with the same degree of assurance that it was necessary to grant an interlocutory injunction on this ground alone. It might be said that it is unduly punctilious to draw any large distinction between a pre-emptive application to restrain the issuance of proceedings, and an application brought to strike out and dismiss those proceedings once commenced, since in substance the same issue is to be determined. However, because of the value to be attached to a litigant's right to commence proceedings of their choice, and the public interest in avoiding the proliferation of proceedings, I consider that it is important to establish that it is necessary, exceptionally, to restrain the issuance of proceedings rather than obtain a remedy within those proceedings once commenced. I do not consider that it is necessary to decide whether in all cases a procedural irregularity on its own is sufficient to justify the grant of a pre-emptive interlocutory injunction. While I would not discount the importance of the reputational concerns of the individual directors, I do not think that that in itself would always be sufficient without more to establish that the grant of an injunction permanent or interlocutory was necessary. To take a simple example: if a substantial and well-grounded application was in the process of being commenced by the Director of Corporate Enforcement, but there had been a failure to comply with s. 160(7), I do not think that, without more, it would be normally appropriate to commence separate proceedings and grant an interlocutory injunction to restrain the bringing of those proceedings. Furthermore, for reasons already touched on, that course would also be inefficient and wasteful of resources. However, it is not necessary to consider whether in the circumstances of this case the apparent invalidity of the notice, on its own would justify the grant of an injunction, since in my view the issue in this case must be approached in the light of all the facts, and in particular the second ground upon which the application was advanced, and to which it is necessary to turn now.

Abuse of process

45 The learned trial judge made no finding on this aspect of the case, considering that it was sufficient that it had been established that there was a defect in the notice sent by the intending moving parties. However, all the relevant evidence was before the High Court in the form of affidavits, and this court is in the same position to come to a judgment on that matter as the High Court was. Furthermore, the matter was fully argued in the High Court and before this court. Accordingly, it is in my view appropriate and necessary to determine that issue.

46 The evidence relating to this issue must be placed against the background to the proceedings already set out above. First, this was a highly unusual purported invocation

of the jurisdiction under s. 160 of the Act. The intended applicants stood to obtain no direct benefit if the order was made, but by contrast the existence of the proceedings, and any order made therein, could be extremely damaging to the individual directors. There was extensive and bitter litigation ongoing between the intended applicants and the corporate entities of which the intended respondents were directors. However, the directors had themselves not been personally involved in the litigation up until this point, and furthermore, they were ultimately responsible for making decisions in relation to the corporate litigation. It is in my view an inescapable conclusion that the notification of the intention to bring a disqualification application was firstly a tactical step in the broader litigation, and second, intended to bring pressure to bear on the individual directors. Furthermore, the first and second affidavits of Mr. Ciaran Long included averments that the objective of issuing the notice was to put pressure on the bank and the group holding company in relation to the proceedings which were already before the courts, and to pressurise the bank in respect of the decision not to appoint Mr. Skoczylas as a director of the bank and for the collateral benefit of the ongoing campaign in relation to the recapitalisation and restructuring of the bank and attempting to damage any sales process of the Irish Life Group. In addition to this, Mr. Skoczylas swore an affidavit which is significant in this regard. Facing a contention that the s. 160(7) was defective and failing to specify grounds of the application, Mr. Skoczylas sought to explain why no detail had. It is recorded in the High Court judgment that, both in his replying affidavit and in written and oral submissions, Mr. Skoczylas had insisted that the making of an application in respect of disqualification by some or any of the intended applicants was by no means certain. At para. 8 of the affidavit he stated *"[t]he defendants have not yet completely formulated or launched the intended legal action* that the plaintiffs attempt to prevent and in respect of which the plaintiffs applied for an injunction". (Emphasis added) At para. 28 he stated: -

> "The plaintiffs' action is absurd and logically incoherent because the defendants have not yet completely formulated or launched the intended legal action which the plaintiffs attempt to prevent in respect of what the plaintiff applied for an injunction […] *Furthermore, not all of the defendants have even yet decided to in fact launch the intended legal action* which the plaintiff attempts to prevent […[Given that the plaintiffs plainly have no way of knowing what the facts, claims and evidence in the intended action by the defendants (or) some of them will be within proceedings and injunction were initiated under false and spurious pretences. The plaintiffs approach is nothing more than a pure farce and a mockery of justice."

47 At para. 29 it was stated: -

> "[…] the defendants of course have no obligation to share details of the proceedings that they intend to launch and *may or may not have decided to launch*."

48 Finally, at para. 30 it is stated: -

"[…] *it is possible that some of the persons who informed the director plaintiffs about their intention to launch the said proceedings would decide in fact not to follow through on that communicated intention."* (Emphasis in italics added).

49 These remarkable averments become if anything more significant in the light of the withdrawal of some of the other individual parties from this appeal. They also put the defects in the s.160 notice in a different light. The absence of detailed grounds was not a mere oversight, but rather reflected the fact that the grounds had not been formulated finally (or perhaps at all), or agreed by the purported applicants giving notice. It was not even clear that the applicants collectively intended to issue the application of which notice was being given.

50 This background makes more serious the evidence adduced by the plaintiffs in these proceedings of the wider circulation of the notices by and on behalf of the intended applicants and Mr. Skoczylas in particular. The existence of the notices was brought to the attention of parties who had no connection to the proceedings, and whose only connection to any of the parties hereto was their involvement in the proposed sale of the Irish Life Insurance business as prospective purchasers. It is recorded in the judgment of the High Court that on 15 January 2013 Mr. Skoczylas wrote to the directors referring to the notification served on the directors under s. 160 and informing them that he was copying the executives of Canada Life "in the context of the reported discussions regarding the resale of Irish Life Group limited to Canada Life". The letter indicated on its face that it had been copied to the Chief Executive of Canada Life, and the President and Chief Executive of its parent company Great-West Lifeco. Notices which were themselves defective, which purported to notify an intention to bring proceedings which had not been fully formulated and which it appears some or all of the applicants had not yet decided to launch, were nevertheless circulated to parties who had no connection to those proceedings and, with a view, plainly, to damaging the individual directors' reputations, and attempting to interfere with a transaction, which was not, itself, in any way connected with the asserted s. 160 proceedings. This aspect of the matter brings these proceedings very close to the situation which arises in applications to restrain the presentation and advertisement of a winding up petition. The statutory procedure was being used, for a purpose for a collateral and in my view improper purpose and accordingly constituted an abuse of process and that factor, together with the invalidity of the notice, would make it appropriate to restrain the prosecution of the proceedings.

Balance of Convenience

51 However, even if it established that an applicant can satisfy the court that there is a *prima facie* case for the grant of an injunction, it is also necessary to consider the balance of convenience. This involves considering the harm that might be occasioned to the party restrained by interlocutory injunction, should it transpire at the hearing of the action that there was no invalidity or abuse of process. Leaving to one side the manner in which a finding of *prima facie* case should operate in any such calculation, the interest at stake from the respondent's point of view is that identified already: the entitlement of every litigant to commence the proceeding he or she chooses and prosecute them in the way

which appears best. For reasons already discussed that is not an unqualified right, but within the limits permitted, it is an exercise of the right to litigate claims and an important value that should be vindicated. However, in these proceedings it has much more limited weight. There is little difference in fact between the resolution of these proceedings and an application to strike out proceedings as invalidly constituted or an abuse of the process, which is a procedure which no litigant can preclude and is part and parcel of the exercise by litigants of their right of access to court. S.160 proceedings are unusual since even if successful they provide no individual benefit to the person commencing them. They are at best proceeding brought in the public interest conferring no private benefit. By contrast they may impose a considerable burden on individual directors obliged to defend them. Furthermore, there are now multiple sets of proceeding in existence commenced by Mr. Skoczylas and or Scotchstone those who support them in which almost every aspect of their dealings with Permanent TSB has been ventilated. Such grounds as are asserted as justifying the application under s160 are a repetition of matters raised in those proceedings. It was also relevant in this regard as Cooke J. observed that any of the factual issues raised by the intended applicants for disqualification, could be determined in particular in the s. 205 proceedings, and nothing would have prevented a consequential application to seek disqualification of directors, on those grounds if they were established in those proceedings and found to justify such a course. Such an application, after the determination of relevant matters in the proceedings would indeed be a more normal invocation of the jurisdiction under s.160. It is particularly noteworthy therefore that those proceedings have not been advanced in the intervening time, now more than six years, which has elapsed since their commencement. The interest asserted by Mr. Skoczylas in this case was therefore of much lesser weight and immediacy than an individual precluded from issuing the single set of proceeding he or she wished to issue, and is accordingly of lesser weight than the interest of the directors in this case, and so the balance of convenience favours the grant of an injunction. If there was any doubt on where this balance lay, it would be appropriate to take into account the fact that the applicants for an injunction have established a strong *prima facie* case. For these reasons I conclude that Cooke J. was correct to grant the injunction sought.

Fresh Evidence

52 In December 2018, however, and shortly before this appeal was due for hearing in the Court of Appeal, Mr. Skoczylas submitted a further lengthy affidavit in which he sought to adduce evidence of matters which he alleged to have occurred or came to light after the decision of Cooke J. in this case, and which moreover he contended he was entitled to adduce on this appeal pursuant O. 58 r. 30(b). He pointed out that, since the injunction had been obtained restrained the issuance of the proceedings, the grounds of the proposed s. 160 application had not been identified. He then sought to refer to evidence adduced in the main proceedings which had been determined by O'Malley J., and which it is to be recalled, he sought to challenge the direction order made on 26 July 2011, pursuant to s.7 of the Credit Institutions (Stabilisation) Act 2010.

53 Mr. Skoczylas sought to contend that contradictory and mutually exclusive statements had been made in particular by the chairman of the holding company Mr. Alan Cook, first at the AGM on 18 May 2011, which were later directly contradicted in an affidavit sworn by him on 20 November 2013, in support of the Minister's defence of the challenge brought to the direction. The essential contradiction he asserts relates to statements as to the solvency and viability of the company on 20 March 2011 when PCAR/PLAR exercises were carried out, at which time it was contended on behalf of the companies, and it is said, by Mr. Cook in particular, that the company was solvent, strong, and did not require the capitalisation recommended in the sum of €4 billion. These and similar statements are then contrasted with the sworn evidence in the main proceedings, in which Mr. Cook supported the view that the company would have collapsed, if the direction order had not been made had the Minister thereafter introduced substantial capital into the company, in return for the issuance of new shares.

54 It is not only asserted that these statements are mutually inconsistent but it is said that they "must have been discernibly misleading/mendacious". It is further asserted that they constituted criminal offences. A similar assertion is made in relation to the audited accounts of the company published in 2011, and which it is argued could not have given a true and fair view of the business of the company if the subsequent statements in the 2013 affidavit as to the state of the company were correct. Alternatively, if the accounts were accurate, it is suggested that the November 2013 affidavit statements, must be untrue.

55 The broad background to this as already touched on at the outset of this judgment is that the Irish Permanent Group was unusual in the banking industry in Ireland, particularly at the time of the crisis in the financial sector, in that it had not lent to developers in the same way as other banks, was not involved with NAMA. Moreover, the group had a profitable insurance business. It is clear that the group acquiesced only reluctantly in the Central Bank's requirement for recapitalisation, and the Minister's proposals for the issuance to him of shares in return for the introduction of the necessary capital.

56 These matters arose in the main proceedings, because one of the issues was that Mr. Skoczylas contended that the direction made by the Minister in July 2011 should be set aside because Mr. Skoczylas contended, as set out in the judgment of O'Malley J., that the company was at the time both solvent and viable. His claim in those proceedings that the Direction Order was invalid on these and other grounds was ultimately rejected by the High Court, after the reference to the CJEU, and his appeal to the Court of Appeal was dismissed. It is noteworthy that O'Malley J. made a finding that "on the balance of probabilities, failure to recapitalise by the deadline would have led to a failure of the bank, whether by reason of a run on the bank by depositors, a revocation of its licence, a call for repayment of the various Notes, a cessation of funding under the ELA scheme or a combination of some or all of these possibilities". It is apparent that the affidavit delivered in December 2018 now seeks to recycle some of the matters adverted to in the proceedings under the guise of matters alleged to have only come to light in the recent

past. The respondents for their part contest the allegations made by Mr. Skoczylas, but also challenge his entitlement to adduce evidence at this stage of the proceedings.

57 I doubt whether indeed it can be said that these matters can be said to have "come to light" or "occurred" after the judgment of Cooke J. was delivered in this case. Clearly, the accounts which Mr. Skoczylas alleges may not have given a true and fair view of the business of the company, and the statements which he alleged may have been false and mendacious, were made prior to the judgment delivered by Cooke J. Insomuch as the contention is predicated on the fact that there is an alleged contradiction between these matters, and the affidavit sworn in the main proceedings, which itself post-dated the judgment of Cooke J., then any alleged inconsistency, contradiction, still less mendacity, was apparent from the date of the delivery of the affidavit in 2013, and there has been significant delay in seeking to adduce such matters in evidence.

58 Furthermore, it is apparent that the increasingly strident allegations of wrongdoing made by Mr. Skoczylas, are all based on the fundamental assertion of mutual contradiction. At a minimum, and notwithstanding the skill and tenacity with which Mr. Skoczylas seeks to present his argument, it is not apparent to me that any such contradiction is necessarily self-evident. It is obvious that matters were moving quickly in the financial world in 2011. It is not at all impossible to contend on the one hand, that the business of the group was essentially solvent and viable, and that therefore the PCAR assessment of substantial recapitalisation was unnecessary, but to accept that once the requirement of recapitalisation became binding, then the only viable source of such funding within the time period was the State, and that moreover the company would likely collapse without it. These matters do not appear to me to provide a very solid foundation for allegations of mendacity, and still less criminality. It is noteworthy that the comprehensive judgment of O'Malley J. addressing these events makes no such finding of inconsistency or contradiction, and does not criticise Mr. Cook's evidence, the position of the board of the company, or the statutory accounts.

59 In any event, in my view, these matters tend to undermine, rather than support, the case made by Mr. Skoczylas in this appeal. Since he introduces them as matters which have only occurred or come to light since the judgment herein, it is apparent that they cannot have been present to justify the issuance of the notices or the threat to issue the s. 160 proceedings in early 2013. Furthermore, even if the evidence can be properly adduced in these proceedings, (and I make no determination in that regard), I do not think it can, by its nature, be of assistance in these proceedings. It does not, and cannot, supply the defect in the notices which were issued, or render them valid. Furthermore, if it is established that the threatened commencement of proceedings into 2011 amounted to an abuse of the process which could properly be restrained by the court, then the threatening of proceedings for a collateral purpose cannot be cured by asserting, however implausibly, that later occurring events might amount to matters which could have justified the issuance of proceedings under s. 160.

Summary and conclusions

60 Returning therefore to the issues posed for resolution at paragraph 21 of this judgment, I conclude that:-

(1) The appropriate test to be applied for the grant of an interlocutory injunction restraining the issuance of proceedings, such as those under s. 160 of the Companies Act 1990, is that set out by Keane J. in *Truck and Machinery Sales v Marubeni Komatsu* [1996] 1 IR 12, that is that an applicant must satisfy the standard of showing a prima facie case, rather than the arguable case test applied in *Campus Oil v The Minister for Industry and Energy (No. 2)* [1983] IR 88;

(2) Applying that test, that the plaintiffs in the proceedings have shown a prima facie case that the purported notice issued under s. 160 (7) was invalid, and that such invalidity would vitiate the proceedings, and that furthermore, the threatened proceedings were for a collateral and improper purpose, and would constitute an abuse of process;

(3) The balance of convenience favoured the grant of an injunction in the particular circumstances of this case.

61 I am therefore satisfied that there was jurisdiction to restrain the issuance of proceedings under s. 160, of the 1990 Act, and that in the circumstances of this case, the proceedings were justified, and the High Court judge was entitled to make the order he did. Accordingly, I would dismiss the appeal and affirm the order of the High Court.