AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP: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, EIMEAR 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

Ruling of the Court delivered the 9th day of March 2021.

1. In a judgment delivered on the 5th of November, 2019 ([2019] IESC 78) ("the principal judgment"), this Court dismissed the appellants' appeal from a decision of the High Court ([2013] IEHC 42 (Unreported, High Court, Cooke J., 4th of February, 2012)), restraining the appellants pending the trial of action from proceeding with an application under s. 160 of the Companies Act 1990 ("the 1990 Act") seeking the disqualification of the

individual plaintiffs as directors. This Court's judgment of the 5th of November, 2019, sets out the fact that a number of the defendants have withdrawn from these proceedings, but it appears that Mr. Skoczylas and Mr. Neugebauer, and possibly Mr. McGann, remain participants in the proceedings. The appellants will be referred to collectively as "Mr. Skoczylas", as he has managed the litigation at all times, and conducted both the appeal and this application in respect of costs.

2. The High Court, after a hearing of three days, held, applying the test for an interlocutory injunction set out in the decision of the Supreme Court in *Campus Oil v. Minister for Industry and Commerce (No. 2)* [1983] I.R. 88 ("*Campus Oil*"), that there was an arguable case that the notices served by Mr. Skoczylas under s. 160(7) of the 1990 Act were inadequate and invalid, and that the balance of convenience favoured the grant of an injunction. The Court did not consider the alternative ground argued: namely, that the applications constituted an abuse of process.

3. On this appeal, this Court accepted Mr. Skoczylas's contention that the applicable test was not that set out in *Campus Oil*, but rather that set out in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu* [1996] 1 I.R. 12 ("*Truck and Machinery Sales*"), namely that, in order to restrain proceedings, it was necessary to show a *prima facie* case that the prosecution of the proceedings would be unlawful. However, applying that standard to the evidence, the Court concluded that there was a *prima facie* case, both in relation to the validity of the notices (applying, in this regard, the decision of the Supreme Court (Fennelly J.) in *Director of Corporate Enforcement v. Byrne* [2009] IESC 57 (Unreported, Supreme Court, Fennelly J., 23rd of July, 2009)) and, moreover, that there was also a *prima facie* case that issuance of the notice was an abuse of process. This latter finding was on the basis that Mr. Skoczylas's own affidavit in the proceedings set out that, at the time the notice was issued, the basis of the application had not been formulated, at least some of the named applicants had not even decided to commence the proceedings, and

the issuance of the notice had been notified to executives of Canada Life Assurance, then in negotiation to purchase the insurance business of Irish Life. A *prima facie* case having been established, it was also held that the balance of convenience favoured the grant of the injunction.

4. The application for costs has been adjourned from time to time, Mr. Skoczylas having sought an oral hearing. He now contends that the High Court order for costs in favour of the plaintiffs should be set aside, and costs reserved to the trial of the action. He also argues that the costs of this appeal should similarly be reserved to the trial of the action. For clarity, it should be understood that the trial of the action concerned is the trial of these proceedings seeking to permanently restrain the commencement of the particular proceedings under s. 160. As a fall-back position, Mr. Skoczylas contends that any order for costs should be stayed pending the conclusion of those proceedings.

5. On this application, the parties were invited to deliver written submissions. Mr. Skoczylas delivered legal submissions running to some 11 pages, but also a booklet described as reference documents, itself running to 18 pages, and containing hyperlinks to attached documentation totalling 479 pages. Included among the documentation were matters such as: transcripts from the hearings in the High Court; an affidavit sworn in November 2019 in relation to these proceedings in the High Court; an application for discovery; and a notice to admit facts also served in these proceedings. In addition to this, the documentation included a statement of claim and appeal notices in separate proceedings described as "Köbler type proceedings" and a complaint made in August 2019 to the European Court of Human Rights in respect of a determination of the 1st of March, 2019, made by this Court ([2019] IESCDET 55), exercising the Court's jurisdiction to refuse leave to appeal from a decision of the Court of Appeal ([2018] IECA 300 (Unreported, Court of Appeal, Hogan J., 2nd of October, 2018)), in separate proceedings. It is not easy to see the relevance of all the material which was submitted, and it is both undesirable

and unacceptable that an application for costs should become so diffuse. An oral hearing on this application running to some one and a half hours was held on the 10th of February, 2021. The relevant principles are well known, there were a limited number of issues in the underlying proceedings, and written submissions from both sides had been delivered. The volume of material and length of hearing was excessive given the issues involved.

6. Order 99 r. 1(4A) of the Rules of the Superior Courts introduced in 2008, and which applied at the time of both the High Court hearing and the Supreme Court appeal, provided that the Court should make an order for costs on the determination of any interlocutory application "save where it is not possible justly to adjudicate on liability for costs on the basis of the interlocutory application". The same requirement is maintained under the updated Order 99 r. 2(3), which came into force shortly after the principal judgment, on the 3rd of December, 2019. Further, ss. 168 and 169 of the Legal Services Regulation Act 2015 (which deal with costs orders in civil litigation) contain no contrary provision.

7. The starting point of the analysis must be that the general rule is that costs follow the event. In this case, the event was plainly the dismissal of the appeal and the upholding of the High Court order. It is true that Mr. Skoczylas succeeded in his contention that the applicable test was not the establishment of an arguable case as outlined in *Campus Oil*, but rather the establishment of a *prima facie* case as set out in *Truck and Machinery Sales*. However, this in itself would not normally lead to any alteration of a costs order. The appeal took one day, and it is not clear that any additional cost was incurred by reason of the argument in relation to the standard of proof. The outcome was the same. Indeed, the plaintiffs had contended in the High Court that they satisfied the higher standard of a *prima facie* case.

8. The principal ground on which Mr. Skoczylas resists costs is that he contends that it is not possible to justly adjudicate on costs following the approach of Laffoy J. in *Tekenable*

Ltd. v. Morrissey [2012] IEHC 391 (Unreported, High Court, Laffoy J., 1st of October, 2012), approving the judgment of Clarke J. (as he then was) in *Allied Irish Banks v. Diamond* [2011] IEHC 505 (Unreported, High Court, Clarke J., 14th of October, 2011), that there are types of injunctions which turn on the merits of the case which are based, therefore, on facts, and it may well be that the court would consider that it is unsafe to deal with the costs where the factual issue might look very different when a court of trial has an opportunity to hear witnesses, to see what other evidence may be disclosed on discovery and the like.

9. On behalf of the successful respondents, Ms. Geoghegan BL relies on the judgment of Butler J. in *Thompson v. Tennant* [2020] IEHC 693 (Unreported, High Court, Butler J., 17th of December, 2020) ("*Thompson v. Tennant*"), in which the learned trial judge considered the jurisprudence, and the observations of Barrett J. in *Glaxo Group Limited v. Rowex Limited* [2015] IEHC 467 (Unreported, High Court, Barrett J., 16th of July, 2015), that there may be a distinction in interlocutory injunction applications between those which turn on issues of fact – in which a different picture may emerge at trial – and cases where the application turns on matters such as adequacy of damages or balance of convenience. In *Thompson v. Tennant*, Butler J. observed that the test was not whether the trial court would be better placed to make the adjudication on costs, but whether it was possible for the interlocutory court to do so. Here, there is no factual dispute in relation to the contents of the s. 160(7) notice. The only issue in relation to this aspect of the case is, therefore, a question of law, and one, moreover, where it has been determined that there is a *prima facie* case based on the existing Supreme Court authority that the notice is insufficient, both in its failure not merely to refer to the specific subparagraph of s. 160, but, more importantly, to identify – even in general terms – the conduct alleged. In respect of the second and alternative limb, there is, it appears, no dispute as to the matters set out in the affidavit of Mr. Skoczylas referred to at para. 46 of the principal

judgment to the effect that the defendants had not completely formulated the proceedings when the notice was issued, that not all of the defendants had in fact even decided to launch the intended legal action, and that it was possible that some of the persons involved would in fact decide not to follow through with that communicated intention. In relation to the notification to the executives of Canada Life, it appears that Mr. Skoczylas contends that the s. 160(7) notice was not served on the executives in Canada Life, but does not, it appears, dispute the fact that he wrote to the individual plaintiff directors informing them that he was copying the executives of Canada Life and that the letter indicated on its face that it had been copied to the Chief Executive of Canada Life and both the President and Chief Executive of its parent company, Great-West Lifeco. It does not appear a relevant distinction of fact, therefore, if, as Mr. Skoczylas contends, the notice itself was not served on the officers of Canada Life and its parent company. Mr. Skoczylas now suggests, in the context of this application, that it was inaccurate for the judgment to refer to the notification of the executives of Canada Life and its parent company. He says:-

> "The letter in respect of the intended s. 160 proceedings, in which the executives of Canada Life were included, was part of an ongoing comprehensive correspondence regarding the re-sale of Irish Life between 5 January and 11 February 2013 involved the Minister for Finance (ILPGH's largest shareholder), executives of Canada Life and four directors of Irish Life (who are among the 11 Director Respondents/[Plaintiffs]".

This appears to accept that the letter in respect of the intended s. 160 proceedings was indeed sent to executives of Canada Life and its parent company. Mr. Skoczylas does not explain why he considers it was necessary to inform the executives of Canada Life and its parent company of proceedings which had not yet been formulated, and in respect of which at least some of the parties had not yet decided to proceed. It remains, however, to be finally decided, as a matter of law, whether this conduct amount to an abuse of process.

10. It is apparent, therefore, that there are a very limited range of issues which remain to be determined in these proceedings, and which are almost exclusively issues of law, and that it has been determined that the plaintiffs have established a *prima facie* case of invalidity and abuse of process.

11. In addition to the foregoing considerations which are applicable to the question of the award of costs on an interlocutory application under O. 99 r. 1(4A), there is the fact that the costs involved in this case are the costs of an appeal of the grant of an interlocutory order. Even if a trial court were to conclude that it would be inappropriate to award costs of an application for an interlocutory injunction pending the trial of the action, it does not follow that the same considerations apply on appeal. The question for this Court on appeal was whether the High Court was correct to conclude that an interlocutory injunction ought to be granted. This Court dismissed Mr. Skoczylas's appeal, and that question is not capable of being revisited and will not be reviewed, whatever the outcome of the trial of the issue. In this case, the High Court and this Court held that the balance of convenience favoured the grant of an injunction. This Court's conclusion that the High Court was correct in granting the injunction is not something that is capable of being affected by any decision as to fact or law at the trial of the action.

12. Finally, there is a further consideration. Part of the function of the court's jurisdiction to award costs is to encourage a responsible and efficient approach to litigation. A party who has a good cause of action, but proceeds in the face of a lodgement, or a *Calderbank* offer (derived from the English case of *Calderbank v. Calderbank* [1976] Fam. 93), and fails to secure a higher award may find themselves penalised on costs even though they have succeeded. A party who brings a claim in the High Court, but who could have brought the claim in a lower court, may again be penalised when it comes to the award of costs. As Fennelly J. observed in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264, the public interest in the administration of justice is not confined to the relentless search for perfect truth – the

just and proper conduct of litigation also encompasses the objectives of expedition and economy. As already observed in the judgment of the 5th of November, 2019, there has been a proliferation of litigation, nearly all generated by Mr. Skoczylas. Insomuch as there is a substantive issue in these proceedings, it is as to whether the directors of the company acted in such a way as to merit disqualification. As observed in the High Court almost eight years ago, that, in turn, is the substance of Mr. Skoczylas's claim under s. 205 of the Companies Act 1963 that he has been oppressed as a shareholder in the company. However, it does not appear that any steps have been taken to advance those proceedings to a hearing. Instead, it appears from the documentation furnished to the Court that Mr. Skoczylas now wishes to pursue the plenary proceedings and has also initiated separate High Court proceedings. To defer a decision on costs, and, moreover, to reserve it to a court which would never have heard or considered the merits of this appeal, will only likely add one further layer of complication to an already tangled web of litigation. Accordingly, the Court considers that it is possible to adjudicate on the costs of the appeal and would hold that the plaintiffs are entitled to their costs. The Court would not interfere with the order made by the High Court.

13. As a fall-back position, Mr. Skoczylas has asked that any order be stayed pending the outcome of the plenary trial. We have given some thought to whether this course would be appropriate in this case. First, we think it reasonable to anticipate that any stay would not necessarily be limited to the point at time at which the High Court had determined the plenary proceedings. In the event that Mr. Skoczylas was unsuccessful and sought to appeal, he would, no doubt, contend that the stay ought to be extended pending such appeal. Second, nothing in the history of these or the related proceedings suggest that the proceedings will be advanced with any expedition. It is now well over a year since the decision in this Court, and it appears that it was only on the 16th of December, 2020, that Mr. Skoczylas sought discovery. Furthermore, the decision of this Court was given in

November 2019, and, accordingly, the appellant has had the benefit of that period during which he was not subject to any active costs order. Mr. Skoczylas does not set out any particular reason why he wishes to have such a stay. Given that Mr. Skoczylas is not resident in Ireland, the Court cannot assume anything about his resources, the mechanism for enforcement at any order for costs, and/or its consequences for his capacity to pursue litigation in this jurisdiction, without any of those matters being adverted to by Mr. Skoczylas, and evidence provided to support any such contention. The process for the adjudication of disputed costs is already sufficiently protracted and, in normal course, it would therefore be some time before any order for costs could be sought to be enforced. These are all considerations which tell against any stay on the order.

14. In addition, these proceedings are a somewhat quixotic endeavour. If Mr. Skoczylas were to finally advance these proceedings, and if he were to convince a court both that the notice was valid and that the proceedings were not an abuse of the process, the only consequence would be that he would be entitled to proceed with the s.160 proceedings, the commencement of which was intimated by the notice. As observed in the principal judgment, s.160 is in the nature of a procedure in the public interest and gives no private benefit. It would be necessary for Mr. Skoczylas to then adduce evidence to satisfy a court that orders should be made against some or all of the individual directors. As already observed, the matters which appear to be relied on by Mr. Skoczylas in this regard are already matters referred to in his s. 205 proceedings and which he could have advanced at any stage over the past decade but has not. If he succeeded in establishing such matters, he could then apply for an order under s. 160, or indeed invite the court to consider making an order of its own motion. In other words, if there was any substance to Mr. Skoczylas's complaints, and if those matters merited orders under s. 160, we could have arrived at that point long ago. All of these considerations suggest that there is little point in a stay on the order for costs. However, the Court is prepared to take into account the fact that

Mr. Skoczylas, notwithstanding his evident intelligence and energy, is not a lawyer. A limited stay may allow time for consideration and encourage focus. In the circumstances, execution of the Order is stayed for one year. For the avoidance of doubt, it should be made clear that this is not a stay on the Order and does not prevent the adjudication of costs.

15. Finally, it is appropriate to note that among the documents submitted by Mr. Skoczylas was a lengthy letter of the 6th of November, 2019 criticising, in somewhat intemperate terms, the judgment delivered the previous day. There is a jurisdiction under which, in exceptional cases, this Court may reconsider a decision given. See, for example, *Re Greendale Developments (No. 2)* [2002] 2 I.R. 514 ("*Greendale*"). Moreover, it has also been made clear that this Court will entertain application to correct errors in judgments where those errors are material, as in *Nash v. DPP* [2017] IESC 51 (Unreported, Supreme Court, 13th of July, 2017) ("*Nash*") and in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63 (Unreported, Court of Appeal, Finlay Geoghegan J., 14th of March, 2018). The letter did not seek to invoke the jurisdiction in *Greendale* or invite correction, as suggested in *Nash.* It is not appropriate for a party to seek to engage in correspondence, general argument and dispute in relation to a judgment delivered. Insomuch as Mr. Skoczylas takes issue with certain statements in the judgment, the Court is prepared to accept that, while the shares in Irish Permanent had fallen considerably when Mr. Skoczylas's company purchased its shareholding, it is not the case that the share price was "a few pence", and that Mr. Skoczylas had only challenged two, and not all the three, statutory directions made. It appears to be in dispute whether, as suggested by the respondents, Mr. Skoczylas delivered a copy of the notice to executives of Canada Life although, for the reasons set out above, it does not appear to be in dispute that they were notified of the proposed issuance of the proceedings under s. 160 against the individual directors. It should be apparent that none of these matters have a bearing on the outcome

of the appeal, and accordingly it is not proposed to take any step in relation to them (and indeed none was suggested) other than to record the position here.