THE COURT OF APPEAL
CIVIL

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Court of Appeal Record No 2018/177
Court of Appeal Record No 2018/365
High Court Record No 201872 COS (2018 No 33 COM)

Baker J
Costello J
Collins J

IN THE MATTER OF PERMANENT TSB GROUP HOLDINGS PLC
AND IN THE MATTER OF A PROPOSED CAPITAL REDUCTION PURSUANT TO SECTION 84 AND SECTION 85 OF THE COMPANIES ACT 2014 (AS AMENDED)
AND IN THE MATTER OF THE COMPANIES ACT 2014 (AS AMENDED)

BETWEEN

PERMANENT TSB GROUP HOLDINGS PLC

APPLICANT/RESPONDENT

AND

PIOTR SKOCZYLAS

RESPONDENT/APPELLANT

JUDGEMENT of Mr Justice Maurice Collins delivered on 21 January 2020

THE APPEALS

1. These appeals arise from an application brought by Permanent TSB Group Holdings plc ("*the Company*") for an order pursuant to Section 85 of the Companies Act 2014 ("*the 2014 Act*") confirming a resolution passed by its shareholders providing for a reduction in its company capital by way of the cancellation of 3,562,883,512 deferred shares ("*the Confirmation Application*").

2. It will be necessary to say something more about the Confirmation Application below and to explain the nature and origin of these *deferred shares*.

3. By way of two notices of appeal, the Appellant, Piotr Skoczylas, appeals against the following orders of the High Court (Haughton J):

    - An order of 4 April 2018 refusing an application made by Mr Skoczylas that the Judge recuse himself from dealing with the Confirmation Application ("*the Recusal Order*")[1]

[1] The Judge's *ex tempore* Ruling on the recusal application is at page 95 and following of the transcript of the hearing on 4 April 2018 (which I shall refer to as "*Day 1*").

- An order of 5 April 2018 confirming the proposed company capital reduction ("*the Confirmation Order*")[2]

- Costs orders, namely (1) an order directing Mr Skoczylas to pay measured costs of €20,000 in relation to the Recusal Application and (2) an order that there be no order for costs in the substantive Confirmation Application. ("*the Costs Orders*")[3]

- An order made under the slip rule correcting the terms of the order made in relation to the recusal costs to provide for the payment of an amount of €20,000 plus VAT by Mr Skoczylas (and correcting two other errors also). ("*the Slip Rule Order*")

4. The Company cross-appeals against the Judge's refusal to award it the costs of the Confirmation Application.

BACKGROUND

The Recapitalisation of the Company in 2011

5. The background to the appeals is rather tangled but I will begin with the re-capitalisation of the Company (then called Irish Life and Permanent Group Holdings Plc) in 2011. The Company was/is a holding company, owning the entirety of Irish Life & Permanent plc ("*ILP*"), which operated Permanent TSB, as well as (as of 2011) owning Irish Life Assurance plc and Irish Life Investment Managers plc.

6. Irish Life Assurance plc and Irish Life Investment Managers plc were at all times profitable companies. However, even though it had avoided NAMA (because it had not lent significantly to property developers) and had not needed State capital (though it did require liquidity assistance), at the end of Quarter 1 2011, based on an assessment exercise by Blackrock Solutions, the Central Bank of Ireland ("*the CBI*") determined that the Company required to raise additional capital of €4 billion. The deadline for doing so was 31 July 2011.

7. The background to this direction (which was legally binding on the Company) is more fully set out in the judgment of O' Malley J in *In the Matter of Irish Life and Permanent Group Holdings plc, Dowling v Minister for Finance* [2014] IEHC 418, at sections A-E. As she explains, the wider context involved the Programme for Support (commonly referred to as the "*bail-out*") and various legal instruments, including an Implementing Decision adopted in December 2010 pursuant to Council Regulation (EU) 407/2010 the effect of which was to require the State to "*adequately recapitalise, rapidly deleverage and thoroughly restructure the banking system*" here (paras 9.1 – 9.7).

8. While the Company was in a position to raise some of the additional capital (something in the order of €1.7 billion), that left a significant shortfall (of €2.3 billion). In reality, the

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[2] The Judge's *ex tempore* Ruling on the confirmation application is at page 154 and following of the transcript of the hearing on 5 April 2018 (which I shall refer to as "*Day 2*").

[3] The Judge's (*ex tempore*) Ruling on costs is at page 75 and following (recusal application) and at page 83 and following (confirmation application) of the transcript of the hearing on 30 April 2018.

State was the only source of this capital and, reflecting this reality, at the end of June 2011 the board of the Company notified shareholders of an EGM on 20 July 2011, at which various resolutions intended to facilitate the issuing of a large number of additional shares to the Minister for Finance were to be proposed.

9. The ordinary shares in the Company had a nominal value of €0.32. As of July 2011, the trading price of those shares was, however, only a fraction of that nominal value. The Company was not permitted to issue new shares at a discount to their nominal value so it was proposed to "*re-nominalise*" the ordinary shares by sub-dividing all issued and unissued ordinary shares into 320 ordinary shares of €0.001 each and immediately following such sub-division, 289 of every 320 ordinary shares would be consolidated into one *deferred* share of €0.289, with the remaining 31 ordinary shares being consolidated into one ordinary share of €0.031.[4]

10. The EGM Notice explained that the purpose of the issue of the deferred shares was to ensure that the reduction in the nominal value of the ordinary shares did not result in a reduction in the Company's capital. It also explained that the deferred shares would have no voting or dividend rights and, on a return of capital on a winding up, would have the right to receive the amount paid up on them only after shareholders received any amounts paid up, plus €10 million, per ordinary share. This, the Notice explained, "*is to ensure that the deferred shares have no economic value*."[5] The deferred shares, it was also explained, would not be freely transferable.

11. In the event, the Company's shareholders voted down this proposal, rejecting the re-capitalisation resolutions and passing a series of resolutions revoking the directors' power to allot shares, directing the board to appoint advisors and carry out a review of recapitalisation options, directing the board to seek an extension of time for the completion of the recapitalisation from "*the Authorities*" and, finally, appointing Mr Skoczylas as an additional director. In broad terms, the shareholders did not accept that the Company required additional capital of the magnitude directed by the CBI, considered that there were other options for recapitalisation that would not dilute their shareholding to the extent proposed and also considered that the proposed issue price of the new shares to the Minister did not properly reflect the true value of the Company.

The Direction Order

12. The Minister then applied to the High Court for a direction order pursuant to section 9 of the Credit Institutions (Stabilisation) Act 2010 ("*the 2010 Act*") and that order ("*the Direction Order*") was duly made by McGovern J on 26 July 2011. In substance, the Direction Order imposed the new regime that had been proposed by the board but rejected by the members, including as regards the re-nominalisation of the ordinary shares and the creation of the deferred shares "*having the rights and being subject to the restrictions attaching to the deferred shares as are set out in the articles of association to be adopted pursuant to paragraph B.1.1c) hereafter*." The affidavit grounding the

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[4] Page 14 of the Notice.

[5] *Ibid*.

application for the Direction Order explained its effect in some detail, including the creation of the deferred shares and the fact that those shares would not be transferable and would have no economic value.[6]

13. The net effect of the Direction Order was that the Minister became the holder of virtually the entirety (99.2%) of the ordinary shares in the Company. The price paid by the Minister was €0.06345 per ordinary share, representing a discount of 10% to the middle market price as of 23 June 2011.

14. The recapitalisation of the Company was approved by the European Commission pursuant to Article 107 TFEU initially on a temporary basis and then in a final decision taken after Ireland had submitted a series of restructuring plans to the Commission.[7]

The Section 11 Application

15. Section 11 of the 2010 Act provided that the relevant credit institution and/or its members could apply to the High Court to set aside a section 9 direction order. Section 11(3) identified the grounds on which such an order could be said aside, namely that that court was of the opinion "*that there has been non-compliance with any of the requirements of section 7*[8] *or that the opinion of the Minister under section 7(2)*[9] *was unreasonable or vitiated by an error of law.*" A number of shareholders of the Company brought such an application in respect of the Direction Order of 26 July 2011, including Mr Skoczylas and a company controlled by him, Scotchstone Capital Fund Ltd ("*Scotchstone*"). I shall refer to this application as the "*Section 11 Application*."

16. It appears to me that an understanding of the nature and scope of the Section 11 Application and of the basis on which that application was determined against the applicants, is critical to assessing Mr Skoczylas' objections to the Confirmation Application and the Company's response to those objections. Accordingly, I propose to set out the history of those proceedings in a little detail.

First High Court Judgement: [2014] IEHC 418

17. The Section 11 Application came on before the High Court (O' Malley J). O' Malley J gave judgment on 15 August 2014: [2014] IEHC 418. She rejected a number of the applicants' arguments[10] and made a series of important findings of fact (at para 41), including findings to the effect that, as a matter of probability, the required capital could not have been raised from private investors (41.2.9) or from existing shareholders (41.2.10) and 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 [Irish Permanent TSB] by depositors, 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*" (41.2.11). That, she found (at 41.2.12) would, as a matter of probability,

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6 Affidavit of John Moran; summarised by O' Malley J at paragraph 31 of [2014] IEHC 418.

7 Temporary approval was given in July 2011. Full approval was given by Decision of 9 April 2015.

8 Section 7 set out various procedural requirements for the making of a proposed direction order.

9 Namely the opinion "*that making a direction order in the terms of the proposed direction order us necessary to secure the achievement of a purpose of this Act specified in the proposed direction order.*"

10 Including arguments to the effect that the share price paid by the Minister was based on a "*false market*" and a separate argument that the value of Irish Life should be attributed to the (pre-recapitalisation) shareholders of ILPGH .

have "*resulted in a complete loss of value to the shareholders*", as well as "*extreme adverse consequences for the State*" (41.2.13) which would have worsened the threat to the financial stability of other Member States and of the EU itself (41.2.14)

18. One of the arguments advanced by the applicants was that the Direction Order was contrary to EU law and, in particular, was incompatible with the Second Company Law Directive (Directive 77/91/EC) insofar as it effected an increase in the capital of the Company without the consent of members and did so without respecting the pre-emption rights of members. O' Malley J decided to make a preliminary reference to the CJEU on this point (though as noted below one of the questions ultimately referred was broader in its terms than the Second Directive).

Opinion of the Advocate General (22 June 2016) and Judgment of the CJEU (8 November 2016) (Case C-41/15)

19. The Judge referred two questions. The first asked whether the Second Directive precluded "*in all circumstances*" a section 9 direction order having the effect of the impugned Direction Order; the second asked whether that Direction Order was "*in breach of European Law.*"[11]

20. Relying to a significant extent on a CJEU decision given shortly before in Case 526/14 *Kotnik*, the Advocate General advised that the first question should be answered to the effect that, in principle, the Second Directive did not preclude legislation permitting the making of an order providing for the taking over of a credit institution which was also a plc without the consent of its members in circumstances where it could not meet its regulatory requirements: para 78. As to the second question, the Advocate General considered the form of question problematic but nonetheless went on to consider the substance of it. In that context, he identified the main criticism levelled by the applicants, namely that the Minister had taken control of the Company and thereby "*confiscated the alleged capital which it contained on the day the Direction Order took effect*." Having discussed the issue of why the Order was directed at the Company rather than ILP, the Advocate General expressed the following view:

> *"97. On the assumption that those statements are correct, the applicants' contention that the Direction Order is unjustified must be dismissed. Indeed, in that scenario, the Bank was and is the sole asset of the Company, meaning that the Bank's failure would lead to the Company's shares becoming entirely worthless, as indicated in the order for reference. I am therefore unable to see how, in that eventuality, there might have been any interference in the applicants' right to property. It would rather seem that by their action, the applicants seek to acquire the 'very substantial gift', as ILP and ILPGH have branded it in their written submissions, which they were not offered by the Minister at the EGM or in its wake."*

21. In its judgment, the CJEU focussed on the Second Company Law Directive. It held that the Directive and the case-law relied on by the applicants (the so-called "*Greek cases*") had no application to exceptional measures affecting the share capital of a plc, such as

[11] Para 33 of the Advocate General's Opinion.

the Direction Order, taken by national authorities where there is a serious disturbance of the economy and financial system of a Member State, without member approval, with the objective of preventing a systemic risk and ensuring the financial stability of the EU: paras 50 & 51.

Second Judgment of the High Court (O' Malley J) (31 July 2017) [2017] IEHC 520

22. After a further hearing, O' Malley J gave a second judgment. One of the principal issues addressed was the proportionality of the Direction Order and whether there had been a less onerous alternative to it (as the applicants contended): see para 51 and following of the judgment. The judgment records the arguments of the applicants as to the price paid by the Minister (which, it was contended, should have been much higher - in the range of 30-70 cents per share - so as to reflect the fair value of the Company); the failure to offer pre-emption rights and alternative ways in which the Minister's investment could have been structured to minimise the impact on existing shareholders. In the view of O' Malley J, however, these arguments failed "*to engage with the evidence adduced on behalf of the Minister and the notice parties, and also fail to engage with the judgments of the CJEU in this case and in Kotnik.*" (para 61) The Judge went on to address a submission that is repeated in the appeal before us, namely that the Company was "*at all times solvent, viable and operating normally*" and that it was simply suffering from temporary illiquidity (para 70). That concentration on the technical definition of solvency involved, in the Judge's view, "*disregarding the reality of the Bank's situation and the exposure of the State to the risks created by that situation*" and in that context she referred back to her earlier finding that a failure to recapitalise would probably have led to a failure of the Bank: para 71. She also rejected a suggestion that her earlier finding that the failure of ILP would have resulted in a complete loss of value to shareholders was a "*purely theoretical*" one and/or not referable to the shareholders of the Company: see paras 74 & 75.

23. The applicants unsuccessfully sought leave from the Supreme Court for a so-called "*leapfrog appeal*": Determination of 15 May 2018 [2018] IESCDET 72. Their appeal therefore proceeded to this Court in the ordinary way.

Judgment of the Court of Appeal (2 October 2018) [2018] IECA 300

24. The judgment of this Court (given by Hogan J, with Irvine and Baker JJ agreeing) identifies the issue on the appeal as being whether the opinion of the Minister grounding the Direction Order "*was unreasonable or was otherwise vitiated by error of law*" (para 10) The issues in the appeal were substantially governed by Irish rather than EU law (para 104) but nothing greatly turned on that because the scope of review of administrative action on proportionality grounds was essentially no different in Irish and EU law (para 105). However, the court was bound by the CJEU judgment (*ibid*).

25. Hogan J considered that given the nature of the Direction Order and its implications for the appellants constitutional rights, the "*no evidence*" test set out in *O' Keefe v An Bórd Pleanála* [1993] 1 IR 39 would be ineffective to protect those rights: para 137. He would, therefore, be prepared to go further than the High Court if necessary to do so (para 140).

The operative test, in his view, was "*in substance the proportionality test articulated in Heaney v Ireland* [1994] 3 IR 593."

26. Hogan J went on to discuss in detail the arguments made by the appellants regarding pre-emption rights, the so-called B share option (which would have involved a passive investment by the State denying it any right to share in any upward movement in the Company's market valuation) and the argument that the share price paid by the Minister reflected a "*false market*" and ought instead to have reflected the market price pre PCAR/PLAR (the reviews that led the CBI to direct the further capitalisation of the Company on 31 March 2011): see paras 149 – 167. All those arguments failed. As regards the price paid by the Minister, Hogan J agreed with O' Malley J as regards the "*false market*" argument and also agreed that the value of Irish Life could not be attributed to the Company's shareholders, concluding that:

> *"167. In these circumstances, I cannot say that the price paid by the Minister for the acquisition of these shares was not close to the market price which then prevailed. It is true that the price was at a 10% deduction to premium, but in the circumstances, I have described where all shareholder value would otherwise have been lost and where no other reasonable prudent investor would have this investment, this deduction cannot be seen as an appreciable interference with property rights.* ***Even if it were, it is clear that the substance of the appellants' constitutional rights were fully respected in the circumstances****." (my emphasis)*

27. The Supreme Court refused leave to appeal from this Court: Determination of 1 March 2019 [2019] IESCDET 55.

28. Scotchstone and Mr Skoczylas have since brought proceedings against Ireland and the Attorney General before the High Court arising from what is alleged to have been breaches of EU law stemming from the last-mentioned Supreme Court Determination, inter alia the Supreme Court's failure to make a further reference to the CJEU.[12] It appears that Mr Skoczylas has also made a complaint to the ECtHR "*regarding breaches by Ireland and by the Irish courts of Art 6.1 ECHR and Art 1 of Protocol 1 ECHR*." However, neither those proceedings nor that complaint affects the finality of this Court's decision in the Section 11 Application.

29. Apart from the Section 11 Application which is now (so far as Irish law is concerned) finally and conclusively determined, there have been a large number of other proceedings involving Mr Skoczylas and/or Scotchstone which have their origin in the 2011 recapitalisation of the Company. The Court was provided with a comprehensive list of these proceedings to which it is not necessary to refer further. There are pending proceedings challenging the constitutionality of the 2010 Act, which were stayed pending the determination of the Section 11 Application. There are proceedings brought pursuant

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[12] Characterised by Mr Skoczylas as "*Kobler-type proceedings*" (after the decision of the Court of Justice in Case C-224/01 *Kobler v Osterreich* (ECLI:EU:2003:513)). The Statement of Claim in the proceedings was provided to the Court but it does not appear either necessary oor appropriate to make any further reference to those proceedings here.

to section 205 of the Companies Act 1963. There have been hearings (and written decisions) relating to injunction and/or stay applications of various kinds (including an unsuccessful attempt to injunct the sale of Irish Life in 2013).[13] As recently as 5 November 2019, the Supreme Court (per O' Donnell J) gave a decision upholding an order of the High Court (Cooke J) restraining a group of shareholders (including Mr Skoczylas and Scotchstone) commencing proceedings to disqualify directors of ILP. I mention these proceedings only by way of background.

30. There was also an earlier application by the Company to the High Court for approval of a capital reduction, in the form of the cancellation of the amount standing to the credit of the Company's share premium account. That application came before Barrett J who granted the orders sought, against the objections of (inter alia) Mr Skoczylas. The court's reasons for doing so were then set out in a lengthy judgement delivered 28 July 2015: *Re Matter of Permanent TSB Group Holdings plc* [2015] IEHC 500, to which further reference is made below. That decision was appealed to this Court but the appeals were not pursued.

THE APPEALS

The Appeal against the Recusal Order

31. This appeal arises in the following circumstances. The Company's section 85 application issued on 20 February 2018. It was grounded on an affidavit of Eamonn Crowley, a director and the Chief Financial Officer of the Company. He explained that the decision to cancel the deferred shares had been taken in consultation with the Joint Supervisory Team (JST), the regulatory body for Permanent TSB that has representatives from the ECB and the CBI. Mr Crowley also explained the restructuring history and associated changes to the memorandum and articles of association of the Company. He explained the rights associated with the deferred shares, averred that they had no economic value, explained that the Company had power under its memorandum and articles of association to reduce its capital and averred to various other formal matters such as the approval by members of the reduction at the AGM, the non-impact on creditors, the effect of the reduction on its balance sheet and so on.

32. The application was initially returnable to the High Court on 26 February 2018. The Company applied for it to be entered into the Commercial list and on 26 February an order to that effect was made by McGovern J and he fixed 21 March 2018 for the hearing of the application. The court gave the usual directions re advertisement/persons intending to appear to give notice and other consequential directions.

33. On 14 March 2018 Mr Skoczylas swore a lengthy affidavit in opposition to the application. At para 15 of that affidavit, he refers to (what he characterised as) the unfair and inequitable creation of the deferred shares in 2011 "*in the circumstances where less restrictive and equally effective means of effecting the original recapitalisation in question existed. Given the unfair and inequitable nature of certain terms of the capital reduction*

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13 *Dowling v Minister for Finance* [2013] IESC 37

in question herein, I have no choice but to oppose those inequitable terms. Not opposing the inequitable and unfair terms of the capital reduction in question would signify my acquiescence thereto." (para 15). Later in the affidavit, Mr Skoczylas characterises the cancellation as "*a final step in an unprecedented massive unwarranted transfer of wealth from the Company's original shareholders i.e. the shareholders from before the 2011 Ex Parte Direction Order, for the benefit of the current majority shareholders.*" (para 22). At para 30, Mr Skoczylas says that c 135,000 "*original shareholders*" holding some 277 million ordinary shares before the July 2011 Direction Order had been unduly deprived, without compensation, of more than 90% of the economic value of the Company and that the measures adopted by the Minister had " *nullified*" the value of shares having a nominal value of €80 million. Later in the affidavit, repeated reference is made to "*siphoning value out of the ordinary shares*" (para 37); a "*massive appropriation of value to the detriment of the original shareholders*" (para 40) and "*the massive transfer of value from the original shareholders to the Minister* ." (para 41) The Affidavit repeatedly asserts that the Company was at all times a solvent, viable going concern (see for instance para 42); says that the "*fair value*" of its shares in June/July 2011 was far higher than the price paid by the Minister (see para 42, E) and repeatedly asserts that the 2011 Direction Order was disproportionate and that there were less restrictive/burdensome ways of recapitalising the Company (to the extent that it needed recapitalisation at all).

34. Also on 14 March Mr Skoczylas gave notice of his intention to attend and be heard on 21 March 2018.

35. On 16 March 2018 Andrew Walsh, the Company's Group Counsel, swore an affidavit in response to Mr Skoczylas' affidavit. As well as addressing the circumstances in which the deferred shares had been created, Mr Walsh referred in some detail to the Section 11 Application, as well as to the 2015 capital reduction proceedings, and asserted that Mr Skoczylas' arguments to the effect that the cancellation of the deferred shares amounted to an impermissible attempt to re-open issues addressed in those proceedings (see para 21 and following).

36. On 20 March 2018 Mr Skoczylas emailed the Commercial list Registrar indicating that he was acutely ill and would not be in a position to attend the hearing on the following day. His email attached a medical certificate and a copy of his airline ticket. In response the Company's solicitors wrote a letter indicating that they had been instructed to proceed unless Mr Skoczylas agreed to discharge the Company's wasted costs and the additional expenses which it estimated it would incur if the matter were adjourned to the following term (expenses amounting, it was said, to approximately €100,000).

37. That, in essence, was the state of play when the matter was called on for hearing on 21 March 2018, save that it appears that written submissions on behalf of the Company were provided to the High Court at some point prior to the hearing.

38. Against the backdrop where the application was listed for hearing, and where the Company was pressing the Court to proceed notwithstanding the absence of Mr Skoczylas (and this is important context for the remarks of Haughton J to which objection is taken),

Haughton J indicated that he had read all of the affidavits and some of the exhibits including the Company's replying affidavit "*that deals with Mr Skoczylas' points*" (page 5, line 24), though he noted that "*they are matters to some extent of legal argument*" (line 27-28). He then indicated that he had read the extracts from the judgment of O' Malley J and (it appears) the judgment of Barrett J and went on:

> *"But having read that material, it seems to me that Mr Skoczylas is relying on arguments that have already been rejected by not just Judge O' Malley but the Court of Justice of the European Union."*

Counsel for the Company having confirmed that that was indeed its contention, the Judge continued:

> *"So that on paper Mr Skoczylas' objections don't seem to be ones that will find favour with the Court. Obviously if he was here I'm sure he would something to say about that.*
>
> *[Counsel] Yes*
>
> *[Judge] And if given the opportunity he might well have something to say about it.*
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> *[Counsel] Yes*
>
> *[Judge] But that is the view that I presently take." (I have emphasised what I understand to be the statements made by the Judge on which Mr Skoczylas places particular reliance).*

39. The Judge went on to refer to the existence of the medical certificate and stated (page 7, line 14) that he "*would be very reluctant to close him off*" and, despite being asked by Counsel for the Company that there be no liberty for Mr Skoczylas to file any further affidavits (page 11, lines 14-16), the Judge in fact gave him a 7 day period in which to do so (in the context of an adjourned hearing date of 4 April 2018).

40. Mr Skoczylas sought and was given a copy of the transcript of the hearing on 21 March and, in reliance on it and particularly the passages set out above swore an Affidavit on 27 March 2018 in which (*inter alia*) he asserted that the Judge had demonstrated objective bias and ought therefore to recuse himself. If he did not do so, Mr Skoczylas asserted, his role at the hearing would be reduced to having to convince the Judge to change the view that he had already clearly formed prior to the trial which, he said, would not comply with the fundamental requirements of a fair trial enshrined in the Constitution and in Article 6(1) ECHR.[14]

41. At the outset of the hearing on 4 April 2018 Mr Skoczylas moved his application for the Judge to recuse himself. The application was opposed by the Company. There was little or no dispute about the applicable principles. Mr Skoczylas made it clear that he was relying

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[14] Para 20

on objective bias only and was not alleging any actual bias (see for instance Day 1, page 40, line 6); he also appeared to accept that the Judge remained open to his arguments (page 18, lines 7-10) though he also made it clear that he considered that the Judge's statements indicated prejudice (page 18, lines 21-23). According to Mr Skoczylas, the Court was wrong to form a preliminary view (page 43, lines 28-29), stressing that the comments were made in his absence and thus could not be characterised as the Court "*teasing anything out*" (page 44, lines 28-29). The nub of his submission was that the Court had "*formed a view that precluded clearly the court from coming today for his hearing with a completely objective [view*]" (page 45, lines 2-4); it was "*preliminary and premature*." (page 45, line 17).

42. In response, the Company submitted that there was a distinction between cases where objective bias was said to arise from some external connection between the judge and the proceedings and cases of alleged prejudgment, relying in particular on *O' Callaghan v Mahon* [2008] 2 IR 514 and a number of decisions of the courts of England and Wales, *Arab Monetary Fund v Hashim* (1993) 6 Admin LR 348 and *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492; [2016] 4 WLR 183. I will refer further to these decisions below.

43. The Judge gave a detailed ex tempore ruling dismissing the application to recuse himself. While he accepted that Mr Skoczylas did not have to go so far as to show that the Court had reached "*an immutable decision*" (language used in *Arab Monetary Fund v Hashim*), it nonetheless needed to be "*reasonably clear from the statements complained of that the court has closed its mind*" before recusal properly arose. (Day 1, page 101, lines 9-16). Having referred in detail to his statements on 21 March, the fact that he adjourned the matter to allow Mr Skoczylas to attend and be heard and permitted him to file a further affidavit, and emphasising that his practice was to engage with counsel and canvass their views, he concluded that a reasonable and fair minded objective observer who was not unduly sensitive and was in possession of the relevant facts would not have a reasonable apprehension of bias (page 110).

44. In his submissions before this Court, Mr Skoczylas emphasised the fact that he was not present in the High Court when the Judge made the statements and therefore, in his submission, those statements could not be explained or excused as being part of the "*teasing out*" of issues with him. Even if the views expressed by the Judge were characterised as "*provisional*" only, it was, he contended, wrong that the Judge should have expressed even a provisional view on an ex parte basis. It forced him to face a judge that perhaps subconsciously would be trying to justify that provisional or preliminary view. A reasonably informed observer would, he argued, regard that as being objectively biased. Mr Skoczylas also placed significant reliance on the judgment of this Court in *Commissioner of An Garda Siochana v Penfield Enterprises Limited* [2016] IECA 141, which the Court brought to the attention of the parties during the hearing of the appeal.

Relevant Legal Framework

45. The principles applicable when considering questions of objective bias and recusal have been the subject of significant recent consideration by the Irish Courts: see, for instances, the decisions of the Supreme Court in *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412; *O' Callaghan v Mahon* [2008] 2 IR 514; *Goode Concrete v CRH plc* [2015] 2 ILRM 289 and *O' Driscoll v Hurley* [2016] IESC 32.

46. The specific issue of pre-judgment was considered by the Supreme Court in *O' Callaghan v Mahon*. The applicant contended that the manner in which the Tribunal had dealt with the disclosure of documents indicated that it had prejudged the issue of the credibility of TG, a witness whose evidence impugned the applicant. The application failed (Hardiman J dissenting[15]). For present purposes, the principal interest is what is said by Fennelly J (with whose judgment Geoghegan and Finnegan JJ agreed)[16] as to "*the quality or extent of prejudicial statements required to satisfy the test for prejudgment.*"[17] Fennelly J referred to a number of common law authorities, all of which emphasised the value of judicial interventions, even where expressed in strong terms, provided that any views expressed were understood to be "*provisional*" and did not suggest that the Judge had formed a "*settled view*."[18] Fennelly J noted an observation in one of the cases cited by him (*Vakauta*, where the issue was a comment made by the judge to the effect that doctors for the respondent were biased in their approach) to the effect that there was "*an ill defined line beyond which the expression by a trial judge of preconceived views about the reliability of medical witnesses could threaten the appearance of impartial justice.*"

47. Fennelly J continued:

> *"548. I find myself in full agreement with these views. It is an inherent and invaluable part of the common-law system of justice that open sometimes even vigorous argument takes place between bar and bench. Judges, on a daily basis, express opinions in the form of questions, statements or argument in the course of a hearing. The whole purpose of these exchanges is to enable the parties to address doubts or difficulties raised by the judge. Arguments are tested and contested. This can and frequently does enable counsel to change the judge's mind. On other occasions, the weakness of an argument is exposed. If judges did not come to the process with some clear, even strongly-held, views, based on the experience they bring to the judicial process, they would be of little value as judges. Parties and their legal advisers assess how a case is going. They discern the approach of the judge. This may lead to a settlement. I am aware that there exists a different culture in the courts of some European countries. I understand that in some it is unheard of for the judge to intervene. I can only say that I do not agree.* ***Of course, a judge may so behave that he steps outside his judicial role. If he does, it will be obvious. In my view, that is what is required, something***

[15] Hardiman J considered that the evidence suggested that the Tribunal had made a judgment as to credibility or, as he put it at para 394, they "*had made up their minds*".
[16] Denham J delivered a separate judgment, with which Geoghegan and Finnegan JJ also agreed. Denham J was satisfied that "*no express or settled view*" had yet been reached by the Tribunal as to Mr Gilmartin's credibility: para 238
[17] Para 532 (page 667)
[18] See para 544 (*Watson*) and 546 (*Vakuata v Kelly*)

quite outside the bounds of proper judicial behaviour to establish objective bias, based on judicial statements.*" (my emphasis)*

Fennelly J went on to refer to *Dublin Well Woman Centre v Ireland* [1995] 1 ILRM 408 where the Supreme Court had held that an reasonable apprehension of bias arose from an extra-judicial statement of the judge which "*could reasonably have been interpreted as an expression of opinion on the precise issue in the case*." That was, in Fennelly J's view, "*an exceptional one*."[19]

48. *O' Callaghan v Mahon* was considered by this Court in *Commissioner of An Garda Siochana v Penfield Enterprises*. There the appellants had objected to a particular High Court Judge hearing a committal motion against them on the basis of comments that he had been made when the article the subject of the motion (published in the *Phoenix* which was owned by one appellant and edited by the other) was brought to his attention (in the absence of the appellants) in the course of a civil jury trial. Counsel for the Commissioner characterised the article as a contempt of court and the Judge himself repeatedly characterised it as "*reckless and irresponsible*." He had also stated that it had been published "*with complete disregard*" for the right of the parties to have an unprejudiced jury and urged the State, in the event of repetition, to bring proceedings before the court. Declining to recuse himself, the Judge stated that he was satisfied that he could afford the *Phoenix* and its editor an impartial hearing. He also considered it relevant that no other judge was as familiar with the case as he was.

49. This Court (per Irvine J) allowed the appeal. Irvine J observed that each case turned on its facts (para 41). Having cited one of the passages from *O' Callaghan v Mahon* set out above, she nevertheless sounded a note of caution:

> *"44. While I endorse these views as expressed by Fennelly J. I nonetheless harbour concerns that it is all to easy for judges, because of their long association with litigation and the legal process to fail to recognise the extent to which strongly worded criticism or the forceful expression of their opinion on issues to be decided may have on litigants who come to court perhaps but once in the course of their lifetime. While, of course, they may be comforted by their legal advisors when told the judge has not prejudged the case and will remain open-minded until the very conclusion of the litigation, some may lose confidence in the fairness of the process and end up extracting themselves from the proceedings on adverse terms."*

50. Irvine J went on to express the view that while the guidance given by *O' Callaghan* (and other decisions) was of some value in the context of comments or statements made on an *ex parte* hearing, where a judge "*expresses a strong view concerning the wrongdoing of a party who is not before the court on an ex parte hearing*" it was hard to see how that could benefit the litigation process in the manner described by Fennelly J when referring to comments made in the course of a hearing *inter partes*: para 48.

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[19] Para 550

51. As regards the decision of the judge not to recuse himself, Irvine J considered that he had not directed his attention specifically to the most important issue for consideration, namely whether a reasonable person armed with the knowledge of all of the relevant circumstances, and in particular what the judge had said at the earlier *ex parte* hearing, might reasonably apprehend that the appellants might not receive a fair, balanced and impartial hearing on the contempt motion: para 50. Addressing that question, Irvine J considered that the particular statements made by the judge were such as would, objectively, give rise to such an apprehension: paras 60-67. Those comments "*might realistically lead the reasonable and informed onlooker to apprehend that the judge had prejudged the contempt issue.*": para 67. Having expressed sympathy for the position in which the High Court judge had found himself, Irvine J summarised the factors that led to her conclusion as follows:

> *"69. I regret to say, however, that the repeated reference by the High Court judge to the article of 26th September 2014 as being "reckless and irresponsible" and his description of the article as "reckless and irresponsible journalism", when considered in the context of the inference to be drawn from his reference to the conduct of the rest of the media as well as unsolicited invitation to the Chief State Solicitor to bring a motion for contempt should there be any repetition by Phoenix, satisfies me that the appellants have met the threshold for objective bias as stated by Fennelly J. at paragraphs at para. 80(a) and (d) of his judgment in O'Callaghan (No 2).*
>
> *70. Accordingly, I am satisfied that a reasonable and fair-minded objective observer, who was not unduly sensitive, but who was in possession of all of the relevant facts, might reasonably apprehend that there was a risk that the High Court judge might not afford the appellants a fair and impartial hearing on the contempt motion. I am also satisfied that the reasonable person, when considering the statements made by the High Court judge in the context of an upcoming contempt motion, might reasonably apprehend that he had already prejudged the issue he was about to determine or was prejudiced to the point that he might not be in a position to afford a fair and impartial hearing."*

52. *O' Callaghan v Mahon* was also cited in *Minister for Communications v RW & MW* [2017] IESC 16 where one of the appellants complained of pre-judgment bias in circumstances where, in a bankruptcy matter in the Commercial list of the High Court, the Judge had at the commencement of the hearing indicated that he had read the papers and expressed the view that there was only one issue (relating to the statute of limitations) left in the case. Dunne J (with whose judgment Denham CJ and Charleton J agreed) characterised that complaint as "*entirely misplaced*". It was, in her opinion, "*inevitable that a trial judge in the course of dealing with a matter will make observations and comments in relation to the matter before him.*" In circumstances where it was clear that the particular appellant was able to put all of the arguments and raise all of the issues he wished and an extensive ruling was then given by the Judge, the comments made by him did not give

rise to "*any possible apprehension of bias/pre-judgment*" on the part of the High Court judge.

53. *Minister for Communications v RW & MW* was not cited to us but is in any event simply an application of the principles set out in *O' Callaghan v Mahon*.

54. Both parties also referred to the decision of the Court of Appeal of England and Wales in *Arab Monetary Fund v Hashim* (1993) 6 Admin LR 348. The facts there were somewhat unusual in that a party to litigation objected to the judge continuing to hear the action based on a comment that the judge had made in another court when dealing with another matter during a break in the opening of the first action. The objection was rejected by the trial judge and that decision was upheld on appeal.

55. Giving the judgement of the Court, Bingham MR stated that:

> *"the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything that may prematurely indicate a closed mind. But a Judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the Judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be." (356, B-C)*

56. Arab Monetary Fund v Hashim emphasises the importance of the judicial oath (a point also emphasised in the Irish authorities, such as Bula Ltd v Tara Mines Ltd (No 6). A conclusion that there is a reasonable apprehension that a Judge is biased should not be lightly drawn "*especially … when the issue is raised with the Judge, but he concludes that he will be able to judge the merits impartially*." (at page 6C-D, citing with obvious approval a passage from Vakuata).

57. *Arab Monetary Fund v Hashim* was approved and applied in *Singh v Secretary of State for the Home Department*. Having set out the passage recited above, Davis LJ went on:

> *"35 I would respectfully agree. Indeed, such statements sometimes can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed. In general terms, there need be no bar on robust expression by a judge, so long as it is not indicative of a closed mind. In fact, sometimes robust expression may be positively necessary in order to displace a presumption or misapprehension, whether wilful or otherwise, on the part of an advocate or litigant on a point which has the potential to be highly material to the case.*
>
> *36 One other feature of the approach required to be adopted in this context is this. It is necessary to consider the proceedings as a whole in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased…."*

58. Mr Skoczylas also relies on the *Bangalore Principles of Judicial Conduct* [20] and in particular paragraph 2.4, which is in the following terms:

> *"A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, not shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue."*

59. While the Bangalore Principles are not part of Irish law, they have been referred to in a number of Irish authorities, including G*oode Concrete and O' Driscoll v Hurley.* In *O' Driscoll v Hurley*, Dunne J (with whose judgment the remaining members of a full seven judge court agreed) was of the view that they were of assistance "*given that they encapsulate at an international level norms of universal application in relation to such issues as bias, the reasonable observer and the question of recusal*" (at pages 15-16). Nonetheless, as indicated by Denham CJ in *Goode Concrete* (at para 53), "*the test is that of the reasonable observer*".

Discussion

60. The jurisprudence just discussed indicates that every case must be considered on its own facts. It also suggests that the threshold for recusal on grounds of prejudgment – at least where the application is based on comments made in the course of proceedings – is a relatively high one. To recap what was said by Fennelly J in *O' Callaghan v Mahon*, what is required is "*something quite outside the bounds of proper judicial behaviour to establish objective bias, based on judicial statements.*" *Arab Monetary Fund v Hashim and Singh* suggest that comments indicative of a court or tribunal having a "*closed mind*" will fall on the wrong side of the line but that provisional expressions of judicial opinion, even if expressed in relatively robust terms, generally will not.

61. In this area – as in so many areas of the law – there is no bright line rule against which judicial comments can be measured nor is there is any algorithm that can be applied to produce the answer in any particular case. It is a matter of weighing up all of the circumstances against the fundamental principle that justice must not just be done but must also be seen to be done and the corollary of that principle that litigants are entitled to expect and receive a fair trial before a judge or tribunal unbiased and impartial in fact **and** perceived to be such by a reasonable observer.

62 Here the Confirmation Application was listed for hearing before the Judge in the Commercial list. It was both commonplace and entirely proper that the Judge should have read the available papers in advance of the hearing. That is an essential feature of litigation in that list. Having read the papers, it was entirely reasonable (and in practical terms unavoidable) that the Judge should have formed some initial views on the Application. The practice in this Court is to read the papers in appeals in advance and I do not think it could plausibly be suggested that, in doing so, members of the Court should

[20] ECOSPC 2006/23. These Principles were adopted by the Judicial Group on Strengthening Judicial Integrity (the Judicial Integrity Group).

or could be precluded from forming some preliminary views on the contending arguments of the parties. Whether in the High Court, this Court or the Supreme Court, where judges have had the opportunity to read the papers in advance, they are not blank slates nor are they required to present as if they are. If authority is needed for that proposition – and I do not think it is – it is provided by *Minister for Communications v RW & MW*.

63 That the views formed by the Judge were merely preliminary or provisional in nature is, in my opinion, evident from the terms in which they were expressed. Furthermore, the Judge clearly indicated that he understood that Mr Skoczylas would have arguments to make to the contrary effect and made it clear that he would hear those arguments and, against the opposition of the Company, adjourned the Confirmation Hearing to a later date so as to enable Mr Skoczylas to attend. He also gave him liberty to deliver a further affidavit in advance of the adjourned hearing. A reasonable observer would, in my opinion, attach importance both to the terms of the Judge's statements and also to the concrete steps that the Judge took to ensure that Mr Skoczylas would have an opportunity to be heard, steps which would have had no purpose if the Judge had made up his mind.

64 The manner in which the Judge dealt with the application to recuse himself is also relevant. In the course of hearing that application, he took considerable care to assure Mr Skoczylas that he had an open mind on the Confirmation Application and, following the conclusion of that application, the Judge gave a detailed Ruling addressing Mr Skoczylas' submissions in detail and comprehensively explaining why he did not consider it appropriate to recuse himself. In giving that Ruling, the Judge applied the correct principles and asked himself the correct question, namely whether a reasonable and fair-minded objective observer would have reasonably apprehended that there was a risk that he would not be fair or impartial in hearing the Confirmation Application.[21] While the Judge's conclusion is not, of course, determinative of the issue before this Court, in my view, it is clearly entitled to weight and that approach accords with the authorities referred to above.

65 Insofar as Mr Skoczylas argues that the Judge applied a "*new paradigm*",[22] I do not agree. The Judge gave his Ruling by reference to the relevant authorities and, while he understandably attached importance to those authorities that specifically addressed the issue of pre-judgment arising from judicial statements, he did not lose sight of the underlying principles set out in the case-law relied on by Mr Skoczylas.

66 I do not overlook Mr Skoczylas' complaint to the effect that the statements made by the Judge were made in his absence. I readily accept that that fact is material to any assessment of the objective bias issue. However, I do not consider that it is determinative in itself or that any different test applies to statements made in the absence of a party.

67 Here the reasonable observer would be aware that the Judge made his comments in the absence of Mr Skoczylas. However, that observer would also be aware that the comments

[21] Day 1, page 11.
[22] Appellant's Written submissions, para 1.17

were made in a context where the Confirmation Application had been listed for hearing and where, accordingly, the Judge had read the papers (which included a lengthy affidavit from Mr Skoczylas). The reasonable observer would also be aware that there was a stenographer in Court and that Mr Skoczylas would receive a transcript of the hearing in advance of the adjourned hearing date (the adjournment being specifically for the purpose of allowing Mr Skoczylas to attend and be heard) and would therefore be in a position to address the comments made by the Judge on that date.

68 I am not convinced that it is particularly useful in this context to engage in factual comparisons with other decided cases. However, given the reliance placed by Mr Skoczylas on *Commissioner of An Garda Siochana v Penfield Enterprises*, it is perhaps appropriate to observe that there are a number of material differences between that case and the appeal here. *Commissioner of An Garda Siochana v Penfield Enterprises* involved an application for committal, a quasi-penal procedure. The comments previously made by the High Court Judge were in strong and unqualified terms and effectively could be interpreted as indicating that the High Court judge was of the view that a contempt had been committed. He had also, in the words of Irvine J, issued "*an unsolicited invitation*" to the State's solicitors to bring a motion for contempt in the event of a repetition of the offending publication.

69 While I appreciate that this is ultimately (and necessarily) a matter for judgment, where differences will frequently be of degree and not of category, the statements at issue here appear to be materially different to the statements in *Commissioner of An Garda Siochana v Penfield Enterprises*. In addition – and this was clearly an important aspect of the Court's decision in that case – in refusing to recuse himself, the Judge did not address the critical issue of whether his earlier remarks could give rise to a reasonable apprehension of bias. In contrast, throughout the recusal application and in his Ruling on it the Judge here articulated and applied the correct test.

70 As regards Mr Skoczylas' reliance on para 2.4 of the Bangalore Principles, I am inclined to agree with the submission of Counsel for the Company that this is concerned with extra-judicial comments by judges, rather than statements made in the context of judicial proceedings. Whether that is so or not, it appears to me that what is said in para 2.4 is no more than a specific application of the principles underlying the Bangalore Principles, principles which are firmly embedded in Irish law and which I have discussed in detail above. In any event, even if para 2.4 were to be regarded as setting down an applicable rule, for the reasons set out above I do not consider that the statements made by the Judge here could properly be said to such as "*might reasonably be expected to affect the outcome of .. proceeding or impair the manifest fairness of the process."*

71 For these reasons, I would dismiss Mr Skoczylas' appeal against the Recusal Order. In doing so, however, I would echo the observations of Irvine J in para 44 of her judgment in *Commissioner of An Garda Siochana v Penfield Enterprises* (set out above). It is important that judges do not make comments prior to or in the course of hearing

proceedings that could give rise to legitimate concern on the part of one party or the other that the judge has arrived at a conclusion prematurely.

72 Lawyers understand the value of a court engaging with arguments in the course of a hearing and nothing that I say is intended to call that practice into question. However, where, as here, only one party is before a court, and where that court is not embarking on a substantive hearing, great caution should be exercised in expressing any view on the merits, however qualified or provisional, to avoid giving rise to unnecessary concern. Courts must also appreciate that comments which may appear unexceptional to lawyers who are well-versed with the way that litigation operates may raise understandable concerns on the part of litigants, even when represented and more so again in the case of unrepresented litigants.

The Appeal against the Confirmation Order

73 I now turn to the substantive appeal against the Confirmation Order. I should record that, when he began his submissions, Counsel for the Company very properly informed the Court that, there having been no stay on the Confirmation Order, the Company had proceeded to register the resolution in accordance with the provisions of section 86 of the 2014 Act and that, as a result, the resolution had already taken effect so that the deferred shares have been cancelled. It was not suggested that the appeal against the Confirmation Order was thereby rendered moot.

74 In both the High Court and in this Court, Mr Skoczylas contended that the Company had elected to have the cancellation of the deferred shares "*approved and scrutinised*" in circumstances where, he argued, High Court approval was not in fact required. This is a somewhat curious complaint given that it was by virtue of the Confirmation Application that Mr Skoczylas had a forum in which to press his objections to the cancellation of the deferred shares. In any event, Mr Skoczylas is mistaken. While he contends that the Summary Approval Procedure (SAP) provided for in section 84(2)(a) & (3) of the 2014 Act could have been utilised by it, the fact that the Company is a plc meant that it was precluded from adopting the SAP: section 1002(3) of the 2014 Act and the Table to that section.

75 It follows that the Company was obliged to apply to the High Court for an order confirming the special resolution which had been passed by shareholders at the Company's AGM on 10 May 2017. That the constitution of the Company permitted it to reduce its share capital was not disputed nor was the fact that the resolution had been passed by the requisite qualified majority and that all other applicable procedural requirements had been complied with.

76 Section 85 of the 2014 Act is silent as to the criteria and considerations that apply when an application for confirmation is made. Where creditors appear and object, certain consequences ordinarily follow: section 85(4). However, the court can disapply those provisions: section 85(5). It did so here, without controversy. Even where there are no objecting creditors, the court has a discretion whether or not to make the order sought: see Courtney, *The Law of Companies* (4th ed; 2016) ("*Courtney*") at para 10.107, citing

(*inter alia*) the decision of the High Court (Barrett J) in *Re Permanent TSB Group Holdings plc* [2015] IEHC 500.

77 *Re Permanent TSB Group Holdings plc* concerned an earlier application by the Company for confirmation of a capital reduction, in the form of the cancellation of the amount standing to the credit of the Company's share premium account. That application came before Barrett J who granted the orders sought, against the objections of (*inter alia*) Mr Skoczylas.

78 Certain procedural objections were raised which are not material here. As regards the substantive application, Barrett J referred to *Re Ratners Group plc* [1988] BCLC 685 and the summary of factors in *Palmers Company Law* (25th ed 2011) and drew from those sources six factors by reference to which the Court's discretion to approve the proposed capital reduction fell to be exercised, as follows:

> **"Six factors that underpin the court's discretion.**
>
> *42. Based upon the foregoing it appears to the court that the following six factors require to be satisfied when a party comes to court, as happened here, seeking a confirmation of a proposed capital reduction:*
>
> *That:*
>
> *(1) in a case to which the Act of 1963 applies, the company is authorised by its articles of association to resolve to reduce its capital.*
>
> *(2) the company duly resolved by special resolution to reduce its share capital.*
>
> *(3) the reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment;*
>
> *(4) the reduction of share capital is for a discernible purpose;*
>
> *(5) all shareholders are treated equitably; and*
>
> *(6) the creditors of the company are safeguarded.*
>
> *43. The first factor identified derives from s.72 of the Act of 1963. The second to fifth factors derive from the above-quoted synthesis of principle in Palmer's Company Law. The sixth arises from a consideration of s.73 of the Act of 1963 and/or s.85 of the Act of 2014."*

79 Here we are concerned with the provisions of the 2014 Act rather than the 1963 Act but for present purposes there does not appear to be any material difference between them such as would impact on Barrett J's analysis.

80 Before discussing further the application of these factors in the circumstances presented here, I note that Mr Skoczylas placed significant reliance in his submissions to this Court

(as he had in the High Court) on the decision of the Supreme Court in *Re John Power and Son Ltd*. [1934] IR 412. That case concerned an application for the approval of a reduction of capital in the context of a scheme of arrangement. In confirming the reduction over the objections of certain preferential shareholders (thereby reversing the decision of the High Court), the Supreme Court rejected the contention that, where a resolution had been passed by the requisite statutory majority of members, then - at least in the absence of bad faith or any misleading statement to the shareholders - the court was bound to give its approval. The court, it held, should be astute to ensure that the majority was not seeking to coerce the minority in pursuit of its own interests, was acting *bona fide* and that the scheme was one which persons acting honestly would regard as reasonable or whether there was any reasonable objection to it such that a reasonable man might say he could not approve of it (at page 424, per FitzGibbon J).

81 *Re John Power and Son Ltd*. is, of course, binding on this Court and on the High Court but I see no inconsistency between the approach advocated by that decision and the approach articulated in *Re Permanent TSB Group Holdings plc* and the authorities referred to by Barrett J. There is no doubt that the fact that a capital reduction resolution has been approved by a large majority of shareholders is not, in itself, determinative of the issue of whether it ought to be confirmed or not. Were it otherwise, no useful purpose would be served by requiring court confirmation, given that the passing of a special resolution is a statutory pre-requisite in any event. But section 85 is equally not to be construed as conferring a minority veto on a capital reduction. An objecting shareholder(s) is in every case obliged to establish a basis for their objections sufficient to justify the exercise the court's discretion against giving the confirmation sought.

82 The real battleground here concerns whether all shareholders were treated equitably. Before addressing that issue further, however, there is also a dispute as to the need for and/or the purpose of the capital reduction here. In light of the evidence put before the High Court by the Company,[23] the Judge's conclusion that "*there is a very clear, clearly discernible purpose for the cancellation of the capital and the that payments that would follow .. that is compliance with ongoing regulatory capital requirements*" and his conclusion that the application before him was made "*genuinely*" and that the reduction was for the overall benefit of all of its shareholders are, in my opinion, unimpeachable.[24] There was some debate before us as to whether the JST correspondence exhibited went so far as to direct the Company to effect the capital reduction. In my opinion, it is not necessary to resolve that issue. The Company was not required as a proof in its application to show that the reduction was being effected as a result of a JST direction. Conversely, proof of such a direction would not in any event relieve the High Court of its statutory obligation to scrutinise the proposed reduction. What was required was evidence that the reduction had a discernible and *bona fide* purpose and I agree with the Judge that the evidence was all one way on that issue. An element of that evidence was the fact – clearly established that by the material before the High Court – that the JST was aware of and supported the proposed capital reduction in the context of the Company's

[23] In particular the evidence of Mr Crowley at paras 16, 17, 26 and 27 of his Affidavit.
[24] Day 2, at pages 171-173

compliance with its ongoing regulatory capital obligations. Insofar as the issue was a live one before this Court, I am of the view that the Judge was correct in his findings as to the role of the JST and the ECB.[25]

83 In the High Court, Mr Skoczylas contended that the information provided to shareholders was inadequate. In his submission, the issues which he was canvassing by way of opposition to the Confirmation Application "*should have been in an encapsulated form brought before the shareholders.*"[26] The Judge rejected that contention and the Mr Skoczylas' Notice of Appeal impugns the correctness of that conclusion. However, the issue was not really addressed in the submissions to this Court. In any event, as so formulated, this ground of objection is essentially dependent on Mr Skoczylas' substantive objections to the cancellation of the deferred shares. If, contrary to his contentions, the cancellation is not inequitable, then clearly the Company was under no obligation to advise shareholders that it was. Conversely, if the cancellation is inequitable as Mr Skoczylas contends, that will obviously dictate that the cancellation not be confirmed,

84 In approaching that issue, there is no significant dispute as to the principles to be applied. They are conveniently stated in MacCann, *The Companies Acts* 1963-2012 (2012), at page 167:

> *"**Reduction must be fair and equitable**: A reduction of share capital will not be confirmed by the court it is unfair or inequitable as between the shareholders generally or between different classes of shareholder."*

A number of authorities are cited by the editors as authority for this statement, including the decision of the House of Lords in *British and American Trustee and Finance Corporation v Cooper* [1894] AC 399 which is relied also by Mr Skoczylas, particularly the statement of Lord Herschell (at page 406) to the effect that:

> *"There can be no doubt that any scheme which does not provide for uniform treatment for shareholders whose rights are similar, would be most narrowly scrutinised by the court and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably."*

85 A key point in this passage is the reference to shareholders "*whose rights are similar*". That usefully serves to emphasise that the issue of equitable/fair treatment cannot be assessed at the level of abstract principle. Instead, it requires focus on the concrete rights, interests and obligations of the shareholders, or classes of shareholders, concerned. That is the point made in the passages from *Courtney* on which Mr Skoczylas relies in this context.[27] The rights, interests and obligations of shareholders are those rights, interests and obligations as arise from the contract between company and shareholder i.e. the articles of association. Mr Skoczylas cites a number of cases to the effect that the shareholders have rights which can properly be regarded as property rights and which are, as such, constitutionally protected: see for instance *Kerry Co-Operative*

[25] Day 2, at page 171.
[26] Day 2, at pages 123.
[27] Chapter 15 of the 2nd Edition (chapter 8 of the 4th edition)

Creamery Ltd v An Bord Bainne Co-Op [1990] ILRM 664. That is undoubtedly so but, once again, these rights are not abstractions and cannot be meaningfully delineated without reference to the articles of association. On the contrary, as Costello J emphasised in *Kerry Co-Operative Creamery Ltd v An Bord Bainne Co-Op* "*their nature and extent are to be ascertained by reference to the contract it has entered into with the society whose items are contained in the society's rules*." (*Kerry Co-Operative Creamery Ltd v An Bord Bainne Co-Op* was concerned with shares in an industrial and provident society whose rules were the equivalent of the articles of a company).

86 A striking feature of Mr Skoczylas' submissions, both in the High Court and in this Court, was his evident unwillingness to engage with the Company's Articles of Association and what they actually provide as to the rights, interests and obligations of the holders of the deferred shares. It will be recalled that the class of deferred shares was created by virtue of the Direction Order which provided for "*the consolidation of 289 ordinary shares of EUR0.001 each out of every 320 ordinary shares arising from the Sub-Division into one deferred share of EUR0.289, having the rights and being subject to the restrictions attaching to the deferred shares as are set out in the articles of association to be adopted pursuant to paragraph B.1.1(c) hereinafter*". Those articles were attached to the Proposed Direction Order and were accordingly before the Court when it made the Direction Order. In the words of the Judge, these changes were "*part and parcel*" of the Direction Order.[28]

87 There appears to have been some delay in the formal adoption of the new Articles of Association. Before the Court are a Memorandum and Articles of Association as amended by ordinary resolution passed on 8 April 2015. The Articles provide for the deferred shares in Regulation 2. Regulation 2(b) makes it clear that the deferred shares (i) are not transferable with the prior written consent of the Directors; (ii) have no right to participate in the profits of the Company available for dividend or distribution; (iii) on a winding up or other return of capital shall be entitled to participate only to the repayment of the amount paid up or credited as paid up on the deferred shares and then only after the holders of the ordinary shares have received repayment of the amount paid up or credited as paid up on thos ordinary shares "*in addition to the payment in cash of €10,000,000 to the Holder of each Ordinary Share then in issue."*

88 It appears that those Articles were replaced by new Articles adopted by special resolution passed on 10 April 2015. Apart from a difference in the number of deferred shares referred to in Regulation 2(a), Regulation 2 is otherwise in identical terms.

89 Those Articles were in turn amended by special resolution passed on 17 April 2015. The amended Regulation 2 differs from its predecessors as regards the rights of deferred shares in respect of return of capital providing that on a winding up or other return of capital, the holders of the deferred shares:

> *"shall, prior and in preference to any repayment of capital or distribution of any of the assets of the Company to the holders of the Ordinary Shares, with equal*

[28] Day 2, page 91.

priority and pro rata solely amongst the holders of the Deferred Shares in proportion to the number of Deferred Shares held by them at the time, be entitled to receive by way of return on capital an aggregate amount of €1,500,000 and the holders of the Deferred Shares shall have no further right to participate in any such winding up (whether by way of distribution of assets or participation in any surplus or otherwise) or to return of capital beyond such amount."

In response to a query raised by the Court, Counsel for the Company explained that the Articles were amended to provide for this preferential payment of €1,500,000 for regulatory capital purposes by ensuring that the repayment of capital to the ordinary shareholders was effectively deferred. We were told by Mr Skoczylas that this amendment was opposed by most shareholders other than the Minister but it appears that it was not the subject of any court challenge.

90 Unsurprisingly, in its submissions the Company placed significant reliance on the Articles. In the Company's submission, on the cancellation of the deferred shares the holders of those shares would receive everything they were entitled to under the Articles. That being so, the Company submitted that the capital reduction accorded strictly with the rights of the deferred shareholders and was therefore unobjectionable, relying on the decision of the House of Lords in *House of Fraser v AGCE Investments* [1987] BCLC 478.

91 As I have already observed, Mr Skoczylas effectively chose not to engage with this debate. In the course of the hearing in the High Court, he accepted that the proposed capital reduction, and in particular the terms of payment to be made in respect of the deferred shares, was in accordance with the Articles.[29] Before this Court there was some discussion about the number of deferred shares that the Minister held but, in essence, Mr Skoczylas appeared once again to accept that the terms of cancellation accurately reflected the Articles.

92 The core of Mr Skoczylas' case, he explained, was that the Court had to look at how the deferred shares were created and allocated as well as adequacy of the €1.5 million as compensation for the "*original shareholders*" (also referred to by him as the "*minority shareholders*"), which according to him were 135,000 in number. While he emphasised that the onus on him was merely to show that the terms of cancellation were inequitable in that they did not adequately compensate those shareholders, Mr Skoczylas' contention before this Court (as it had been before the High Court) was that compensation of €80 million was required. That amount, he explained, was the product of the nominal value of the ordinary shares in the Company at the point in time that the deferred shares were created (€0.32 per share) multiplied by the number of ordinary shares at that time (277 million). Absent such compensation, Mr Skoczylas argues, the cancellation of the deferred shares would involve expropriation of the property rights of the holders of those shares.

93 In my opinion, this submission bears no relationship to commercial or legal reality.

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[29] Day 1 at page 188.

94 In considering the Confirmation Application, the High Court correctly took the view that the relevant frame of reference comprises the Articles and the rights of the deferred shares under those Articles. The only value of the deferred shares under the Articles is as set out above i.e. their entitlement to share *pro rata* in the distribution of the sum of 1.5 million.

95 In my opinion, there is no basis for the suggestion that any greater value is embedded in the deferred shares. The Direction Order made by the High Court, and upheld on appeal to this Court, provided for the creation of the class of deferred shares explicitly on the basis that those shares would have **no** economic value. That is clear from the terms of Regulation 2 of the draft Articles which were before the Court when it made the Direction Order. As a result of the amendment of Regulation 2 on 17 April 2015, the deferred shares were allocated a fixed value of €1.5 million. Their value is no more or less than that.

96 The measures provided for by the Direction Order clearly had the effect of very significantly diluting the shareholdings of the "*original shareholders*". However, the Direction Order cannot be questioned in these proceedings. Equally, the Court cannot assess whether the cancellation of the deferred shares is equitable or fair by reference to the state of affairs that existed before the making and implementation of the Direction Order. The rights, interests and obligations of the "original shareholders" were altered irrevocably by the Direction Order, in a manner which the High Court and this Court has held to be valid and lawful. The lawfulness and reasonableness of the Minister's intervention in 2011, and the fairness of his treatment of the "*original shareholders*", are not issues in the Confirmation Application. Rather, they were issues in the Section 11 Application and were determined in that Application.

97 Accordingly, it is not now open to Mr Skoczylas to maintain, either directly or indirectly, that the terms on which the Minister acquired their shareholding in the Company were unfair to those shareholders or that compensation is due to those shareholders arising from the Direction Order or the steps that it authorised, including (but not limited to) the creation of the deferred shares.

98 In any event, there is simply no basis, in law or in commercial common-sense, for suggesting that the value of any company at any given time ought to reflect the cumulative nominal value of its issued shares, which appears to be the basic premise of Mr Skoczylas' argument. As to the suggestion that the Company's shares had a value of €80 million at the relevant time, that appears to be predicated on assertions and/or assumptions as to the financial strength and value of the Company as of June/July 2011 that are wholly inconsistent with the findings of fact made by the O' Malley J in her 2014 judgment and in particular the findings I have noted above from para 41.2.9- 41.2.14 of that judgment.

99 To put this in some form of sensible perspective, the Minister paid €0.063 per share in 2011. That was a 10% discount on the market price as of 23 June 2011. The suggestion that the Minister ought to have paid existing shareholders a total of €80 million, based on

the *nominal* value of their shares (€0.32 per share), which was a multiple of the price being paid by the Minister for the shares being issued to him, makes no sense. Any such payment would never have been permitted by the European Commission (the judgment of Hogan J in this Court explains how significant was the fact that price paid by the Minister represented a discount on the market price in the Commission's State Aid assessment) because it would have represented a significant windfall to shareholders. Payment of that amount to shareholders as "*compensation*" for the cancellation of their deferred shares (leaving them with their ordinary shares) would similarly represent an extraordinary and unwarranted windfall for them at this stage.

100 In Mr Skoczylas' submissions to this Court (as in the High Court) there was much discussion of the financial statements of the Company, of statements made by the Company (in submissions to the Minister seeking to persuade the Minister not to proceed down the Direction Order route), as to the financial status of the Company and the fair value of its shares and of the issue of whether the Company was solvent as of June/July 2011. Those submissions are nothing to the point, as they fail utterly to engage with the reality of the Company's position at that time, as recorded in the findings of fact made by O' Malley J in the first High Court judgment. In any event, the suggested contradictions/inconsistencies on which Mr Skoczylas places such emphasis are more apparent than real. As was explained by O' Donnell J. in *Permanent TSB Plc v Skoczylas* [2019] IESC 78 – in which the Supreme Court upheld an interlocutory injunction restraining Mr Skoczylas from prosecuting disqualification proceedings against directors/former directors of Permanent TSB plc -

> *"58…. 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."*

101 Mr Skoczylas' argument that his objections do not impugn the Direction Order because that Order does not address the cancellation of the deferred shares (though, he says, it might have done) or determine that the shares could be cancelled without compensation must also be rejected. The objections he makes to the cancellation of the deferred shares, the complaints he makes of expropriation of property, transfers of value and so on could only be entertained if the Direction Order is disregarded. At this stage, however, that Order is a fixture in the legal landscape and once one takes as the starting point the

position of the Company following the making and implementation of that Order, then the complaints of inequitable treatment, expropriation and so on necessarily fall away. All of the deferred shareholders are being treated in precisely the same way and in accordance with their entitlements under the Articles.

102 I would add in fairness to the Judge that the suggestion that he was confused as between *deferred* shares on the hand and *preferred/preference* shares on the other is without foundation. The Judge correctly had regard to the provisions of the Articles in considering the nature and rights of the deferred shares and correctly identified those rights.

103 Looking at the cancellation of the deferred shares through the prism of the Supreme Court decision in *In Re John Power and Son Ltd,* in my opinion the evidence clearly establishes that the cancellation is not motivated by any bad faith, does not involve the majority seeking to coerce the minority in pursuit of its interests, is, in my opinion, one "*which persons acting honestly would regard as reasonable*" and to which no reasonable objection, such that a reasonable person might say he could not approve of it, has been identified by Mr Skoczylas.

104 The final issue to consider is the argument made by Mr Skocylas that the cancellation of the deferred shares on the terms proposed would involve a breach of EU law.

105 Mr Skoczylas says firstly that the Company is an emanation of the State by reason of the majority stake held by the Minister for Finance. That proposition does not appear to be in controversy. On that premise, he then contends that the cancellation of the deferred shares on the terms proposed would be in breach of Article 85 of Directive 2017/1132 which provides that "*for the purposes of the implementation of this Chapter, the laws of the Member State shall ensure equal treatment to* ***all shareholders who are in the same position****.*" (my emphasis).

106 In his submissions in the High Court, Mr Skoczylas contended that the cancellation of the deferred shares "*allow it [the State] to directly benefit from this move ie they will now pay themselves as is obviously admitted in the Grounding Affidavit to balance (sic) of the 80 million in question..*" In his written submissions on appeal, (para 4.28) Mr Skoczylas asserts that Article 85 precludes an emanation of the State from cancelling the deferred shares "*and in return not paying the original shareholders holding the deferred shares at least the nominal value of those shares*..".

107 It appears to me that there is no factual basis whatever for the suggestion that the cancellation of the deferred shares will result and/or is intended to result in a benefit to the State (beyond its receipt of its *pro rata* share of the €1.5 million payment). More generally, all holders of the deferred shares are being treated in precisely the same way. In fact, it seems clear that it is Mr Skoczylas that is, in fact, advocating for differing – and therefore prima facie discriminatory – treatment of different cohorts of deferred shareholders. His contention appears to be that "*original shareholders*" who hold deferred shares should be paid materially more for those shares than persons who acquired shares

subsequently. That contention derives no support whatever from the provisions of Article 85.

108 Accordingly, I do not see any merit in the Article 85 argument.

109 Mr Skoczylas also seeks to rely on Article 47 of the Directive. Article 47 provides that "*[s]hares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par."*[30] It is not clear whether Article 47 was invoked in the High Court. It is also unclear whether it could have direct effect against the Company (given that the issue of shares necessarily took place *before* the Minister gained control of the Company). In any event, the complaints made all relate back to the Direction Order and, if it is said that there was any frailty in that Order because of any alleged inconsistency with Article 47, that should have been raised in the Section 11 Application. Finally, as a matter of fact, these complaints appear to disregard the fact that the Direction Order provided for the sub-division and consolidation of the ordinary shares of the Company, effectively re-nominalising the ordinary shares as shares of €0.031 – which were then issued to the Minister for a price (€0.06345) that exceeded that **nominal** value.

110 Again, I cannot see any merit in the Article 47 argument.

111 Finally, Mr Skoczylas invokes Article 63 TFEU. He contends that "*cancellation of the 'deferred shares' without any adequate compensation to the minority shareholders is liable to deter investors from other Member States and consequently affect access to the market*", citing a number of CJEU judgments in support of that proposition.[31]

112 Again, this argument is disconnected from the evidence, which makes it clear that the deferred shares have little or no economic value, that such value is being paid out and that all deferred shareholders are being treated equally and in accordance with the Articles of the Company. The suggestion that compensation ought to be payable to the "*minority shareholders*" implicitly – but necessarily – seeks to re-open the issues concerning the effect and validity of the Direction Order which, as far as this Court is concerned, have been finally determined in this jurisdiction.

113 I will address the request for a reference to the CJEU separately below.

114 For these reasons, which are entirely consistent with the Judge's analysis, I would dismiss Mr Skoczylas' appeal against the Confirmation Order.

The Appeal against the Costs Orders

115 As already noted, there are a number of different aspects to the costs appeal. I will deal with the costs of the substantive Confirmation Application first and then consider the costs of the Recusal Application.

[30] Para 4.29 of his submissions to this Court.
[31] Submissions at 4.30

116 Before doing so, it is appropriate to recall that this Court's review of the costs orders made by the High Court starts from the position that significant weight is to be given to the Judge's exercise of his discretion in respect of costs: see for instance the decisions of this Court in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 and *Lawless v Aer Lingus* [2016] IECA 235.

Costs of the Confirmation Application

117 I can see no basis for interfering with the Judge's exercise of his discretion regarding the costs of the Confirmation Application. It is clear from the Ruling given by him that the Judge correctly understood the authorities opened to him, notably the decision of the Chancery Division in *Re Peninsular and Oriental Steam Navigation Co* [2006] EWHC 3279 (Ch). Nothing in that decision, or in the authorities referred to in it, supports Mr Skoczylas' contention that he had any entitlement to the costs of opposing the application for confirmation, notwithstanding that his opposition was unsuccessful. The furthest those cases go is to indicate the existence of a practice to the effect that, ordinarily, objectors will not be required to pay the company's costs even when the application for confirmation succeeds. The authorities indicate that the courts can – and sometimes have – gone further and directed the company to pay the costs of the unsuccessful objector but it is clear that there is no settled practice to that effect, still less any such rule of law. The Judge here made no order against Mr Skoczylas – despite being urged to do so by the Company – but clearly did not consider that whatever assistance had been afforded to the Court by his submissions justified awarding him his costs against the Company. That was quintessentially a matter for the judgment of the High Court Judge and I can see no basis for interfering with that judgment. For completeness I would add that Mr Skoczylas also relied on the fact that the Company's application was unnecessary: as I have already explained that is not correct. Finally, the Company's failure to respond to a Notice to Admit Facts served shortly before the Confirmation hearing had no bearing on the issue of the costs of the Confirmation Application.

118 As for the Company's cross-appeal, this must equally be rejected in my view. In essence, the Company argues that the Judge was wrong to conclude that he had derived some, limited, assistance from the submissions of Mr Skoczylas. I do not understand how such a submission could be entertained on appeal. The Judge was best-positioned to assess the extent to which he derived assistance from Mr Skoczylas' submissions and this Court has no basis for second-guessing his view in that regard.

Costs in respect of the Recusal Application

119 The Judge took the view that the application for recusal did not raise any novel issues or points of exceptional public importance.[32] In the Judge's view, Mr Skoczylas was intelligent enough to have appreciated that the application was a matter of seriousness and that it should have only been brought in the light of "*a very strong factual matrix*" which he considered was not present in this case. The application "*wasn't warranted*". (page 81).

[32] Transcript of 30 April 2018, pages 80-81

120 Mr Skoczylas says that he should have been awarded the costs of the recusal application (Submissions, para 4.31). In the alternative, he says that no order should have been made (4.39) and also objects to the form of order made (4.40) on the basis that the amount directed to be paid was arbitrary and that he had no opportunity to make submissions on the amount. He also says that the order would cause hardship to him (4.46).

121 It is clear that the Judge, having decided to make an award of costs against Mr Skoczylas, thought that the form of order he went on to make was in ease of the parties (because it avoided the cost and delay of taxation) and that the amount of costs measured by him was lower than the likely level of taxed costs.[33] Nevertheless, Mr Skoczylas was not given an opportunity to make submissions on *quantum* and the Court can only speculate on what taxed costs might ultimately have been.

122 In making a costs order against Mr Skoczylas, the Judge appears to have been significantly influenced by his view that the application was not "*warranted*", which I understand to mean that the application was not simply one that had been unsuccessful but was one which ought never to have been brought. Mr Gallagher did not quarrel with this understanding of the Judge's Ruling. I respectfully disagree with the Judge's view. Although I have concluded that the Judge was correct to refuse the Recusal Application, in all of the circumstances (rehearsed in detail above), I would be reluctant to criticise Mr Skoczylas for bringing the application nor would I be willing to characterise that application as unwarranted, in the sense indicated by the Judge. It was not, in my opinion, a frivolous application nor does the material before this Court indicate that the application was made other than *bona fide*, in circumstances which were not of Mr Skoczylas' making.

123 Although the Judge is entitled to a significant margin of appreciation in relation to the issue of costs, given that the view that he took was based on a characterisation of the Recusal Application which does not appear to me to be appropriate, I consider that I am free to reach my own view as to the appropriate order. In my view the appropriate order to make in the particular circumstances is to set aside the costs order made by the Judge and to substitute for it an order that here be no order for costs in respect of the Recusal Application. In the particular circumstances here, I do not think that it would be consistent with the interests of justice to require Mr Skoczylas to pay any part of the Company's costs in relation to the Recusal Application.

124 That conclusion is, I emphasise, one founded on the particular facts and circumstances here. I do not mean to imply that any special costs rule applies to applications for recusal generally, or to applications based on alleged pre-judgment in particular. It may be that there is an argument to be made that applications for recusal are not, or at least may not always be, comparable to the kind of *inter partes* dispute that falls squarely within Order 99 but no argument to that effect was made to this Court and accordingly I express no view on that issue. However, even on the basis that the ordinary rule that "*costs follow*

[33] Transcript of 30 April 2018, at pages 83

the event" is applicable, it appears to me that there were, on the facts, sufficient special circumstances to justify a departure of that rule, to the limited extent of making no order as to costs.

125 In the circumstances it is not necessary to address the further points made regarding the form of the costs order or the quantum of costs awarded (including the alleged failure to give Mr Skoczylas an opportunity to be heard on the *quantum*).

The Appeal against the Slip Rule Order

126 This appeal is effectively a moot in light of the fact that the underlying order for costs is being set aside.

127 In any event, although there was undoubtedly a degree of confusion on the issue of VAT, the Judge ultimately indicated that he intended to direct payment of €20,000 plus any applicable VAT.[34] The Order as initially drawn up did not accurately reflect that and it follows that the Judge was entitled to correct the Order under the slip rule and/or the Court's inherent jurisdiction.

REFERENCE TO THE CJEU

128 Mr Skoczylas asks the Court to refer questions to the CJEU relating to Article 63 TFEU and Articles 85 and 47 of Directive 2017/1132. He asserts that, as "*the national court of last resort*" we are obliged by Article 267 TFEU to make such a reference: submissions, para 5.1.

129 The questions we are asked to refer are as follows:

> *"Regarding an interpretation of Article 63 TFEU and of Art. 85 of Directive (EU) 2017/1132*
>
> *A In the circumstances, such as the circumstances of this case …. ,must Art 63 TFEU and/or Art 85 of Directive (EU) 2017/1132, combined with the principle of proportionality under EU law, be interpreted as precluding the company in question from cancelling the deferred shares in question, and in return paying the original shareholders holding the deferred shares only c €140,000 in aggregate (i.e. massively below the nominal value of those shares worth originally in aggregate c €80m), benefitting the Member State as the majority shareholder, as well as the other shareholders who became shareholders following the aforementioned original recapitalisation in question?*
>
> *"Regarding an interpretation of Art. 47 of Directive (EU) 2017/1132*
>
> *B In the circumstances, such as the circumstances of this case, having regard to the CJEU judgment in the case C-41/15 Dowling e a, must the first paragraph of Art. 47 of Directive (EU) 2017/1132 combined with the principle*

[34] Transcript of 30 April 2018, at page 89.

of proportionality under EU law be interpreted as precluding an emanation of the State from contriving an outcome of the following steps:

i) splitting into two groups ordinary shares in a company, such as ILPGH in this case, against a decision of the majority of shareholders

ii) forcing artificially a de facto nil economic value onto one of those groups, such as the deferred shares in this case, with an explicit aim of circumventing the legal provisions prohibiting issuing shares below the nominal value; and then

iii) cancelling the shares with the forced nil value without an adequate compensation to the affected shareholders equal at least to the nominal value that was de facto appropriated."

130 The jurisprudence of this Court is clearly to the effect that it is not a court of last resort and therefore is not under an obligation to refer as if it were pursuant to Article 267: see *Sony Music Entertainment* (Ireland) Limited [2018] 2 IR 623, per Hogan J at paras 95 – 100, as well as the judgment of the same judge in *Byrne (a minor) v O Conbhui* [2018] IECA 57, pars 35-39. As Hogan J observed in those judgments, the Determination of the Supreme Court in *Dowling v Minister for Finance* [2016] IESCDET 40 (yet another chapter in the litigation arising from the 2011 Direction Order) is consistent with that understanding: see para 22 of that Determination.

131 In any event, the questions which we are asked to refer are clearly premised on factual assertions/assumptions that have no foundation in the evidence here and appear to have no actual connection with the issues that properly arise on the Confirmation Application but rather raise issues regarding the Direction Order. The manner in which the questions are formulated is wholly tendentious and they are not capable of eliciting answers that could be of any assistance to this Court in determining the appeals before it. Furthermore, the questions do not appear to raise any real issue of interpretation as opposed to application of the EU law provisions to which they refer.

132 Accordingly, there appears to me to be no basis for any reference to the CJEU.

DISPOSITION

133 For the reasons set out above, I would:

- Refuse the appeal against the Recusal Order
- Refuse the appeal against the Confirmation Order
- Vary the Costs Order to the extent of setting aside the order for costs (measured in the amount of €20,000 plus VAT) in respect of the Recusal Application and substitute no order for costs;
- Affirm the costs order made in the Confirmation Application.
- Make no order in Slip Rule Order

- Decline to make any reference to the CJEU