



THE COURT OF APPEAL

APPROVED

NO REDACTION NEEDED

Record Numbers: [C.A. Nos. 871, 872, 873 and 874 of 2014]

High Court Record Number: [2012 No. 116 MCA]

Haughton J.

Neutral Citation Number [2022] IECA 285

Binchy J.

Pilkington J.

**IN THE MATTER OF IRISH LIFE & PERMANENT PLC AND IN THE
MATTER OF THE CREDIT INSTITUTIONS (STABILISATION) ACT
2020, AND IN THE MATTER OF AN APPLICATION BY THE MINISTER
FOR FINANCE FOR A DIRECTION IN RELATION TO IRISH LIFE &
PERMANENT PLC PURSUANT TO SECTION 9 OF THE CREDIT
INSTITUTIONS (STABILISATION) ACT 2010 AND ANCILLARY
ORDERS**

BETWEEN/

**GERARD DOWLING, PADRAIG MCMANUS, PIOTR SKOCZYLAS,
SCOTCHSTONE CAPITAL FUND LIMITED, JOHN PAUL MCGANN,
GEORGE HAUG, TIBOR NEUGEBAUER, AND J. FRANK KEOHANE**

APPELLANTS

-AND-

THE MINISTER FOR FINANCE

RESPONDENT

-AND-

**PERMANENT TSB PLC (FORMERLY IRISH LIFE AND PERMANENT
PLC)**

NOTICE PARTY

RULING OF THE COURT delivered electronically on the 13th day of December, 2022

1. The Court heard this appeal over two days on 10 and 11 November 2020, and judgment was delivered electronically on 8 November 2022 (Haughton J., *nem. diss.*) (“the Judgment”) dismissing the appeal. All questions of costs (in the High Court, and in this Court) remain to be addressed, and for that reason no order has yet been drawn or perfected. This ruling is not part of the Judgment, but should be read with it, and nomenclature and abbreviations used in the judgment are adopted here.
2. In the Judgment at para.209 the Court affirmed the decision of the trial judge (Peart J.) that the appellants do not have *locus standi* under s.11(1) of the Credit Institutions (Stabilisation) Act, 2010 (as amended) to apply to the High Court to set aside the March Direction Order, which was an order directing the sale by ILP of its life assurance business Irish Life to the Minister for €1.3 million, such sale to be completed on or before 30 June 2012. The Court did not therefore consider

it necessary or appropriate to consider or determine the substantive arguments. Haughton J. concludes "...I would dismiss the appeals", and Binchy and Pilkington JJ. concurred with that order.

3. By notice of motion issued on 24 November 2022 by three of the appellants namely Piotr Skoczylas, Tibor Neugebauer and John Paul McGann ("the applicants"), the following three reliefs are now sought:

"1. An Order to vary or set aside/rescind the judgment of this Court delivered on 8 November 2022 and any order reflecting that judgment, pursuant to the jurisdiction identified in *Re Greendale Developments Ltd (No.3)* [2000] 2 I.R. 514 and reflected in other judgments; and

2. Without prejudice to the foregoing, an order to correct material and decisive errors in said judgment, pursuant to jurisdiction referred to in in, inter alia, *Nash v. DPP* [2017] IESC 51 and *Bailey v Commissioner of An Garda Síochána* [2018] IECA 63; or

3. In the alternative to the above, and without prejudice to any of the foregoing, an order to stay these proceedings and to stay any order in this case, pending the conclusion of the ongoing cases rec. no. 2013/2708P and 2013/2709P (the "constitutional proceedings") in respect of the inconsistency of the Credit Institutions (Stabilisation) Act 2010 (the "2010 Act") with the Constitution and the incompatibility of the 2010 Act with EU law and the ECHR;..."

The first two reliefs will be referred to for convenience as "the review application". The motion is grounded on an affidavit sworn by Piotr Skoczylas on 24 November 2022, and the exhibits to that affidavit.

4. The jurisprudence set out later in this ruling demonstrates that the jurisdiction of a court to review its own decision is an exceptional one. It also indicates that a court asked to review its own decision may consider the papers and make a preliminary ruling on such an application. In *Nash v. D.P.P.* [2017] IESC 51 O'Donnell J., referring to the decision of the Supreme Court in *D.P.P. v McKevitt* [2009] IESC 29, stated:

“12. Important guidance as to the exercise of this jurisdiction was given by this Court in DPP v McKeivitt [2009] IESC 29. There, Murray CJ (Denham, Hardiman, Geoghegan and Fennelly JJ concurring) delivered a ruling on an application to set aside the decision of the Court which had dismissed an appeal pursuant to s. 29 of the Courts of Justice Act 1924 (as amended) on the grounds of an alleged error of fact in the judgment. The ruling referred to the explicit provisions of Art. 34.4.6, observing that when a party seeks to set aside a final decision of this Court a preliminary question always arises as to whether the court has jurisdiction even to entertain such an application. Two important factors had to be addressed in considering whether to re-open a decision which had been delivered:

“Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such.

Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant.”

13. The jurisdiction therefore was aptly described as a “potential jurisdiction” (emphasis in original) to be exercised only in exceptional circumstances and an applicant was obliged to show cogent and substantive grounds which are objectively sufficient to enable the court to enter upon the exercise of wholly exceptional jurisdiction. In the circumstances of that case, the Court considered the error complained of, which had originated in the submissions made on behalf of the DPP but had not been identified or brought to the attention of the Court on behalf of the applicant, was in any event not central to, or indeed, necessary for the determination of the particular issue in the case. Accordingly, the Court did not consider it necessary to hear submissions from either party and refused the application. This decision illustrates, therefore, that the existence of the Greendale jurisdiction, exceptional as it is, does not subtract from the constitutional importance of Art. 34.4.6, and if a court concludes at any

stage that the case is one captured by that Article, then it must dismiss the application since to proceed further would arguably involve a separate breach of the provisions of the Article.

The basic rule established by the Constitution is that justice itself requires that there be an end point to all disputes.”

5. The preliminary question that therefore arises on applications such as the present one is whether it should be entertained or should be dismissed on the basis of the finality of the order/decision. Practice Direction SC17 governs the procedure to be followed in all review applications before the Supreme Court, and provides that an intending applicant must lodge a notice of motion, grounded on affidavit, and provides (para.2) that the papers will then be considered either by a single judge or a panel of three whose function is to decide whether a hearing on the merits is justified (para.3). If satisfied that such a hearing is justified, service of the papers and other directions may follow; if not so satisfied the application is refused.
6. Although there is no applicable rule or practice direction in this Court, the practice has been for the same panel of judges that heard an appeal and delivered judgment(s) to consider applications for review ‘on the papers’, whether those papers are a simple written request for review or a more elaborate motion. Although this has not been the invariable practice of the Court, it is the appropriate one to adopt in the present application.
7. Accordingly having regard to the foregoing, and to the principle of finality of judgments, and the jurisprudence on review of judgments referred to later in this ruling, the Court has decided to follow a similar procedure in this instance. Procedurally the Court has decided that it should give preliminary consideration to the application ‘on the papers’ and in its own terms, and determine whether it meets the threshold for review, and whether a hearing on the merits is justified. Only if it does meet that threshold will the Court issue directions as to further affidavits and legal submissions.

8. In taking this approach the Court has also taken into account an email sent by Mr. Skoczylas to the Court of Appeal Office on 8 December 2022 in which he objected to the Court addressing the motion without giving the parties an opportunity to make submissions, and holding an oral hearing, which he submitted would be a denial of constitutional justice. He suggested that the Court's approach "is untethered from the fundamental principles of an adversarial hearing and a fair trial", and contrary to the right to a fair trial protected by Article 6.1 of the European Convention on Human Rights, and contrary to the practice of this Court in other applications for review. The Court was advised by Costello J. that this request and submission was repeated by Mr. Skoczylas when this motion was listed before her on its initial return date on 9 December 2022. She has also advised that she indicated to Mr. Skoczylas that the panel of judges who were seized of the appeal are dealing with the motion and that she would relay the applicants' request/submission, and that the Court seized of the matter would notify the parties of how it intends to proceed.
9. The Court rejects the request for an opportunity to make legal submissions and/or for an oral hearing at this stage in the process. The finality of judgments and the exceptional nature of the jurisdiction to review mean that an applicant for review must, in the request for review, put forward a cogent argument and/or evidence for exceptionality and, as will be seen, breach of constitutional right. Unless that is done the Court can have no legal right or duty to revisit its primary judgment and decision, or permit further legal submissions or an oral hearing, or even engage with the respondents to the application for review where to do so will incur further legal costs for which there may be no justification. In that regard the application only becomes "adversarial", in the sense of being a contested *inter partes* dispute, when the Court decides that the threshold is met, at which stage appropriate directions can be given to ensure that all sides are heard. Further, the applicants have, in Mr. Skoczylas' 24 page affidavit, propounded four reasons which, individually or in combination, are asserted as the grounds for a review of the Judgment,

and detailed submissions are set out in the affidavit, together with references to caselaw and documents exhibited in support of the arguments.

10. While it is true that in some instances of a request for review the Court of Appeal has directed submissions, and an oral hearing, that is not an invariable practice, and it has certainly not been followed in all instances. The justification for undertaking an initial examination on the papers submitted by an applicant to determine whether the application meets the threshold for review has been explained earlier, and the Court considers it to be the appropriate procedure in the present case.
11. The Court has also taken the view that it is appropriate to address the application for review before addressing any issue of costs. This ruling also does not address the issue of the stay sought as the third relief in the notice of motion, and the contents of Mr. Skoczylas' affidavit relevant to that issue will be addressed at a later date.

The principles relating to the review of judgments

12. It is instructive to start with *Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 where the jurisdiction of the Supreme Court to revisit an earlier decision was first recognised in the judgment of Denham J., with whom Barrington J. and Lynch J. agreed.
13. Before turning to her judgment it is helpful to refer to the judgment of Hamilton C.J. who conducted a review of the jurisprudence up to that point, and with whose judgment the other members of the court agreed. The application for review in that case was based on the grounds that the core issue of *ultra vires* was decided by the court without affording the applicants “any proper opportunity to argue the point – denial of natural/constitutional justice, in breach of Article 40.3 of the Constitution and arts. 6.1 and 14.1 of the European and of the United Nations Conventions respectively”. Hamilton C.J. notes at pp.527 to 528 that under the common law a final order made and perfected could only be interfered with –

“(1) in special or unusual circumstances, or

(2) where there has been an accidental slip in the judgment as drawn up, or

(3) where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.

The restriction on the power of a court to amend or vary an order which has been made and perfected, therein set forth, must apply to an application to set aside an order.”

At p.529 he refers to the further principle accepted at common law that an action may be brought to set aside a judgment or order made by a court which had been obtained by fraud. Referring to the judgment of Barrington J. in *Waite v House of Spring Gardens Ltd.* (unreported, High Court, 26 June 1985) he notes at p.530 –

“In this judgment, Barrington J. accepted that a judgment obtained could be set aside on the grounds of fraud and that the proper method of impeaching a completed judgment on the ground of fraud was by action in which the particulars of alleged fraud were exactly set out.

This involves the issue of a new writ.”

Hamilton C.J. then refers at some length to the important dissenting judgment Denham J. in *Attorney General v Open Door Counselling Ltd (No.2)* [1994] 2 I.R. 333, to which reference is made shortly. He proceeded to reject the application in the following terms:

“It is clear from the judgment of the Supreme Court delivered in this case [1998] 1 I.R. 8 that all the issues raised by the applicants therein including what was described as the core issue (*ultra vires*) were dealt with in the judgment of the court and that regard was had to the submissions (both oral and written) of counsel for the applicants. It may well be that due to a misunderstanding counsel was deprived of the opportunity of elaborating and extending his submission further but the issue was dealt with in the judgment of the court as follows:-

‘....’

The judgment of the court was delivered and the order made in pursuance thereof correctly stated what the court actually decided and was of a final nature. It was the final determination

of the appeal brought to this court in these proceedings and did not contain liberty to any party to apply in respect of any matter contained in the order.”

14. In her judgment in *Greendale* at p.538 Denham J. refers to her dissenting judgment in *Attorney General v Open Door Counselling Ltd (No.2)* [1994] 2 I.R. 333. That application concerned the judgment and order of the Supreme Court made in 1988 applying a perpetual restraint, which was constitutional at the time, restraining the defendants from assisting pregnant women travelling abroad to obtain abortions, or providing them with information. A review was sought by the second named defendant, Dublin Well Women Centre, following two amendments of Article 40.3.3^o which had the effect of allowing women to travel abroad for abortions, and to obtain information in the State on abortion services available in another state. Finlay C.J. for the majority decided that the Court should not adjudicate on the interpretation of the two new amendments, and declined a review. In a forceful dissent Denham J. stated, at p.352:-

“This is one of the rare exceptions when the Supreme Court should exercise its implied non-appellate jurisdiction. Constitutional rights are impinged upon by the order of the Supreme Court on the 16th March 1988. The rights in issue are constitutional rights. There are no facts in issue. There is an element of transiency in the time in which these constitutional rights can be protected.

The Supreme Court has an inherent jurisdiction to protect constitutional rights and justice. This jurisdiction must be exercised sparingly in a non-appellate way as the fabric of the administration of justice and the system of courts is best served by a clear hierarchical structure concluding in the Supreme Court. However, in certain circumstances, to protect constitutional rights, or to ensure that justice is upheld, it is appropriate that the Supreme Court exercise such jurisdiction.”

In *Greendale* Denham J. (as she then was) quotes these passages and goes on to state, at p.543:

“It is only in the most exceptional circumstances that the inherent jurisdiction such as the applicant wishes the Supreme Court to exercise would be exercised. The allegation by the applicant that the order was wrong is not a reason to unlock this jurisdiction.”

Then at p.544 Denham J. states:

“The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.”

15. In his concurring judgment in *Greendale* Barron J. stated, at p.546:

“The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right-minded citizens damage the authority of this court. I believe that the jurisprudence of this court has always been to this effect.”

16. In *L.P. v. M.P.* [2002] I I.R. 219 at p.230 Murray J. (as he then was) in the Supreme Court made the following observations on the exceptional nature of the circumstances that might give rise to the jurisdiction:

“... [S]uch exceptional circumstances could not include rulings made in final instance by a court concerning such matters as the admissibility in evidence even if they have implications for the manner in which a party was allowed to present its case. Rulings on questions of law and procedure are a matter for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality in courts of last instance. Otherwise, I confine myself to saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice.”

This statement was quoted with apparent approval by Clarke C.J. at para.2.7 of his judgment in *Student Transport Scheme Ltd v. The Minister for Education and Skills and Bus Eireann* [2021] IESC 35, where a review sought on the basis of generalised complaints about the way in which the appeal was heard was refused. He concluded:

“8.1 For the reasons set out in this judgment, I am satisfied that the principles established in the Greendale jurisprudence apply equally to an attempt to set aside a determination of this Court refusing leave to appeal. In the context of any such application, and in accordance with the relevant jurisprudence, a party seeking a Greendale order must establish to the very high threshold identified in the case law that there has been a clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, in the manner in which the process leading to the determination in question was conducted.”

17. These judgments demonstrate the type of rare and exceptional circumstances that might justify a review by the Supreme Court based on denial of constitutional justice. The decision in *Greendale* shows that a material denial of a right to natural justice may be a trigger, and *Student Transport* emphasises that the *process* leading to the determination will usually be the constitutional focus. For example, if the Court in a multi-party appeal accidentally overlooked one party’s written

submission which bore on a material point of law, that might cause the Court to revisit its judgment. The *Open Door* case on its extraordinary facts was arguably exceptional, and so engaged with substantive constitutional provisions that it might have led to a review; indeed with the development of this jurisprudence it might now be decided a different way. Another example is what occurred in *Abbeydrive Developments Ltd v. Kildare County Council* [2010] IESC 8 where the Supreme Court invoked the *Greendale* jurisdiction to revisit its judgment in which it had held that the applicant was entitled to a default planning permission. The planning watchdog An Taisce had been misinformed that the planning application at issue had been withdrawn, and had only become aware of the proceedings when the judgment of the Supreme Court was reported. It applied to be heard before the order was perfected, contending that the granting of a default permission would breach the EIA Directive. Kearns P. was satisfied that the exceptional and unusual circumstances left the Court with no alternative if the Court was to do justice. Accordingly the matter raised by An Taisce was remitted to the High Court for hearing and the declaration previously granted by the Supreme Court was made subject to the determination of that issue.

18. It is also clear that a material error fact may give rise to review and correction, as happened in *Nash v D.P.P.* [2017] IESC 51, an important recent decision that is relied on by Mr. Skoczylas in his affidavit. O'Donnell J. (as he then was) opened his judgment in *Nash* as follows:

“1. Every judge, particularly a judge in a final court of appeal lives with the possibility, and sometimes the reality, of judicial error. This should not be surprising. If there was no possibility of judicial mistake, either in fact or law, there would be no need for an appellate system. At a more basic level, there is a well established jurisdiction to alter a decision prior to the making and perfection of the order in a case. See e.g.: *Milensted v Grosvenor House (Park Lane) Ltd.* [1937] 1 KB 717 and in the criminal context *Richards & anor v. Judge O'Donoghue and D.P.P.* [2016] IESC 74. It is not necessary here to discuss the circumstances

in which such jurisdiction may be exercised in civil cases. (See Delany and McGrath, Civil Procedure in the Superior Courts, 3rd ed, paras. 24-32). Judgments and orders may also be amended by the ‘slip rule’, Order 28, to which a reasonably generous interpretation is given: see the observations of Lowry LCJ in *McNichol v Neely* [1983] NI 43 quoted with approval by Murray J in *McMullen v Clancy* [2002] 3 IR 493. There is also a procedure for speaking to the minutes of a final order with a view to clarifying that order. None of this would be necessary if error, or at least the possibility of error, did not exist.

2. The possibility of judicial error in its broadest sense is a particular reality for a court of final appeal. No one has improved upon the statement of Justice Robert H Jackson in *Brown v Allen*, 344 US 443, 540, (1953):

“There is no doubt that if there was a super – Supreme Court a substantial proportion of our reversals of State courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final”.

The awareness that error if made cannot be corrected is a sobering reality which explains in part the time and care courts take to try to ensure that the process is fair, and in particular the outcome, is correct.”

19. Mr. Skoczylas relies particularly on para.s 6 – 7 of the judgment of O’Donnell J.L

“6. I do not doubt that some errors of fact or description can creep into a judgment particularly in matters which are not central to the outcome and reasoning. Sometimes there is a lack of clarity in the information submitted. Sometimes, as occurred in *People (DPP) v. McKeivitt* [2009] IESC 29, there is an error in the legal submissions which is then repeated in the judgment, and on other occasions, there is a simple misunderstanding which is not picked up or clarified in oral argument, or identified by the judge or his or her colleagues. What then is to be done when a party (normally the losing party) considers that a judgment contains errors of fact? In principle, this may arise in all courts but for present purposes I propose to consider

only the position in the Supreme Court. In my view, the first thing that must be done is that the party, and if legally advised, his or her advisors, should make a careful assessment of the nature of the alleged error. If an error is identified, in principle it may be one which is trivial or inconsequential, or it may be of some significance either as a matter of simple accuracy, or because of its potential effect on the legitimate interests of the parties or indeed other individuals. As Clarke J. points out, an example occurred at an earlier stage in this case. Exceptionally, an error may be capable of being so fundamental and central that it should lead to the setting aside of a judgment including perhaps resulting in the reversal of the decision itself. It will be necessary to consider these matters in some more detail but at this stage it is important to emphasise the responsibility that lies upon the party and his or her advisors in making this analysis, and if appropriate advising upon it.

7. This responsibility flows from the significance of an application to court in respect of a judgment delivered. It is sometimes thought that such applications are not welcomed or encouraged because of the potential embarrassment of an error being publicly identified. As Baroness Hale observed in *Re L and B* [2013] UKSC 8, while judicial tergiversation is not to be encouraged, it takes courage and intellectual honesty to admit ones mistake. But those are features required at all stages. The obligation to do justice fairly, and without fear or favour, which guided the judge to give the original judgment, should extend to a willingness to acknowledge error if justice should require it. History has shown in any event, that courts have entertained applications and exceptionally made orders setting aside judgments already given. Courts are, however, reluctant to entertain such applications for different and good reasons. First, the revisiting of old ground inevitably adds to the costs incurred by and the stress imposed upon all the parties involved. It also requires the allocation of scarce time and resources which are therefore necessarily denied to litigants who have not yet had their case heard or considered on appeal. For example, this application has occupied considerable time

both in and outside court. More importantly again, such an application in principle runs directly counter to an important value which the law, and it should be added justice, accords to finality. That applies with particular force in the Supreme Court by virtue of the provisions of Art. 34.4.6 which provides:

“The decision of the Supreme Court shall in all cases be final and conclusive.”

20. Having elaborated on the reasons why finality is so important, O’Donnell J. continued:

“9. The requirement of finality in litigation is not therefore the product of judicial decision or statute. It is encapsulated in the provisions of the Constitution which establishes this Court and which it is bound to uphold. That imposes constraints upon the court when it is invited to alter or set aside its decision. On the plain words of the Constitution it is not permitted and the court is obliged to uphold both the text and the values it espouses.

10. Notwithstanding the apparently all-embracing terms of Art. 34.4.6, there is however an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality. The justification for this is perhaps the fundamental constitutional obligation of this Court to administer justice which is in unqualified terms and is the governing principle of Art. 34. Any tension between these two provisions may perhaps be reconciled by considering that where by reason of judicial error or some other extraneous consideration, it is plain that the outcome of the case cannot be said to be the administration of justice for the purpose of Article 34 then it cannot be said to be a ‘decision ‘for the purposes of Art. 34.4.6. It is not necessary to discuss here the possible circumstances in which such an exceptional application could be made. It is plain it must be something fundamental to the decision. One clear example is where a case of objective bias is established for some reason in respect of one or more members of a court. See for example the discussion in *Bula Ltd. v. Tara*

Mines (No. 6) [2000] 4 IR 412 at 476, and in another jurisdiction R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 at 585. The jurisdiction was originally identified in Re Greendale Developments Ltd. (No. 3) [2000] 2 IR 514...”

O’Donnell J. then quoted with approval the passage quoted earlier from the judgment of Denham J. at p.544 in *Greendale*.

21. The decision in *Nash* also affirms that the jurisdiction to apply for review or correction of a decision applies to the judgment before the perfection of the order (as occurred in *Abbeydrive*), a point well-made by Mr. Skoczylas in para. 7 of his affidavit. This was first confirmed by the Supreme Court in *Re McInerney Homes Ltd* [2011] IESC 31, where the Court upheld the decision of Clarke J. in an examinership to revisit his judgment before a final order was made as there were “strong reasons” to do so.

22. At para. 8 of his affidavit Mr. Skoczylas also makes several references to the recent decision of the Supreme Court in *Student Transport Scheme Limited v The Minister for Education and Skills and Bus Eireann* [2021] IESC 22. There the Court held that the *Greendale* jurisdiction to revisit a decision extended to an application for leave to further appeal to the Supreme Court which had been refused. The caselaw relating to the threshold for review is reprised by Clarke C.J. He emphasises once again the exceptionality of the jurisdiction. He refers to the judgment of Dunne J. in *Murphy v. Gilligan* [2017] IESC 3, and quotes with approval her observation at para. 138 that:—

“the *Greendale* jurisprudence does not exist to allow a party to re-argue an issue already determined”.

23. Decisions of the Court of Appeal to which reference will be made shortly have proceeded on the basis that this court enjoys a similar jurisdiction to that of the Supreme Court to review its own decisions. Skoczylas in para. 5 of his affidavit describes the Judgment as “final and conclusive”,

as *per* Article 34.4.3. This is not entirely correct, and the different position of the Court of Appeal under the Constitution 1937, when compared to that of the Supreme Court, needs to be noted.

24. Under Article 34.4.1° the Court of Appeal has “appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.” Article 34.3° provides:–

“3° The decision of the Court of Appeal shall be final and conclusive, *save as otherwise provided by this Article.*”[emphasis added]

Article 34.5 sets out constitutional position and jurisdiction of the Supreme Court, and the relevant sub-articles provide:

“1° The Court of Final Appeal shall be called the Supreme Court.

2°...

3° The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that –

i the decision involved a matter of general public importance, or

ii in the interests of justice it is necessary that there be an appeal to the Supreme Court.

6° The decision of the Supreme Court shall in all cases be final and conclusive.”

25. The Supreme Court is the apex court in the hierarchy, and as Denham J. in *Greendale* and O’Donnell J. (as he then was) in *Nash* have indicated it has a special responsibility to uphold the Constitution; this is further exemplified by its jurisdiction under Article 26 to determine whether any Bill referred to it by the President is repugnant to the Constitution. Order 58 of the Rules of Superior Courts and Supreme Court practice directions set out the procedures to be followed in applications to the Supreme Court for leave to further appeal from the Court of Appeal. Accordingly, in contradistinction to the Supreme Court whose decisions can never be the subject of any further appeal, decisions of the Court of Appeal can be further appealed to the Supreme

Court where that court is satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be a further appeal to that court.

26. This needs to be born in mind when considering the exceptional jurisdiction of both courts to review their own decisions. The absolute constitutional conclusiveness of decisions of the Supreme Court – the “sobering reality” referred to by O’Donnell J. in *Nash* - must be a factor that it takes into account when considering an application for review. It follows that the Court of Appeal when considering an application for review should not be required to ignore the possibility that the litigant is constitutionally entitled to apply to the Supreme Court for leave to further appeal. It may, for instance, take that view that an allegation that the Court failed to have due regard for the principles of natural or constitutional justice in coming to its decision is more appropriately addressed by the applicant applying to the Supreme Court for leave to further appeal, rather than invoking such rare and exceptional jurisdiction as this Court has to review its own decisions.
27. In this regard it is also to be noted that if a litigant is refused leave to further appeal to the Supreme Court, that decision in itself may be subject of a review application. This was established in that court’s decision to admit for review its refusal of leave in *Student Transport Scheme Limited*, referred to earlier, although the application was ultimately refused.
28. The jurisdiction of this Court to revisit its own judgments and orders was considered in *Bailey v Commissioner of An Garda Síochána* [2018] IECA 63, a decision also relied on by Mr. Skoczylas at para. 6 and in part V of his affidavit. Finlay-Geoghegan J. speaking for the Court considered the submission that the jurisdiction of the Court of Appeal to revisit its own decision was closer to that of the former Supreme Court under *Greendale* than that of the High Court in *Re McInerney*. She stated:

“30. That submission is well founded, save, of course, that the Supreme Court was then - as now - referred to as the “Court of Final Appeal” and that status clearly informs the approach

of the Supreme Court in those judgments. The Court of Appeal is not a court of final appeal as such. However, neither is it a court of first instance nor a court from which there is an automatic right of appeal as is the position in relation to the majority of proceedings before the High Court. It is a matter for the Supreme Court as to whether any particular application for leave meets the constitutional threshold. Accordingly a decision of the Court of Appeal is final and conclusive unless and until the Supreme Court grants leave to appeal therefrom for the purposes of Article 34.5.3. Hence except, possibly, in the case of a decision on a question which obviously meets the constitutional threshold it seems appropriate that the Court of Appeal consider an application, such as this, upon the basis that its decision may be final and conclusive. In summary, whilst the Court of Appeal is not a court of final appeal as such its judgment or decision on any individual appeal may be the final and conclusive judicial decision on the disputes in question and litigation between the parties.

31. It therefore appears that the principles set out by the Supreme Court, most recently summarised by O'Donnell J. in *Nash* (with which that part of his judgment Denham C.J., Clarke J., Dunne J. and Charleton J. concurred) are the applicable principles and this Court should follow closely the approach taken by the Supreme Court in those judgments allowing for the different factual contexts and nature of the errors identified.”

Finlay Geoghegan J., having quoted extensively from the judgment of O'Donnell J. in *Nash*, concluded:

“35. Applying the above to the different constitutional position of the Court of Appeal means that there is, notwithstanding Article 34.4.3, an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality where it is considered necessary to do so to comply with the constitutional imperative to administer justice. Whether that threshold is met will depend upon the relevant facts.”

29. The scope of the jurisdiction in this Court was addressed in *Friends First Managed Pension Funds Limited v. Paul Smithwick* [2019] IECA 197 where Whelan J. said:-

“15. The court retains a power to vary or reverse its decision at any time until the order consequential upon its judgment has been perfected. The power to review is to be exercised in accordance with the overriding objectives of the Constitution. It is incumbent on the parties to assist the court in ensuring that the matter is dealt with justly and at a proportionate cost.

16. Implicit in the jurisprudence is the importance of proportionality and finality. The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect. In particular, the jurisdiction cannot appropriately be used as a vehicle to present further other or new arguments after judgment on material that was before the court which could have been deployed or availed of at the original appeal hearing for the proposition later advanced.”

30. Recently in *Launceston Property Finance DAC v Wright* [2020] IECA 146 Whelan J. conducted a review of the caselaw and restated the proposition that the jurisdiction to review or set aside a judgment now invoked is an exceptional one. Judgments are otherwise final (subject, in the case of this court, to the acceptance by the Supreme Court under Article 34.5.3 of the Constitution of an application for leave to appeal to it on the ground that the decision involves a matter of general public importance or in interests of justice it is necessary that there be an appeal to the Supreme Court). Following her review of the caselaw, Whelan J. helpfully summarised the position as follows:-

“7. In summary, the jurisdiction:-

(i) is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

- (iii) requires the applicant to discharge a very heavy onus;
- (iv) is not for the purpose of revisiting the merits of the decision;
- (v) alleged errors which have no consequence for the result do not meet the required threshold;
- (vi) cannot be invoked on the basis of the discovery of new evidence;
- (vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;
- (viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;
- (ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome.”

Application of the principles

31. In assessing whether the application for review meets the threshold, the Court has carefully considered the affidavit of Mr. Skoczylas, and his exhibits. That affidavit is for the most part in the nature of a legal submission, and sets out the arguments for review in parts I to V. Exhibit ‘PS1’ is a transcript of a directions hearing in respect of the appeal herein (Irvine J.). Exhibit ‘PS2’ is part of the transcript of the hearing before this court that is relevant to the contention in part IV of the affidavit that this court should not have permitted the Attorney General to represent the notice party, and relates to the argument and ruling on that issue on the first day of the hearing. Mr. Skoczylas also exhibits at ‘PS3’ some new material in support of that contention, in the form of two newspaper articles from October, 2021. The arguments in Part VI of his affidavit and the

remaining exhibits – the pleadings and the parties’ written legal submissions in the constitutional action – relate primarily to the stay application which is not considered in this ruling.

Part I

32. In part I Mr. Skoczylas sets out his ‘opening remarks and the kernel of this application’. He refers to the Judgment as ‘final and conclusive’. As indicated earlier this is not entirely correct. It is constitutionally open to the applicants to apply to the Supreme Court for leave to further appeal. Having said that, it is entirely a matter for the applicants as to whether they make such an application, and, if they do, it is entirely a matter for the Supreme Court as whether it accedes to it. What the applicants cannot do is treat the review that is sought as an opportunity to appeal matters decided with finality in the Judgment.
33. Mr. Skoczylas observes in para.5 that the primary finding of Peart J. was that the applicants did not have *locus standi* and that the rest of his observations were strictly *obiter*. He avers that “there is no judgment offering a *ratio decidendi* on the merits/legality of the March 2012 *Ex Parte* Directon Order.”
34. This court in the Judgment took a different view, Haughton J. in para.76 observing that “...most of the judgment of Peart J. addresses the substantive issues”, and concluding that “...were it necessary to decide this point I would tend to the view that Peart J. did consider and determine the substantive issues against the appellants, in addition to finding that they lacked *locus standi*”.
35. However, even if the applicants are correct in their contention that there has not been any determination of the merits of the application under s.11 of the 2010 Act to set aside the March Direction Order, that is not in itself a ground for review of the Judgment. In many instances a litigant may be held to lack *locus standi* to challenge an administrative or other decision, or may be out of time, with the result that the legality of the impugned decision is not tested; and the fact that other persons may have standing, but chose not to bring a challenge, cannot form the basis for a review of the Court decision that there is no *locus standi*.

36. In para. 6 Mr. Skoczylas sets out four distinct reasons for asserting that the Judgment is a “nullity” and “cannot be said to be the administration of justice”, and he avers that these four reasons “should be seen in combination”. The four reasons are developed in parts II to IV of his affidavit, under the following headings:

- II. The Court acted *ultra vires* by *de facto* absolving an administrative decision of government from being challenged in court *by any person* other than two legal persons controlled and 99.2%-owned by the government, thus violating the fundamental requirements of constitutional justice.
- III. This Court has acted *ultra vires* in causing an inordinate and inexcusable nine-year delay to adjudicate upon this appeal, including two years to deliver its judgment, thus failing to adjudicate within a reasonable time and to abide by the fundamental requirements of a fair trial, fair procedures and constitutional justice.
- IV. Having regard to the facts in this case, the Court has failed to abide by the fundamental requirements of a fair trial, fair procedures and constitutional justice, by allowing the Attorney General to represent in his alleged “personal capacity” ILP against the Appellants who are the ILPGH shareholders (where ILPGH is a 100% and the only shareholder in ILP), while at the same time the Attorney General has been representing in his official capacity the Minister for Finance who was sued by the ILPGH shareholders herein.
- V. The Court made material/decisive errors in its judgment, which are of the gravity requiring a correction pursuant to the jurisdiction referred to in, *inter alia*, *Nash -v- DPP* [2017] IESC 51 and *Bailey -v- Commissioner of An Garda Síochána* [2018] IECA 63. (This argument relates to the treatment in the Judgment of the issue of whether the appellants through their ownership of shares in ILPGH owned a beneficial interest in ILP in which ILPGH was sole shareholder.)

37. In para. 8 of his affidavit Mr. Skoczylas sets out certain specific legal submissions. He submits:–

- “a fundamental denial of constitutional justice” (*per* the Supreme Court in *McKevitt and Student Transport*) from “the Court’s *ultra vires* acts”
- that in effect the March Direction Order could not be the subject of any effective court challenge
- that the “*ultra vires* acts, errors and failings described in this Affidavit” are fundamental and such that the Judgment “cannot be said to be a ‘decision’ for the purposes of Art. 34.4.3^o” (*per* the decision in *Nash*)
- that “the Applicants herein do not attempt to re-argue an issue already determined”;
- that the errors are “something extraneous going to the very root of the fair and constitutional administration of justice”
- that failure to exercise the exceptional jurisdiction would conflict with the guarantee of fair procedures in the Constitution as “*there has been a clear breach of the principles of natural justice to which the applicant[s] ha[ve] not acquiesced, and that such failure to take steps to remedy [the] breach would, in the eyes of right-minded citizens, damage the authority of the court*” (*per* Mac Menamin J. in *Bates v. Minister for Agriculture, Fisheries and Food* [2019] IESC 35, referenced in *Student Transport* at para.2.11).

38. Although there maybe a certain overlap between points II and V, the applicants make in essence four different arguments. The Court does not accept, at least in respect of the present application, that the four reasons can or should be viewed in combination. Either the applicants have established, in respect of a particular matter, an exceptional circumstance for the exercise of the jurisdiction to review, or they have not. It is not open to the applicants to argue that if the Court finds that none of the matters is an exceptional circumstance justifying a review, then the Court should view them in combination and come to a different view. Such an approach would undermine the principle of finality. It would also encourage disappointed litigants to trawl through

judgments with a view to compiling a series of complaints the combination of which they would then assert amounted to a denial of justice. The Court will therefore consider parts II to V in turn.

II The Court acted *ultra vires* by *de facto* absolving an administrative decision of government from being challenged in court by any person other than two legal persons controlled and 99.2%-owned by the government, thus violating the fundamental requirements of constitutional justice.

39. The concept of *ultra vires* is that a person or body exercising public functions should not act outside the powers conferred on them by statute. In the case of a court, it means that the Court must act within the jurisdiction conferred on it by the Constitution and by statute. If a court gives a decision that is within its jurisdiction, it cannot be said to be acting *ultra vires*.

40. This point is made because of the appellants' contention that this court acted *ultra vires*. That contention is misconceived. Under the Constitution the appellants had the right to appeal from the judgment and order of Peart J., and duly lodged appeals to the Supreme Court. Subsequently the Court of Appeal was established on 28 October, 2014 pursuant to the 33rd Amendment to the Constitution. Transitional measures relating to pending appeals to the Supreme Court were set out in Article 64 under which the Chief Justice could give a direction, under the seal of the Supreme Court, for the transfer of classes of appeals to the (new) Court of Appeal for hearing and determination. The appellants' appeals were covered by such a direction, and therefore this court had the jurisdiction to hear and determine them that the Supreme Court would have had if there had been no Article 64 transfer. No argument was ever made that this Court did not have such jurisdiction. In deciding to affirm the decision of the High Court on the *locus standi* issue this Court clearly acted within jurisdiction.

41. Turning to the wider argument made by Mr. Skoczylas, this is based on the contention that, if the Judgment is correct, only ILP or ILPGH would have had *locus standi* under s.11 of the 2010 Act to challenge the correctness of the *ex parte* decision of Kearns P. approving the March Direction

Order, and to seek to have it set aside. As both these companies were controlled by the Minister, *de facto* there could in effect be no challenge to the March Direction Order. Mr. Skoczylas is critical of a statement in para.16 of the Judgment that found:-

“...it difficult to understand what benefit the appellants hope to derive from this appeal, and in the Notice of Appeal they have not identified any remedy which they claim would be appropriate should they succeed”.

Mr. Skoczylas suggests that “...this Court has failed to acquaint itself adequately with s.11...”, failed to understand that the only remedy under s.11 is to set aside a direction order, and failed to heed his explanations at hearing. He argues that the Court “had a duty *in this case* – which it manifestly failed to fulfil – to adjudicate on whether the March 2012 Direction Order Should be set aside or not”, and that the Judgment has “brought about an unlawful outcome” and deprived the applicants of an effective remedy, which he suggests is contrary to a statement of Clarke C.J. in the Supreme Court in related proceedings dealing with the appeal against the refusal of an injunction restraining the sale of ILP to the Minister, report at [2013] IESC 37, at para. 13.4. He therefore submits that the Court has deprived the applicants of their “constitutionally protected right” i.e. their right of action, being an unenumerated right protected by Article 40.3.1^o - to have the substance of the appeal/merits of their challenge, adjudicated upon.

42. These are substantially the same arguments that were made by the appellants in their written and oral submissions to this Court on the appeal on the *locus standi* issue. As the Judgment demonstrates they were considered by this Court. The Court in para. 16 emphasised that the statutory jurisdiction in s.11 of the 2010 Act was “limited to setting aside or varying the direction order”. The Court was alive to the extensive arguments pursued by Mr. Skoczylas in the High Court, and again pursued in this Court, that if the appellants did not have *locus standi* there would be no challenge to the legal validity of the March Direction Order - see for example the recitation of argument at paras. 82, 83, 95, and 96. These arguments were duly addressed in the Judgment

– see for example para. 141 and ensuing paragraphs, in particular para.s 159, 168 – 185 (on effective judicial protection), and 196.

43. What is apparent is that in part II the applicants in reality ask this court to revisit arguments made by them in the appeal, which were considered by this court, adjudicated upon, and rejected. As Dunne J. stated in *Murphy v. Gilligan* “the *Greendale* jurisprudence does not exist to allow a party to re-argue an issue already determined”. The issue is now re-packaged by Mr. Skoczylas as a constitutional denial of justice because, he argues, the substance of the s.11 application cannot be adjudicated. But the core decision of this court was that as a matter of statutory interpretation the appellants simply did not have *locus standi*. The Judgment is clear on that, and the wider arguments for a broad interpretation, including the right to an effective remedy, were considered and rejected. The applicants in effect say the Judgment was wrong, and seek to emphasise the constitutional dimension in order to bring their application within the review jurisdiction. This attempt to get the Court to revisit the merits is impermissible, and further cannot be said to give rise to an ‘exceptional circumstance’. The ground canvassed in part II therefore does not meet the threshold for review.

III. This Court has acted *ultra vires* in causing an inordinate and inexcusable nine-year delay to adjudicate upon this appeal, including two years to deliver its judgment, thus failing to adjudicate within a reasonable time and to abide by the fundamental requirements of a fair trial, fair procedures and constitutional justice.

44. As this point is now raised for the first time, the Court wishes to put the following on record:

- As stated earlier the appeals herein were transferred for hearing to the Court of Appeal pursuant to Article 64. They travelled with appeals in two related, but different matters (Rec. No. 2014/1015, and Rec. No. 2014/1017). As appears from the transcript exhibited by Mr. Skoczylas at “PS1” all three matters were the subject of case management directions before

Irvine J. on 18 July 2019, and the present appeals were listed for hearing on 10 and 11 November 2020, and the other two appeals for hearing on 12 November 2020.

- As Mr. Skoczylas informed Irvine J. (transcript, p.7 line 11 – 20) the s.11 appeals were “very complex”, took 10 days in the High Court, and “the case file has about 10,000 pages”.
- The documentation lodged in this Court in the present appeals ran to some 9 boxes. In addition the appellants’ legal submissions included links to further judgments of the Irish courts, the Court of Justice, and the European Court of Human Rights, that required consideration.
- The same members of the court heard the other two appeals. Although not as extensive as the present appeals, they did involve considerable volumes of documentation.
- In the year 2021 one member of court was unable to work due to significant illness.
- In the other two appeals judgments were delivered by Binchy J. on 31 January 2022.

45. If Mr. Skoczylas made any complaint of delay to this or any other court at any time in the period 2013 to 2019 it is certainly not referred to in his affidavit. It is apparent from the exhibited transcript that Mr. Skoczylas did not, in July 2019, make any complaint to Irvine J. about the delay. Further at no point during the interval between the hearing of these appeals and delivery of judgment did any of the appellants raise an issue of delay.

46. Most pertinently, the Court does not consider that the lapse of time from the appeal hearing to the date of judgment constitutes an “exceptional circumstance” that would warrant the Court revisiting the Judgment, still less setting aside its decision. The question must be asked, on what possible basis could the delay be a reason in itself for setting at nought the reasoning and decision set out in the Judgment?

47. It should also be recalled that the sale of Irish Life by ILP to the Minister for €1.3 billion under the March Direction Order was completed on 29 June 2012. Mr. Skoczylas and others in the injunction proceedings then sought to injunct the further sale on of Irish Life by the Minister to

Canada Life, also for €1.3 billion, which had been agreed on 19 February 2013. Laffoy J. at first instance refused an injunction, and that decision was upheld on appeal by the Supreme Court – see [2013] IESC 37. The Supreme Court pointed out that the plaintiffs in those proceedings could apply to amend their claim of wrongdoing by the Minister to seek damages for loss in the value of their respective shareholdings in ILPGH. That remains the position since 2013, although it does not appear that those proceedings have been advanced, or even amended.

48. In any event Mr. Skoczylas has not pointed to any circumstance, let alone an exceptional circumstance, that is constituted or occasioned by delay beyond vague assertions of denial of fair trial and fair procedures. Nor does this issue involve the suggestion of any material or decisive error in the Judgment. This complaint does not reach the threshold for review.

IV. Having regard to the facts in this case, the Court has failed to abide by the fundamental requirements of a fair trial, fair procedures and constitutional justice, by allowing the Attorney General to represent in his alleged “personal capacity” ILP against the Appellants who are the ILPGH shareholders (where ILPGH is a 100% and the only shareholder in ILP), while at the same time the Attorney General has been representing in his official capacity the Minister for Finance who was sued by the ILPGH shareholders herein.

49. Mr. Skoczylas supports this submission by reference to, and exhibiting, the relevant part of the transcript of day 1 of the appeal hearing. He did raise the issue early on, suggesting (p.110, line 28) that it was an abuse of the process for the Attorney General (to which office Mr. Gallagher was appointed in June 2020) to represent the notice party, that if allowed by the Court it “...shows...unjust conduct of this proceeding” (p.11, line 4), and that “Mr. Gallagher...must not be allowed to mix up his day job of Attorney General with representing a private party in these proceedings.”

50. The transcript shows that to avoid delaying the hearing of Mr. Skoczylas’ submissions the debate and ruling on this objection were taken up at the end of Day 1, after Mr. Skoczylas’ primary oral

submissions, and before any reply submission was made by Mr. Gallagher. Pages 225 to 227 of the transcript record a robust response from Mr. Gallagher making the following points:

- That it was not a matter for Mr. Skoczylas, or for the Court, to dictate who should represent the notice party.
- That although appointed Attorney General he remained a practising barrister entitled to appear before the courts.
- That having appeared for the party for nine years in ten related cases he considered it appropriate to continue to discharge his duty to his client, and that his client was happy to engage him, and he appeared for the notice party in his personal capacity, not as Attorney General.
- That there was a long-standing tradition going back to the nineteenth century of Attorney Generals continuing to appear in the courts, even if in recent times this is only done exceptionally.
- That on Mr. Skoczylas' own case Permanent TSB is an emanation of the State, that the State still owned 74.9% of the shareholding, and that the State interests were very much aligned with Permanent TSB.
- Without prejudice to the foregoing, in his capacity as Attorney General he would be entitled to represent the vital interests of the State in the proceedings, but as those interests and the interests of the notice party were aligned and as the Supreme Court had recognised when joining Permanent TSB as a notice party that it was appropriate that their perspective be brought before the Court, it was appropriate that he should represent them.

51. Mr. Skoczylas in a reply submission opened by stating that he "...wasn't making *per se* any application. I was pointing out an about of process that is being perpetrated by the State." He responded to the last point made by Mr. Gallagher by saying that the reason the Supreme Court allowed the joinder of the notice party was because its interests might be divergent from the State,

but Mr. Gallagher was now resiling from that position and aligning himself with the State. He again said it was an abuse of the process and that if this was allowed it would be “a cloud hanging over this judgment”, and a basis for referral to the ECHR “depending on the ultimate decision of the Supreme Court”.

52. The Court rose and having considered its decision ruled against Mr. Skoczylas – see transcript pp.230-232. In essence the Court was satisfied that neither it nor the appellants had any function in relation to the representation of another party – it was a matter for that party what solicitors and counsel it instructed. Mr. Gallagher was clearly representing the notice party, not the State. It was not an abuse of process, and the Court accepted that Attorney Generals did occasionally appear in court, although less often than in the past.

53. Of note is that Mr. Skoczylas offered no authority for the proposition that Mr. Gallagher while Attorney General could not continue to represent his client. He said, after delivery of the ruling and ‘for the record’, that he *was* suggesting a conflict of interest, but he certainly did not make this plain in his earlier submissions, or develop the point in any meaningful way.

54. In his affidavit Mr. Skoczylas now seeks to develop his argument, including the suggestion of conflict of interest, with the aid of two newspaper articles – a piece by former TD and Minister for Justice Alan Shatter published in the Irish Times on 6 October, 2021, and a piece by former TD and Minister for Transport Shane Ross published in the Independent on 3 October, 2021. Borrowing from these articles Mr. Skoczylas now suggests –

- that under legislation and in constitutional convention the Attorney General’s duty was to advise government, and not to advise or represent parties other than Ireland while in office, and that he was bound to comply with the Civil Service Code of Standards and Behaviour published by the Standards in Public Office Commission, as drawn up by the Minister for Finance on 9 September 2004 under s.10(3) of the Standards in Public Office Act, 2001;

- that the Court allowed the Attorney General “to add the weight of his office” to representing the notice party, thereby equating the interests of the State with ILP/the notice party, and that Mr. Gallagher was thereby “wearing two different hats”;
- that the Attorney General “has an extremely important role regarding careers of judges” because as a member of the Judicial Appointments Advisory Board he is “co-responsible” for selecting candidates for judicial appointments, and as a person who sits at Cabinet meetings he “... plays an important role in nominating judges who are to be promoted”. He submits that “Attorney General Gallagher was in this case making submissions before Judges whose careers might depend on his subsequent decisions, and that “the judicial process was manifestly tainted”;
- quoting from the article by Alan Shatter, this “...is also about avoiding conflicts of interest, real or perceived, ensuring public confidence in the manner in which he carries out his role and there being no public perception, however wrong, of the AG or any member of the judiciary’s judgment being affected by conscious or unconscious bias” and “...there could be a risk when he engages in private litigation, litigants on the opposite side may fear unconscious bias could influence the outcome of proceedings to their detriment.”;
- that as Attorney General between 2007 and 2011 Mr. Gallagher was involved in the drafting of the emergency legislation that became the Credit Institutions (Stabilisation) Act, 2010.

55. The Court is satisfied that these contentions do not amount to exceptional circumstances, do not engage with fundamental constitutional rights, and do not reach the threshold for review of the Judgment. There are a number of reasons for this.

56. There is no legislation or caselaw that prohibits an Attorney General representing a private client. Indeed this is referred in the article relied on by Mr. Skoczylas by Alan Shatter, an eminent lawyer, where he states, correctly, that “no law prohibits an AG from maintaining a private practice while in office.”

57. Nothing in Mr. Skoczylas' affidavit undermines the key reason for this court's ruling during the hearing – namely that litigants are free to choose and engage their own solicitors and counsel, and the courts have no function in that choice.

58. The courts have no role in relation to the Attorney General. Under Article 30.1 of the Constitution the Attorney General is –

“...advisor to the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law.”

Under Article 30.4 the Attorney General is not a member of the Government. Article 30.6 provides:

“Subject to the foregoing provisions of this Article, the office of the Attorney General, including the remuneration to be paid to the holder of the office, shall be regulated by law.”

It is therefore a matter for the Oireachtas to regulate the office of Attorney General through legislation, and the primary legislative provision is s.6 of the Ministers and Secretaries Act, 1924 (as amended). It is not a matter for the courts. Equally, if the Civil Service Code of Standards and Behaviour applies to the office of Attorney General (and it is not clear that it does), the Court has no role in the policing of that Code.

59. The Court also has no function in relation to the regulation of the profession of barristers, which is a matter for the Legal Services Regulatory Authority and the Bar Council of Ireland.

60. No complaint is made by Mr. Skoczylas that he was not afforded an adequate opportunity to address this court fully when he was permitted to raise the question of representation during the hearing, and invited to make submissions. While referring at that time to an abuse of process, he made no express reference to conflict of interest (at least not until after the Court's ruling). None of the arguments that he now makes were made by Mr. Skoczylas, at that time when he could have made them, and for that reason alone they cannot now be relied on to seek a review of the

Judgment. In any event the Court is of the view that the point now made does not demonstrate a “clear breach of the principles of natural justice” (*per* Barron J. in *Greendale*) such as to warrant a review.

61. The articles relied on by Mr. Skoczylas are in the nature of political commentary, and indeed advocate legislative change; they are not authorities for Mr. Skoczylas’ proposition that in ‘allowing’ the Attorney General to represent the notice party he was deprived of a fair trial, fair procedures or constitutional justice. In any event no formal application was ever made by Mr. Skoczylas, and it is not correct to say that the Court ‘allowed’ the Attorney General to represent the notice party – that was entirely a matter for the notice party, its solicitors and the barrister they chose to engage.

V The Court made material/decisive errors in its judgment, which are of the gravity requiring a correction pursuant to the jurisdiction referred to in, *inter alia*, *Nash -v- DPP* [2017] IESC 51 and *Bailey -v- Commissioner of An Garda Síochána* [2018] IECA 63.

62. This argument relates to the treatment in the Judgment of the issue of whether the appellants through their ownership of shares in ILPGH owned a beneficial interest in ILP in which ILPGH was sole shareholder, such that they should be treated as “members” of ILP for the purposes of s.11(1) of the 2010 Act.

63. The argument that they should be so treated was based on the judgment of Feeney J. reported at [2012] IEHC 89, in which he held that Mr. Skoczylas, who was the beneficial owner of shares in ILPGH held at that time through a nominee, had *locus standi* to bring a s.11(1) challenge to the earlier July 2011 Direction Order.

64. The Judgment at paras. 99 to 105 notes relevant differences between the July 2011 Direction Order and the March Direction Order, and then over paras. 107 to 118 analyses the decision of Feeney J. The Judgment concludes, over paras. 121 to 124, that as a matter of law the entirety of the legal and beneficial interest in ILP was owned by ILPGH, and that the appellants as members

of ILPGH never had any beneficial interest in ILP or its assets and cannot be treated as “members of that institution” for the purposes of s.11(1) of the 2010 Act. Further reasoning for this conclusion, and the interpretation preferred in the Judgment, is set out in paras. 125 to 130, and in paras. 131 to 140 the Judgment rejects the broad and purposive interpretation contended for by Mr. Skoczylas in his written and oral submissions to the Court on behalf of the appellants.

65. The arguments now made by Mr. Skoczylas for a review are that the reasoning on the beneficial interest issue in the Judgment is “manifestly” in error, and therefore a fundamental denial of justice in respect of his constitutionally protected property rights. In paras. 22 to 29 of his affidavit he conducts analysis of those parts of the Judgment where he asserts the Court erred or contradicted itself, and he sets out why this is so.

66. It is not necessary to set out his arguments here because in essence what Mr. Skoczylas seeks to do in part V is to re-argue what was one of the key issues fully canvassed on the appeal. That that is not a permissible exercise is abundantly clear from the judgment of Dunne J. in *Murphy v. Gilligan* quoted earlier, and as Whelan J. stated in her summary in *Launceston* at para.7 a review application “...(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment”. In *Friends First* the same judge stated:

“16. Implicit in the jurisprudence is the importance of proportionality and finality. The exceptional jurisdiction is not an invitation to litigants who are dissatisfied with the outcome of an appeal hearing to apply to the court to review its determination so that a variation or a revocation of the judgment can take effect. In particular, the jurisdiction cannot appropriately be used as a vehicle to present further other or new arguments after judgment on material that was before the court which could have been deployed or availed of at the original appeal hearing for the proposition later advanced.”

67. These principles apply with full force to Mr. Skoczylas’ arguments in part V, and cannot be circumvented by simply describing the applicant’s shareholdings as involving constitutionally

protected rights. If that were so then every decision which resulted in a litigant failing to protect claimed property rights would justify review of that decision.

Conclusion

68. The applicants have failed to satisfy the Court that the very high threshold for permitting a review application to proceed has been met, on any of the grounds set out in Mr. Skoczylas' affidavit. The ruling of the Court is that the application to vary/set aside/ rescind or correct the Judgment is refused.