APPROVED

COURT OF APPEAL

Record No: 2020 149

Neutral Citation Number [2023] IECA 280

Donnelly J.

Faherty J.

Ní Raifeartaigh J.

Scotchstone Capital Fund Ltd

AND

Piotr Skoczylas

Applicant/Appellants

AND

Ireland and the Attorney General

Respondents/Respondents

1. **JUDGMENT of the Court delivered on the 14th day of November, 2023**This Court gave judgment on 31 January 2022 dismissing the appeal of the plaintiffs/appellants against the judgment and order of the High Court striking out the proceedings as being frivolous and/or vexatious and/or bound to fail. At the end of the judgment, delivered electronically, the Court indicated that, given that the appellants have been entirely unsuccessful in their appeal, it would appear to follow that the respondents are entitled to the costs of this appeal, to be adjudicated in default of agreement but the appellants were given time to contend for a different order by way of written submissions.

2. The appellants filed written submissions seeking their own costs, and, in the alternative, if such order is not granted, an order that each side would bear its own costs. The appellants also sought, if required, a stay on any order for costs against them pending the outcome of other proceedings in which the appellants seek to challenge the constitutionality of the Credit Institutions (Stabilisation) Act 2010 ("the 2010 Act") to wit *Dowling & Ors v Minister for Finance & Ors* (Rec. No. 2013/2708P).

3. Prior to the Court being in a position to deal with the costs and stay issue, the second appellant sought further orders in a motion dated 16 March 2022 as follows:

a) "to vary/set aside/rescind the judgment of this Court of 31st January, 2022 ("the *Greendale* relief")

b) to correct what he contends are "material and decisive errors" in the said judgment ("the *Nash* relief")

c) alternatively, an order to stay these proceedings and to stay any order striking out this case pending the outcome of other proceedings in which the appellants seek to challenge the constitutionality of the Credit Institutions (Stabilisation) Act 2010. (*Dowling & Ors v Minister for Finance & Ors* (Rec. No. 2013/2708P))"

For ease of reference and despite the difference in reliefs sought, this motion will be referred to as the "*Greendale* Motion".

4. By judgment dated 5 December 2022, this Court refused all the reliefs claimed in the motion. As the issue of costs regarding the substantive appeal remained outstanding, we directed that the costs of the 16 March 2022 motion and the costs of the substantive appeal be heard together in a costs hearing that will be fixed as soon as possible.

5. This judgment deals with the issue of the substantive costs of the appeal, the costs of the motion of 16 March 2022 and the issue of a stay, if required, on any order of costs made against the appellants. The hearing of the application for costs was heard on 26 July 2023.

6. The passage of time between the judgment of the 5 December 2022 and the hearing of the motion is due to the fact that in the meantime the second appellant sought to issue a further *Greendale* motion and also to seek a correction of an error in the proceedings. This Court dealt with this application by way of a ruling dated 30 January 2023 in which we rejected the application and said that if there was an application it could be dealt with by way of the process indicated in Order 28 rule 11. Without issuing a motion, the second appellant sought such an amendment at the costs hearing although he notified the State and the Court of his intention to do so by email shortly before the hearing.

7. A further delay to the hearing of the within issues was caused by a change of solicitors for the first appellant in advance of the hearing of the *Greendale* Motion and an almost immediate motion to come off record by the new solicitor. That motion was opposed by the second appellant, as director of the first appellant, and a judgment was delivered on 25 May 2023 permitting the new solicitor to come off record. The contested hearing for costs of that motion was heard on 26 July 2023 and is the subject of a separate ruling by this Court also given today.

8. At all times in this litigation the second appellant has represented himself. Up to October 2022, during the period when the first appellant was legally represented, the solicitor on record had adopted the submissions made by the second appellant. That situation appears to have applied to other litigation to which both appellants were party.

The Costs of the Substantive Appeal

9. The indicative view given by the Court in its judgment of 31 January 2022 that the respondents appear entitled to their costs reflects the position as set out in s. 169(1) of the Legal Services Regulation Act, 2015, that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party unless the court orders otherwise, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties. The respondents in written and oral submissions urged upon the Court that the general principle covered the situation here and there was no reason to deviate from it. The respondents also urged the Court to measure costs if they were awarded same.

10. In written submissions by the second appellant (adopted by the first appellant) and in oral submissions by the second appellant (which this Court will view as covering the situation of the first appellant), it was strongly urged upon the Court that the nature and circumstances (indeed the special or unusual circumstances as per *Veolia Water UK Plc & ors v Fingal County Council* [2006] IEHC 240 and reflected in s. 169) of this case were such that they ought to be granted their costs or, alternatively that no order be made.

11. The second appellant submitted that the Court was required to have regard to settlement approaches made by the appellants. He referred to three open letters dated 15 June 2017, 2 September 2020, and 30 May 2023. The first letter, addressed to the Minister for Finance at Government Buildings was written two years in advance of these proceedings, refers to the "multifaceted litigations" that have been ongoing and makes no specific reference to taking these proceedings. In those circumstances, the letter has no relevance to the costs issue before this Court.

12. His letter of 2 September 2020 is addressed to both the Minister for Finance and Mr. Pearse Doherty TD who he styles as "The Shadow Minister for Finance". It is a lengthy letter and the only *relevant* "objective" as stated in the letter with regard to costs is to urge the Minister to engage in an amical discussion regarding a Bill of Costs in respect of a costs order made against the Minister in another set of proceedings (proceedings in which the appellants here were unsuccessful) which "may lead to a compromise that may contribute to constructively concluding the outstanding litigation what will otherwise last many more years". The contents of that letter include the claim that the second appellant will continue to vigorously and resolutely pursue all outstanding litigation until justice is done no matter how long it takes and will seek additional references to the CJEU. He says this will result in the State spending millions of Euros in taxpayer money until justice is done. He claims that he wants to stop the "gravy train" of payment to lawyers by the State.

13. In the letter the second appellant refers to previous letters from Arthur Cox in 2014 offering on behalf of the Minister to pay the second appellant and others €350,000 and to give up any costs claims regarding the litigation in question which was said by Arthur Cox to be "a fair and reasonable offer". The second appellant says that subsequently the Department has *incongruously* resiled from that offer and has deemed it "no longer of any relevance". The second appellant's letter makes strong claims that State officials and their advisors "**manifestly hurt the interests of the taxpayers"** (emphasis in submissions) while accepting, condoning and/or benefitting from an unrestrained and futile "gravy train".

14. In his letter of 30 May 2023, which is addressed to the Chief State Solicitor and to Arthur Cox, Solicitors, and is headed "**Settlement offer**", the second appellant expands on his view of the litigation. He claims he is a victim in the ongoing litigation; there is

and have been multiple proceedings concerning a direction order made by the High Court in July 2011 in respect of Irish Life and Permanent Group Holdings plc pursuant to the Credit Institutions (Stabilisation) Act, 2010, in which the second appellant had an interest. He offers to settle all the litigation for €197,725, a sum he claims is 25% of the Bill of Costs he had submitted in respect of earlier proceedings.

15. Arthur Cox replied by letter dated 21 June 2023 on behalf of the Minister for Finance. They noted that the second appellant's letter "details groundless complaints and claims and many inaccuracies including with respect to the expenses incurred by the Minister in defending your campaign of litigation". They reject the claim he is a victim in the litigation. They state that the Minister is concerned with the common good and not with paying monies to individuals for unsuccessful legal campaigns. They note that the Minister has obtained numerous costs orders against the second appellant. They also state that if he is concerned with the expenditure of public funds, then he should bring his unsuccessful legal campaign to an end.

16. Section 169(f) directs the court's attention to whether a party made an offer to settle and if so the date, terms and circumstances of that offer, in considering whether to order otherwise than the costs to the entirely successful party. We are satisfied that this sub-section together with the first paragraph of s. 169(1), in directing the court's attention to the nature and circumstances of the case, the conduct of the parties and the circumstances surrounding the offer, requires a court to have regard to whether or not the conduct of the parties was reasonable.

17. We have already said that the first letter sent by the second appellant, predating these proceedings, is not relevant and, in the circumstances, it could not be said that the respondents were unreasonable in failing to engage with it. With regard to the letter of 30 May 2023, we consider that this is not the type of settlement offer to which a court

ought, in general, give much, if any, weight in the context of costs. The date of the letter indicates that it has come long after the original judgment on appeal was delivered and subsequent to the contested *Greendale* Motion. Moreover, the second appellant's reference to himself as a "victim" of this litigation is entirely erroneous where he himself has been the instigator especially in the context of having taken a *Köbler* case which has been struck out as bound to fail. It cannot be said that in respect of the issue of costs before us that there was anything unreasonable in the respondents not accepting that offer.

18. With respect to the letter of 2 September 2020, we have considered its contents and timing carefully. Undoubtedly circumstances had changed since the 2014 original offer had been made. In the interim, there had been multiple decisions of the High Court, Court of Appeal, Supreme Court, and Court of Justice of the European Union; in none of which had the appellants secured any substantive success. Costs orders had also been made against the appellants by 2 September 2020; the High Court in these proceedings had made such an order. The letter, although not using the word victim, portrayed the second appellant as a victim of the litigation when in fact he was the driver of it, including, significantly, the within *Köbler* proceedings. This letter was also highly argumentative but, more importantly, was lacking in specifics as to settlement. While certain percentage payments of both the second appellant's Bill of Costs for the concluded case and the first appellant's costs were mentioned, there was nothing about the costs incurred by the State to that point. Of further significance is that the request for payment was coupled with a request for "amicable discussion… to avoid an *adversarial* costs taxation/adjudication" (*emphasis* in original). It was stated that such "amicable discussion may lead to a compromise that may contribute to constructively

concluding the outstanding litigation" in question. In all the circumstances, it was not unreasonable for the respondents not to have settled on the basis of this letter.

19. The second appellant relied upon the case of *Ryan v Connolly* [2001] IESC 9 in inviting the Court to look at "without prejudice" correspondence. The second appellant relied upon the following dicta of the Supreme Court in *Ryan v Connolly* where it was stated: "Thus, where a party invites the court to look at "*without prejudice*" correspondence, not for the purpose of holding his opponent to admissions made in the course of negotiations, but simply in order to demonstrate why a particular course had been taken, the public policy considerations may not be relevant". The Supreme Court in *Ryan v Connolly* said that the rule against admitting "without prejudice" correspondence evolved because it was in the public interest that parties should be encouraged, as far as possible, to settle their disputes without resort to litigation. Parties would be seriously inhibited in pursuing such negotiations if the correspondence could subsequently be used against them. In that case, the Supreme Court held that "the court is entitled to look at the "*without prejudice*" correspondence for the purpose of determining whether the circumstances were such that the defendants ought not be allowed maintain their plea under the Statute of Limitations". Thus, *Ryan v Connolly* clarifies that the rule that without prejudice letters ought not to be admitted in evidence is itself based upon considerations of public policy. That rule must not be applied in so inflexible a manner as to produce injustice. In *Ryan v Connolly,* the Supreme Court said it would be "unthinkable" that the attachment of the "without prejudice" label to a letter which expressly and unequivocally stated that no point under the Statute of Limitations would be taken if the initiation of proceedings was deferred could not be considered by a court if a defendant latter sought to maintain such a plea. Ultimately,

it should be noted, the Supreme Court was not satisfied that such representation had been given.

20. The second appellant asks the Court to look at the "without prejudice" correspondence in order to see why this litigation proceeded (with resultant costs). We are not satisfied that it is necessary or appropriate to do so in this case. From the letter of 2 September 2020, it is apparent why the respondents had already rejected (by letter August 2020 from Arthur Cox which is referenced in the letter) the overtures of the second appellant. Moreover, this is a situation which is entirely unlike that of *Ryan v Connolly*, which involved a claim based upon an "unthinkable" injustice that may result if a defendant was allowed to go behind a specific assurance that had been given. It is in that sense that the Supreme Court spoke of the admission of the correspondence "in order to demonstrate why a particular course had been taken". What is claimed here falls well short of the type of considerations in which the public policy considerations in not admitting "without prejudice" correspondence can or should be set aside. For a court to receive into evidence "without prejudice" correspondence merely to see *why litigation proceeded* would negate the very public interest behind the rule; which is to encourage parties to settle their disputes without resort to litigation. Something more must accompany the appellants' request; we do not see that here.

21. Therefore, we are satisfied that the presumptive entitlement of the respondents to be paid their costs has not been displaced by the letters containing settlement proposals made by the appellants.

22. The second appellant makes a submission that the Court decided to deprive the appellants of their fundamental constitutional right of action which is akin to the property right under the Constitution. We view this argument as one which is focussed on the correctness or otherwise of the Court's decision. That is not a relevant

consideration as to the matter of costs and we therefore reject this as a basis for displacing the presumptive entitlement of the respondents to costs.

23. The next ground that was urged upon the Court was the submission that, relying on the Court's own judgment, that this was the first time a *Köbler* claim has been brought in this jurisdiction, and was thus unprecedented and ground-breaking, warranting the application of the principles in *Collins v Minister for Finance* [2014] IEHC 74, relying on para 19 thereof in particular. The second appellant also relies upon *Dunne v Minister for the Environment* [2007] IESC 60 and the decision of O'Malley J. in *Dowling v Minister for Finance* [2017] IEHC 832.

24. We agree with the submission of the second appellant that, in accordance with the decision in *Dunne v Minister for the Environment* that there is no predetermined category of cases which fall to be considered outside the full ambit of the jurisdiction to depart from the rule that costs follow the event. Each case is to be decided on a case to case basis. We also agree that the decision in *Collins v Minister for Finance* points to a jurisdiction which justifies a departure from that rule to permit a (partial) order for costs in favour of the unsuccessful party. We also agree that the jurisdiction to do so may also apply to situations where private parties take cases where their private interests were the main concern. We note however what is stated in *Dunne*; the fact that the litigation has not been brought for personal advantage and that the issues raised are of special and general public importance are facts which may be taken into account. In *Dunne*, the Supreme Court overturned the award of costs to the plaintiff and awarded the State its costs of the High Court and Supreme Court. The mere fact that litigation is not taken for private benefit does not of itself justify a departure from the general rule. There must at least be some element of public importance/interest to the proceedings.

25. We are not satisfied that this is a case which requires the Court to disapply the general rule that costs follow the event. *Collins v Minister for Finance* concerned, *inter alia*, a constitutional challenge by a Teachta Dála to the Credit Institutions (Financial Support) Act, 2008. The fact that the plaintiff was a public representative and the importance to the State and its citizens that the constitutionality of important and novel executive and legislative decisions with far-reaching consequences be judicially determined were two of the factors identified by the Court in making the partial award of costs in *Collins*. Other issues raised were the importance of the questions and the weighty issues concerned.

26. The fact that the present case was the first *Köbler* case before the courts does not engage the jurisdiction to disallow the respondents their costs. It is important not to lose sight of the fact that this Court upheld the High Court's decision that this was a case which was bound to fail. The judgments applied well-settled principles to this case. Notwithstanding the nature of the claim being advanced in the proceedings, the case did not raise or decide the type of weighty issues in *Collins* (where partial costs were awarded to the plaintiffs).

27. While we have had regard to the fact that in *Dowling v Minister for Finance*, O'Malley J. made an order granting the second appellant 40% of his outlay and the first appellant 30% of its costs, which was upheld by the Court of Appeal (but no order was made on the costs of the appeal), we do not accept that O'Malley J.'s decision and reasoning "that this was a case of exceptional public importance" is in any way determinative of the costs issue of this appeal. The original case may have been considered to be such but that is not the case here. The appellants, having been on the losing side in *Dowling*, proceeded to challenge the outcome in *Dowling via* the within *Köbler* proceedings on the basis that the decision constituted a manifest breach of European law. While there

is undoubtedly a jurisdiction so to bring *Köbler* proceedings, such proceedings are fresh proceedings. The within proceedings were therefore adjudicated upon as fresh proceedings. It was held by this Court, at the motion stage, that these proceedings were bound to fail. These *Köbler* proceedings are not in any sense a continuation of the *Dowling* litigation. Notwithstanding the appellants' entitlement to commence the within proceedings, they are not and were not of exceptional public importance. They serve only the interests of these appellants; they do not concern particularly weighty matters and therefore we reject the arguments on behalf of the appellants that they constituted such.

28. We also reject the argument based upon *Curtin v Dáil Éireann* [2006] IESC 27 that this was an exceptional and *sui generis* case, for the reasons set out above applied *mutatis*.

29. We also reject the submission which relied on *O'Keeffe v Hickey* [2009] IESC 39 that this case was, in a substantive sense, *de facto* a test case and that different principles ought to apply such as consideration of the complexity or difficulty of the legislation for which the respondents were in substance responsible. We do not agree that this is in substance a test case and in any event, even if it were, there was no complex or difficult legislation at issue in the within *Köbler* case. This was a straightforward application of the "bound to fail jurisprudence" as applied to a *Köbler* case.

30. For all of these reasons we are satisfied that there is no reason to order otherwise than granting the entirely successful respondents the costs of the substantive appeal. We will address whether those costs ought to be measured below.

The Costs of the *Greendale* Motion

31. In essence the second appellant also sought his costs of the *Greendale* motion. He based this claim on the fact that it could not be said to have been deemed frivolous,

vexatious and bound to fail. His argument revolved around the fact that the Court held a substantive hearing on the motion and that the Supreme Court Practice Direction – there being no Court of Appeal Practice Direction in existence at the time – said that the matter was to be determined on the papers whether having regard to the case-law, which sets a high threshold, a hearing on the merits is warranted.

32. We consider that this submission does not reflect the reality of the legal and factual position. We reject wholeheartedly the argument that merely because an oral hearing is directed in respect of a claim to Greendale relief (or Nash relief) that the legal position with regard to the award of costs has been altered. The second appellant issued a motion; he intended that there be a hearing in respect of the matter. All the relief he sought on that motion was denied to him. The costs of that motion follow the event.

Measuring Costs

33. The respondents sought an order measuring costs, indicating that Order 99 rule 7 provides that in awarding costs the court may direct that a sum in gross be paid in lieu of adjudicated costs. The second appellant objected to such measurement of costs.

34. In *Taaffe v McMahon* [2011] IEHC 408 the High Court held that the *rule "clearly contemplates that judges have power to measure costs"*. In *Landers v Dixon* [2015] IECA 155, Hogan J., writing for this Court, endorsed that decision noting: *"It is probably fair to say that the decision in Taaffe suggests that the underlying purpose of the measured costs jurisdiction was to bring about finality in litigation if this can properly be done while avoiding what Kearns P. described as a 'lengthy, protracted and costly taxation'…"*.

35. The respondents also rely upon the decision of *Rippington v Ireland* [2019] IEHC 664 where it was said that first, the power should be confined to straightforward cases,

Secondly, the parties must be given an opportunity to address the court as to the appropriate sum to be awarded. Thirdly, whereas the exercise of assessing costs need not be as elaborate as before the Taxing Master (now Legal Costs Adjudicator) there must be material before the court which allows it to make an informed decision.

36. A further decision of this Court was brought to our attention at the hearing of the appeal. In *Loomes (p/a T. Loomes & Co.) v Rippington* [2023] IECA 90, the Court of Appeal overturned an order measuring the costs of legal professional services provided by the plaintiffs to the defendants. The factual background given rise to the proceedings and ultimately the appeal was long and contentious. The plaintiff was a solicitor who brought an action for payment of a bill of costs. He had earlier been consulted by, and apparently acted for some time for the defendant, in a will suit brought by the defendant. She subsequently made complaints about him. The High Court gave judgment for the plaintiff and said that the amount recoverable might be determined either by way of an adjudication of costs or might be measured by the court. The judge said he would hear the parties later. Some two years later the matter came back to court and the plaintiff asked that costs be measured. There appeared to be confusion between the parties and the court as to what was at issue in the short hearing which took place. Ultimately however the Court of Appeal was satisfied that the judge had fallen into error into failing to identify the core issue of whether the claim for costs should be assessed by the court as a claim for professional services or the bill of costs sent for adjudication and in his approach to the measurement of the claim. The bill of costs had been quite extensive but there was little engagement with the items in the bill. We are of the view that it is of particular relevance that the Court of Appeal in *Loomes v Rippington* referred to the observation of Hogan J. in *Landers v Dixon* that while the High Court has been prepared to measure costs in a number of relatively straightforward judicial

review and Article 40 applications, no judge of the High Court would see himself or herself as possessing expertise in costs equivalent to what is now a legal costs adjudicator (formerly a Taxing Master).

37. A large part of the second appellant's objection to the measuring of costs was that no figure had been suggested and, thus how was the Court to assess that figure. We agree that if a court was to measure costs the final figure could never be arrived at by the court without some material before it on which to base its figure. We are conscious that there may be some situations where the court will have a basis from its own experience for such measurement without detailed bills of costs or other evidential material; simple and short motions of the type frequently dealt with by courts or straightforward and quickly dealt with Article 40 applications may feature in that regard. This would not involve the court clutching "a figure out of the air without having any indication as to the estimated costs" as per Purchas LJ. in *Leary v Leary* [1987] 1 All ER 261 referred to in *Landers v Dixon*. In *Landers v Dixon* the Court of Appeal accepted that it was not necessary that the judge must hear evidence regarding the costs or even invite detailed submissions on costs as in a straightforward case any personal knowledge of fees may permit the type of "educated estimate" of the level of costs. The respondents accept that there would have to be an opportunity for submissions on the amount of the costs, should the Court agree that the costs should be measured in this case.

38. We consider that the first question to be decided is whether this is such a straightforward case that measuring costs would be appropriate. We consider that while the Court decided that this involved the straightforward application of the "bound to fail" jurisprudence to a *Köbler* type case, this is not the same as a straightforward case which may warrant an order measuring costs. In *Taaffe v McMahon* what was at issue was an

uncontested judicial review arising out of a bench warrant that should never have issued. In *Landers v Dixon*, this Court overturned the decision of the High Court to measure costs in the sum of €20,000 in respect of a well charging order and an order for sale on a home, albeit that it did so on the ground, *inter alia*, that the party affected had not been given a chance to make brief submissions.

39. This case is quite far removed from the circumstances in *Taaffe v McMahon*. This was a hotly contested appeal with lengthy submissions, a lengthy hearing and significant post hearing litigation. We note that the Court in *Landers v Dixon* referred to the fact that there had been some twenty applications to the Court over a three year period and while there have not been that number to this Court in this case, the number and nature of those applications has nonetheless been significant. The respondents were represented by senior and junior counsel. The solicitor on record was the Chief State Solicitor. We note however that the letter sent on behalf of the Minister for Finance was sent by Arthur Cox solicitors who have, it appears, represented the Minister in at least some of litigation involving the appellants to which he was party. Undoubtedly there must have been some interaction with the Chief State Solicitor with regard to this case and we have no indication of how such cost might be factored into this case.

40. We are also required by the principles to take cognisance of the fact that we are not legal costs adjudicators. In a case such as this, which in terms of the costs is not of the straightforward variety outlined above, it is important that the Court would have some material on which to make the preliminary order that it would proceed – in a subsequent hearing - to measure costs.

41. In the present case we have been given no such information by the respondents. We are not prepared to make a preliminary order in this case that the costs will be measured by the Court. Were we to so order we would be doing so without being able to assess

just how straightforward the bill of costs is likely to be. We certainly have no acquired or recent history of how bills of costs in these types of motions are generally dealt with. In those circumstances, and without that material, we are not in a position to assess whether this is the type of situation where we could embark upon measuring costs. In particular where, as here, there has been a reserved judgment, an intervening motion and a protracted delay before the oral hearing on costs subsequent to the delivery of written submissions, we consider that it was incumbent on the respondents to place before us some material upon which we could be satisfied that this was a suitable case upon which to engage in the process of measuring costs.

42. We therefore refuse to measure costs. Instead, we make an order for the payment of the respondents' costs, against the appellants, such costs to be adjudicated upon in default of agreement.

The Stay on the Order for Costs (a) pending the determination of other proceedings and without prejudice (b) that the costs orders be stay until the ultimate adjudication of any application of leave to appeal/notice of appeal to the Supreme Court.

A stay on costs pending the determination of other proceedings

43. The appellants seek a stay on the order for costs pending the determination of the proceedings challenging the constitutionality of the 2010 Act. That case has now been heard by the High Court but there is no indication of when judgment will be granted. The second appellant relies upon the general principle that in considering a stay the overriding consideration is to maintain a balance so that justice will not be denied to either party. He also relies in particular on a previous decision in respect of one set of proceedings taken in respect of the procedures under the 2010 Act in which the Court of Appeal granted a stay pending the determination of certain related proceedings.

44. We are satisfied that the Order of the Court of Appeal *In The Matter of Permanent TSB Group Holdings Public Limited Company Dowling v Minister for Finance* made on the 4 May 2022 that there be a stay on execution (not adjudication) of the costs orders up to 31 July 2023 is not a helpful nor binding precedent on this Court. In the first place, that stay was time limited; it was not the extended stay that the appellants seek here. Secondly, those proceedings appear, from the transcript of the Court of Appeal ruling provided to us, to have a closer connection to the proceedings challenging the constitutionality of the 2010 Act than the within proceedings. What we have here is a separate *Köbler* case, not intimately connected with the constitutionality of the 2010 Act. Furthermore, the possibility of further delay in the final determination of the constitutional challenge cannot be ruled out given the relatively recent hearing of that case in the High Court and the likelihood of an appeal by either side against an unfavourable decision therein.

45. In all the circumstances we are satisfied that the balance of justice does not require us to take the unusual step of staying the order for costs pending the outcome of separate proceedings.

Costs pending determination of application for leave to appeal

46. We consider that the matter of an application for leave to appeal is different. We consider that the balance of justice in this situation requires a stay to be granted on the costs orders for a period of 21 days from the date of the perfection of the order to enable an application to be made to the Supreme Court should the appellants wish to do so. This stay will then continue until the determination of proceedings before the Supreme Court or until such time as the Supreme Court otherwise determines.

<u>The Amendment to the Judgment of 22 January 2022</u>

47. In the judgment of 22 January 2022 this Court made two references to the lack of an application before the High Court for a stay on the order (in effect a stay on the order dismissing the proceedings) in the event of an appeal. We did so at paragraph 42 and para 45 as follows:

> "We also note that the High Court order does not record that there was any application for a stay on the order: it does record a stay on the costs until the determination of the appeal." (para 42)
>
> "No such application appears to have been made to the High Court, and no such application was made to this Court prior to the hearing of the appeal." (para 45)

48. We made an inadvertent error in so stating; there had been such an application to the High Court. As appears from our judgment we did not base our refusal to grant the stay on the absence of an application for a stay. We are however happy to correct this inadvertent error in the facts recorded pursuant to O. 28, r. 11 RSC.

49. We will therefore direct that the judgment be amended as follows:

1) Para 42 be amended as follows by the deletion of "We also note that the High Court order does not record that there was any application for a stay on the order: it does record a stay on the costs until the determination of the appeal".
2) Para 45 be amended as follows by the deletion of "No such application appears to have been made to the High Court, and no such application was made to this Court prior to the hearing of the appeal".

50. The second appellant has sought not only the deletion of the amended passages but its replacement as follows:

a) Replace the deleted section in para 42 with: "The High Court order does record a stay on the costs until the determination of the appeal. Additionally, we record, pursuant to Order 28 Rule 11 of the Rules of the Superior Courts,

that, while the High Court order does not record that there was an application for a stay of execution or of proceedings, such an application was indeed made by the Plaintiffs (the Appellants herein) on 16 April 2020, seeking, *inter alia*, *"an order, pursuant to Order 86A rule 5(1) and Order 58 rule 10(1) RSC, for a stay of execution or of proceedings under the High Court pre-trial judgment of Sanfey J delivered on 2 April 2020 until the ultimate conclusion of appeals from that judgment; and without prejudice to the foregoing, separately and additionally,"* "*until the ultimate conclusion of the proceedings rec. no. 2013/2708P regarding the unconstitutionality of the Credit Institutions (Stabilisation) Act 2010 (the "2010 Act") and an incompatibility of the Act with EU law (the "constitutional proceedings")"*. We acknowledge that we were presented with the respective High Court application in the Appeal Books".

b) Para 45: "We acknowledge that we incorrectly stated in the original version of this judgment that no application for a stay of execution or of proceedings appeared to have been made in the High Court; the respective correction has been made herein pursuant to Order 28 Rule 11 of the Rules of the Superior Courts (see also paragraph 42 above)."

51. We are of the view that such extensive "corrections" are not to be made to the judgment. They are unnecessary. The purpose of this jurisdiction is to correct factual errors in the judgment and we have agreed to do so. What we will direct is that the version as delivered and approved should be taken down from the Court website and replaced by the corrected version. This corrected version will be approved by the Court as the version corrected by the Court.

<u>Conclusion</u>

52. For the reasons set out in this judgment we have concluded that:

a) The respondents as the entirely successful parties are entitled to their costs of the substantive appeal and of the motion dated 16 March 2022;

b) We refuse the application to measure costs;

c) We refuse the application.