COURT OF APPEAL
Neutral Citation Number [2022] [IECA 275
Record No: 2020 149

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

Scotchstone Capital Fund Ltd

Appellant

AND

Piotr Skoczylas

Applicant/Appellants

AND

Ireland and the Attorney General

Respondents/Respondents

JUDGMENT of the Court delivered on the 5th day of December 2022

Introduction

1. On the 31st January, 2022, this Court delivered judgment dismissing the appeal against the decision and order of the High Court (Sanfey J.) to strike out proceedings as being frivolous and/or vexatious and/or bound to fail.
2. By notice of motion dated 16 March 2022, the second named appellant (hereinafter the applicant) issued a motion in which he sought the following orders:

    a) to vary/set aside/rescind the judgment of this Court of 31st January, 2022 pursuant to the jurisdiction identified in *Re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514; ("the *Greendale* relief")

    b) to correct what he contends are "material and decisive errors" in the said judgment, pursuant to the jurisdiction identified in *Nash v Director of Public*

Prosecutions [2017] IESC 51 and *Bailey v Commissioner of An Garda Síochana* [2018] IECA 63 ("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))

3. Scotchstone Ltd, the first appellant, did not issue a motion. Subsequent to the issuing of the *Greendale* motion by the applicant, the Court was apprised that the first appellant had instructed Flynn O'Donnell Solicitors (who had acted for the first appellant in the appeal) to retain counsel for the purposes of making submissions in relation to the *Greendale* motion. One set of submissions was filed by the appellants (signed by the applicant in person and senior counsel, whom the Court was informed was instructed by Mr. Shane O'Donnell of Flynn O'Donnell Solicitors), each adopting the other's submissions. There was a change of solicitor for the company in October 2022. The new solicitor issued a motion to come off record on the 26th October 2022. That motion has been adjourned, at the request of the applicant, for hearing to the 7th December 2022. Hence, at the hearing of the motion on 2nd November 2022, the applicant was not represented.

4. A brief background to the history of these proceedings is necessary. The appellants, as plaintiffs, sought a declaration that Ireland was obliged to make good damages allegedly caused to them by infringements of EU law for which it is claimed Ireland was responsible. The appellants relied on Case C-224/01 *Köbler v. Österreich,* Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* and Case C-160/14 *João Filipe Ferreira*

v Portugal. For ease of reference these proceedings will be called the *Köbler* proceedings.

5. Following the issue of the *Köbler* proceedings, the respondents brought a motion to strike out those proceedings for being frivolous and vexatious and/or bound to fail. They succeeded in that motion before Sanfey J. in the High Court and the appellants were unsuccessful in their appeal. In the course of the appeal, the applicant who appeared for himself, and whose oral and written submissions were adopted by the first appellant's then solicitor, argued that the High Court was wrong in law and in fact in granting the dismissal. The respondents submitted that the High Court was correct.

The Judgment of 31st January 2022

6. Before turning to the judgment delivered on 31st January 2022, it is apposite to refer briefly to proceedings ("the underlying proceedings") which preceded the *Köbler* proceedings. Suffice it to say that the central legal issue litigated by the appellants in the underlying proceedings was whether the Minister for Finance breached the appellants' rights under the Second Companies Directive when he recapitalised a bank (Irish Life and Permanent plc) of which they were shareholders. The recapitalisation was made pursuant to Direction Orders under the Credit Institutions (Stabilisation) Act 2011 ("CISA"). The underlying proceedings gave rise to the decision in *Dowling v Minister for Finance* [2014] IEHC 418 where the High Court made a reference for a preliminary ruling to the Court of Justice of the European Union. In Case C-41/15 *Dowling v. Minister for Finance,* the CJEU decided the issues contrary to the arguments of the appellants. The decision of the CJEU was applied by the High Court (O'Malley J.) in *Dowling v Minister for Finance* [2017] IEHC 520. The decision of O'Malley J. was upheld by the Court of Appeal in *Dowling v Minister for Finance* [2018] IECA 300. The Supreme Court refused leave to appeal (*Dowling & ors -v- The Minister for*

Finance & ors [2019] IESCDET 55) (see paras.149-234 of the judgment of 31st January 2022).

7. In the present (*Köbler)* proceedings, the appellants claimed damages against the State based upon a claim that there has been a manifest infringement of their EU law rights by the Supreme Court's decision. The case made by the appellants was, in essence, that the national courts have misinterpreted and/or misapplied the ruling of the CJEU in *Dowling* in a manner which brings the present litigation into the *Köbler* line of case law.

8. In our judgment of the 31st January, 2022, we set out the legal principles applicable to considering a *Köbler* claim. We analysed the interpretation of the decision of the CJEU in *Dowling* and how it was subsequently applied in the Irish courts. As the issue before us was, in essence, the respondents' claim that the proceedings ought to be struck out as bound to fail, we examined whether such a strike out jurisdiction existed in the case of a *Köbler* type claim and we concluded, at para 310, that: "[n]othing in the *Köbler* line of jurisprudence, or in the EU authorities more generally, has been cited in support of the proposition that EU law prohibits domestic legal systems from having procedural mechanisms for the dismissal of unstateable cases."

9. This Court held that the trial judge had not erred in his application of those principles, nor had he refused to take into account the submissions and authorities of the appellants. The Court also found that it was not contrary to EU Law to exercise the jurisdiction to strike out proceedings when a court is presented with a *Köbler* case which is frivolous or vexatious or bound to fail. The applicant does not take issue with the fact that the procedural mechanism for the dismissal of unstateable cases applies in principle to a *Köbler* claim. He maintains however that the Court was incorrect in the application of those principles to the facts of the present case.

10. In our judgment delivered on 31st January 2022, we identified the case actually made by the appellants as follows, at para 314:

> "the case is fundamentally very straightforward and is founded upon a single contention from which all the various claims and arguments are derived. This fundamental contention is that the Irish courts in the *Dowling* litigation (including the Supreme Court, which is the relevant court for the purposes of the *Köbler* doctrine) misinterpreted the Court of Justice decision in *Dowling* and accordingly were in error in how they addressed the issues of EU law in the *Dowling* litigation after the case's return from Europe. The appellants' case, no matter how it is formulated, is dependent upon this keystone, namely a particular interpretation of the CJEU decision in *Dowling*. If that keystone is removed the remainder of the edifice falls, complex though the case may seem on its face and lengthy though the pleadings are."

11. The Court went on to note that the proceedings before it raised issues concerning questions of law, not questions of fact, and stated at para 342:

> "Accordingly, we are of the view that the appellants' claim that the Irish court manifestly infringed their EU law rights by reason of the manner in which they (or any of them) approached the issues of EU law is bound to fail because it is based on the appellants' misinterpretation of the clear and unequivocal CJEU decision in Dowling. Indeed, we not only think that the appellants are bound to fail in their claim that the courts "manifestly" infringed their EU law rights, but that they are bound to fail in any claim that the courts infringed their EU law rights at all."

Reliefs (a) and (b) sought in this motion

The *Greendale* (and *Nash*) jurisprudence

12. At the hearing of the motion, the applicant confirmed that he was not disputing the principles to which the respondents pointed as having been established in the *Greendale* jurisprudence. The applicant's principal submission was that the judgment of 31st January 2022 violated those principles in a fundamental manner.

13. Prior to addressing his claim, it is prudent to identify, briefly, the salient principles in the *Greendale* jurisprudence. The written submissions of the parties relied primarily on the same authorities and the quotations from the judgment often overlapped. The *Greendale* jurisprudence covers the circumstances in which a court may revisit a judgment or a final order. Although the authorities relied upon refer to the Supreme Court, the parties to this application were also in agreement that the same principles apply to a decision of the Court of Appeal which is final and conclusive unless and until the Supreme Court grants leave to appeal therefrom for the purposes of Article 34.5.3 of Bunreacht na hÉireann (see *Bailey v Commissioner of An Garda Síochána*). Moreover, as the applicant has noted in his submissions, it was said in *Bailey v Commissioner* of An Garda Síochána that the Court of Appeal has jurisdiction to revisit an issue decided in a written judgment before the order envisaged by the judgment is drawn up and perfected. The same principles apply to the jurisdiction to revisit a judgment which is otherwise entitled to finality where it is considered necessary to do so to comply with the constitutional imperative to administer justice.

14. Counsel for the respondents submitted that an appropriate place to start was the recent decision of the Supreme Court in *Student Transport Scheme Ltd. v The Minister for Education and Skills* [2021] IESC 35. We agree that that is an appropriate starting point because it is not only a recent judgment of the Supreme Court but one which summarises the principles emerging from the leading authorities.

15. In delivering the judgment of the Court in *Student Transport*, Clarke CJ reviewed the relevant jurisprudence of the Court and said with respect to *Greendale*:

> "In her judgment in *Greendale*, Denham J. held that this Court has a jurisdiction and a duty to protect constitutional rights, so that the powers of the Court should be as ample as required to protect such rights. On this basis, she held that this Court has the power to overturn a final order where an applicant successfully establishes that allowing the order in question to remain in place would infringe on their constitutional rights. Some of the language used in the judgment might, if read out of context, suggest a relatively low threshold for there could be a number of circumstances where it might be contended that constitutional rights might be engaged. However, Denham J. expressly stated that this jurisdiction to set aside a final order should be exercised only in very exceptional circumstances and she emphasised that there is a heavy burden on an applicant who seeks to establish that such circumstances are present." (at paragraph 2.2)

16. Clarke CJ. referred to other instances where the Court had emphasised the high degree of exceptionality and the heavy burden on an applicant. McGuinness J. in *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 had stressed the fact that the jurisdiction established in *Greendale* exists as an exception to the principle of finality found in the Constitution. Clarke CJ. quoted from Murray J. in *L.P. v M.P.* [2002] 1 IR 219 as follows: "…. 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." In the decision in *DPP v McKevitt* [2009] IESC 29, when considering whether the Court has jurisdiction to consider re-opening one of its previous decisions, Murray CJ stated:

"[20] …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.

[21] Accordingly, insofar as this Court has potential jurisdiction, in the exceptional circumstances referred to in the case-law, to review one of its earlier decisions, an applicant must show cogent and substantive grounds which are objectively sufficient to enable the Court to enter on an exercise, by way of a hearing of an application on the merits, of that wholly exceptional jurisdiction. (For example, a mere assertion of subjective bias on the part of the Court by a dissatisfied litigant could not be a ground on which the Court could have jurisdiction to hear and determine an application)".

17. Dunne J. in *Murphy v Gilligan* [2017] IESC 3 had noted that the *Greendale* jurisprudence does not exist to allow a party to re-argue an issue already determined. MacMenamin J. stated in *Bates v Minister for Agriculture, Fisheries & Food* [2019] IESC 35, at para. 112, that it is only where "there has been a clear breach of the principles of *natural justice*, to *which the applicant has not acquiesced*, and such that failure to take steps to remedy such breach would, in the eyes of right-minded citizens, damage the authority of the court" (emphasis in original) would the court take the "highly exceptional step" of setting aside , rescinding or varying a final order made by the court. In *Student Transport*, Clarke CJ. also noted that:

> "the principle of finality applies even where there may be a basis for suggesting that a judgment of this Court was wrong. Where new evidence emerges after a final decision of this Court (as opposed to before a final decision of this Court

when an application to admit new evidence can be moved) then that, too, is insufficient, in and of itself, to justify reopening."

18. In his motion the applicant claimed separate relief "to correct material and decisive errors in the judgment" based upon the *Nash* and *Bailey* decisions. In his submissions, both written and oral, the applicant did not expand on why this ought to be considered a separate jurisdiction and in effect made the same submissions in relation to both the *Greendale* and *Nash* lines of jurisprudence. We are satisfied that an analysis of the jurisprudence (see in particular Clarke CJ. in *Student Transport* where he said it was important to note the detailed analysis of the jurisprudence carried out by O'Donnell J. in *Nash)* demonstrates that the decision in *Nash* belongs within the overall *Greendale* jurisprudence. Thus, the same principles apply where an application is made to set aside a judgment based upon what are said to be errors in the judgment. Not every error will lead to the setting aside of the judgment. The high threshold that must be reached before there will be a review, as identified in the *Greendale* authorities, applies where there is a claim of material and decisive error which must go to the very root of the fair and constitutional administration of justice such that there has been a fundamental denial of justice.

19. It is clear from the judgments that there are various policy reasons, identified by O'Donnell J in *Nash*, as to why finality "is both necessary and desirable". It would be intolerable not only for the winning party, but all litigants seeking access to the courts, for a losing party to be permitted to reopen cases which have been finally determined. It is thus necessary to have an end point in litigation. The requirement of finality in litigation is also encapsulated in the provisions of the Constitution which say that the decisions of the Supreme Court "shall be final and conclusive". As we have seen, this

applies also to Court of Appeal decisions, save that an application for leave to appeal may be made to the Supreme Court on limited grounds.

20. Drawing on *Student Transport*, the correct approach to the circumstances in which a court might reopen or revisit a decision is as follows:

    i. The applicants bear a "very heavy onus of proof" (*Greendale*, Denham J.)

    ii. The underlying facts must give rise to an issue "going to the very root of the fair and constitutional administration of justice" such that there has been "a fundamental denial of justice" (*L.P.*, Murray CJ) or "a substantive issue concerning a denial of justice … consistent with the onus of proof" (*McKevitt*, Murray CJ). This must be "a clear breach of the principles of natural justice…such that failure to take steps to remedy such a breach would, in the eyes of right-minded citizens, damage the authority of the court." (*Bates*, McMenamin J.)

    iii. The exercise of the jurisdiction must be weighed against the desirability of finality to which "great weight" is attached (*Bula*, McGuinness J.)

    iv. The principle of finality applies even where the Court has made an error: "The principle of finality applies even where there may be a basis for suggesting that a judgment of this Court was wrong." (Clarke CJ, *Student Transport*).

The parties' submissions

21. The applicant's written submissions of 10,000 words included exhibits comprising a further 100 pages including his High Court submissions in the constitutional proceedings *Dowling & Ors v Ireland & Ors* pending before the High Court in which these appellants are among the plaintiffs. He made further oral submissions, the bulk of which referred to his *Greendale*/*Nash* application.

22. The overriding submission of the applicant was that this Court had acted *ultra vires,* and its decision was thus a nullity, because, in its findings, the Court had voided in substance "the formal position in law" under EU law, and had, therefore, "penalised" the appellants for relying on that formal position in law by striking out the proceedings at the pre-trial stage. The phrase "the formal position in law" is contained in paragraph 332 of the Court's judgment of 31st January, 2022 as follows:

> "The appellants object that the Court of Justice simply does not rule on the validity of domestic measures as such. They castigate the Irish courts in Dowling for their alleged ignorance of this point. The appellants repeatedly submit that the Irish courts, in holding that the Court of Justice had in effect pronounced the direction order, a domestic measure, in accordance with EU law, have applied an "invented novel interpretation of EU law". However, as we have seen, while the formal position in law is that the Court of Justice claims at the level of principle not to formally rule on whether national measures comply with EU law, this is not the practical reality of the CJEU jurisprudence, as we have discussed earlier in this judgment (see Section 3 above). In some (although of course not all) cases, the reality is that the Court of Justice does in effect and in real terms indicate whether the domestic measure complies with EU law or not. There is, as discussed earlier, a spectrum of the type of answer that the court gives, ranging from "outcome" to "guidance" to "deference" cases, to use the language of one commentator (as set out above). In our view, the decision in Dowling was clearly an "outcome" case within that taxonomy; that Court was in effect deciding the outcome by answering the question posed in the precise manner it did, leaving no room for the domestic court to engage in any further analysis of the EU law issues in the case."

23. The applicant submitted that the Court acted *ultra vires* because the Court had no jurisdiction to make the decision it did as it was a clear violation of the position in EU law; that there is no taxonomy of CJEU decisions such as that identified by the Court; and that the Court is bound to apply EU law and to recognize the primacy of EU law enshrined in the Treaties and the Constitution. He submitted that what this Court did was to seek to interpret EU law which is solely a matter for the CJEU. He thus contended that what the Court did was unlawful and cannot be considered an administration of justice. A failure on the part of the Court to now take steps to correct this would damage the authority and standing of the Court itself. It was also submitted that the Court's striking out of the proceedings pre-trial violated the principle of legal certainty – a general principle of EU law – and thus deprived that principle of its value and effectiveness, all of which must render the Court's action *ultra vires.*

24. In support of his argument that the right of access to a court is impaired if the rules cease to serve the aim of legal certainty and the proper administration of justice, the applicant referred to provisions of the Treaties such as 4(3) of the TEU, to textbooks such as Chalmers, Davies and Monti, *European Union Law (Cases and Materials)* 2nd Edition, and to cases such as Case C-345/06 *Heinrich* as well as the European Court of Human Rights decision of *Zubac v Croatia* (ECHR 324 (2016)). He submitted that the decision of the court regarding the formal position of EU law amounted to a barrier preventing him from having his *Köbler* case heard on the merits. He also referred to documents in the Official Journal of the European Union which give guidance to national courts on preliminary references under Article 267 TEU.

25. The applicant asked the Court to pay specific attention to the Table he had set out in his written submissions between pages 15 and 21. In this Table he sets out, on the left-hand side, quotations from various authorities in the *Greendale* line of jurisprudence.

On the right-hand column are his submissions as to how the application of the law applies to this case. We have considered that Table and do not consider it necessary to repeat all that it says. In substance it makes the same points as already set out above, emphasising the applicant's argument that this Court acted *ultra vires* and, in the premise, *de facto* voided in substance the "formal position in law" under EU law. There are some further refinements in the Table to the applicant's arguments, for example that the "finality" at issue here "refers to this Court depriving the Appellants of their right of access to court to have [their *Köbler* case] heard and tried [on its merits]." In substance, however, they are all aspects of the same argument.

26. In response to the applicant's submissions, counsel for the respondents submitted that, in essence, the applicant was making the same case now as he did at the appeal and that this is not permitted by the *Greendale* jurisprudence. Counsel referred in detail to the judgment of the Court. He submitted that there was no basis for the Court to exercise the exceptional *Greendale* jurisprudence. The issues raised in the *Greendale* application have already been addressed by the Court in its judgment of 31st January 2022. Counsel rejected that the issue raised by the applicant was a matter of jurisdiction, instead submitting that, in essence, the matter raised fell within the scope of the original appeal and had been addressed in the 31st January judgment. It was also not a matter of a breach of constitutional rights.

27. In reply the applicant strongly urged on the Court that this was not a repetition of the arguments made previously. Rather, the *Greendale* motion was in response to the failure of the Court to apply the formal position in law, which rendered the Court's decision a nullity~~,~~ there being no jurisdiction to disapply his rights under EU law.

Analysis and Decision on Greendale/Nash Relief

28. There is undoubtedly a high threshold for any applicant who seeks to have a final decision (including a finding in a written judgment) overturned. As was said by Murray J. in *L.P. v M.P.*, what must be shown are exceptional circumstances constituting something extraneous going to the very root of the fair and constitutional administration of justice. At the outset we wish to refer to the oral submissions made by the applicant to the effect that in making its decision the Court was essentially engaged in the summary disposal of the case. He contended that he was deprived of access to court for the trial of his action in circumstances where it could not be said that the case was a clear one for summary disposal. We are fully satisfied that in so far as the applicant makes these points, this is a clear attempt to re-open matters that have been decided against him in the judgment. He has therefore not satisfied the *Greendale* principles by reference to the foregoing argument.

29. We also reject any suggestion that because these proceedings were *Köbler* type proceedings and unprecedented in this jurisdiction, there are implications for the application of the *Greendale* jurisprudence. The exceptional circumstances required for a successful *Greendale* type application must relate to the issue that is said to have arisen out of (or subsequent to) the written judgment; the exceptional circumstances do not relate back to the exceptionality of the legal and factual issues in the underlying proceedings.

30. The issue raised by the applicant in this application is in fact quite straightforward, although it is repeated in a number of different ways. The submission is that this Court went beyond its jurisdiction is disregarding the formal position in EU law upon which the applicant says he was entitled to rely. This, it was submitted, meant that this Court determined that the CJEU actually decided the national case by applying EU law to the

facts of the case and thus ruling on the compatibility of the national measure with EU law. He says that this contradicts EU law which is clear that the CJEU decides only EU law and does not decide national law.

31. It is important to bear in mind that the *Greendale* jurisprudence is not concerned with whether the decision of the Court was right or wrong, i.e. it does not concern the merits but only whether the decision reached could be said to be a nullity or to amount to a denial of justice. It is not for this Court in the exercise of the *Greendale* jurisdiction to enter into an examination of whether it made the correct or incorrect decision; our task is to examine whether the applicant has reached the requisite high threshold required for the judgment to be set aside.

32. In resolving the motion before this Court, it is important to return to the central issue in the appeal that was before this Court. That was stated at paras 86 and 87 of the January 31st judgment, as follows:

> 86. A central plank of the appellants' submissions in this case is that a CJEU decision on a preliminary reference *cannot ever* go so far as to apply EU law to the domestic measure which has given rise to the preliminary reference, but rather that the CJEU confines itself to providing a general interpretation of the point of EU law which it then falls to the domestic court to apply. Indeed, the appellants are disparaging of any contrary view and allege that the courts in the *Dowling* litigation were ignorant of this important distinction and employed an invented, novel approach to the CJEU decision in *Dowling* itself by interpreting it as having definitively ruled that the direction order did not breach EU law.
>
> 87. The appellants cite in this regard an extract from the CJEU Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings: *"Under the preliminary ruling procedure the*

Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply the law to the factual situation underlying the main proceedings". (Italics in original)

~~33.~~ From the foregoing, it is apparent that the applicant's arguments in this *Greendale* motion, although couched in the language of the *Greendale* principles, are in fact, the same arguments that were made in the substantive appeal. Many of the authorities he now cites as to the central feature of the within application, which is that this court ignored/disapplied EU law, are the same as those relied on at the appeal. For example, the extract from the CJEU recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01), which is highlighted in the Additional Book of Authorities referred to at the oral hearing, is virtually the same extract that the applicant relied on in the appeal albeit that that authority has its origins in an issuance from the Court of Justice (2009/C 297/01).

34. This is also true of much of the case-law he relies upon in this *Greendale* application; C-136/12 *Consiglio*, C-484/10 *Ascafor* and C-163/10 *Patriciello* were all relied upon by him to make what was, essentially, the same point he made at the hearing of the appeal. For example, in his written submissions in the substantive appeal he relied upon an extract from *Ascafor and Asidac* at para 32 that says:

> "…the procedure laid down in Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice. It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."

Precisely the same quotation has been relied upon by the applicant in this *Greendale* motion, parts of which he has highlighted and on one part underlined in red. Indeed, this quotation is set out at para 92 of the Court's judgment of 31st January 2022. The Court's judgment also discussed the decision *in Patricello.*

35. The judgment of the 31st January 2022 dealt with the central issue of the import of the CJEU decision in *Dowling* and how it was required to be treated (and was treated) by the Irish courts on return. The applicant strongly disagrees with the findings this Court reached and he is entitled to disagree. That disagreement does not entitle him to seek to rerun those arguments by asserting, in a variety of repetitious submissions, that the Court acted *ultra vires* in its findings on the very issue that was before the Court on appeal, or that the principle of legal certainty was violated. We are not concerned here with whether the judgment and reasoning of this Court was correct but rather whether it is open to challenge under the high threshold set by the *Greendale* principles. We reject the argument that the judgment of the Court of 31st January 2022 violated the primacy of EU law – a central norm of EU law – and that the judgment is thus a nullity. Our judgment dealt squarely with the very issue at stake, the interpretation of the decision of the CJEU in *Dowling*. There was no "egregious abuse of judicial power" as the applicant has claimed, in the Court's interpretation of EU law in accordance with the case law, or in the Court having set out a theoretical framework for understanding the practical application of that case law. As the substantive judgment demonstrates, the appellants' arguments were heard and were answered comprehensively.

36. In so far as the applicant argues that there was a "fundamental refusal of justice and fair procedures/process" in how the Court applied EU norms or interpreted the case law of the CJEU – a submission that was advanced in a variety of ways -we reject that submission. There was no question or issue of any denial of procedural fairness as the

applicant postulates: the simple fact is that the legal issue that lies at the heart of his *Greendale* application is one that has already been decided against the appellants in the judgment the Court has delivered on the appeal. It is not sufficient in a *Greendale* application to reframe the central decision that the court was required to make in the appeal by terming it as a fundamental denial of justice by reference to how the Court analysed the issue in reaching its decision. The Court heard the submissions and reached a determination on the issue having heard both sides. Even if the Court was wrong in that analysis, that does not satisfy the exercising of the exceptional jurisdiction which a *Greendale* application warrants.

37. We are also satisfied that there was no procedural unfairness in this case where the appellants had the benefit of a full hearing of the appeal. Moreover, we reject the applicant's contention that the 31st January judgment constituted a "summary" disposal of his case: the Court applied the principles applicable to applications for a strike out/dismissal on the basis that the proceedings are bound to fail or are frivolous and vexatious. Although the respondents, who brought the strike out application, bore a heavy burden, the high threshold for the striking out of proceedings was met in this case; the fact that the proceedings were *Köbler* proceedings did not debar the application of the strike out jurisdiction.

38. We are satisfied that the applicant has not discharged the heavy onus on him as required by the principles in the *Greendale* jurisprudence to set aside the written judgment of the 31st January 2022.

Relief (c):

The application for a stay

39. This application was a somewhat unusual one. It was an application for a stay on the entire proceedings (including any decision of the Court on the *Greendale* motion) until the constitutional proceedings taken by the appellants against the State are concluded. The applicant submitted that to do otherwise would perpetrate an injustice to the appellants. He submitted that as the Court's judgment of 31st January 2022 explicitly recognised, the 2010 Act, which is being challenged by the appellants in the constitutional proceedings, was instrumental for the rejection of the appellants' claims in *Dowling*, where all the judgments in that litigation relied upon the presumption of constitutionality/lawfulness of the 2010 Act. He submitted that the repugnancy of the 2010 Act (were it to be found to be repugnant to the Constitution) would invalidate the 2011 Direction Order, which would thus have implications for the judgment delivered by the Court on 31st January 2022.

40. In aid of his submission that "the strike out jurisprudence allows the proceedings to be stayed", the applicant referred to *Barry v Buckley* [1981] IR 306, citing the dicta of Costello J that "if the proceedings are frivolous or vexatious, they will be stayed". We are satisfied, however, that the *Barry v Buckley* dicta has no bearing on what the applicant now seeks; he clarified in oral hearing that he wishes the Court not to enter judgment/finalise the order itself until the constitutional proceedings are heard. The *Barry v Buckley* line of authority clearly envisages that the stay would be a permanent one; stopping the proceedings from continuing at any point. Here, the applicant wishes to keep the *Köbler* proceedings alive until the outcome of other proceedings.

41. The applicant submits that the overriding consideration for the Court, in deciding whether to grant a stay, is to maintain a balance so that justice will not be denied to either party: hence, rights of significant fundamental importance should be taken in account when deciding on a stay. In this regard, the applicant relies on *Redmond v*

Ireland [1992] 2 IR 362 and *O'Toole v RTE* [1993] ILRM 454. However, the *Redmond* line of authority addresses a different scenario; that of a stay on an order in the event of an appeal. For example, in *Redmond v Ireland*, McCarthy J. set out at page 336 of the Irish Reports a summary of factors that may be taken into account in deciding whether or not to grant a stay. Those factors are clearly directed to a situation where the stay that is sought is one pending the appeal of the decision.

42. This application is not based upon a stay in the event of an appeal; even if it were, it would be difficult to see any basis for granting it. The motion brought by the respondents was that the proceedings be struck out on the grounds that they were frivolous or vexatious or bound to fail. The High Court agreed. The Order of this Court (upholding the High Court) when made, will result in the striking out of the proceedings. Pursuant to the *Redmond* line of authority, a stay is usually on a part of the order that requires or permits some kind of overt act by the other party, e.g. the paying out of damages in a personal injuries case or the entry into occupation of a premises. Here, however, there is nothing comparable to stay; the order does not require the applicant to take any particular step. 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.

43. The applicant urged on the court that the stay of proceedings was necessary to prevent the State from taking advantage of its own failures to comply with EU law. In so urging he relied upon a dictum of the CJEU in *Marshall v Southampton and South-West Hampshire Area Health Authority* (Case 152/84). That case however concerned the failure to implement measures required by a directive within the prescribed time. Thus, it is not an apt comparator; the situation here is entirely different based upon the findings of the Court.

44. The applicant argued that the appellants were the only parties to the proceedings who stood to be harmed if the stay is not granted. In the first place, we are not persuaded that the applicant has demonstrated that he will suffer any harm by the non-granting of a stay, even if the constitutional proceedings are determined in his favour. We note that in the constitutional proceedings the applicant has sought financial compensation for breach of his constitutional rights and of his rights protected by EU law. Secondly, we are not satisfied that it is true to say that the respondents will not suffer any harm if a stay is granted. The effect of a stay on the Order of the Court may well result in further applications in the future, with all of the implications that that may entail in terms of court time and (possibly) costs for the State, who is the successful party in these proceedings and who should be permitted the benefit of the Order of the Court.

45. We are satisfied that the "stay" sought by the applicant ought not to be granted. The application is in truth an application for this Court to adjourn the making of the Order in this case to await the outcome of other separate proceedings. 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. It would be inconsistent with the proper administration of justice for this Court, having proceeded to hear and determine the within appeal to finality, to then take the extraordinary step of "staying" or "arresting" the judgment/order of the Court *solely* so that other proceedings may be heard to finality. As a matter of principle, a case which has been heard and determined and where judgment has been given, ought to be finalised, subject to any appropriate intervention that is made pursuant to the *Greendale* jurisprudence. It would be inconsistent with the policy considerations which attach to the importance of finality, as expressed in the relevant judgments, to postpone finality merely because other proceedings exist. Moreover, even if it may be appropriate to make such an

intervention in other situations, this is not a situation where such an intervention ought to be made. The within proceedings are of a particular type; a *Köbler* claim that the Supreme Court engaged in a manifest violation of EU law. We are satisfied that these proceedings are separate and discrete proceedings which ought to be finalised now.

46. We therefore refuse the application for a stay on the proceedings. We confirm that appeal ought to be dismissed and that the proceedings are therefore struck out in accordance with the High Court order.

Application for references to CJEU

47. In his grounding affidavit, the applicant sought a reference to the CJEU as follows:

> "Having regard to facts such as the facts herein, must the general principle of EU law mandating that the State may not take advantage of its failure to comply with EU law be interpreted as precluding courts of a Member State from striking out a *Köbler* type base governed by EU law (such as this case) against a Member State – where premises of the strike-out decision rely on the consistency with the Member State's Constitution and/or on the compatibility with EU law of a piece of legislation the subject of separate ongoing constitutional proceedings (against the State) impugning said legislation's constitutionality and compatibility with EU law – before the conclusion of said constitutional proceedings?"

48. We do not find that this is an appropriate question to refer. It is not a matter which arises out of the findings in the judgment of the 31st January 2022. The matter that was before the Court on appeal was solely directed towards determining whether the decision of the High Court to strike out the proceedings was a correct one. This application for a preliminary reference is based upon his request for a stay on entering judgment and finalising this appeal. We have set out above exactly why we refuse the

stay requested. We also consider that it would be entirely inappropriate for this Court to refer this issue when the issue did not arise in the proceedings before this Court at any time prior to the delivery of judgment. In all the circumstances, we do not find it either necessary or appropriate, in order for us to deliver judgment on the *Greendale* application, to make the reference as requested.

49. We would also observe that it is by no means clear that any decision about a stay on proceedings is in fact a matter of EU law. The reference in the question to "the general principle of EU law mandating that States may not take advantage of their failure to comply with EU law" is not sufficient to persuade us that an issue of whether to grant a stay of the entirety of one set of proceedings (post-delivery of judgment) until separate proceedings are determined engages any issue of EU law.

50. We are satisfied that it is not a question upon which a decision is necessary to enable this Court to give judgment on the *Greendale* application.

51. In his submissions, the applicant also asked the Court to make two further references "regarding any doubts it might have regarding:

- an absolute legal imperative for it to apply "the formal position in law" under EU law, and not to strike out this case pre-trial because the Appellant relied on said "formal position in law",

  and

- the legal imperative under EU law for the Irish courts to apply the strict proportionality principle of EU law, including the "least restrictive means" test thereunder as pertaining to actions of Member States applying EU law, without being each time explicitly called upon by the CJEU to do so."

52. As we have made clear in our judgment of the 31st January 2022, we do not have doubts about the interpretation and application of the CJEU decision in *Dowling* which was the issue in question in these *Köbler* proceedings. Referral to the CJEU on any of the many suggested referrals raised by the appellant in the High Court and on appeal was not necessary to give judgment then, and it is not necessary to do so now.

53. We therefore reject the request to make a referral or referrals to the Court of Justice of the EU.

Conclusion

54. For the reasons set out above, we refuse the applicant the *Greendale* relief and the *Nash* relief that he sought in his notice of motion. In the judgment we note that although sought as separate reliefs, the *Nash* decision forms part of the general *Greendale* jurisprudence and therefore were dealt with together.

55. We also refuse the applicant the stay on the proceedings that he has requested which is in effect a stay on the finalisation of the motion to strike out these proceedings. We confirm the decision to dismiss the appeal. Therefore, the Order of the High Court stands and the entire proceedings are struck out.

56. The issue of costs regarding the substantive appeal remains outstanding. Both parties have already made written submissions in respect of the costs of the appeal. We propose that the issue of the costs of this application and the costs of the substantive appeal be heard together in a costs hearing that will be fixed as soon as possible.