UNAPPROVED
THE COURT OF APPEAL

Appeal Number: 2020/149

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

Neutral Citation Number [2023] IECA 129

BETWEEN/

SCOTCHSTONE CAPITAL FUND LTD.

- AND -

PIOTR SKOCZYLAS

PLAINTIFFS/APPELLANTS

-AND-

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court dated the 25th day of May 2023

1. The issue that arises in this judgment is whether in circumstances where the solicitor-client relationship has irretrievably broken down, the Court should nevertheless refuse to permit the solicitor to come off record.

2. This is the application of Doran W. O'Toole & Co., Solicitors for the first named appellant, to come off record. For ease of reference, the applicant will be referred to as "the Solicitors" or "Mr. O'Toole". The application is opposed by the first appellant (hereinafter "Scotchstone" or "the Company") *via* the second appellant (hereinafter "Mr. Skoczylas") *qua* his position as a director of Scotchstone.

3. Before dealing with the merits of the application, it is useful to briefly set out the history of the proceedings and the circumstances in which the Solicitors came on record for Scotchstone.

4. Scotchstone and Mr. Skoczylas, 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. For ease of reference the proceedings will be referred to as "the *Köbler* proceedings". Following the issue of the *Köbler* proceedings, the respondents brought a motion to strike out the proceedings for being frivolous and vexatious and/or bound to fail. They succeeded in that motion before Sanfey J. in the High Court. Both Mr. Skoczylas and the Company appealed the decision of Sanfey J. to this Court. Mr. Skoczylas appeared for himself. The Company was represented by Flynn O'Donnell, Solicitors ("Flynn O'Donnell"). Flynn O'Donnell played little or no part in the appeal, Mr. Skoczylas' oral and written submissions having been adopted by Flynn O'Donnell on behalf of the Company. This was not unusual in litigation involving Mr. Skoczylas and Scotchstone, for reasons which will become apparent.

5. The argument advanced in the appeal was that the High Court was wrong in law and in fact in granting the dismissal of the proceedings. The respondents submitted that the High Court was correct.

6. This Court gave judgment in the substantive *Köbler* appeal on 31 January 2022 upholding the High Court Order ([2022] IECA 23.

7. By notice of motion dated 16 March 2022, Mr. Skoczylas issued a motion in which he sought the following orders:

(a) To vary/set aside/rescind the judgement of this Court of 31 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 Mr. Skoczylas contended were "material and decisive errors" in the substantive judgment, pursuant to the jurisdiction identified in *Nash v. Director of Public Prosecutions* [2017] IESC 51 and *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63 ("the *Nash* relief");

(c) Alternatively, an order to stay the within proceedings and to stay any order striking out the case pending the outcome of other proceedings in which the appellants seek to challenge the constitutionality of the Credit Institutions (Stabilization) Act 2010.

8. Subsequent to the issuing of what will hereinafter be referred to as the *Greendale* motion, the Court was apprised by Mr. Skoczylas that Scotchstone had instructed Flynn O'Donnell (who had acted for the Company in the appeal) to retain counsel for the purposes of making submissions in relation to the *Greendale* motion. Ultimately, on 2 August 2022, one set of submissions was filed on behalf of Mr. Skoczylas and Scotchstone (signed by Mr. Skoczylas in person and Senior Counsel for Scotchstone who, the Court was informed, was instructed by Mr. Shane O'Donnell of Flynn O'Donnell), each adopting the other's submissions.

9. On 11 October 2022, the Solicitors formally came on record for Scotchstone in the within proceedings. This was in circumstances where Mr. O'Donnell had informed Mr. Skoczylas on 1 October 2022 that Flynn O'Donnell wished to come off record. There is dispute between Mr. O'Toole and Mr. Skoczylas as to Flynn O'Donnell's reasons for coming of record, as is apparent from their respective affidavits. This Court, however, does not find it necessary for the purposes of the present application to say whose account (Mr. O'Toole's or Mr. Skoczylas') in this regard is to be preferred.

10. The *Greendale* motion was scheduled for hearing before this Court on 2 November 2022. On 24 October 2022, in advance of the scheduled hearing, Mr. Skoczylas sought to

lodge an affidavit sworn by him on 21 October 2022, together with exhibits, with the Court of Appeal Office. Mr. Skoczylas' email of 24 October 2022 referred to "exceptional developments" and "unique circumstances" that had arisen regarding Scotchstone's legal representation of which, Mr. Skoczylas said, the Court needed to be apprised.

11. On 25 October 2022, Mr. Skoczylas was informed by the Office, pursuant to the direction of the Court, that the Court had not given liberty to any party to file further affidavits, the Court already being in receipt of the respective affidavits sworn by the parties in relation to the *Greendale* motion as well as the parties' written submissions.

The Greendale motion and the Solicitors' motion to come off record

12. The *Greendale* motion duly came on for hearing on 2 November 2022. It is common case that by the time that motion came before the Court, the Solicitors' motion dated 26 October 2022 to come off record had been filed in the Office and made returnable for 4 November 2022. The motion was grounded on an affidavit sworn by Mr. Doran W. O'Toole on 26 October 2022.

13. Mr. O'Toole's affidavit is relatively brief. Therein he avers that he was requested by Mr. Skoczylas on 3 October 2022 to come on record for the Company "immediately". According to Mr. O'Toole, when he asked about the case Mr. Skoczylas was "vague and evasive" saying that Mr. O'Toole would be more of an "administrator" and that Mr. Skoczylas "would do everything". Mr. O'Toole asked for pleadings to be sent to him. He says that on 6 October 2022, a folder was sent to him by email "with limited access". He avers to being pressured by Mr. Skoczylas to file a notice of change of solicitor and that he and Mr. Skoczylas had their first disagreement about the drafting of that notice. He states:

> "4. I say the problems began immediately. Mr. Skoczylas would not listen to my advices, he was totally unreasonable expecting me to take on cases with limited information and pleadings and refused to even discharge Outlays being the Stamp Duty

on the Notice of Change. He has also on numerous occasions threatened me with a Complaint to the LSRA.

5. I say that Piotr Skoczylas informed me that the Company had no issue with its previous Solicitors, Flynn O'Donnell Solicitors but told me not to contact them and there were no issues in relation to costs. I am not in a position to act for the Company as I will not continue now knowing how unreasonable the Second Named Plaintiff is and I am reluctant to continue not knowing the Company's position with the previous Solicitor on Record or without payment of fees.

6. I say I cannot continue to act for a company where I know very little about or how the Company is financing its litigation. Mr. Skoczylas has been aggressive and threatening to me. I cannot continue to act for the Company or to take instructions on behalf of the Company and the Second Named Plaintiff."

14. What was set out by Mr. O'Toole in his grounding affidavit and what was averred to by Mr. Skoczylas in the affidavit he swore on 21 October 2022 (an affidavit to which the Court will return in due course) constituted the state of play regarding the application to come off record by the time the *Greendale* motion came before the Court on 2 November 2022. At that hearing, Mr. Skoczylas advised the Court that he was not ready to deal with the motion to come off record (which he was opposing) scheduled for 4 November 2022 and he required time to put in submissions. He referred to the affidavit he had sworn on 21 October 2022 and intimated that he would be relying on it and that he wanted to swear a further affidavit in reply to Mr. O'Toole's affidavit. Mr. Skoczylas was duly informed by the Court that as there was now a motion to come off record before the Court, his 21 October 2022 affidavit would be accepted as part of his response to the motion. The Court duly fixed the hearing of the application to come off record for 7 December 2022, with leave given to Mr. Skoczylas to file his affidavits by 2 December 2022.

15. Significantly, on 2 November 2022, Mr. Skoczylas had no objection to the *Greendale* motion proceeding (it not having been argued by Mr. Skoczylas on behalf of the Company that Mr. O'Toole was required to remain in the courtroom for the hearing) and, indeed, he stated that he was happy to proceed. Thus, Scotchstone did not participate in the *Greendale* application notwithstanding that it had previously been envisaged it would do so. Of course, the Solicitors remained on record for the Company, and as will become clear, this is what was and continues to be of concern to Mr. Skoczylas, not whether there was *de facto* participation by the legal representative on record for Scotchstone on the day. In any event, the joint written submissions of Mr. Skoczylas and the Company on the *Greendale* motion were before the Court.

16. The hearing of the *Greendale* motion then proceeded with submissions from Mr. Skoczylas, and from Mr. McCullagh SC on behalf of the State respondents. Thereafter, the Court reserved its judgment in relation to the matter.

17. The Court duly delivered judgment on the *Greendale* motion on 5 December 2022 ([2022] IECA 275), refusing Mr. Skoczylas *Greendale* relief, refusing a stay on the proceedings, and confirming the decision of the Court as given on 31 January 2022 to dismiss the appeal of Sanfey J.'s Order. In its judgment of 5 December 2022, the Court noted that the issue of the costs of the appeal remained outstanding and that both sides had made written submissions in respect of the costs of the appeal. The Court proposed that the costs of the *Greendale* application and the costs of the appeal be heard together. The Court has yet to fix a date for this costs hearing.

Scotchstone's response to Mr. O'Toole's application to come off record

18. Mr. Skoczylas swore a replying affidavit in the motion to come off record on 1 December 2022. It is described by Mr. Skoczylas as supplemental to the affidavit he had

earlier sworn on 21 October 2022. Before looking to Mr. Skoczylas' 1 December 2022 affidavit, it is apposite to first look at the affidavit he swore on 21 October 2022.

19. In his 21 October 2022 affidavit, Mr. Skoczylas describes himself as a director of Scotchstone and as someone authorised by the Company's Memorandum and Articles of Association to represent the Company in judicial proceedings. He acknowledges however that as he is not a solicitor, he cannot represent the Company before the Irish courts, "as per the applicable Irish jurisprudence".

20. Mr. Skoczylas had previously apprised the Court of what he described was the positive reaction to and adoption by the courts, in litigation in which he and Scotchstone were involved, of the practice whereby the Company only ever had "technical/limited" legal representation and would routinely adopt the submissions made by Mr. Skoczylas.

21. Mr. Skoczylas describes the practice thus:

> "As the Court also knows, following the ruling of Judge Feeney in 2012, the Irish courts, including the Supreme Court, have universally accepted that the company can be represented in a so-called technical/limited capacity, whereby the solicitor on the record adopts my submissions on behalf of the company. The solicitor on the record representing the company on said limited/technical basis, was Mr. O'Donnell from Flynn & O'Donnell, as the Court knows."

The Court will return to the issue of "technical/limited" legal representation later in the judgment.

22. Mr. Skoczylas goes on to address the circumstances in which Flynn O'Donnell came off record for Scotchstone explaining that Mr. O'Donnell had informed him that he wished to come off record because "[b]eing a legal cost accountant, he did not wish to extend his practicing solicitor's certificate due to costs involved".

23. He refers to an email he sent to the Court on 6 October 2022 informing it that a change of solicitors was being carried out, namely, that Mr. O'Donnell was coming off record, with the Solicitors coming on record instructing two named senior counsel and one junior counsel. The Court was also informed that the requisite notice of change of solicitor was in the process of being filed and served.

24. Mr. Skoczylas next addresses the Company's relationship with Mr. O'Toole, averring that Mr. O'Toole "has provided the company with an inadequate legal service", that his actions have "amounted to misconduct" and that he acted "dishonestly". He alleges that Mr. O'Toole repeatedly misled him and then sent him "unbecoming and accosting angry emails", all of which, he avers, is the subject of a formal complaint by the Company to the Legal Services Regulatory Authority ("LSRA"). Mr. Skoczylas exhibits a copy of the complaint to the LSRA.

25. He goes on to advert to a telephone call on 11 October 2022 with a named Senior Counsel instructed by the Solicitors during which he alleges he was rudely berated. He describes Counsel as having behaved unacceptably on the basis of what appeared to Mr. Skoczylas to be false information Counsel received from Mr. O'Toole. He alleges that Counsel had influenced the whole legal team heretofore assembled for Scotchstone to abandon the Company as their client, thereby leaving the Company without a legal team "shortly before important hearings, including an upcoming hearing in the Court of Appeal on 2 November 2022…" He says that this alleged conduct is also the subject of a formal complaint to the LSRA.

26. Mr. Skoczylas avers that given the difficult circumstances in which the actions of Mr. O'Toole and Counsel have left the Company, Mr. O'Toole is obliged to stay on record until a new solicitor is found, "in order to enable steps that the Company would wish to undertake

before the courts, given that the Company, which cannot afford to pay for a solicitor, is obliged to be represented by a solicitor (in said technical/limited capacity)".

27. Mr. Skoczylas then states:

> "… As I informed Mr. O'Toole, my intention is to have another solicitor come on the record as soon as possible, in the circumstances. I have been striving to secure a new solicitor to come on the record before the upcoming hearing in the Court of Appeal on 2 November 2022. However, securing another solicitor to come on the record at such a short notice in such a complex ongoing case has been proving very difficult thus far, and it is currently unclear when it will be possible, in the unique and difficult circumstances."

28. He goes on to state that given that the Company cannot afford legal representation, he made a legal aid application "to secure a technical/limited representation for the company" and he exhibits a copy of the said application to the Legal Aid Board.

29. In his supplemental affidavit sworn 1 December 2022 in response to Mr. O'Toole's grounding affidavit, Mr. Skoczylas again references the circumstances of the Solicitors' retention and he say that their coming on record as a replacement for Flynn O'Donnell came on foot of a recommendation from the Senior Counsel to whom Mr. Skoczylas had referred to in his earlier affidavit. At para. 5, he avers that when he telephoned Mr. O'Toole on 3 October 2022 he had explained the background to the proceedings in detail and answered his questions.

30. Specifically, he had made clear to Mr. O'Toole that no payment from Scotchstone or Mr. Skoczylas was possible in all the circumstances and that Mr. O'Toole could recover his costs only if costs were awarded in favour of Scotchstone while the Solicitors were on the record. Moreover, it had been agreed that Mr. Skoczylas would draft the requisite notices of change of solicitor in the three sets of proceedings (including the *Köbler* proceedings) which,

it was intended, Mr. O'Toole would take over. All of this, Mr. Skoczylas says, occurred during the one hour and 44-minute telephone conversation on 3 October 2022 which Mr. Skoczylas recorded.

31. Mr. Skoczylas describes as "mendacious" Mr. O'Toole's averment that he was "vague and evasive" when briefing Mr. O'Toole on the case. Contrary to what was said by Mr. O'Toole, Mr. Skoczylas had explained in detail what the case was about and had emailed Mr. O'Toole the case files in the three sets of proceedings including in the *Köbler* proceedings. He denies that access to the case files was limited. In this regard, he exhibits email correspondence between himself and Mr. O'Toole between 3 and 6 October 2022, which included the case files.

32. Mr. Skoczylas describes the assertion that Mr. O'Toole was pressured to file notices of change of solicitor as "misleading at best", averring that he had requested Mr. O'Toole to file notices in the three cases and that he, Mr. Skoczylas, had drafted the requisite notices of change of solicitor in respect of which the Solicitors had made no comment until 7 October 2022 when a Legal Executive in Mr. O'Toole's Office had emailed him "with certain enquiries regarding the still-unfiled Notices". This was, Mr. Skoczylas says, despite an earlier email from Mr. O'Toole on 6 October advising that the notices had been "sent off". In any event, Mr. Skoczylas had answered the queries and there was no disagreement at that stage.

33. At para. 7C, Mr. Skoczylas disputes Mr. O'Toole's assertion that problems in the solicitor/client relationship had begun immediately, describing that averment as "mendacious and/or misleading" and that same was belied by the fact that Mr. O'Toole, notwithstanding the alleged problems, had filed a notice of change of solicitors on 11 October 2022 in the *Köbler* proceedings.

34. He describes as "manifestly untrue" Mr. O'Toole's averment that he was expected to take on cases with limited information or pleadings. He describes as "manifestly not true and/or misleading" the allegation that he refused to discharge outlay such as stamp duty in respect of the notices of change of solicitors, saying that this issue arose for the first time on 12 October 2022 after Mr. O'Toole had informed him that he wished to come off record. In those circumstances, Mr. O'Toole had "unduly demanded" payment for the notices, "demanded unduly payment for the motions to come off record" and failed to discharge his relevant duties including under, *inter alia*, s. 150 of the Legal Services Regulation Act 2015 ("the 2015 Act").

35. Mr. Skoczylas denies that he threatened Mr. O'Toole on numerous occasions with a complaint to the LSRA. Insofar as the LSRA was mentioned in correspondence between them, this had to be seen in its context and timing and, in this regard, Mr. Skoczylas refers to various emails sent to Mr. O'Toole on 12 October 2022.

36. At para. 7D, Mr. Skoczylas again avers that he informed Mr. O'Toole on 3 October of the reason (referred to earlier) Mr. O'Donnell had ceased to act for Scotchstone and that Mr. O'Donnell did not have any claims against the Company. Mr. O'Toole was also informed that there was a costs order in favour of the Company from which Mr. O'Donnell would benefit following the adjudication by the Legal Costs Adjudicator. On that basis, he had made it clear to Mr. O'Toole that he did not have to send a notice of change of solicitor to Flynn O'Donnell and that he, Mr. Skoczylas, would ensure that Mr. O'Donnell was informed of the fact that he would not be dealing with the *Köbler* case any longer, in respect of which Mr. O'Toole took no issue.

37. According to Mr. Skoczylas, Mr. O'Toole has misled the Court by his averment that he did not know how the Company would finance the litigation *vis-a vis* his firm. He repeats his earlier averment that he had informed Mr. O'Toole on 3 October 2022 that he would not

be paid by the Company unless a costs order was made in favour of the Company while Mr. O'Toole was on record. This, Mr. Skoczylas says, was consistent with the advice he had received from the named Senior Counsel on 1 October 2022, and this had been acknowledged by Mr. O'Toole, as the record of a telephone conversation of 3 October 2022 between Mr. Skoczylas and Mr. O'Toole demonstrates. In this regard, Mr. Skoczylas referred to extracts from that record.

38. Mr. Skoczylas describes Mr. O'Toole as having made a "patently false and mendacious" assertion that he had been "aggressive and threatening". Finally, he repeats his assertion that Mr. O'Toole is obliged to stay on record until a new solicitor is found given that the Company cannot afford to pay for a solicitor.

The hearing on 7 December 2022

39. As scheduled, the motion to come off record duly came on for hearing on 7 December 2022. Mr. O'Toole opened his application with reference to his grounding affidavit sworn on 26 October 2022. He prefaced his submissions by stating that he had held off applying to come off record for a period, in order to afford time to the Company to retain a new solicitor. He said it was necessary for him to come off record for the reasons set out in his affidavit, and so that he would be in a position to deal with the complaint that had been lodged against him with the LSRA. He submitted that neither Mr. Skoczylas nor the Company would be prejudiced if he were allowed to come off record and that Mr. Skoczylas in his affidavit of 21 October 2022 had effectively acknowledged that Mr. O'Toole should come off record.

40. In aid of his argument that the solicitor/client relationship had broken down, Mr. O'Toole pointed to a number of emails exhibited in Mr. Skoczylas' affidavit of 21 October 2022. He referred to an email sent on 7 October 2022 by his Office requesting Mr. Skoczylas' residential address so that he could be served with a notice of change of solicitor for the

Company and requesting certain other information in order that Mr. O'Toole could comply with the relevant anti-money laundering legislation ("AML") before notices of change of solicitor were filed. Specifically, Mr. Skoczylas had been requested to provide photographic identification, a recent utility bill, a VAT/PPS No. for Scotchstone and the Company's Certificate of Incorporation and Memorandum and Articles of Association. In his replying email on the same day, Mr. Skoczylas had queried the need for his residential address and had supplied only his UK passport and Maltese ID with address which, Mr. O'Toole submitted, was not sufficient.

41. Mr. O'Toole also referred to email exchanges on 10 and 11 October concerning the notices of change of solicitor with which he had been provided by Mr. Skoczylas, which, according to Mr. O'Toole, required amendment as had been notified by the Central Office. These email exchanges were said by Mr. O'Toole to evidence the breakdown of the solicitor/client relationship. Mr. O'Toole highlighted one such email sent by Mr. Skoczylas on 11 October which had indicated that Mr. O'Toole should consider himself "off all the cases". In further aid of his application to come off record, Mr. O'Toole referred to a conversation he had with Mr. O'Donnell of Flynn O'Donnell on 10 October 2022.

42. It is common case that many of the factual matters aired by Mr. O'Toole in his oral submissions on 7 December 2022 had not been adverted to in his own grounding affidavit (albeit the correspondence relied on was exhibited in Mr. Skoczylas' affidavits). In his replying submissions, Mr. Skoczylas took issue with the matters Mr. O'Toole's sought to rely on which had not been deposed to in his grounding affidavit.

43. The Court agreed with Mr. Skoczylas that Mr. O'Toole was obliged to put the factual matters upon which he wished to rely in oral submissions on affidavit. It also noted that Mr. O'Toole had not taken the opportunity to reply by way of affidavit to the specific complaints Mr. Skoczylas had made in his 21 October 2022 and 1 December 2022 affidavits.

Accordingly, the Court directed that Mr. O'Toole swear a further affidavit. He was given until 14 December 2022 to do so. Should he wish to, Mr. Skoczylas was given leave to file a further replying affidavit on or before 11 January 2023.

Mr. O'Toole's affidavit of 14 December 2022

44. Mr. O'Toole's more expansive affidavit was sworn on 14 December 2022. At para. 6 thereof, he denies that he had agreed to act on a "no foal no fee basis" or that his response to Mr. Skoczylas on 3 October 2022 to the effect that "you won't be getting letters off me looking for bundles of money…" could be taken that he was acting on a "no foal no fee" basis.

45. He avers that his and Mr. Skoczylas' respective interpretations of what was meant by the Solicitors acting on a so-called "technical/limited" basis differed. Mr. O'Toole characterised Mr. Skoczylas' interpretation as meaning that the Solicitors were to be no more than an administrator or "puppets on strings" for Mr. Skoczylas, which was unacceptable to Mr. O'Toole.

46. He accepted that Mr. Skoczylas drafted notices of change of solicitor in the three cases in question. Upon receipt of these notices, Mr. O'Toole had furnished them to his Legal Executive and pointed out that they contained errors which would have to be addressed with Mr. Skoczylas. On 10 October 2022, Mr. O'Toole's Law Clerk attended at the Central Office with the notices as drafted by Mr. Skoczylas. His Law Clerk was advised that the notices required amendment. Mr. O'Toole next avers to an email he sent to Mr. Skoczylas at 8.02 am on 11 October 2022 to the effect that his Law Clerk had filed the notices of change of solicitor on 10 October 2022. This, Mr. O'Toole later realised, was a mistaken belief on his part as the notices were not in fact filed until the morning of 11 October 2022 due to the fact that they required amendment. According to Mr. O'Toole, notwithstanding that this was a minor confusion on his part, it was not acceptable to Mr. Skoczylas. Furthermore, the tenor

of Mr. Skoczylas email at 11.48am on 11 October suggested that it was the Solicitors and the Central Office clerks who had erred in respect of the notices of change of solicitor: he could not accept that the notices he drafted required amendment, demonstrated by the same email. According to Mr. O'Toole, "this ultimately is when [Mr. O'Toole] after obtaining legal advice knew that [he] was not in a position to act for [Mr. Skoczylas] or the Company".

47. Notwithstanding that Mr. Skoczylas had instructed that the Solicitors were not obliged to file/serve a notice of change of solicitors on Flynn O'Donnell as that was not required by the rules of court, Mr. O'Toole was, however, anxious to talk to Mr. O'Donnell. At para. 8 of his affidavit, Mr. O'Toole says that he spoke to Mr. O'Donnell on 10 October 2022. He avers to a follow up call with Mr. O'Donnell on 14 December 2022.

48. At paras. 15-19 of his affidavit, Mr. O'Toole adverts to the email correspondence between himself and Mr. Skoczylas over the course of 11-12 October 2022. These email exchanges are considered elsewhere in the judgment.

49. With regard to his request to Mr. Skoczylas for AML documents, Mr. O'Toole, at para. 21, says that it was standard practice to request this information. However, Mr. Skoczylas had not furnished his address as requested but rather that of the Company. Mr. O'Toole did not believe Mr. Skoczylas resided in Malta. Mr. Skoczylas had not furnished a utility bill despite being requested to do so.

50. At para. 22, Mr. O'Toole refers to Mr. Skoczylas' request to him (after apparently Mr. Skoczylas had spoken to Mr. O'Donnell by telephone on 12 October 2022) not to file a motion to come off record in circumstances where Mr. Skoczylas was endeavouring to get another solicitor to come on record which, if it happened, would save Mr. O'Toole the cost of applying to come off record.

51. Replying to Mr. Skoczylas' complaint that he had not furnished a s.150 letter, Mr. O'Toole avers that it was quite simply not practical that he would have done so since as of

10 October 2022 he did not believe he had a full grasp of the complexity of the litigation and remained unsure of what his full instructions were. According to Mr. O'Toole, Mr. Skoczylas had taken it upon himself to draft letters which ordinarily Mr. O'Toole would draft; by way of example, it was Mr. Skoczylas and not Mr. O'Toole's Office who had informed the Court that the Solicitors were coming on record. This, together with the call Mr. O'Toole had with Mr. O'Donnell on 10 October and the emails from Mr. Skoczylas suggesting that he had not dealt correctly with the notices of change of solicitor, had "set off alarm bells". Mr. O'Toole "was not going to allow [Mr. Skoczylas] to bully [him]". While the limited involvement which Mr. Skoczylas envisaged for the Solicitors might allow him to take the lead by the making of submissions in court and the like, Mr. O'Toole was not prepared to allow Mr. Skoczylas interfere with Mr. O'Toole's Office's administration "as he had with Mr. O'Donnell's".

52. Mr. O'Toole goes on to state, at para. 23, his belief "that [Mr. Skoczylas] won't accept there is no Solicitor/Client relationship". He says that it is fundamentally not possible for him to continue to act for Scotchstone in circumstances where Mr. Skoczylas has undermined his position as an officer of the court by accusing him of lying and misleading and mendacious behaviour, all of which Mr. O'Toole says is untrue. He continues as follows:

> "I was contacted by [Mr. Skoczylas] on the 3rd October 2022 and by the 11th October 2022 and from his own emails of the same date no matter what way he twists it and excuses he makes clearly indicate that I was to come off record. There is no conceivable way that I can continue to act for [Mr. Skoczylas]."

53. At para. 25, he addresses Mr. Skoczylas' complaint about him to the LSRA. He contends that same is frivolous and vexatious and without merit and that he only became aware of the complaint upon receipt of Mr. Skoczylas' affidavit of 26 October 2022 as filed in court on 2 November 2022. Mr. O'Toole avers that he is concerned that since he continues

to be involved in a matter that is before the Court, the LSRA may defer consideration of the complaint. Accordingly, he is desirous that the Court deals with the matter expeditiously as he is obliged to put his insurance company on record of any complaint to the LSRA even if same is frivolous and vexatious or without merit or foundation. He avers that the longer it takes for him to come off record, and the complaint to be dealt with, there is the likelihood of potential additional insurance costs being incurred by him.

54. At para. 28, he avers that he has been "far too reasonable" with Mr. Skoczylas and he regrets not having made better enquiries before his Law Clerk proceeded to file the notice of change of solicitor in the *Köbler* proceedings. He states that he has his professional reputation to protect and stand over. He does not want to have any hand, act or part in the litigation in which Mr. Skoczylas is involved. His belief is that Mr. Skoczylas is intentionally preventing him coming off record which he can only perceive as "malicious".

Mr. Skoczylas' affidavit sworn 22 December 2022

55. Mr. Skoczylas took up the offer to respond to Mr. O'Toole's affidavit and he swore an expansive replying affidavit on 22 December 2022. Much of the affidavit traverses matters already canvassed by Mr. Skoczylas in his two previous affidavits. The principal matters addressed in this most recent affidavit are summarised below.

56. At para. 8, Mr. Skoczylas contends that had Mr. O'Toole not come on record in the *Köbler* proceedings, Mr. O'Donnell would still be on record. This, Mr. Skoczylas says, is in circumstances where Flynn O'Donnell remain on record for Scotchstone in other proceedings. Hence, Mr. O'Toole is obliged to stay on record in the aforementioned "technical/limited" capacity until a new solicitor is found or until the "hot" phase of the *Köbler* litigation is over.

57. Mr. Skoczylas alleges that Mr. O'Toole in his 14 December 2022 affidavit has introduced "new evidence, partly inadmissible hearsay which demonstrates new and shifting

grounds" for his motion. Mr. O'Toole's "entirely new grounds" also partly contradict the grounds set out in his 26 October 2022 affidavit. He characterises Mr. O'Toole's reporting of comments allegedly made by Mr. O'Donnell on 10 October 2022 as inadmissible hearsay evidence. At para. 24, he points out that notwithstanding that Mr. O'Toole emailed him on 4 November 2022 advising that Mr. O'Donnell would file an affidavit corroborating Mr. O'Toole's reasons for coming off record, Mr. O'Toole has failed to produce such affidavit.

58. The Court would have it noted at this juncture that, at the hearing of the motion to come off record on 2 February 2023, Mr. O'Toole sought to adduce an affidavit sworn by Mr. O'Donnell. However, given the lateness of the production of Mr. O'Donnell's affidavit, the Court declined to admit same. Moreover, the Court takes the view that the alleged reasons (as set out by Mr. O'Toole) for Mr. O'Donnell ceasing to act for the Company are not germane to the issue to be decided by the Court in the present application, which is whether leave should be given to Mr. O'Toole to come off record.

59. Mr. Skoczylas goes on to say that insofar as Mr. O'Toole asserts that he had a conversation with Mr. O'Donnell on 10 October 2022, that assertion belies Mr. O'Toole's earlier averment that he was reluctant to continue acting for Scotchstone "not knowing the Company's position with the previous Solicitor on Record". He also points out that Mr. O'Toole does not say that the information he received from Mr. O'Donnell on 10 October formed the basis for his application to come off record, rather, as his 14 December 2022 affidavit shows, Mr. O'Toole attributed his decision to come off record to issues that arose regarding the notices of change of solicitor drafted by Mr. Skoczylas. Insofar as Mr. O'Toole relies on his conversation with Mr. O'Donnell on 10 October as a basis upon which to come off record, Mr. Skoczylas' position is that at the very least, before coming on record for the Company on 11 October Mr. O'Toole was obliged to contact Mr. Skoczylas regarding Mr. O'Donnell's allegations.

60. In any event, Mr. Skoczylas describes Mr. O'Toole's claims as to what Mr. O'Donnell reported to him as "incongruous and mendacious" and points to the fact that after apparently speaking to Mr. O'Donnell on 10 October Mr. O'Toole emailed Mr. Skoczylas at 8.02am on 11 October advising him that a notice of change of solicitor in the within proceedings had been filed the previous day. Nowhere in that email does Mr. O'Toole make the allegations he now makes. Nor, Mr. Skoczylas says, were there such allegations in emails sent by Mr. O'Toole on 11 October at 1.50pm, on 12 October at 1.49pm, 4.58pm and 10.29pm, on 13 October at 10.48am, or in the email he sent on 14 October at 8.53pm.

61. Mr. Skoczylas contends that Mr. O'Toole's claim to have spoken to Mr. O'Donnell on 10 October is further belied by an email he sent to Mr. Skoczylas on 4 November wherein he refers to having had "reason to speak to Shane O'Donnell on 2 November 2022", by an email he sent on 12 October querying "how Shane O'Donnell managed to get his costs from you…" and by his email of 14 October querying if Mr. Skoczylas had discharged Flynn O'Donnell's costs. Mr. Skoczylas' position is that all of this makes clear that Mr. O'Toole had not yet had the alleged conversation of 10 October 2022 with Mr. O'Donnell. He points out that Mr. O'Toole has not provided any record of his telephone conversation of 10 October with Mr. O'Donnell.

62. At para. 23, Mr. Skoczylas describes various matters set out by Mr. O'Toole as "unmeritorious *ad personam* attacks". He repeats his earlier assertion that neither Mr. O'Donnell nor his Firm have made any claims against Scotchstone.

63. Mr. Skoczylas again denies the claim that he did not adequately brief Mr. O'Toole and points to the duration of telephone conversation on 3 October 2022 with Mr. O'Toole and to the fact that the full case file was emailed to him on 6 October 2022. In those circumstances, he describes as "incongruous and entirely unreasonable" Mr. O'Toole's claim that a deficit in instructions was an adequate basis for Mr. O'Toole to decide on 11 October 2022 (as Mr.

O'Toole says he did) to apply to come off record for the Company, incidentally the same day he formally came on record for the Company.

64. At para. 28, he avers that if Mr. O'Toole had any concerns about the "technical/limited" capacity of his involvement in the *Köbler* litigation he should not have come on record on 11 October 2022. His position is that Mr. O'Toole expressly acknowledged the extent of his proposed involvement during the telephone conversation of 3 October 2022.

65. At para. 33, Mr. Skoczylas repeats his prior assertion that in circumstances of Mr. O'Toole having informed Mr. Skoczylas within a day of having come on record on 11 October 2022 that he wished to come off record, and in circumstances where he has failed to discharge his s. 150 duties, Mr. O'Toole has no basis for making demand off the Company for payment. Furthermore, he points to Mr. O'Toole's email of 12 October 2022 wherein he stated: *"I have no intention in pursuing you or the Company for the money but I asked for the outlay to receive the response I expected from you!".* His position is that if Mr. O'Toole had any fundamental problems with payment he had a duty, before coming on record on 11 October 2022, to make that clear in writing which he "manifestly" failed to do.

66. Mr. Skoczylas describes as "incongruous and entirely unreasonable" Mr. O'Toole's claim that his concerns regarding the notices of change of solicitor which Mr. Skoczylas drafted justify the application to come off record in circumstances where the notices had been sent to Mr. O'Toole on 3 October 2022, days in advance of his coming on record for the Company. He points out that neither Mr. O'Toole nor his Office pointed to any defects in the notices, rather it was the Central Office that had added the word "The First Named" after the word "Plaintiff" in the notice of change of solicitor presented to the Central Office in respect of the within proceedings.

67. At para. 40-41, he denies that he agreed on 11 October 2022 that Mr. O'Toole could come off record before a new solicitor was found to replace him. He says he is supported in this regard by the chain of emails which passed between them on 11 October 2022.

68. Mr. Skoczylas counters the claim made by Mr. O'Toole that he failed to supply information to allow Mr. O'Toole to fulfil his AML obligations by stating that if Mr. O'Toole had any concerns in this regard he should not have come on record on 11 October 2022. His position is that he replied adequately (by email of 7 October 2022) to Mr. O'Toole's AML request and produced all necessary documentation, including proof of his registered address in Malta. In the same email he had asked Mr. O'Toole to let him know whether or not what had been furnished addressed Mr. O'Toole's questions in full. Neither Mr. O'Toole nor his Office had reverted further in this regard and they duly proceeded to sign a notice of change of solicitor on 7 October 2022 which was filed on 11 October. In those circumstances, it was, Mr. Skoczylas says, "incongruous and entirely unreasonable" for Mr. O'Toole to cite alleged deficiencies in Mr. Skoczylas' response to the AML requirements as a reason to come off record.

69. At para. 46, Mr. Skoczylas describes Mr. O'Toole's contention that the LSRA cannot deal with the complaint Mr. Skoczylas has made as "opaque/incoherent and difficult to understand". His understanding, from Mr. O'Toole's submissions to the Court on 7 December 2022, is that what is being suggested is that the LSRA cannot deal with the complaint while Mr. O'Toole remains on record for the Company, a proposition, Mr. Skoczylas says, that is not borne out by the 2015 Act.

The hearing on 2 February 2023

70. The application to come off record was ultimately heard by the Court on 2 February 2023. The submissions made by Mr. O'Toole and Mr. Skoczylas were largely in line with the arguments they canvassed in their respective affidavits.

Correspondence post the hearing

71. On 16 March 2023, Mr. Skoczylas emailed the Office of the Court of Appeal requesting that the Court would take account of certain case law and other materials he had relied on in response to the application by Mr. O'Toole in the High Court in proceedings bearing record no. 2023/2708P to come off record. The case law to which the Court was directed comprised the following: *Dowling & Ors v. Ireland* [2023] IEHC 38, *Allied Irish Bank plc v. Aqua Fresh Fish Ltd* [2018] IESC 49, 1 I.R. 517, *Law Society of Ireland v. Doocey* [2022] IECA 246, *Law Society v. Tobin* [2017] IECA 215, *Bolton v. The Law Society* [1993] EWCA Civ 32, *In re Burke* [2021] IESC 13 and *Eastern Health Board v. M.K.* [1999] 2 I.R. 99. (The High Court has not yet ruled on Mr. O'Toole's application in proceedings 2013/2708P and is awaiting this Court's ruling on the application Mr. O'Toole now makes in the within proceedings).

72. The Court was satisfied to receive both the materials relied on by Mr. Skoczylas and the ruling of Feeney J. in *Dowling & Ors v. Minister for Finance* (2011/239) delivered *ex tempore* on 1 February 2012, upon which Mr. O'Toole placed reliance in the post-hearing submission he made to the Court on 21 March 2023. The case law and materials relied on, respectively, by Mr. Skoczylas and Mr. O'Toole have been duly considered by the Court and reference to same has been made where considered necessary or appropriate.

Discussion

73. As their affidavit evidence demonstrate, Mr. O'Toole and Mr. Skoczylas each raise myriad issues upon which they rely as demonstrating, in the case of Mr. O'Toole, why he should be permitted to come off record, and in the case of Mr. Skoczylas, why the Court should refuse Mr. O'Toole's application to be allowed to cease acting for Scotchstone. In the view of the Court, a great many of the contentious issues raised in the affidavits are not capable of being resolved by the Court. The Court cannot, by way of example, determine whether Mr. O'Toole's retention was on a "no foal no fee" basis as claimed by Mr. Skoczylas or whether the Company's financial position is as set out by Mr. Skoczylas. Nor can it conclusively determine whether Mr. Skoczylas has supplied Mr. O'Toole with the requisite information for AML purposes. The Court has already stated it does not have to decide which of the versions (Mr. O'Toole's or Mr. Skoczylas') regarding Mr. O'Donnell coming off record is to be preferred. In any event, in the Court's view, such issues of contention do not require to be resolved for the purposes of the within application.

74. The fact of the matter is that the very existence of the myriad issues of contention between Mr. O'Toole and Mr. Skoczylas as deposed to in their respective affidavits (and corroborated to a large degree by email exchanges between them), together with the tenor of the language used by both (and particularly by Mr. Skoczylas), amply demonstrates the discord that has arisen in the solicitor-client relationship at issue here. Moreover, the Court does not intend to comment on matters that are more properly for another forum, such as Mr. Skoczylas' complaint about Mr. O'Toole to the LSRA, save to acknowledge that the existence of such complaint (whatever its merits) is, again, undoubted evidence of the breakdown of the solicitor-client relationship between Mr. O'Toole and Mr. Skoczylas (*qua* his role as a director of Scotchstone authorised to instruct Mr. O'Toole on behalf of the Company).

75. Whilst, as the affidavit evidence demonstrates, there is very little upon which Mr. O'Toole and Mr. Skoczylas are *ad idem*, they both agree that the solicitor- client relationship has broken down. Mr. O'Toole has expressly advised the Court that he has no trust in Mr. Skoczylas. Mr. Skoczylas, likewise, in his oral submissions, acknowledged that there was no relationship of trust between him and Mr. O'Toole. Even if they were not in agreement on this issue, as the Court has already noted, the tenor of their respective affidavits and of certain emails that have passed between them amply highlights the breakdown of the solicitor-client relationship.

76. Order 7 r. 3(1) of the Rules of the Superior Courts allows a solicitor to apply to the court for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the proceedings. Albeit there are limited authorities on the issue, the courts have had occasion to consider applications made pursuant to O. 7, r.3.

77. In *O'Fearail v. McManus* [1995] WJSC 1362, the insurance company indemnifying the defendant in an assault and battery action instructed a solicitor to take up the matter on its behalf. A defence was duly delivered. The insurance company subsequently took the view that the incident in question was not covered by the insurance policy and withdrew from the case. The solicitor applied pursuant to O. 7, r.3 to come off record. The application was refused by the High Court. The Supreme Court, however, took the view that the reality of the situation had to be recognised. Giving the *ex tempore* judgment of the Court, O'Flaherty J. stated:

> *"The present situation, as it has unfolded before us, is that the insurance company, rightly or wrongly, has repudiated. It says that it does not want Mr. O'Brien to act any longer and I think in those circumstances it would be a forced form of liaison to say to Mr. O'Brien that he should continue to act for this defendant and I would in the circumstances allow him to come off record".*

78. In *Maloney v. Malhas & ors/Shortt v. Malhas & Ors* [2014] IEHC 296 (which were malpractice suits by the plaintiffs who were dissatisfied with cosmetic surgery that had been performed on them by the defendant), an application to come off record in both cases was made by the solicitors for the defendant at the request of the Medical Defence Union (MDU) on the basis that in *Maloney* there was no estate from which the defendant solicitors could take instruction, and as regards both the *Maloney* and *Shortt* cases, the MDU were not going to underwrite any award that might be made to the plaintiffs. The applications were resisted by the plaintiffs. Interestingly, in concluding that the defendant solicitors should be allowed to come off record, Birmingham J. noted, *inter alia* that no authorities had been cited in which an application for leave to come off record had been refused. He noted that many of the reported cases about solicitors applying to come off record concerned what, if any, conditions ought to be imposed for the purpose of coming off record and the issue of costs.

79. As noted by Delaney & McGrath *Civil Procedure*, 4th Ed (Roundhall, 2018), applications such as the present are most commonly brought where a solicitor is unable to get satisfactory instructions as to the conduct of the proceedings, or where there is a dispute or breakdown as to the conduct of the proceedings, or where there is a dispute or breakdown in relations between a solicitor and a client. Legal authorities on applications premised on a breakdown of the solicitor-client relationship are thin on the ground. This is not surprising in circumstances where it is to be expected that where a breakdown in relations occurs there is perhaps little appetite for any opposition to such applications. As can be seen, however, the present case is an outlier in this regard.

80. In the words of O'Flaherty J. in *O'Fearail v. McManus*, O. 7, r.3 "*gives the courts a wide discretion*" in deciding whether or not a solicitor should be permitted to come off record. It is in the context of this wide discretion that Mr. O'Toole's application to come off record and Mr. Skoczylas opposition to the application fall to be considered.

81. Essentially, Mr. O'Toole's principal submission is that the solicitor-client relationship in this case has broken down irretrievably. As already noted, Mr. Skoczylas does not dispute that this is the case. However, the breakdown notwithstanding, he staunchly resists Mr. O'Toole's application and advances a number of bases which he says supports his submission that Mr. O'Toole's application should be refused. Each of those will now be considered in the context of the Court's consideration of whether it should exercise its discretion and accede to Mr. O'Toole's application.

The requirement for the Company to be legally represented in litigation

82. Pursuant to Irish law, save in exceptional circumstances where the interests of justice necessitate, a corporate entity is only entitled to be represented in legal proceedings by a lawyer who has a right of audience: a director or shareholder is not normally entitled to represent a company in legal proceedings (see, generally, *Battle v. Irish Art Promotion Centre Limited* [1969] I.R. 252, *Coffey v. The Environmental Protection Agency* [2014] 2 I.R. 125 and *Allied Irish Bank plc v. Aqua Fresh Fish Ltd* [2018] IESC 49). As explained by Finlay Geoghegan J. in *Aqua Fresh Fish, "The inability of a company to appear in person to pursue or defend a claim is because it is an artificial person with a separate legal personality from its shareholders and directors, as unequivocally stated by the House of Lords in Salmon v. Salmon & Co. Limited [1897] A.C. 22".*

83. Mr. Skoczylas does not seek in any way to challenge the law as it stands. Rather, he points to the above legal principle as evidencing the need for the Court to refuse Mr. O'Toole's application to come off record, particularly in circumstances where, Mr. Skoczylas contends, the Company has been unable to procure a replacement for Mr. O'Toole. In his affidavit evidence, Mr. Skoczylas refers to his efforts in this regard since Mr. O'Toole evinced his intention to seek to come off record.

84. It is, however, noteworthy that while Mr. Skoczylas avers that he has been striving to secure a new solicitor and that this endeavour has been very difficult in view of the "unprecedently complex and multifaceted litigation", he does not in his affidavits of 21 October 2022, 1 December 2022 and 22 December 2022 elaborate on the efforts he has made in this regard. He did, in his oral submissions, refer to having contacted two dozen solicitors with no success. The Court however is prepared to accept that Mr. Skoczylas' efforts to date in this regard have not met with success and, hence, the Court will weigh this factor (as it will the fact that neither a shareholder nor a director of Scotchstone can represent the Company) in determining Mr. O'Toole's application to come off record.

The Company's alleged impecuniosity and its failed application for legal aid

85. According to Mr. Skoczylas, the Company has at all relevant times been without the financial resources to pay its legal advisors (a state of affairs which has come about, Mr. Skoczylas alleges, as a result of the "forced recapitalisation of Permanent TSB Group Holdings" by the State which is at the heart of the reason for the litigation in the first place). He says that the Company's inability to discharge legal fees was made known to Mr. O'Toole prior to the Solicitors' retention and that it was explained that the Solicitors would only be paid if the Company recovered costs in the litigation while the Solicitors remained on record. This, Mr. Skoczylas, says, was accepted by Mr. OToole, something Mr. O'Toole disputes. According to Mr. Skoczylas, Flynn O'Donnell's retention was based on a similar understanding.

86. In the wake of the unravelling of the relationship between Mr. Skoczylas and Mr. O'Toole, on 21 October 2022 Mr. Skoczylas made an application on behalf of the Company to the Legal Aid Board for legal aid, both in relation to the *Köbler* proceedings and other proceedings involving the Company. By the date of hearing of the motion to come off record, the Legal Aid Board had refused Scotchstone's application on the basis that the Company

was not a "person" as required by the Civil Legal Aid Act 1995. The Court was advised by Mr. Skoczylas that in refusing the application the Legal Aid Board relied on the decision of the High Court in *Friends of the Irish Environment CLG v. The Legal Aid Board & Ors* [2020] IEHC 454 where Hyland J. held that the intention of the 1995 Act was to provide civil legal aid to natural persons only.

87. That decision was upheld in a judgment of this Court on 3 February 2023 ([2023] IECA 19). Writing for the Court, Murray J. concluded that *"on its proper construction, the Civil Legal Aid Act 1995 allows the provision of legal aid and advice only to individuals and not to bodies corporate"* (at para. 114).

88. While the Court has already stated that it does not consider that it needs to determine whether Mr. O'Toole accepted what Mr. Skoczylas said in relation to the Company's financial position, or whether he agreed to act on a "no foal no fee" basis, the Company's alleged impecunious state is a factor that requires to be weighed by the Court in the context of determining Mr. O'Toole's application to come off record in circumstances where pursuant to Irish law, the Company is precluded from applying for legal aid.

The "technical/limited" nature of the Solicitors' representation as a basis to refuse Mr. O'Toole's application to come off record

89. Notwithstanding the admitted total breakdown in the solicitor-client relationship, Mr. Skoczylas maintains that Mr. O'Toole's role as the Company's legal representative can continue to be tolerated (including by the Court) on the basis that the Solicitors have been retained by the Company only in a "technical/limited" capacity, in essence largely to comply with the legal requirement on a company *qua* litigant to be legally represented by lawyer with a right of audience.

90. Legal representation for the Company in a "technical/limited" capacity appears to have its origins in the 2011 *Dowling* litigation bearing record no. 2011/239. On 1 February

2012 in a ruling given *ex tempore* in *Dowling & Ors v. Minister for Finance* (2011/239) Feeney J., in accordance with *Battle v. Irish Art promotion Centre limited*, refused Mr. Skoczylas leave to represent the Company. Feeney J. found that no exceptional circumstances arose such that the Company could be represented by Mr. Skoczylas. As observed by Feeney J., the Company had a right of access to the courts, but that access was dependent upon legal representation. The nature and extent of the representation was a matter for the Company. Feeney J. stated that the court would, however, be "pragmatic" in relation to how matters would be dealt with to ensure that the proceedings were as fair and complete as possible. As the High Court transcript in *Dowling* records, it appears that in the course of responding to Mr. Skoczylas' application to represent the Company, counsel for the Minister had suggested a type of "technical" representation for Scotchstone, essentially what would amount to a lawyer sitting in court on behalf of the Company and adopting the position Mr. Skoczylas would be presenting on his own behalf. In submissions made to the High Court on 2 February 2012, post Feeney J.'s ruling, Mr. Skoczylas was not initially enamoured of this solution but was prepared to adopt it "under protest". On 2 February 2012, a solicitor acting for Scotchstone informed the court that she had been asked to appear "only for the purpose of consenting on behalf of the Company to the arguments put forward by Mr. Skoczylas". That was ultimately acceptable to Feeney J. He stated, however: *"You are still a qualified experienced solicitor who can have as much input as you desire. It is a matter between you and the client in relation to the matter…".*

91. Since 2012, legal representation for the Company has been on that basis.

92. Mr. Skoczylas says that he informed Mr. O'Toole "exhaustively" about the fact that his services and the services of the previous solicitors "would be/were provided as formally accepted by the courts, on a so-called technical/limited basis, which meant that the role of

the solicitor for Scotchstone was – and would be – limited to adopting on behalf of Scotchstone my pleadings/submissions and to participation on that basis in court hearings".

93. Thus, in circumstances where the bulk of the legal work is being done by Mr. Skoczylas, his argument is that the work required to be done by the Solicitors cannot be regarded as "a resource intensive" exercise for Mr. O'Toole. As he said in oral submission, the courts only have to listen to him (Mr. Skoczylas). This is in circumstances where the Company's and (where applicable in other litigation) the other litigants' legal representatives just have to adopt Mr. Skoczylas' legal submissions. Hence, Mr. O'Toole will not be directed by the Company, other than to adopt Mr. Skoczylas' legal submissions. In such circumstances, there is, Mr. Skoczylas says, no difficulty for Mr. O'Toole in simply staying on in the proceedings and, thus, no difficulty in the Court refusing Mr. O'Toole's application to come off record, even in the face of the breakdown in the solicitor-client relationship.

94. As referred to earlier, Mr. Skoczylas contends that this "technical/limited" role envisaged for the Solicitors already has the imprimatur of the courts. He relies on the following remarks as evidence of this.

- Clarke J. in *Dowling v. Minister for Finance* [2012] IESC 32:

> *"6.1…In substance it is the Court's understanding that, while reserving the right to make additional observations, it would be the intention of all of the parties who oppose the Minister's direction to rely substantially on the submissions made by Mr. Skoczylas. That seems an eminently sensible way of dealing with the case.*
>
> *[…]*
>
> *9.1 … It does have to recorded that in making the primary submissions on behalf of the lay applicants Mr. Skoczylas both in written and oral presentation made his case cogently and politely."*

- O'Malley J. in *Dowling v. Minister for Finance* [2014] IEHC 418:

  "2.1. The first three applicants are individual shareholders in the Company and have represented themselves in these proceedings. Mr. Skoczylas was for a period a director of the Company, having been elected at the EGM in July, 2011. By agreement with the first and second named applicants he has presented the case on their behalf. It will not, I hope, be patronising to say that his advocacy has been both diligent and effective."

- Hardiman J. in *Dowling & Ors v. Cook & Ors* [2013] IESC 25:

  "13. It will be noted that Mr. Skoczylas conducted his case personally and did so with conspicuous ability, advancing an elaborate scholarly argument in favour of the positions he put forward. Indeed, he received the unique compliment of having his argument gratefully adopted by counsel for some of the other petitioners who advanced no additional argument."

- Fennelly J. in *Dowling v. Minister for Finance* [2013] IESC 58:

  "45… Mr. Skoczylas presented these arguments and displayed highly impressive command of a wide range of materials of law and fact."

- Peart J. in *Dowling v. Minister for Finance* [2012] IEHC 436:

  "40. … Their case has been presented with great skill and clarity by Mr. Skoczylas."

- Sanfey J. in *Skoczylas & Ors. v. Ireland* [2020] IEHC 184:

  "I am happy to acknowledge that Mr. Skoczylas, although a lay litigant, was extremely professional and effective in his conduct of the application before me."

- Irvine J. in *Permanent TSB Plc v. Skoczylas & Ors* 62/13 (SC)/2014/752(CoA):

> *"I have to say that in my – I don't know, is it three and a half years in the Court of Appeal – the best books we have ever received have been from I think Mr. Skoczylas. So if he tells me that they are done in accordance with the Rules, I tend to accept what he says… it's absolutely true and I think my colleagues would agree with me."*

95. Whilst the Court is prepared to accept that Scotchstone's previous legal representatives may have been entirely happy to adopt Mr. Skoczylas' legal submissions, and may even have been satisfied to abide by his directions in relation to how the litigation involving Scotchstone should be conducted from a procedural viewpoint and, indeed, whilst the Court duly notes the comments of the aforementioned learned judges (and recalls that in the substantive *Köbler* appeal Flynn O'Donnell were presented by Mr. Skoczylas to the Court as acting in a "technical/limited" capacity"), the fact of the matter is that all of this does not cancel out or render subsidiary the very toxic solicitor-client relationship that now exists between Mr. O'Toole and Mr. Skoczylas *qua* his role as a director of Scotchstone (Mr. O'Toole's client).

96. At the risk of repetition, Mr. O'Toole's principal position is that there is no trust between him and Mr. Skoczylas. Furthermore, he says that he is not prepared to adopt submissions advanced by Mr. Skoczylas with which he does not agree. He says, effectively, that he should not be forced to stay on record in circumstances where confrontation as to the extent of the Solicitors' remit in the proceedings has arisen between himself and Mr. Skoczylas. Moreover, in his 14 December 2022 affidavit, he disputes Mr. Skoczylas' contention that the Solicitors' retention on a "technical/limited" basis cannot be deemed to be resource intensive. He says that Mr. Skoczylas does not realise the time he takes up and that he has no concept of the workings of a general practice. He also avers as follows:

> "26…It is quite clear that [Mr. Skoczylas] is providing Legal Services to the Company…but endeavours to do so under the guise of Solicitors. [He] is drafting legal documents which is evident from [his] affidavits and his own admissions to drafting the documents for [Mr. O'Toole's] office even though he was never requested to do so. This 'technical/limited' capacity is something the Deponent is uncomfortable about..."

97. Given Mr. O'Toole's now fundamental objection to the role envisaged for him by Mr. Skoczylas, even if it is the case that Mr. O'Toole did not demur when initially apprised by Mr. Skoczylas of the Solicitors' "technical/limited" role in the litigation, it is difficult to see how Mr. O'Toole can be shoehorned into acting only in a "technical/limited" capacity in view of his now concern that in acting in such capacity he may not be able to perform his obligations both to the Court and in respect of general professional practice requirements. In the view of the Court, Mr. O'Toole's concerns in these regards must attract considerable weight. As acknowledged in Chapter 5 of the *Solicitor's Guide to professional Conduct* (4th Ed., Law Society of Ireland, 2022, a solicitor interacts with the court in two ways. Firstly, by way of advocacy before the court and, secondly, in filing pleadings and other documents that come before the courts. It is instructive to refer to the beginning of Chapter 5 of the Guide:

> "A solicitor owes a duty to do their best for their client. A solicitor also owes a duty to the court as an officer of the court. The proper administration of justice requires that the court is able to rely upon every lawyer who appears before it or who has dealings with it.
>
> A solicitor: a) should promote and protect by all proper and lawful means, without fear or favour, the client's best interests, b) Should keep information about clients confidential and must not disclose the facts known to them regarding the client's

> character or previous convictions without the client's express consent, c) Has an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved, and should assist the court in the administration of justice, and should not deceive, or knowingly or recklessly, mislead the court."

It also goes on to say:

> "A solicitor should avoid improper or abusive litigation, predatory litigation, abuse of process, taking unfair advantage, misleading the court, and conducting frivolous and/or vexatious cases."

98. Furthermore, the duty owed by a solicitor is a personal one in respect of which the solicitor is required to exercise an independent judgment. Thus, as an officer of the court, Mr. O'Toole cannot be forced into a position where he is bound to abide by submissions canvassed by Mr. Skoczylas, or directions given by him, even if he, Mr. O'Toole, does not agree with them. It will be recalled that at paras. 254-255 of its substantive *Köbler* judgment ([2022] IECA 23), this Court took the Company's previous solicitor to task for his adoption of those parts of Mr. Skoczylas submissions which were couched in the language which the Court considered "inappropriate".

Mr. Skoczylas' reliance on certain case law and materials in opposing the application to come off record

99. Mr. Skoczylas has requested the Court to have regard to certain case law, including for example *The Law Society of Ireland v. Tobin* and the decision of the English Court of Appeal in *Bolton v. Law Society*. The first thing to be noted is that these cases concern appeals from disciplinary proceedings initiated against solicitors by the respective Law Societies in Ireland and the UK. Here, however, the Court is not concerned with such matters. As we have already said, the complaint (whatever its merits) Mr. Skoczylas has

made against Mr. O'Toole to the LSRA is a matter for that body. Hence, the case law pertaining to disciplinary proceedings taken against solicitors following a complaint is not germane to the issue this Court has to decide. That being said, however, even if the Court, for example, were to have regard to the reference by Peart J. in *The Law Society of Ireland v. Tobin* to the *"absolute honesty and integrity expected of a solicitor"* or his statement that *"[i]f a solicitor undertakes to do something it must be done"*, and the dicta of Bingham M.R. in *Bolton v. Law Society* that *"lawyers…should discharge their professional duties with integrity, probity and complete trustworthiness"*, it must be remembered that trust is a two-way concept. Here, Mr. O'Toole has said that he has no trust in Mr. Skoczylas. Mr. Skoczylas of course returns that sentiment.

100. Mr. Skoczylas also drew the Court's attention to extracts from "*The Solicitor's Guide to Professional Conduct"* (4th ed), in particular the "Core Principles of the European Legal Profession & the Code of Conduct for European Lawyers" as appears at Appendix 1 to the Guide. Para. 1.15.4 provides: "A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client". He also cites Chapter 2 of the Guide which states, *inter alia*, at p. 30: "A solicitor should not terminate the solicitor/client relationship without good cause and without reasonable notice".

101. Insofar as Mr. Skoczylas advances the above principles in opposing Mr. O'Toole's application, it will be recalled that the motion to come off record was not lodged until some 14 days or so after Mr. O'Toole intimated his intention to cease acting for Scotchstone. As Mr. O'Toole explained, he delayed so as to afford Mr. Skoczylas an opportunity to seek new legal representation. It will also be recalled that on behalf of Scotchstone, Mr. Skoczylas did not on 2 November 2022 seek to adjourn the *Greendale* motion even in circumstances where it had clearly been envisaged that Mr. O'Toole as Scotchstone's legal representative

would play a role at the hearing (albeit in the so-called "technical/ limited" capacity). Thus, in respect of what has transpired to date, it can hardly be said that Mr. O'Toole's evinced intention to seek to come off record has caused prejudice to the Company.

102. It is of course the case that the costs hearing in respect of the substantive *Köbler* proceedings (and the *Greendale* motion) remains outstanding. As a date has yet to be fixed in this regard the Court considers that the time that has (and will have) elapsed by the time the costs hearing will come on for hearing constitutes the "reasonable notice" the Solicitor's Guide to Professional Conduct envisages should be given to a client by a solicitor who intends to seek to come off record.

103. As can be seen, the Guide also states that "a solicitor should not terminate the solicitor/client relationship without good cause…". In the view of the Court, by any stretch of logic or reasonableness, a mutual breakdown in trust (not to mention the fact that the client has made a formal complaint against the solicitor in trenchant terms) must qualify as grounds for a solicitor ceasing to act for a client and hence applying to come off record.

104. In *O'Fearail v. McManus*, Flaherty J. described as a *"forced form of liaison"* a suggestion that a solicitor who had had been retained by an insurance company who had then repudiated the insurance policy and said it no longer wished the solicitor to act should be kept on record for the defendant. Given the circumstances that arise here, it seems to the Court to be at the very least an understatement to say that keeping Mr. O'Toole on record would be a *"forced form of liaison".*

105. In light of the total breakdown in the solicitor-client relationship here, the Court is strongly of the view that it is impermissible for Mr. Skoczylas to seek to tether Mr. O'Toole to the Company. In all the circumstances of this case, the Court cannot endorse the continuation of the relationship, even on the basis of a so-called "technical/limited" arrangement, or indeed on any other basis. The fact that the Company may be without the

financial resources to obtain other legal representation and is not able to seek or obtain legal aid are not, in all the circumstances of this case, sufficiently weighty factors such that Mr. O'Toole should be forced to stay on record for the Company.

The email correspondence of 11-12 October 2022

106. Furthermore, the Court is fortified in its view that Mr. O'Toole application should succeed after perusing certain email exchanges between the Mr. O'Toole and Mr. Skoczylas. As can be gleaned from his affidavit evidence, one of the factors upon which Mr. O'Toole relies in seeking leave to come off record is that by the time he made lodged his application to come off record, Mr. Skoczylas's had already either dispensed with his services or agreed to Mr. O'Toole's proposed course of action. In support of his contention, Mr. O'Toole cites, in particular, email exchanges between himself and Mr. Skoczylas on 11 and 12 October 2022. Mr. Skoczylas strongly disputes Mr. O'Toole's contention that over the course of email exchanges between them he effectively acceded to Mr. O'Toole's decision to come off record for the Company and disputes that any such agreement is evident in the email exchange relied on by Mr. O'Toole. It was thus necessary to consider this correspondence.

Did Mr. Skoczylas/the Company dispense with Mr. OToole's services or otherwise agree to Mr. O'Toole's intention to cease to act for the Company?

107. At 1.50 pm on 11 October 2022 Mr. O'Toole emailed Mr. Skoczylas offering to send him a synopsis drawn up by his Law Clerk as to what was wrong with the notices of change of solicitor which Mr. Skoczylas had drafted. Mr. O'Toole pointed out that two of the notices had been amended but that the High Court Office was not consenting to changing the other notice. Mr. O'Toole's email continued:

> "I don't think myself and yourself are going to get on. I like to do my cases the way I have learned and administer cases in the way required to get the best results for my client. I like to think I have been successful with those cases but I don't think from

the manner we have communicated we will get on with each other. I appreciate you have a Law Degree etc. but after I got my Law Degree like most Solicitors I had to spend three years training in the Office to learn about administration."

108. The records show that just one minute before that email was sent, Mr. Skoczylas emailed Mr. O'Toole at 1.49pm in the following terms.

"Given that you have failed to file the Notices of Change of Solicitor, with which you have been dealing over the last 8 days, you should not file any Notices of Change of Solicitors anymore. In fact, you're repeatedly misleading me and others have led me to believe that there is unlikely any basis for your acting as a solicitor for Scotchstone Capital Fund Ltd. Either you call me and explain your behaviour, or you should consider yourself off all the cases that have anything to do with me or with Scotchstone Capital Fund Ltd" (emphasis added).

109. At 1.51pm, Mr. O'Toole emailed Mr. Skoczylas as follows:

"I take it you have in the meantime sacked me".

110. Insofar as Mr. O'Toole relies on this email chain as evidence that Mr. Skoczylas no longer wished him to act for the Company, Mr. Skoczylas in his affidavit of 22 December 2022 seeks to explain his 11 October 1.49 pm email by reference to a telephone conversation he had at 1.25pm on the same day with the Senior Counsel whose recommendation had led to Scotchstone retaining Mr. O'Toole. Mr. Skoczylas asserts that in the course of that conversation he was berated by Counsel for, *inter alia,* not doing what Mr. O'Toole wanted. At para. 41D of his affidavit, he avers as follows:

"It was clear at that point that I was on the receiving end of an unacceptable coordinated behaviour of two legal professionals who were supposed to serve the interests of the Company, but were patently failing to do so."

111. According to Mr. Skoczylas, the parting of the way between himself *qua* director of Scotchstone and Mr. O'Toole will indeed come to pass, but not just yet. As he explained in his affidavit sworn 22 December 2022:

> "It was, of course, clear to me at that point that there was no realistic prospect *longer term* of either [Senior Counsel] or Mr. O'Toole continuing acting for Scotchstone, unless something fundamental happened, including their offering adequate explanations and apologies for their unacceptable behaviours. That is how my reference to Mr. O'Toole 'considering himself off all the cases have anything to do with me or with Scotchstone…' ought to be seen in my email sent to him on 11 October 2022 at 1:49pm. Indeed, it cannot be reasonably seen in any other way, given that Mr. O'Toole was at that point on the record for Scotchstone, and an appropriate process was required for him to come off the record in due course." (at para. 41E, emphasis in original)

112. Mr. Skoczylas also avers (at para. 41F) that Mr. O'Toole failed to mention in his 14 December 2022 affidavit that following the email Mr. Skoczylas sent at 1.49pm on 11 October Mr. O'Toole had telephoned him. In the course of that telephone conversation, Mr. Skoczylas had made it clear that there was no prospect "longer term" of Mr. O'Toole acting for Scotchstone, unless something fundamental happened, including Mr. O'Toole offering adequate explanations and apologies for his unacceptable behaviour, neither of which were forthcoming. Mr. Skoczylas goes on to aver that given that Mr. O'Toole had just filed the notice of change of solicitor in the *Köbler* litigation on 11 October, he had asked whether it was possible for Mr. O'Toole to withdraw the notice he had just filed so that matters could revert to the previous *status quo*, "and so that the previous solicitor, Flynn and O'Donnell, could be deemed to continue being on the record". Mr. Skoczylas says that it was in that context he sent a further email to Mr. O'Toole at 2.16pm on 11 October asking Mr. O'Toole

not to file any further notices of change of solicitor and requesting that he withdraw the notices he had filed including the notice filed with respect to the present case. Mr. Skoczylas avers that the aforementioned email correspondence was followed by a "stand-alone" email sent by him at 3.23pm on 11 October asking Mr. O'Toole to destroy all the electronic materials that Mr. Skoczylas had shared with him, once he was off the record.

113. At para. 41H Mr. Skoczylas continues:

> "Mr. O'Toole argues incongruously that that email allegedly stated that I agreed – or even asked – that he would come off the record before his replacement was found, which is plainly not the case. In this regard, firstly, it is important to note that the email is regarding the administration of the case after Mr. O'Toole is no longer on the record – the email is not in respect of his coming off the record per se. Secondly, being a non-native speaker, I wrote the opening sentence of that email using inadvertently the word "since"; of course, in the circumstances, I did not mean to say "because" but "once"/"from the time" – it is clear that the email referred to the future, once Mr. O'Toole's firm is off the record. My email cannot be reasonably understood in any other way, given that it also includes the words "no longer on the record"; hence, it is clear that it refers to the future, once Mr. O'Toole's firm is no longer on the record. It is incongruous for Mr. O'Toole to claim that I wrote that email as if Mr. O'Toole had been already no longer on the record at that point, as that was self-evidently not the case."

114. Mr. Skoczylas asserts that Mr. O'Toole is attempting to unduly exploit his (Mr. Skoczylas') linguistic imprecision as justification for asserting that he had agreed on 11 October 2022 to Mr. O'Toole coming off the record at that point. He says that the same applies "mutatis mutandis" to another stand-alone email he sent to Mr. O'Toole at 3.55pm

on 11 October regarding personal information which, as he reminded Mr. O'Toole, required to be treated in accordance with GDPR. The email stated:

> "Since Doran W. O'Toole & Co. Solicitors… are no longer on the record for Scotchstone Capital Fund Ltd., please treat all the personal information I have shared with you in accordance with the General Data Protection Regulation… any potential infringement of the GDPR on your part will be pursed appropriately.
>
> Furthermore, in all respects of our interactions, you are bound by the Rules and Regulations imposed on you by the Legal Services Regulation Act 2015. You are subject to the supervision of the Legal Services Regulatory Authority."

115. Mr. Skoczylas relies on the second paragraph of that email as evidence that he did not consider Mr. O'Toole to be off the record or that their professional relationship was over at that point.

116. On 12 October 2022 (at 1.49pm) Mr. O'Toole emailed Mr. Skoczylas advising, *inter alia,* that he would "draft the motion for the High Court and the Court of Appeal" (presumably a motion in relation to his intention to apply to come off record in, *inter alia,* the within proceedings in respect of which the High Court Office had accepted a notice of change of solicitor on 11 October 2022). Mr. O'Toole's email also adverted to outlay said to be due to the Solicitors in respect of the notices of change of solicitor (a total of €280.00). Mr. Skoczylas was requested to put the firm in funds for same. The email continued as follows:

> "It is disappointing why you would not listen to me. If you continue in your approach I feel you will continue to have obstacles thrown in your way. I believe you will also find it difficult to obtain a new Solicitor. I have been at this too long and you are always better working with the system than trying to beat the system. Your responses that you have sent me in relation to GDPR and the LSRA only reflect on you and

show as to type of character you are. I am still at loss why you have threatened me with GDPR and the LSRA as I decided that I could not work with you/your company no longer even though it was for a very brief period. Life is too short to have to put up with your unnecessary hardship. Further I have no time for people that are totally unreasonable, disrespectful and won't listen to good advices. I was trying to help you. I wish you well in the future and if you can get a new Solicitor in the meantime that will avoid me having to take two applications and having to file affidavits and stating as to why I am coming off record after only engaging with me on the 10th of October 2022. You can also file a notice of change yourself in the High Court."

117. Mr. Skoczylas reply on the same date (at 3.26pm) can be summarised as follows:

- Mr. O'Toole's demands were "unwarranted".
- It had been made clear to Mr. O'Toole that he would not be paid including for outlay and that the engagement was on a no win no fee basis.
- The Solicitors had never informed Mr. Skoczylas, as was their duty under the 2015 Act, that they would wish to demand fees or payments for outlay.
- Mr. Skoczylas did not understand what motions or affidavits Mr. O'Toole had in mind and that he had not instructed or authorised Mr. O'Toole to prepare any motions or affidavits.
- Should Mr. O'Toole swear an affidavit attesting to falsehoods, the matter would be pursued in accordance with the law.
- Mr. O'Toole's allegation that Mr. Skoczylas did not listen to him were "untethered from reality and … plainly false".
- Mr. O'Toole had misled Mr. Skoczylas regarding the notice of change of solicitors as the email correspondence demonstrated.

- Mr. Skoczylas had not threatened Mr. O'Toole with anything and that he had only pointed out his legal obligations.
- Should Mr. O'Toole continue making unwarranted monetary demands or other unwarranted demands, the matter would be brought before the LSRA.

118. Considering the entirety of the email chain just referred to, the Court rejects Mr. Skoczylas' contention that Mr. O'Toole is seeking to exploit Mr. Skoczylas' (self-described) linguistic imprecision in arguing that Mr. Skoczylas agreed on 11 October to Mr. O'Toole coming off record. While Mr. Skoczylas may not have expressly agreed with the contents of the email sent by Mr. O'Toole at 1.50pm on 11 October or that sent at 1.51pm, in the view of the Court, on any reading of the email sent by Mr. Skoczylas at 1.49pm on 11 October, and Mr. Skoczylas' later email correspondence on 11 October (to which reference has already been made), it is impermissible for Mr. Skoczylas to now seek to contend that he was not intent on parting company with Mr. O'Toole on 11 October 2022. He quite clearly intimated to Mr. O'Toole at 1.49 pm on 11 October that there was unlikely any basis for a continuing solicitor client relationship between Mr. O'Toole and Scotchstone, an intimation that was compounded by the later requests made to Mr. O'Toole to return the case file and destroy personal information with which he had been supplied. Furthermore, there is no gainsaying Mr. Skoczylas' email to Mr. O'Toole at 2.16pm on 11 October wherein he stated:

> "…please do not file anymore the Notice of Change of Solicitor in the case rec. no. 2012/116MCA. As far as the other two cases are concerned, i.e. the cases rec. nos. 2019/29991 P [the *Köbler* proceedings] and 2013/2708P, please withdraw the two Notices of Change of Solicitor that you have just filed, or, alternatively, please file the Notices informing the Court that you are off the record in those two cases" (emphasis added).

119. Whatever way one looks at it, the emails in question show that Mr. Skoczylas was ready to part company with Mr. O'Toole on 11 October 2022. For the Court to conclude otherwise and say, as Mr. Skoczylas contends it should, that the parting of the ways between Mr. O'Toole and the Company was for the "longer term" would, in light of the email exchanges, involve the Court engaging in something akin to linguistic gymnastics, which the Court is not prepared to do.

The alleged prejudice going forward arising from Mr. O'Toole's application to come off record

120. Mr. Skoczylas maintains that the Company's position going forward will be prejudiced if Mr. O'Toole is permitted to come off record. It will be recalled however that the Solicitors formally came on record for Scotchstone on 11 October 2022, which was some nine months, give or take, *after* the Court delivered its judgment in the substantive appeal, and some three weeks in advance of the hearing of the *Greendale* motion scheduled for 11 November 2022. The *Greendale* motion was issued only by Mr. Skoczylas albeit, as already referred to, Flynn O'Donnell were retained by the Company to make submissions on the motion, with the Solicitors later coming on record on 11 October 2022. The Court has earlier commented (at para. 15 hereof) on the fact that Mr. Skoczylas did not demur at Mr. O'Toole's non-participation at the hearing of the *Greendale* motion on 2 November 2022 and he did not request on the day that Mr. O'Toole should stay for the duration of the hearing and orally adopt Mr. Skoczylas' submission, as had clearly been envisaged at the time of the drafting of the joint written submissions of Mr. Skoczylas and Counsel for the Company. As already referred to, judgment has been given in the *Greendale* motion.

121. The fact of the matter is that the *Köbler* proceedings have been adjudicated by the High Court and by this Court on appeal. It is therefore difficult to see how Mr. Skoczylas can maintain (as he does in his 21 October 2022 affidavit and his 1 December 2022 affidavit)

that the proceedings are currently at a "hot" phase or assert that there remains a "complex ongoing case".

122. Of course, another way of looking at matters is that the Court should refuse Mr. O'Toole's application to come off record on the basis that no harm can be said to arise by keeping him on record until the costs in the substantive *Köbler* appeal and the *Greendale* motion are dealt with. The Court, however, for all the reasons set out above, cannot endorse the tethering of Mr. O'Toole to the Company even at this late stage of the *Köbler* proceedings.

123. It may well be when the question of costs in respect of the *Köbler* appeal and the costs of the *Greendale* motion come on for hearing that the Company will be without legal representation once Mr. O'Toole comes off record. That undoubtedly presents some difficulty for the Company. However, as Scotchstone did not issue a *Greendale* motion (albeit together it joined with Mr. Skoczylas filing written submission), it is unlikely that the Company is at risk of any substantive adverse costs ruling in relation to the unsuccessful *Greendale* motion.

124. It is accepted that the situation is otherwise in respect of the substantive *Köbler* appeal where the Company was an appellant together with Mr. Skoczylas. Again, however, the position is that both Mr. Skoczylas and the Company have already lodged written submissions on costs in the *Köbler* appeal. Same were filed on 14 March 2022. The submissions are headed "Piotr Skoczylas' outline submissions on costs, adopted by the First Named Appellant [the Company]". The respondents filed outline submissions on costs on 21 March 2022 wherein they address the arguments canvassed by the appellants (Mr. Skoczylas and the Company) on the issue of costs. On 21 March 2022, Mr. Skoczylas filed "outline contemporaneous reply submissions".

125. While, therefore, when the time comes to hear the parties on the issue of costs the Company may be without legal representation, the Court will nevertheless have an indication of the Company's approach to the question of costs from the joint written submissions. Indeed, even if a legal representative is found for Scotchstone who is willing to act in the "technical/limited" capacity ordained by Mr. Skoczylas, it is unlikely that that will add anything of substance to the costs hearing: the most the Court can expect from such a legal representative at any costs hearing (if the previous history is anything to go by) is that they would simply say they are adopting Mr. Skoczylas' submissions. It is in this context that the Court is constrained to find that the alleged prejudice going forward for Scotchstone by Mr. O'Toole coming off record cannot surmount the reasons already identified by the Court as to why it should exercise its discretion in favour of permitting Mr. O'Toole to come off record.

Summary

126. For all the reasons set out above, the Court is satisfied to accede to Mr. O'Toole application to come off record for the Company.

Costs

127. The Court hereby invites written submissions (not exceeding 1000 words) from Mr. O'Toole and Mr. Skoczylas on the issue of the costs of the application, same to be lodged within 21 days of receipt of the within judgment.