

**THE HIGH COURT  
COMMERCIAL**

**[2007 No. 4313 P]  
[2007 No. 85 COM]**

**BETWEEN**

**HUGH McGIVERN**

**PLAINTIFF**

**AND  
PADDY KELLY**

**DEFENDANT**

**Judgment of Mr. Justice Kelly delivered the 22nd day of February, 2008.**

**Introduction**

1. This ruling concerns an email communication sent to the plaintiff by Simon Kelly, a son of the defendant, during the currency of these proceedings. The contents of the email were described by the defendants own counsel as "shameful". He was correct in that description.
2. I was and am of the view that the sending of the email was a contempt of court. Neither the defendant or Simon Kelly sought to contend otherwise.
3. This judgment deals with that issue and the consequences for Simon Kelly.

**Background**

4. These proceedings commenced on 6th June, 2007. They arise out of a share purchase agreement dated 6th November, 2006. Under that agreement the plaintiff agreed to sell to the defendant shares owned by the plaintiff in each of four companies which operate the 'Mango' franchise for ladies clothing. The agreement also provided for the release of the plaintiff from certain guarantees and indemnities entered into by him in respect of debts and liabilities of those companies.
5. On 25th June, 2007 the proceedings were transferred to the Commercial List and appropriate directions were given in respect of delivery of pleadings and discovery.
6. On 8th October, 2007 the trial date of 5th February, 2008 was assigned to the case.
7. The case began on the date assigned and remained at hearing for two days. On the morning of the third day of the trial it was announced that a settlement had been reached between the parties. I was asked to, and did in fact, receive and file those terms of settlement.

**The parties**

8. The plaintiff is an insurance broker. He owns the brokerage McGivern Flynn which he began in 1982. In addition, he is the managing director of a business called Trade Credit Brokers which is a specialist credit insurance business owned by IFG Plc. He has a number of personal business interests, owns properties and equities and has a number of property and business interests in common with the defendant.
9. The defendant was described by the plaintiff as a "very skilled property man". He played little, if any, part in the transaction the subject matter of these proceedings.
10. Virtually all of the dealings which the plaintiff had concerning the agreement in suit were conducted with the defendant's son, Simon Kelly. This is apparently quite a normal way for the defendant to conduct his property and business affairs.

**The Email**

11. The defendant delivered his defence to these proceedings on the 5th of July, 2007. In the early hours of that day Simon Kelly sent the following email to the plaintiff:

"Hi Hugh,

I had the pleasure of meeting my S.C. and preparing the defence against your bullshit claim for the 1m. We agreed flexibility on the repayment schedule and you are now breaking this agreement. I appreciate that the Belfast situation may have caused you discomfort. It is a shit lease and one of your worst deals. Mango continually blame you for this.

If you continue this action regarding Mango, I am going to be forced to seek to cause you loss and pain in other business arrangements.

There are plenty of places that I can hurt you and you can hurt me. If we go this route, other partners of yours are going to be pulled in such as Mark Bourke in IFG. The actions will be very public and as an executive of a PLC, your position may become difficult. Joe may feel that all of this litigation may distract you from your day job.

In the very near term this dispute is going to move beyond the bounds of a commercial claim and become personal. If this happens, I do not care what cost I will bear to make you regret taking this action. You may win in court but it will be to your eternal regret.

Have a think about all the things we have done over the years, and exercise your mind to see exposure for yourself. Then decide if you really want to chase this. You have made a lot of money from our overall relationship and we have made very little. Maybe you are smart or maybe you are a crook.

Once we move beyond Thursday, real legal costs are going to mount and I will not be paying any of yours in a settlement. I will be seeking mine from you and the claim is bullshit.

I now have no interest in meeting you again. David Kelly is available to meet you if you think there may be a better

solution.

Otherwise, see you in court on the 16th and beyond, and probably in the papers a lot more.

Regards,

Simon Kelly”.

12. The plaintiff gave evidence that the Mark Bourke referred to in the third paragraph of the email is effectively his employer whilst the “Joe” referred to in the final sentence of that paragraph is the Chairman of the company in question. He also gave evidence that the threat of causing him loss and pain in other business arrangements had been carried into effect. I am not in a position to make any adjudication on this aspect of the matter because the plaintiff’s cross examination had not been completed at the time the action was settled, nor had I heard from the defendant in evidence on this topic.

### **Contempt of Court**

13. Every citizen has a constitutional right of access to the courts. As was said by Kenny J., over forty years ago in *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345:

“That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee of article 40.3 seems to me to be a necessary inference from article 34.3.1... it must follow that the citizens have a right to have recourse to that court.”

14. It is of the highest importance that a citizen who exercises the right to litigate should be able to do so free of threats or obstructions.

15. Conduct that is calculated to inhibit a litigant from availing himself of the constitutional right to have his legal entitlements determined by the court by the use of threats, is a contempt of court. From as far back as 1744 it was held that threatening a party if he allows an action or suit to continue amounts to contempt of court. It is so because it creates an obstruction to a party to proceedings. (see *R v. Carroll* (1744), 1 Wils. 75; *Smith v. Lakeman* (1856), 2 L.J.Ch. 305; *Re Mulock, ex parte Chetwynd* (1864), 33 L.J.P.M. and A 205; *Sharland v. Sharland* (1885) 1 T.L.R. 492; *Pavlova v. Harvey* (1914), Times 27th of November).

### **The Content of the Email**

16. There can be little doubt but that the email in question is minatory in tone. It says “if you continue this action regarding Mango, I am going to be forced to seek to cause you loss and pain in other business arrangements.” Then it goes on to refer to the plaintiffs employers and proceeds to say “I do not care what cost I will bear to make you regret taking this action” and “you may win in court but it will be to your eternal regret”.

17. It is hard to avoid the conclusion that the email was sent with a view to dissuading the plaintiff by threat from continuing with his action.

18. Fortunately the plaintiff was not in fact deterred. He was right not to be so. Far from the claim, so vulgarly described in the email, being without merit, the defendant has agreed to pay a sum of 1.35 million euros to the plaintiff to say nothing of the many other terms which are contained in the formal written settlement which I received and filed.

### **The Reaction of Simon Kelly**

19. When the email in question was put in evidence by the plaintiff during the first day of the trial I expressed my concern as to its tone and contents and said that *prima facie* it appeared to me to be a contempt of court. As I was assured that Mr. Simon Kelly would be giving evidence in the trial I decided to leave over any explanation in relation to it to that stage in the hearing. Because of the settlement reached after the second day of the trial that stage was never reached.

20. On the morning of the third day of the hearing, when the settlement of the action was announced, counsel on behalf of Simon Kelly made submissions by way of apology and also referred to a statement which had been prepared by Simon Kelly.

21. The statement reads as follows:-

“I regret writing the email to Mr. McGivern and I regret its contents and their nature. The mail was written late at night and was born of frustration at the thought of the litigation. I hope this honourable court will appreciate that this was a novel and very stressful situation for me. I accept of course that this does not excuse my actions.

I regret that this email was ever sent and a (sic) withdraw wholly all its contents. I unreservedly apologise to Hugh for sending the message and regret that I did not communicate this sooner.

I apologise to this honourable court for the fact that this message had to play (sic) in the proceedings particularly having regard to its vulgar content. The contents of the email were out of character for me, and I have never previously or subsequently sent a message of such a nature.

I intended no disrespect to the integrity or dignity of the court and its processes, though I appreciate that taken at face value my action in sending the mail can be read in this manner.

I again reiterate my sincere apology to Mr. McGivern and this honourable court.”

22. Simon Kelly also gave evidence before me. The email was apparently composed by him and sent late at night in the privacy of his own home. He normally does not work late at night. He told me that he had not intended to intimidate the plaintiff. He again expressed contrition and tendered a sincere apology.

23. Finally he indicated a willingness to make a contribution to a charity as an earnest of his regret.

24. Simon Kelly is a man of considerable business experience and I find it difficult to accept his evidence that he did not intend to intimidate the plaintiff by sending the email. It speaks for itself. What other purpose was there for its being sent? It was not written in the heat of the moment but late at night when all was quiet. This makes the matter more serious.

25. On the other hand, I accept that Mr. Kelly has now seen the error of his ways and has come to realise that regardless of how wealthy or involved in business and land transactions one may be, no person is above the law. Conduct of the type in question is to be deprecated.

26. Mr. Kelly has apologised to the plaintiff and he in turn has accepted the apology. He apologised to the court in writing and under oath viva voce.

#### **Decision**

27. Having regard to the contrition expressed and the way in which Simon Kelly dealt with the matter when confronted with his wrong doing, I am not inclined to take any further action whether by sending the papers to the Director of Public Prosecutions or otherwise.

28. I believe that the fact that this matter has been aired in public court has been embarrassing for Mr. Kelly as he himself acknowledged.

29. My decision to take no further action in the matter is however, conditional upon Mr. Kelly honouring the willingness which he expressed in the witness box to make a substantial contribution to charity. If therefore a sum of €20,000 is paid to a nominated charity within a period of fourteen days from today's date no further action in the matter will be taken. Mr. Kelly is also liable for the costs of the hearing of the third day of the action, which was devoted almost exclusively to the issues dealt with in this judgment.