

THE HIGH COURT

2007 52 CA

BETWEEN

PATRICK KELLY

PLAINTIFF

AND

THE NATIONAL UNIVERSITY OF IRELAND, ALSO KNOWN AS UNIVERSITY COLLEGE, DUBLIN

DEFENDANT

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 26th day of February, 2010:

1. The within decision is given in response to a motion brought by the plaintiff herein, namely Mr. Patrick Kelly, on 22nd February 2010 seeking:

"An order amending the order perfected on 8th December 2009 'so as to carry out the intention and express the meaning of the Court at the time when the order was made...'."

In the supporting affidavit Mr. Kelly contends that the Order made and perfected on 8th December 2009, does not properly reflect this Court's ruling or its intention of that date. In support of what he asserts was the Court's intention on that date he exhibits the transcript of the appearance before the Court where the Order was discussed, on 8th December 2009.

2. For the purposes of clarity the Order, dated the 8th December 2009, should be set out. The Order states, inter alia:

"The Court doth Order in mandatory form that the Plaintiff do forthwith remove or have removed from any website any link reference or assertion of availability relating to or touching upon any documentation or communication covered or affected by the Order of this Honourable Court dated 26th November 2009 in the within proceedings whether such website be controlled by the Plaintiff or otherwise and in particular inter alia the links and assertions of availability of such documents contained on:

i) www.scribd.com

ii) www.docstoc.com

iii) www.trinitycollegevisitors.0catch.com

Including any sub-domains therein.

AND IT IS FURTHER ORDERED that the said Plaintiff his servants and agents and all persons having notice of the making of this Order forthwith be restrained and prohibited from further publishing any link reference or assertion of availability relating to or touching upon any document or communication covered or affected by the aforesaid Order on any website whether controlled by the Plaintiff or otherwise or in any form whatsoever."

The Order of 26th November 2009 (perfected on 27th November 2009), referred to in the above-recited Order related to the removal from the internet by Mr. Kelly of certain specified and other allegations contained in an affidavit of 11th November 2009 and legal submissions of 12th November 2009 which had as their object or effect the scandalising or undermining of the reputation or authority of the Court.

3. Following the making of the Order of the 26th November 2009, the defendant returned to Court on 8th December 2009 to bring to the Court's attention matters which it felt were in contravention of that Order. In particular the defendant noted that on Mr. Kelly's website it was explicitly stated that the materials directed to be removed were still available on other websites on the internet. Mr. Kelly, on his site informed all who accessed it that:

"The above documents are available from other sites on the internet. Patrick Kelly is not responsible for the publication or circulation after the 26th November, 2009, of those documents on the internet."

Mr. Kelly's response was that it was inevitable that in the time between first putting the documents on the internet and the Order for the removal of their content they may have been distributed by others unknown to him, and over whom he had no control; hence the hearing and resulting Order of 8th December 2009.

4. Mr. Kelly complains that this Order does not represent the ruling of the Court, as evidenced by the transcript of the 8th

December 2009, there otherwise being no written record of it, apart from the Order. He takes particular issue with the phrase *"whether controlled by the Plaintiff or not"*. He claims that he would be unable to remove anything from websites which he does not control.

5. I concur with the authorities Mr. Kelly has placed before me in relation to the Court's jurisdiction to alter or amend its own Orders, and agree fully with their contents. It is clear that the Court has jurisdiction to alter or amend an Order once it has been perfected:

- i) Where there has been an accidental slip in the order as drawn up (the slip rule);
- ii) When the Court itself finds that the order does not correctly state what the Court actually decided and intended.

See the judgment of Finlay C.J. in *Belville Holdings Ltd. v. Revenue Commissioners* [1994] ILRM 29, quoted with approval by McGuinness J. in *G McG v. D W (No. 2)* [2000] 1 ILRM 121. Finlay C.J. quoted from the decision of *Romer J. in Ainsworth v. Wilding* [1896] 1 Ch. 673, who firstly commented on the decision of the Court of Appeal in *In re Swire* (1885) 30 Ch. D 239 (CA):

"Cotton LJ says 'it is only in special circumstances that the Court will interfere with an Order which has been passed and entered except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the Order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the Order really pronounced."

Lindley LJ says 'if it is once made out that the Order, whether passed and entered or not, does not express the Order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'

And Bohan LJ says 'an Order as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express meaning of the Court at the time when the Order was made, provided the amendment can be made without injustice or in terms which preclude injustice.'

I am satisfied that these expressions of opinion validly represent what the true common law principle is concerning this question."

I would fully agree with the above statement of the Court's jurisdiction. The Court may alter or amend an Order where it is required under the slip rule or, in exceptional circumstances, where it does not accurately represent the judgment and intention of the Court.

6. Before continuing I would firstly state that there is a rationale behind the inclusion of the impugned phrase in the Order of the 8th December 2009. The Plaintiff herein has in the past sought to rely on the fact that he does not control a website, so as to insulate himself from consequences which would otherwise flow if he did. Despite the undoubted fact that the relevant materials contained on such sites were provided by him, nevertheless he claims that once he has distributed such information, he is at all times thereafter immune from judicial scrutiny because he cannot remove the material since he does not "control" the websites. For that reason it was necessary to include those words within the Order so that the Plaintiff could not rely on the fact that he did not "control" the website to circumvent any Order this Court might make in relation to non-publication. It was also clear to the Court that Mr. Kelly was informing people through the affected websites that although material had been removed it was *"available from other sites on the internet"*. Such redirection, even to sites not controlled by the plaintiff, was therefore well within the Court's comprehension.

7. Nonetheless it is clear that one of the Plaintiff's concerns relates to a situation where a website of which he has no knowledge publishes materials covered by the Order. I must say that in this regard his concerns are not merited. When looking at the law of contempt for breach of an order, it is clear that, in general, where it is alleged that a party has breached an order, they will only be held liable for that breach where:

"the disobedience is more than casual or accidental and unintentional." (*Heatons Transport (St. Helens) Limited v. Transport and General Workers Union* [1973] 1 AC 15, Roskill L.J.)

Thus although a party may unintentionally breach an Order where they carry out an act which is within the four walls of an Order, where that breach is *"casual, accidental or unintentional"*, it will not be found to be a breach of the Order. This is consistent with the Court's interpretation of the word *"wilful"* in *Stancomb v. Trowbridge UDC* [1910] 2 Ch. 190.

8. Furthermore, if a breach of a Court order is alleged, the breach must be proved beyond reasonable doubt. As stated by the Court in *Competition Authority v. Licensed Vintners Association & Ors.* [2009] IEHC 439:

"The overwhelming preponderance of case law is to this effect: Re Bramblevale Ltd. is a clear-cut example espousing the higher standard: National Irish Bank Ltd. is a clear-cut example of the application of this standard in practice; Keane J, as he then was, despite very strong circumstantial evidence of a breach, refused to attach as the required matters had not been established beyond a reasonable doubt. The only contrary view of note is Millett J's decision in Chelsea Man Plc., where the standard of "degree and impression" is suggested. If that view cannot be explained by reference to its own facts, and if the citation of Bramblevale and Dean to the court would have made no difference, then respectfully I would have to prefer the alternative view. I believe that the criticism offered of that decision by Arlidge, Eady & Smith is sound and accords with established practice. Moreover, I have to say that even if this area had not been touched by authority, I would have come to the same conclusion on first principles."

9. In those circumstances it may be implied that if a website existed of which the Plaintiff had no knowledge, be it actual, constructive or implied, which breached the terms of the Order, he could not be held in contempt because of its mere existence. In this respect I am therefore entirely confident that the Order does not breach Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as alleged by the Plaintiff or at all.

10. As with all statutory interpretation, an Order of the Court should be interpreted, so far as is possible, in a way which does not breach the Constitution. Obviously if the Order cannot be applied in a constitutional manner it could not possibly stand. However, I am quite satisfied as to the constitutional propriety of the Order in question. The main aim of the Order is to prevent Mr. Kelly from publishing the materials referred to, or to have published through others, such materials. In that respect the phrase "*whether controlled by the Plaintiff or not*" was deliberately placed in the Order as previously stated. It may be taken that if the Plaintiff had no knowledge, either actual, constructive or implied, of the impugned action he would not breach the order; this is implicit in all Orders of the Court, as such would clearly be inequitable and unjust. However, were he to pass materials on to another, who in turn placed them on a website which the Plaintiff had no control over, or should he find the material on another's site and inform people of such on his websites, he should not be protected merely by virtue of the fact that he does not control it. Should a situation arise, where material covered by the Order became available, through whatever means, on another's website and this came to the Plaintiff's attention, it would be prudent for him to bring the Order of 8th December 2009 to the attention of such persons publishing the material, so that they might themselves remove such material. Should they not do so they will breach the terms of the Order.

11. I would also note that there is a practical distinction to be made between a judgment or ruling and an order. A judgment or ruling makes findings of facts in a certain legal context and comes to a conclusion thereon. The order is designed to give practical effect in the implementing process of such conclusions. It would be unusual, although not unknown, for a judgment to explicitly state the precise way in which the directions and intentions of the Court should be recorded for this purpose: such is a matter for the order. In this respect the Order of 8th December 2009 was drafted in accordance with standard practice.

12. In his grounding affidavit, Mr. Kelly mentions, in abbreviated form, certain passages from the transcript of the 8th December 2009. The following statement from the Court, however, should also be noted:

"I propose to make an order in mandatory form directing and compelling Mr. Kelly forthwith to take all steps to remove or have removed from any website the information which I will specify contained in page 12, or any like information indicating links to the above matter. I will also make an order permanently restraining and prohibiting him from inserting on the websites that I have mentioned that information or any like or similar information, and I will further consider the matter and revert to the parties."

The Court, following a question from Mr. Kelly clarified for him that on that occasion the Order was:

"directed towards removing any reference to the availability of the documents which you have referred to on other sites."

13. It is therefore clear that the aim of judgment was to have removed from any website the materials covered by the Order, and any references thereto. The exact terms of the Order were therefore put in place to cover the eventualities which the judgment foresaw. It is not overarching, and it fundamentally reflects both what the Court said and what it intended.

14. I am therefore satisfied that the Order made and perfected on 8th December 2009 accurately reflects the Court's intention and its ruling, and that it does not breach either the Constitution or any provision of the European Convention on Human Rights. Again I would add, for the benefit of Mr. Kelly, that should materials appear on websites which he has absolutely no connection with, and which he has absolutely no knowledge of, he will not be held liable for the unconnected actions of others. Nonetheless should such sites come to his attention it would be prudent for him to notify those persons of the existence of the Order and request them to remove such materials.

15. In those circumstances, the Court can see no reason to alter or amend the Order perfected on 8th December 2009 to reflect, or even better reflect, the Court's intention and ruling, and Mr. Kelly's application is hereby refused and the Order stands as is.