



## THE COURT OF APPEAL

**Finlay Geoghegan J.  
Peart J.  
Hogan J.**

Neutral Citation Number: [2017] IECA 161

**Appeal No. 2014 747**

**ARTICLE 64 TRANSFER**

**BETWEEN/**

**PATRICK KELLY**

**PLAINTIFF/ APPELLANT**

**- AND -**

**NATIONAL UNIVERSITY OF IRELAND DUBLIN AKA UNIVERSITY COLLEGE DUBLIN (UCD)**

**DEFENDANT/ RESPONDENT**

**- AND -**

**THE DIRECTOR OF THE EQUALITY TRIBUNAL**

**NOTICE PARTY**

### **JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of May 2017**

1. This appeal raises important questions relating to the jurisdiction of the Court of Appeal to hear an appeal from a judgment and order of the High Court purportedly made in proceedings which commenced as a circuit appeal. It also raises important questions in relation to the jurisdiction of the High Court when hearing an appeal from the Circuit Court pursuant to s. 37 of the Courts of Justice Act 1936 ("Act of 1936").

2. The appeal is against an order of the High Court (Hedigan J.) of 29th January, 2013 made for the reasons set out in a written judgment [2013] IEHC 23 delivered on the same day. The order was made in proceedings with a record no. [2007 No. 52 CA]. As the record number indicates, the proceedings were an appeal from the Circuit Court. The appeal in question was an appeal from an order made by the then President of the Circuit Court, Deery P., on 12th March, 2007 in Circuit Court proceedings [2006/07275] in the Dublin Circuit. The order refused an application of the plaintiff/appellant (to whom I will refer as "Mr. Kelly") under O. 57A, r. 6(6) of the Circuit Court Rules seeking discovery of certain categories of documents from the defendant/respondent (to which I will refer as "UCD").

3. Apart from costs, the order of the High Court of 29th January, 2013 was:-

"IT IS ORDERED that all proceedings herein in the Circuit Court and in this Court be stayed permanently and that the said Applicant [Mr. Kelly] be prohibited from issuing any further applications or proceedings arising from the said Applicants application to UCD in 2001 and 2002 against the said Respondent [UCD] or any of its servants or agents or any of the legal advisors of the said Respondent without obtaining prior consent of the High Court such consent to be applied for in writing to the Principal Registrar of the High Court."

### **Background facts**

4. Prior to considering the jurisdictional issues raised in the appeal it is necessary to set out briefly the background facts and the lengthy and protracted procedures in the Circuit Court and the High Court which led to the hearing of this appeal.

5. In 2002 Mr. Kelly, having applied, was not offered a place for a Masters in Social Science in UCD for the academic period 2002 – 2004. Mr. Kelly claimed that he was more qualified than the least qualified female applicant for the course and also made complaints in relation to the interview process. He commenced a formal complaint in 2002 to the Director of the Equality Tribunal pursuant to the Equal Status Act 2000. In 2006, the Equality Tribunal concluded that Mr. Kelly had failed to establish prima facie discrimination on gender grounds. Some days later Mr. Kelly appealed that decision pursuant to s. 28 of the Equal Status Act 2000 to the Circuit Court, Dublin Circuit, which proceeding had a record number 2006/07275.

6. In those Circuit Court proceedings, Mr. Kelly brought an application pursuant to O. 57A, r. 6(6) of the Circuit Court rules for discovery of certain documents. That application was refused in 2007. In March, 2007 Mr. Kelly issued a notice of appeal to the High Court against the refusal of his application for discovery. The notice of appeal was to the High Court sitting in Dublin and specified to be an "appeal under Part IV of the Courts of Justice Act 1936 and O. 61, r. 2 of the Rules of the Superior Courts".

7. In the High Court appeal [2007 No. 52 CA], Mr. Kelly made a number of applications including an application for a reference to the Court of Justice pursuant to Article 234 [now Article 267 TFEU] for a preliminary ruling. That was initially refused on grounds that it was premature and the matter had to be determined in accordance with Irish law. On 14th March, 2008 the High Court (McKechnie J.) refused the discovery and disclosure of the documents sought by Mr. Kelly in his application to the Circuit Court in accordance with Irish law but the preliminary ruling to CJEU was left open. In January, 2010 the High Court (McKechnie J.) made a reference to the Court of Justice under Article 267 TFEU seeking a preliminary ruling on five questions. Suffice to say that the answers given did not oblige the Irish High Court to make an order for discovery or disclosure of the documents in favour of Mr. Kelly.

8. It appears there were then further applications to the High Court. These included applications to set aside earlier judgments of McKechnie J. Those applications were dealt with by Hedigan J.

9. On 9th May, 2012 the High Court (Hedigan J.) in the same circuit appeal [2007 No. 52 CA] made *inter alia* an order that:-

"the provisional Judgment of Mr Justice McKechnie dated the 31st July 2008 in which he decided *inter alia* that the documents sought by the Plaintiff in his appeal to the Circuit Court were confidential and that UCD did not have to disclose the documents in question is now no longer deemed provisional but has become the final decision in this matter."

10. It appears from the order of 9th May, 2012 that on the same day, the High Court considered "the Court's Motion restraining the Plaintiff issuing further proceedings herein". The order records that the Court noted,

"the sworn Undertaking of the Plaintiff to make no further interlocutory applications in these proceedings to the Circuit or High Court against either

(i) University College Dublin

(ii) Its employees both present or past

(iii) Mr. Eugene O'Sullivan solicitor for UCD"

The order also noted that the undertaking was subject to the plaintiff's right of appeal on a point of law from the decision of the Circuit Court in the event that his appeal from the Equality Tribunal is unsuccessful and any application in relation to costs."

11. The same order of the 9th May included,

"Liberty to the Defendant to issue a Motion in relation to a restraining Order herein".

12. The hearing of the substantive Circuit Court proceeding, namely, the appeal brought by Mr. Kelly pursuant to s. 28 of the Equal Status Act 2000, commenced before the Circuit Court on 23rd October, 2012. On 24th October UCD applied to dismiss the appeal and Mr. Kelly then made an allegation of bias against the Circuit Court trial judge. UCD were granted an adjournment by the Circuit Court trial judge, and on 24th October, 2012 applied *ex parte* to the High Court (Hedigan J.) and were granted an order giving liberty to issue and serve a notice of motion seeking to re-enter the original circuit appeal proceeding [2007 No. 52 CA] and other restraining reliefs. The motion was initially returnable on 25th October, 2012. Thereafter it was adjourned with directions in relation to affidavits and submissions, and heard on affidavit evidence with submissions on 23rd November, 2012.

13. The reliefs sought by UCD in the motion brought in the circuit appeal proceedings form the refusal of discovery [2007 No. 52 CA] were:

(i.) An order permanently staying the within proceedings in the Circuit Court and in this Honourable Court.

(ii.) An order permanently restraining the Applicant from taking any further steps in these proceedings against the Respondent, its servants or agents and/or current, former or retired employees.

(iii.) An order permanently restraining the Applicant from instituting any further proceedings against the respondent, its servants, agents and/or current, former or retired employees or against any other Respondent or Defendant to which the Respondent in the within proceedings might be entitled to join as a notice party without leave of this Honourable Court."

14. Insofar as orders were sought in relation to "the within proceedings" those were the Circuit Court proceedings [2006/07275], the appeal pursuant to s. 28 of the Equal Status Act, 2000 in the Circuit Court, Dublin Circuit. As appears from the outset of this judgment, the order made by the High Court on 29th January, 2013 in substance granted the orders sought.

15. Mr. Kelly, on 14th February, 2013, served a notice of appeal from the High Court order to the Supreme Court [2013/54].

16. A copy of a transcript of a short hearing before the Supreme Court (Denham C.J., O'Donnell J. and McMenamin J.) on 10th May, 2013 in relation to that appeal was handed in to this Court. It appears that by that point in time UCD had raised the jurisdiction of the Supreme Court to entertain Mr. Kelly's appeal by reason of s. 39 of the Act of 1936. Mr. Kelly took the point that the order made by the High Court on 29th January, 2013 was not a decision on an appeal to it under Part IV of the Act of 1936. It appears to have been accepted at that point in time by UCD that the appeal brought by Mr. Kelly under Part IV of the Act of 1936 from the refusal of Deery P. to make an order for the discovery and disclosure of documents had been finally heard and determined by the High Court by 9th May, 2012.

17. The Supreme Court at the hearing on 10th May, 2013 directed that the issue of the Supreme Court's jurisdiction to hear the appeal from the order of the High Court of 29th January, 2013 would be determined at the hearing of the appeal.

18. However before that happened, Mr. Kelly's appeal to the Supreme Court fell into the category of appeals transferred to this Court by the direction of the Chief Justice issued, with the concurrence of the other members of the Supreme Court, pursuant to Art. 64.3.1 of the Constitution on 29th October, 2014. Mr. Kelly subsequently sought to have the direction set aside in relation to his appeal but that application was refused by the Supreme Court on the 25th February, 2016: see *Kelly v. University College, Dublin* [2016] IESCDT 30. The appeal thus fell to be heard and determined by this Court and a hearing date of 12th May, 2017 was given.

The original appeal brought in 2006 to the Circuit Court pursuant to s. 28 of the Equal Status Act 2000 has not been fully heard or determined. The above is a short summary of the multiple applications made by Mr. Kelly to both the Circuit Court and the High Court.

#### **Jurisdictional issues**

19. The first issues which must be considered on the appeal are the jurisdiction of this Court to hear the appeal from the order of the High Court of 29th January, 2013 and the jurisdiction of the High Court to make such order. The jurisdictional questions are interconnected and must be dealt with together.

20. Mr. Kelly's submissions on jurisdiction in summary are:

(i.) The order made by the High Court on 29th January, 2013 was not made on an appeal from the Circuit Court to the High Court pursuant to Part IV of the Act of 1936.

(ii.) Accordingly, s. 39 of the Act of 1936 does not exclude an appeal from the High Court to this Court. There is no other statutory provision excluding the appeal and accordingly there is a right of appeal pursuant to Art. 34.4.1 of the Constitution.

(iii.) The High Court had no jurisdiction to make the order made. The only jurisdiction it had was in the circuit appeal proceeding [2007 No. 52 CA] to determine the discovery appeal from the Circuit Court which had been finally determined on or before 9th May, 2012.

UCD in response submits that the order made by the High Court was an order made in exercise of its appellate jurisdiction from the Circuit Court, and accordingly the jurisdiction of this Court is excluded by s. 39 of the Act of 1936. It relies upon the inherent jurisdiction of the High Court, the fact that it was the High Court judge who first raised the question of a restraining order against Mr. Kelly and the leave granted to apply for a restraining order in the order of 9th May, 2012 against which there was no appeal.

**Whether this Court has jurisdiction to hear an appeal from the decision of the High Court in this matter**

21. Article 34.2 of the Constitution provides that the courts shall comprise:

- (i.) Courts of First Instance;
- (ii.) a Court of Appeal; and
- (iii.) a Court of Final Appeal.

22. Article 34.3 insofar as relevant provides:

“1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.

[...]

4° The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.”

23. The general appellate jurisdiction of the Court of Appeal from the High Court is set out in Article 34.4.1:

“4 1° The Court of Appeal shall–

- (i) save as otherwise provided by this Article, and
- (ii) with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.”

24. The Circuit Court is a court of local and limited jurisdiction for the purposes of Article 34.3.4 which was established by s. 4(1) of the Courts (Establishment and Constitution) Act 1961. The right of appeal from the Circuit Court pursuant to which Mr. Kelly brought his 2007 appeal to the High Court is provided for by s. 37 of the Courts of Justice Act 1936 (as applied by s. 48(3) of the Courts (Supplemental Provisions) Act, 1961. It is not in dispute between the parties that this was an appeal to which s. 37 of the Act of 1936 applies. The High Court when determining an appeal under s. 37 is sitting as a court of appeal to hear and determine an appeal from the Circuit Court, a court of limited jurisdiction, in accordance with the right of appeal as prescribed by statute. It is important to emphasise that in hearing and determining such a circuit appeal, the High Court is not acting as a court of first instance with its full originating jurisdiction pursuant to Art. 34.3.1. The statutory appellate jurisdiction of the High Court is a jurisdiction conferred by statute which is in addition to and is distinct from its originating jurisdiction as a court of first instance pursuant to Art. 34.3.1.

25. Section 37(2) of the Act of 1936 provides that the appeal to the High Court is to be heard and determined “by way of rehearing of the action or matter in which the [Circuit Court] judgment or order subject of the appeal was given or made...”. Section 40 contains certain other provisions in relation to the hearing and determination of such appeals but none are relevant to the jurisdictional issues before this Court.

26. Section 39 provides:-

“The decision of the High Court ... on an appeal under this Part [IV] of this Act shall be final and conclusive and not appealable.”

27. The decision of the High Court made on 29th January, 2013 cannot be considered to be a “decision of the High Court ... on an appeal” under Part IV of the Act of 1936. There was no decision of the Circuit Court which was the subject of an appeal to the High Court in relation either to the subject matter of the notice of motion brought by UCD in October, 2012 or to the matters determined by the High Court judge in his judgment and order of 29th January, 2013.

28. The Court of Appeal enjoys an appellate jurisdiction in accordance with Article 34.4.1 from all decisions of the High Court, save as otherwise provided by Article 34 itself, or decisions which are the subject of an exception or regulation prescribed by an Act of the Oireachtas. UCD has not relied on any provision in this regard other than s. 39 of the 1936 Act. But this provision does not apply to the decision of the High Court in question as it was not a decision on an appeal under Part IV of the 1936 Act. Any such legislative provision must, of course, in accordance with the established principles, be expressed in clear and unambiguous terms (see, *inter alia*, *A.B. v. Minister for Justice Equality & Law Reform* [2002] 1 I.R. 296 per Keane C.J. at p. 303 and *Clinton v. An Bord Pleanála* [2007] 1 I.R. 271 per Fennelly J. at p. 293 and *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 I.R. 509, 533-535 per Clarke J.).

29. In support of its submission that s. 39 of the 1936 Act excludes an appeal to this Court, UCD relies on the judgment of Finlay C.J. in *Kinahan v. Baila* (Unreported, Supreme Court, 18th July, 1985). That judgment appears to be the single judgment with which the other members of the Court concurred. In that case the appeal to the High Court had been from an order of the Circuit Court made in

a custody case. In the High Court, Lardner J. ordered that the appellant, Mr. Baila, should give security for costs of the appeal in the High Court and the appeal not be proceeded with until such security was given. Mr. Baila then sought to appeal that order to the Supreme Court and the preliminary point was taken that the appeal was excluded by s. 39 of the Act of 1936. Finlay C.J. having quoted s. 39 then stated:

"The basis on which it was sought to distinguish this appeal from what would appear otherwise to be the very clear and unambiguous terms of s. 39 was that the application made to the High Court was an interlocutory application touching on a matter, namely, security for costs, which had not been the subject matter of any application and, therefore, any decision in the Circuit Court proceedings. I am quite satisfied that this does not take this appeal outside s. 39, and I am quite satisfied that any interlocutory application made and **any decision made by the High Court exercising its appellate jurisdiction under the Courts of Justice Act 1936 in relation to appeals from the Circuit Court**, is captured, as is every other decision by the High Court on a circuit appeal, by s. 39 and there is no room in the interpretation of s. 39 to make a special exception in relation to matters by way of interlocutory application raised for the first time in the proceedings, **provided they are raised in a circuit appeal**. I am, therefore, satisfied this Court has not got any jurisdiction to hear this appeal..." [emphasis added].

30. As appears from the foregoing passage, the decision of the former Chief Justice is based upon the conclusion that in making the interlocutory order in question the High Court was exercising its appellate jurisdiction under the Act of 1936 as the application had been made in the course of a circuit appeal. The facts of the present appeal are, however, different. As already stated, it is common case that the appeal from the Circuit Court to the High Court had been finally determined on or before 9th May, 2012. Thereafter the circuit appeal was no longer before the High Court.

31. UCD sought, however, to rely upon the leave granted in the order of 9th May to apply for a restraining order. That leave, even if it had been granted within jurisdiction, cannot assist the submission of UCD. The circuit appeal taken by Mr. Kelly only related to a refusal to grant him discovery and disclosure of certain documents which he was seeking. The circuit appeal was not in respect of his substantive proceeding before the Circuit Court, namely, the appeal pursuant to the Equal Status Act. Leave was not being granted in relation to a matter which could be said to have been raised in the particular circuit appeal, *i.e.*, relating to Mr. Kelly's application for discovery and disclosure of documents for the purposes of his substantive proceedings before the Circuit Court.

32. Accordingly I have concluded that the Court of Appeal does have jurisdiction to hear and determine the appeal from the order of the High Court of 29th January, 2013 pursuant to Article 34.4.1 as its jurisdiction is not excluded by s. 39 of the Act of 1936.

#### **The High Court jurisdiction to make the Order of 29th January, 2013**

33. The next jurisdictional issue is whether or not the High Court had jurisdiction to make an order of the type made on 29th January, 2013. That issue must be considered irrespective of the merits.

34. The jurisdiction identified by the High Court judge at para. 3 of his judgment is the inherent jurisdiction of the High Court to restrain the institution of proceedings to prevent an abuse of process. He referred to what was stated by Keane C.J. in *Riordan v. An Taoiseach (No. 4)* [2001] 3 I.R. 365 at 370:-

"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious . . . This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation . . . This court is extremely reluctant, as the High Court has been, to restrain the access of any citizen to the courts. The stage has clearly been reached, however, where the proper administration of justice requires the making of such an order against the applicant. Accordingly . . . the court will, in exercise of its inherent jurisdiction, order that the applicant be restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to these proceedings . . ."

35. The restraining order made in *Riordan* was made in proceedings which had been commenced by the applicant in the High Court in which it was exercising its full originating jurisdiction under Art. 34.3.1 as a court of first instance. The appeal brought to the Supreme Court was also brought pursuant to the then provisions of Art. 34.4.3 entitling the plaintiff to such an appeal. The inherent jurisdiction of the High Court and, on appeal, the Supreme Court, being referred to by Keane C.J. forms part of their respective inherent jurisdictions as a court of first instance with full originating jurisdiction and as an appellate court therefrom.

36. For the reasons already stated, the statutory jurisdiction of the High Court pursuant to s. 37 of the Act of 1936 to hear and determine an appeal from the Circuit Court is quite different. It is a limited appellate jurisdiction conferred by statute. The appellate jurisdiction is to hear and determine the appeal by a rehearing and is limited to the subject matter of the application to the Circuit Court and the jurisdiction of the Circuit Court in relation to the application. When exercising such appellate jurisdiction it may, of course, as *Kinahan v. Baila* makes clear, make what might be considered to be a first instance decision on an interlocutory application, but as is also clear from the judgment of Finlay C.J., such application must relate to the circuit appeal. No authority was opened to us which indicates that the High Court, when exercising the statutory appellate jurisdiction in a circuit appeal, has an inherent jurisdiction to hear and determine an application at first instance which cannot be said to be for the purpose of or in connection with the determination of the particular circuit appeal.

37. There is an *obiter* observation in *Kinahan v. Baila* which appears supportive of this conclusion. As appears from that judgment, the order of the High Court for security for costs had been made pursuant to O. 29 of the Superior Court Rules. While the former Chief Justice acknowledged that the Court had no jurisdiction in the matter – so that, accordingly, his views must be considered to be *obiter* – he nonetheless did subsequently state that the jurisdiction of the High Court to make an order for security for costs in the circuit appeal should not have been exercised pursuant to O. 29 of the Superior Court Rules, but rather pursuant to O. 13 of the Circuit Court Rules. This is consistent with the Act of 1936 conferring on the High Court a statutory jurisdiction to hear and determine appeals from the Circuit Court in accordance with the Circuit Court jurisdiction and rules (save, of course, those specifically relating to the pursuit of an appeal).

38. Accordingly, I have concluded that the High Court in October/November 2012 did not have jurisdiction to hear or determine the application made by UCD, either to place a stay on the substantive circuit proceedings which were part heard and adjourned, or to make an order restraining Mr. Kelly from instituting further proceedings or further applications in the existing circuit proceedings arising out of the incidents in 2002 in UCD. The fact that the High Court in the order of 9th May granted leave to bring the application cannot assist UCD. The High Court cannot, by granting leave to apply, confer on itself a jurisdiction that it does not otherwise have.

39. In reaching my conclusion on the jurisdiction of the High Court to entertain the application of UCD and make the order of 29th January, 2013, I wish to make clear that I am not expressing any view as to the existence or absence of an inherent jurisdiction in the High Court to make orders to prevent an abuse of process in relation to the prosecution, hearing or determination by it of a circuit appeal. The appeal from the Circuit Court in relation to the discovery and disclosure of documents had been finally determined by 9th May, 2012. The alleged abuse of process did not relate to the circuit appeal. UCD sought, in reliance on the *Isaac Wunder* jurisdiction, not only to restrain further proceedings but also dismiss part-heard circuit proceedings.

40. I would add that, in any event, it is not clear that the High Court enjoys any jurisdiction to make an order which in substance compels the Circuit Court to dismiss the proceedings which are still pending before it. As Gannon J. said in *Clune v. Director of Public Prosecutions* [1981] I.L.R.M. 17 at 20:

"The courts of limited jurisdiction established by legislation pursuant to constitutional authority in that behalf are not in any sense subject to direction, control or supervision by the superior courts established by the Constitution..."

As is clear from *Clune*, if the Circuit Court has fallen into error, the remedy is an appeal or judicial review. But the capacity of the High Court to dismiss or require the Circuit Court to dismiss proceedings which are pending before it must be regarded as at best doubtful. This is in part, however, what in substance occurred in the present case. While the High Court order granted a "permanent stay" on the continuation of the Circuit Court proceedings, this type of order must be regarded as being "in the nature of a dismissal of the action": see the comments of Hogan J. in *Flynn v. Bon Secours Health Systems Ltd.* [2014] IEHC 87.

#### **Other Issues**

41. It is not necessary, in the light of the conclusions reached to consider other issues on the appeal. I wish to emphasise that this is a decision on the respective jurisdictions of the High Court and this Court and not on the merits. The Circuit Court proceedings commenced in 2006 require to be finalised. It remains, in the first instance a matter for the Circuit Court to achieve this.

#### **Conclusions**

42. My conclusions on the issues decided on this appeal are:-

(i.) The order of 29th January, 2013 was not a decision of the High Court on an appeal under Part IV of the Courts of Justice Act 1936 and accordingly the jurisdiction of this Court to hear and determine the appeal therefrom is not excluded by s. 39 of the Act of 1936.

(ii.) The High Court had no jurisdiction to make orders of the type made in the order of 29th January, 2013 either staying the substantive proceedings before the Circuit Court (an appeal pursuant to s. 28 of the Equal Status Act 2000) or restraining the plaintiff from issuing further proceedings or applications in the existing circuit proceedings.

#### **Relief**

43. The appeal will be allowed and an order made vacating the order of the High Court of 29th January, 2013. The Court will hear the parties in relation to costs and expenses in the High Court and in this Court.