THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 102

Record No. 2019 448

Edwards J.
Faherty J.
Murray J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/
RESPONDENT

- AND–

KEVIN GORMLEY

DEFENDANT/
APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 12th day of March 2020

1. The appellant seeks to appeal a decision of the High Court (Jordan J.) of 8 October 2019 refusing his application pursuant to O.123 of the Rules of the Superior Courts for the Digital Audio Recording ("DAR") of the hearing of proceedings to which he had been a party. The proceedings comprised an appeal from a decision of the Circuit Court. The respondent has issued a motion in which it seeks the dismissal of the appeal on the basis that the Court has no jurisdiction to entertain it. This judgment is addressed both to that motion, and to the underlying appeal.

2. In the proceedings, the respondent sought possession of property at Edenderry, Co. Offaly. Those proceedings were initiated in the Circuit Court by way of Civil Bill for Possession dated 20 January 2016. An order for possession having been granted by that Court (HH Judge Fergus) on 16 January 2019, a notice of appeal of that order was issued on 22 January. That appeal was heard by the High Court (Jordan J.) on 20 May 2019 when the appellant was legally represented by counsel and solicitor. On that date, the Court affirmed the order of the Circuit Court of 16 January 2019 and extended the stay on the execution of the order for possession for a period of twelve months from 20 May 2019.

3. On 10 June, the appellant issued a motion in the Circuit Court seeking the DAR of the Circuit Court proceedings of 16 January. He also issued a separate motion seeking the DAR of the hearing before the High Court of the Circuit Court appeal proceedings on 20 May. The latter motion came for hearing before Jordan J. on 25 June 2019. On that

date, the appellant's motion seeking the DAR was heard in full. The Court refused the application at the conclusion of the hearing on that date.

4. On 25 June 2019 the appellant issued a further motion in the High Court seeking, again, the DAR of the proceedings before the Court on 20 May. The motion and affidavit were identical in every respect to those issued on 10 June grounding the application which has been refused on 25. This second application came before Jordan J. on 8 October 2019 and was, again, refused. On 4 November, this appeal was filed against – and only against – the decision of 8 October. Essentially, the contention advanced in the notice of appeal is that where a party to a matter seeks a transcript or recording of a trial, "*in order to certain [sic.] the detail of what has happened … then it is … necessary and appropriate that the DAR be made available to that party*". Reference is made to the constitutional mandate that the administration of justice be conducted in public. It is emphasised that the Bank did not offer any legitimate reason to the trial judge as to why he should refuse the DAR.

5. Section 39 of the Courts of Justice Act 1936 appears in Part IV of the Act, which in turn provides for and regulates appeals to the High Court from certain decisions of the Circuit Court. It is clear that the underlying appeal to the High Court the DAR of which was sought by the appellant, falls within that Part of the Act. Section 39 provides as follows:-

> *"The decision of the High Court or of the High Court on Circuit on an appeal under this Part of this Act shall be final and conclusive and not appealable."*

6. The preclusion on appeal to this Court entailed by this provision is not limited to the final decision of the High Court in allowing or refusing the appeal in question. It extends to any interlocutory application made to, and any decision made by, the High Court exercising its appellate jurisdiction under the 1936 Act in the course of appeals from the Circuit Court. This was explained in *Kinahan v. Baila* (Unreported Supreme Court, 18 July 1985). There, the Court was concerned with an attempt to appeal a decision of the High Court refusing an order for security for costs of proceedings by way of appeal from the Circuit Court.

7. Determining that it followed from s.39 that there was no appeal against such a decision, Finlay C.J. observed of the argument that because the decision was not the disposal of the appeal itself, s.39 did not apply :-

> *"I am quite satisfied that that does not take this appeal outside Section 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 Court Appeal, by Section 39 and there is no room in the interpretation of Section 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.".*

8. It follows that s.39 excludes an appeal against a wide range of interlocutory orders made by the High Court in the course of an appeal from a decision of the Circuit Court, including orders for discovery, for particulars, orders seeking to strike out the appeal, costs orders and indeed orders made in the course of the ordinary management of the appeal. Such orders are not merely made (as Finlay CJ variously described it) "on" or "in" the appeal, but they are made in furtherance of the appeal, and they are made while the appeal is pending and while the Court is thus seised of it.

9. In one sense, every order made within the title of an appeal from a decision of the Circuit Court can be said to be "in", or "on" the appeal. However, it is also clear that there exists a narrow category of application which, while it may be brought under the rubric of a Circuit Court appeal, is nonetheless so disconnected in its legal basis and effect from the course of the underlying appeal as to be outside the provisions of s.39. This follows from the judgment of Finlay Geoghegan J. in *Kelly v. National University of Ireland Dublin aka UCD v. The Director of the Equality Tribunal* [2017] IECA 161, [2017] 3 I.R. 237.

10. In *Kelly* the plaintiff appealed a decision of the Equality Tribunal made pursuant to the Equal Status Act 2000 that he had failed to establish a *prima facie* case of discrimination in connection with the refusal by the defendant of his application to join an academic course, to the Circuit Court. In those Circuit Court proceedings, he sought an Order of discovery which was refused. That Order was unsuccessfully appealed by the plaintiff to the High Court in proceedings to which Part IV of the Courts of Justice Act 1936 clearly applied. Subsequent applications were brought to the High Court in those same appeal proceedings, including an application to set aside the earlier Order refusing the appeal. The discovery appeal concluded in the High Court with an Order of Hedigan J. of 9 May 2012 whereby liberty was given to issue a motion restraining the plaintiff from bringing further proceedings.

11. The substantive case proceeded before the Circuit Court where the plaintiff in the course of an application made by the defendant to dismiss the appeal, made allegations of bias against the Circuit Court Judge. The defendant then applied to the High Court for liberty to issue and serve a notice of motion re-enter the original Circuit Court appeal and seeking the restraining reliefs enabled by the Order of 9 May 2012. Those orders were granted. Specifically, the High Court ordered that all proceedings in the Circuit Court and in the High Court be stayed permanently and that the plaintiff be prohibited from issuing any further applications or proceedings arising from the plaintiff's application to UCD against the defendant, or any of its servants or agents without first obtaining the consent of the High Court.

12. The defendant contended that the order thus made by the High Court was made in the exercise of its appellate jurisdiction from the Circuit Court, and accordingly that the jurisdiction of the Court to hear the appeal was excluded by s.39 of the 1936 Act.

13. In rejecting this contention and concluding that the decision was appealable notwithstanding s.39, the Court observed (para. 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 29 January 2013."*

14. The decision in *Kinahan v. Baila* was distinguished on the basis that the application in that case had been made "*in the course of a circuit appeal*" (para. 30). Finlay Geoghegan J. continued:

> *"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."*

15. What thus emerges from the decision in *Kelly* is a distinction within the general category of orders made within the rubric of an appeal from a decision of the Circuit Court, between those orders which can properly be described as having been made "*in the course of*" the appeal, and a narrow category of orders which – although made within the Circuit Court appeal proceedings - do not further the appeal itself and stand independently of it. Kelly also makes it clear that one useful indicia of whether an order falls within or without the "*course of*" the appeal, is whether the Order has been made after the appeal has concluded. However, this cannot be dispositive. It would make little sense to say that the order made in *Kelly* could be appealed if it were made after the appeal had concluded, but that it could not be appealed if the same order was made while the appeal was live.

16. Instead, I think the correct distinction is between Orders which are made in furtherance of, or which are an integral part of, the appeal (such as those under consideration in *Kinahan v. Baila*) and orders (such as that in *Kelly*) which, while made within the framework of the appeal, neither advance, determine, dispose of nor are an inherent part of those proceedings. Orders for security for costs, for discovery, for particulars – and indeed almost all orders available within proceedings of this kind - are sought for the sole purposes of furthering the position of the moving party in, or are an integral part of, the proceedings. They have no other point. The Order under consideration in *Kelly* (insofar as there is jurisdiction to make it at all) was in the nature of an *Isaac Wunder* order, and it was in its effect external to the proceedings – as demonstrated by the fact that such relief is most usually sought at the conclusion of proceedings. That an order could be made after the appeal had been determined is a strong indicator that it falls within the latter category, but the actual timing of the order appears to me to be irrelevant to that inquiry. By distinguishing between these two types of relief the intention behind s.39 can be given effect to, while also observing the principle articulated by the Court in *Kelly* that a legislative exclusion on the right of appeal must be expressed in clear and unambiguous terms.

17. The facility for obtaining access to the DAR is provided for by O.123 of the Rules of the Superior Courts, as amended by the Rules of the Superior Courts (O.123) 2013, S.I. 101 of 2013, and the Rules of the Superior Court (Court of Appeal Act 2014) 2014, S.I. No. 485 2014. Rule 9(1) provides:-

> *"(1) Any party or person who seeks access to any part of a record of proceedings (in this rule referred to as the "relevant record") which is held by or for the Supreme Court, the Court of Appeal or the Court, as the case may be (in this rule referred to as the "relevant court") may apply to the relevant court by motion in the proceedings concerned on notice to the other party or the parties to those proceedings, grounded upon an affidavit."*

18. Order 123(9)(4), provides:-

> *"(4) Subject to sub-rule (5), the relevant court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the relevant court may direct."*

19. Some features of this jurisdiction should be noted. Access to the DAR is not automatic, and it does not follow – even for a party – as a matter of right (see *Hudson v. Halpin* [2013] IEHC 4). It must be established that it is in the interests of justice to grant the Order. Thus, a party seeking access to the DAR must give some reason for seeking same. While very often parties seeking such access will require it to enable the further prosecution of their proceedings or an appeal thereof, the power of the Court to grant access to the DAR is not limited to these situations. The DAR can be legitimately sought, for example, because of its potential relevance to other related proceedings (see for example *Knowles v Governor of Limerick Prison* [2016] IEHC 33 at para. 31). Further, it is clear that there is no requirement that proceedings be still pending before such an application is made: an application can – and often will be - made after the proceedings have concluded, and when the Court to which the application is made, is no longer seised of that lis. Finally, it will be noted that under O.123, r.9(1), the application must be brought "*in the proceedings concerned*".

20. These features of the Rule come into focus when it is remembered that the relief sought by the appellant refusal of which gives rise to this appeal, has no relationship with any Order made by the Circuit Court itself. The decision in *Kelly* makes it clear that this is important in determining whether an order is "*on*" an appeal within the meaning of s.39. Thus, in that case the Order sought to be appealed had been made by Hedigan J. on foot of leave granted when he was seised with the appeal. The respondent sought to rely upon this. Finlay Geoghegan J. reasoned as follows (para. 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 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,*** *ie, relating to Mr. Kelly's application for discovery and disclosure of documents for the purposes of his substantive proceedings before the Circuit Court."* (emphasis added)

21. Accordingly, an order on foot of an application to the High Court seeking production of the DAR and made within proceedings by way of an appeal from a decision of the Circuit Court is not a decision "on" an appeal from a decision to which Part IV of the Act of 1936 applies. This conclusion follows, in particular, from three features of such an application:

    (a) An application for the DAR can be – and in this case was – brought after the conclusion of the appeal and at a time when the High Court is no longer seised with those proceedings;

    (b) Such an order need have no necessary connection with the prosecution or furtherance of the position of either party to the appeal in that litigation, and – given that no appeal was possible in this case from the decision of the High Court in the substantive proceedings – did not do so here.

    (c) The order seeking the DAR was not dependant in any way upon an issue that had been determined in the Circuit Court. This was relief of an originating kind, not relief arising from any order made by the Circuit Court itself.

22. In her helpful written and able oral submissions Ms. Duffy BL sought to contend that the decision of the Court in *Kelly* was distinguishable from the issue in this case on the basis that in *Kelly* the Court also found that the High Court did not have jurisdiction to make the Order in question. That the Court made such a finding is correct: the jurisdictional basis for the making of the Order against which it was sought to appeal was the inherent jurisdiction of the Court, and this Court determined that the High Court when exercising its statutory appellate jurisdiction did not enjoy such an inherent jurisdiction – at least to make an Order of that kind (paras. 36 and 37). This was particularly the case in a context in which the order made by the High Court was one which, in substance, compelled the Circuit Court to dismiss the proceedings which were then pending before it (para. 40).

23. However, while not insignificant, that feature of the case did not affect the reasoning of the Court as to the scope of *its* jurisdiction, and it does not affect the implication of the decision for this appeal. The Court treated the issue of appealability, and of jurisdiction, separately – as indeed it had to do. Otherwise it could not determine the appeal. Thus, if anything, the want of jurisdiction makes the point. If there were no appeal from such a

decision, there would be no mechanism to correct the exceeding by the High Court of its jurisdiction, given that Judicial Review does not lie against the High Court. If there was to be a remedy by way of appeal, that could only be because there must be decisions of the High Court made within the rubric of a Circuit Court appeal, which themselves are capable of appeal. Once that is understood, the issue reduces itself to whether in any particular circumstance the decision sought to be appealed against is within or without the section. That, in turn, requires a definition of when an order made within such a proceeding is truly "*on*" a Circuit Court appeal. The Court in *Kelly* could have, but did not, define this by reference to whether the decision was or was not made within jurisdiction. Instead, it looked to the relationship between the order sought to be appealed, and the substantive proceedings themselves. Indeed, para. 31 of the judgment (quoted above) makes it clear that the conclusions of the Court did not depend on the fact that the Court had no jurisdiction to make the order in the first place.

24. As to the merits of the appeal, it is impossible to see what grounds of appeal the appellant can have. He faces three obstacles, each of which appears to me to be insuperable.

25. First, in neither his affidavit grounding the application to the High Court nor his notice of appeal to this Court has he identified any proper basis on which he said the DAR should be furnished to him. His affidavit records that he wanted the DAR to "*properly advocate [his] case before any appellate Court*". Of course, there was no appellate Court with jurisdiction to hear any such case. Apart from that ill-founded justification, the affidavit and, in particular, the notice of appeal proceeded on the basis that the appellant wanted the DAR, and that he had an entitlement to it. He says in his notice of appeal "*[i]t is the Applicants case that a motion seeking the Dar should be granted as of right*". This does not reflect the jurisdiction conferred by the relevant Rule.

26. Second, the Order was, in any event, a discretionary order, and some basis must be identified for the contention that the trial Judge erred in the exercise of his discretion (see *Lawless v. Aer Lingus Group plc* [2016] IECA 235 at para. 22). No such valid basis is disclosed.

27. Third, the order which he seeks to appeal against was a replication of the earlier order of Jordan J. This is obvious, if from nothing else, from the fact that the motion and affidavit on the basis of which the application was presented, were identical. That order has not been appealed. Even if an application under O.123 is categorised as merely an interlocutory application (and I express no view in relation to this question) the appellant could not simply repeat the application which had been refused without there having been some change in the underlying circumstances : *"[i]t is … clear that a party will not be permitted to reopen a decision on an interlocutory matter absent a good reason for doing so such as a material change in circumstances"*, Delaney and McGrath Civil Procedure (Fourth Ed. 2018). No good reason or change of circumstances for the repeated application is identified anywhere.

28. It follows that while it is my view that the Court has jurisdiction to entertain this appeal, it must refuse it.