

THE HIGH COURT

Record Number: 2018/255CA

**BETWEEN:**

**MARS CAPITAL IRELAND DAC**

**PLAINTIFF**

**-AND -**

**JAMES HUNTER**

**DEFENDANT**

**EX TEMPORE JUDGMENT of Ms. Justice Power delivered on the 27th day of January 2020**

1. This is an appeal from a decision of O'Donoghue J., made on 26 June 2018, striking out the plaintiff's motion seeking leave to issue Circuit Court proceedings.
2. The facts of the case, briefly, are as follows. An order for possession of the lands and premises contained in Folios 23834F and 9940 of the Register of Freeholders, County of Mayo, was made in favour of the plaintiff on 11 January 2010.
3. By motion dated 23 March 2018 the plaintiff sought an order pursuant to Order 36, rule 10 of the Circuit Court Rules granting leave to issue Circuit Court proceedings on foot of the aforesaid order for possession.
4. The motion was returnable for 9 April 2018. The plaintiff, the moving party, did not attend the motion. Counsel for the defendant was present. The motion was adjourned to 26 June 2018.
5. On 26 June 2018 the plaintiff, once again, failed to attend the hearing of the motion. On that day, the Circuit Court made an order striking out the plaintiff's motion and awarding costs to the defendant, to be taxed in default of agreement.
6. It is that order which the plaintiff now seeks to appeal. In bringing this appeal, the plaintiff is asking this Court firstly, to assume jurisdiction and, thereafter, to hear the motion for leave to execute, which was struck out by the Circuit Court judge.

**The Parties' Submissions**

7. Counsel for the defendant raised a preliminary point on jurisdiction. She objected to the High Court hearing the appeal on the basis that this Court has no jurisdiction to entertain it in circumstances where there was never, in fact, *any hearing* before the Circuit Court.
8. She submitted that the Circuit Court is a court of local and limited jurisdiction established by s. 4(1) of the Courts (Establishment and Constitution Act) 1961.
9. Section 37 of the Courts of Justice Act 1936 (hereinafter 'the Act of 1936') provides for appeals from the Circuit Court in civil cases heard without oral evidence. It states:  
  
*"37. —(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit*

*Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given.*

(2) *Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."*

10. Section 39 of the Act of 1936 provides:

*"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."*

11. The defendant's submission may be summarised as follows:-

- (i) since the motion was struck out for non-attendance on two occasions, there was, in fact, no hearing before the Circuit Court and, consequently, there is nothing from which to appeal;
- (ii) to allow the appeal would involve this Court taking on the role of a court of first instance and hearing evidence that was not opened to or put before the Circuit Court; and
- (iii) to allow the appeal would prejudice the defendant in circumstances where the order of this Court is final and the defendant would, as a result of the operation of s. 39 of the Act of 1936, be deprived of an appeal.

12. The defendant relied upon a number of authorities, including, *Fitzpatrick v Powell* [1946] I.R. 32. In that case, Haugh J. declined to hear an appeal which would involve the High Court being the first court to hear the evidence in the case. Counsel for the defendant argued that the solution, in the instant case, was for the plaintiff to issue a fresh motion before the Circuit Court.

13. In bringing this application, counsel for the plaintiff relied, firstly, on Article 34 of the Constitution and argued that his client had a statutory right of appeal. If its application was not granted by this Court, then his client risked being denied its right to appeal. He distinguished the facts of *Fitzpatrick v Powell* on the basis that the proceedings in that case involved a claim for damages for personal injuries. He submitted that the Court should adopt the approach of Faherty J. in *AIB v Cosgrove* [2017] IEHC 803 where, notwithstanding the non-attendance of the defendant, the High Court, nevertheless, heard the appeal. He urged that this Court should '*forget what happened in the Circuit Court*' and grant a *de novo* hearing under s. 37 of the Act of 1936.

14. Counsel for the plaintiff also contended that if his client brought a fresh motion before the Circuit Court, then it ran the risk of being told that the matter was *res judicata*. This, he

claims, was because the face of the Circuit Court order referred to that court '*reading the pleadings and documents filed and hearing what was offered by or on behalf of the parties*'. This, he submitted, was sufficient to establish that there had been a hearing before the Circuit Court. He submitted that no prejudice would lie against the defendant if the High Court now heard the motion for leave to execute because all of the pleadings had been delivered to the other side.

15. In reply, counsel for the defendant distinguished *AIB v Cosgrove* from the facts of this case. No preliminary issue had been raised in that case objecting to the jurisdiction of the High Court. Furthermore, if the plaintiff's appeal were granted and the motion for leave to execute were heard by this Court, the defendant would, in fact, be deprived of any right of appeal given that the High Court would have been the first court to hear the evidence in this case.
16. Counsel for the defendant further submitted that in circumstances where she was arguing that there was, in fact, no hearing before the Circuit Court from which to appeal, her client could not then raise any issue of *res judicata*, should a fresh motion be issued in the Circuit Court.
17. Finally, counsel for the defendant pointed to the significant delay wherein the defendant had not pursued this case since the order for possession was made in 2010.

#### **Decision**

18. Section 37(2) of the Act of 1936 provides that an 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 the subject of such appeal was given or made*'.
19. Having heard the parties and considered their submissions, I am satisfied that, in this case, there was, in fact, no decision of the Circuit Court which could be the subject of an appeal to this Court. In circumstances where the Circuit Court has neither heard nor determined an application because the application itself was struck out due to the non-attendance of the moving party, then the appropriate course of action is for that party to issue a fresh motion before the Circuit Court rather than asking this Court to hear the motion for the first time.
20. In this regard, I am guided by the judgment of the Court of Appeal (Finlay Geoghegan J.) in *Kelly v National University of Ireland Dublin aka UCD* [2017] 3 I.R. 237, which confirmed that on the hearing of an appeal from the Circuit Court pursuant to s. 37 of the Act of 1936, the High Court is exercising a limited appellate jurisdiction conferred by statute and is not acting as a court of first instance with its full originating jurisdiction pursuant to Article 34.3.1 of the Constitution. As in *Kelly*, no authority has been opened before this Court which indicates that the High Court, when exercising its '*statutory appellate jurisdiction in a Circuit Court appeal, has an inherent jurisdiction to hear and determine an application at first instance which cannot be said to be the purpose of or in connection with the determination of the particular circuit appeal*'. As Finlay Geoghegan

J. pointed out, the High Court cannot 'confer on itself a jurisdiction that it does not otherwise have'.

21. Insofar as the plaintiff relies upon *AIB v Cosgrove*, I am satisfied that the case is distinguishable on a number of grounds, not least of which is the fact that there was a hearing before the Circuit Court. In this case, there was no hearing at all.
22. In *Permanent TSB plc formerly Irish life and permanent plc v O'Connor* [2018] IEHC 339, Barrett J. accepted the contention made by the defendants in that case to the effect that within our court system, in proceedings commenced before the Circuit Court, parties typically have two chances to make their respective cases. They have an initial trial before the Circuit Court on such evidence as is put before that court. A party to such proceedings who considers that she or he has one or more grounds of appeal, has a right of appeal to the High Court, where a *de novo* hearing is undertaken. Following such a *de novo* hearing, matters typically end.
23. In that case, the defendants argued that the evidence which was placed before the High Court was not properly in evidence before the Circuit Court and thus they were getting only one chance to make their case and had no right of appeal if the High Court decided matters in a way that the defendants considered to be erroneous.
24. I agree with the approach taken by Barrett J. in that case. He stated:

*"The very least that a financial institution must do if it seeks a possession order is to ensure that it has its evidence in order; the very least that a trial court must do is to provide judgment solely on the basis of such evidence as is properly before it; and the very least that the High Court must do in terms of Circuit appeals is to ensure that it offers and undertakes a de novo hearing of the case previously heard, and that it is not acting as a court of entirely first instance adjudging for the first time on evidence of critical significance in terms of the relief initially sought in the Circuit Court."*
25. Whilst this case did not concern a possession order *per se*, the plaintiff's motion, nevertheless, sought leave to execute an order for possession, albeit some considerable time after the making of that order. In the circumstances, I am satisfied that it was incumbent upon the plaintiff in bringing such a motion, to attend at the hearing thereof and to make whatever arguments it considered appropriate in support of its application. It is not open to the plaintiff to fail to attend the hearing of its own motion, not once, but on two occasions, and then to appeal a 'strike out' of its application to the High Court under s. 37(1) of the Act of 1936.
26. If this Court were to proceed to hear this application as an appeal, the result would be that the defendant would have only one opportunity to have matters fully and properly heard, rather than two, as is his entitlement.

27. The Court, therefore, considers that the most appropriate way to proceed is to strike out this application in circumstances where the plaintiff is at liberty to issue a fresh motion before the Circuit Court should it wish so to do.
28. Accordingly, I allow the defendant's preliminary objection and dismiss the application herein.