



**THE SUPREME COURT
DETERMINATION**

BETWEEN

CHARLES KELLY LIMITED

PLAINTIFF

AND

ULSTER BANK LIMITED

DEFENDANT

Neutral Citation: [2021] IESCDET 32

Supreme Court record no: S:AP:IE:2020:000130

Court of Appeal record no: A:AP:IE:2019:000477

High Court record no: 2015 No. 6744 P

Date of Determination: Tuesday, 16th March 2021

Composition of Court: Clarke C.J., O'Malley J., Baker J.

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE
CONSTITUTION APPLIES**

RESULT: The Court does not grant leave to the Applicant, William Kelly, to appeal to this Court from the Court of Appeal

REASONS GIVEN:

ORDER SOUGHT TO BE APPEALED

COURT: Court of Appeal
DATE OF JUDGMENT OR RULING: : 22 nd September, 2020
DATE OF ORDER: 22 nd September, 2020
DATE OF PERFECTION OF ORDER: 28 th October, 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 18 th November, 2020 AND WAS IN TIME.

General Considerations

1. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B. S. v. Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 IR 812. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.
2. Furthermore, the application for leave filed and the respondent's notice are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties.
3. Any ruling in a determination concerns whether the facts and legal issues meet the constitutional criteria identified above, is particular to that application, and is final and conclusive only to that extent and as between the parties.

Background

4. The applicant is Mr. William Kelly, a former director of Charles Kelly Limited. He was removed from that position as a result of proceedings brought in the High Court under s.205 of the Companies Act. The decision in those proceedings is under appeal.
5. In the intervening period, the company has issued proceedings for negligence and breach of duty against its bank, and the applicant seeks to be joined in that action as a notice party. The company opposes his application.

6. Both the High Court and the Court of Appeal have held that he is not entitled to be joined, and he seeks leave to appeal against the decision of the latter court.

The Court of Appeal decision

7. The applicant submitted that he was entitled to be joined because
- (i) the claims against the bank involved allegations that he had acted improperly as a director and employee of the company, and could not succeed without a finding that he was culpable;
 - (ii) that the company could not be relied upon to provide accurate information to the court and his presence would be of assistance in that regard;
 - (iii) that the outcome of the action might significantly affect the value of his shares in the company;
 - (iv) that if he was not joined he would not have access to the proceedings and would not have an opportunity to challenge any evidence of findings of the court;
 - (v) that the company's true motive for taking the action was to delay and to conceal the value of the company until his challenge to the s.205 matter had been extinguished;
 - (vi) that it was necessary for him to be joined to protect his good name in circumstances where there was an ongoing garda investigation; and
 - (vii) that he had a pending unfair dismissal claim.
8. The *ex tempore* judgments in the Court of Appeal take as their starting point the general principle that in private civil proceedings a plaintiff can choose who to sue, and cannot be compelled to sue any particular party. The leading authorities relating to O. 15 r. 13 of the Rules of the Superior Courts were considered. The points made by the applicant were dealt with as follows:

- (i) The fact that the case made by the company against the bank might warrant conclusions that the applicant had acted improperly was not a sufficient ground for joinder;
 - (ii) Evidence in the action was a matter for the parties, and it was not for the Court of Appeal to infer that evidence would be wrongly omitted or withheld;
 - (iii) The High Court had directed that the applicant was to sell his shares to the company. That had not yet happened, and the order was under appeal, but the fact that it was under appeal did not mean that the Court had to disregard what was on its face a valid decision of the High Court. As things stood, the applicant was not a shareholder or director;
 - (iv) The applicant had no greater entitlement to access to the proceedings than any other member of the public. No relief was sought against him and no order that the court might make in the proceedings could have a direct impact upon him;
 - (v) The proceedings between the company and the bank were not, as the applicant appeared to believe, intertwined with the s.205 proceedings. The action against the bank could not give rise to an issue estoppel as between the applicant and the bank, and the case could have no impact on his appeal against the s.205 orders;
 - (vi) It would not be appropriate to join the applicant for the purpose of allowing him to protect his good name. The garda investigation was an entirely separate matter that would in no way depend upon the outcome of the bank proceedings;
 - (vii) Similarly, the outcome of the applicant's unfair dismissal claim could not affect the bank proceedings in a manner that would justify his joinder.
9. It was also noted by the Court that the argument made by the applicant in relation to his pecuniary interest in the company was not logical, in that

his position was that the bank had acted correctly. His evidence would therefore be damaging to the company.

The application for leave to appeal

10. The notices filed by the parties are available on this website and will not be summarised in any great detail.
11. The applicant understands the Court of Appeal to have ruled that a *legitimus contradictor* must be a current director and shareholder of the company, and asserts that this is a new condition never previously imposed in “declaratory civil private proceedings”. In the view of this Court, this is a misunderstanding. The Court of Appeal imposed no such condition – it simply pointed out that in the light of the High Court orders the applicant could not rely upon his status as a director or shareholder for the purpose of the application to be joined. There is already a *legitimus contradictor* in the proceedings. The bank is the party against which reliefs are sought, and it is a matter for the bank to decide how the action will be defended.
12. The applicant continues to maintain that his pecuniary or legal interests will be, or may be, directly affected by the bank proceedings. However, it appears that he wishes to support the bank as against the company. He has not engaged with the observations of the Court of Appeal that it is difficult to see how his financial interests would benefit from the success of the bank, and that the action could not give rise to any form of issue estoppel as against him that might affect his legal position.
13. It is claimed that the decision of the Court of Appeal means that declarations may be made as to the rights of third parties who have a beneficial proprietary interest, in the absence of those third parties, and that this amounts to a breach of the right of access to a court and to an effective remedy, protected by Article 40.3.1 of the Constitution, Article 6(1) of the European Convention on Human Rights and Article 81(2)(e) of the Treaty on the Functioning of the European Union. The applicant seeks

to have certain questions referred to the Court of Justice for preliminary ruling under Article 267 of the TFEU.

14. In the view of this Court, none of these instruments have the effect of precluding national rules of court procedure that allow the courts to determine who are the proper parties to proceedings. It is often the case that a non-party may be referred to disparagingly in the course of an action. However, no order may be made against a non-party. Having regard to that fundamental principle, the fair and efficient administration of justice requires limits to be placed on the entitlement of such persons to be heard.
15. The applicant submits that the Court of Appeal exercised its discretion without having referred to a particular High Court judgment that he believes supports his case. Whether or not that is so, such a submission simply asks this Court to correct an error in the application of established case law to the facts of the case by the Court of Appeal. This Court no longer has the role of correcting errors by other courts unless the constitutional criteria are otherwise met.

Written submissions

16. In a letter accompanying the application for leave to appeal, the solicitor for the applicant has sought permission to file written submissions. This was refused. The provisions of the Rules and relevant practice directions make it clear that applicants must be able to formulate the points of law they wish to raise within the parameters of the statutory form.

Decision

17. In the circumstances, the Court considers that the constitutional criteria have not been met. Leave to appeal will accordingly be refused.

And it is hereby so ordered accordingly.