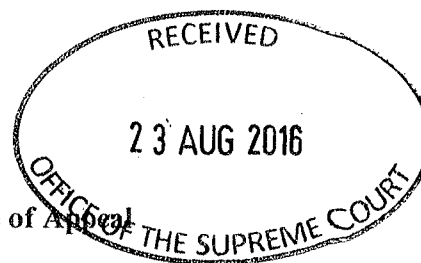


No. 1

## SUPREME COURT

Application for Leave and Notice of Appeal



## For Office use

Supreme Court record number of this appeal	2016:000115
Subject matter for indexing	

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

V			
High Court Record Nr	2012/3492P	Court of Appeal Record Nr	2014/01251
Date of filing	27 MAY 2014		
Name(s) of Applicant(s)/Appellant(s)	GERALD KELLEHER & ANN KELLEHER		
Solicitors for Applicant(s)/Appellant(s)			
Name of Respondent(s)	JAMES CODY & SONS SOLICITORS		
Respondent's solicitors			
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input checked="" type="checkbox"/> Yes	ARTICLE 64 TRANSFER	<input type="checkbox"/> No	
If yes, give [Supreme Court] record number(s) 240/14			

Are you applying for an extension of time to apply for leave to appeal?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If Yes, please explain why	SEE BELOW	

## 1. Decision that it is sought to appeal

Name(s) of Judge(s)	THE PRESIDENT, PRES. OF THE H.C., J. EDWARDS
Date of order/ Judgment	15 <sup>th</sup> JUNE 2016

Reason for late appeal

Mrs Kellehers father died on the 5<sup>th</sup> June and was buried the 8<sup>th</sup> one week prior to the hearing. The impact of this coupled with the strain of the hearing and the Court's decision left the defendants so upset and traumatised that they were unable to endure further stress or face dealing further with their legal situation or consider what remedies were open to them. As litigants in person they did not have the benefit and support of legal advice in the situation.

## 2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name **GERALD KELLEHER & ANN KELLEHER**

Original status

<input type="checkbox"/> Plaintiff
<input type="checkbox"/> Applicant
<input type="checkbox"/> Prosecutor
<input type="checkbox"/> Petitioner

<input checked="" type="checkbox"/> Defendant <b>BOTH</b>
<input type="checkbox"/> Respondent
<input type="checkbox"/> Notice Party

<b>Solicitor</b>			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

<b>Counsel</b>			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

<b>Counsel</b>			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	<b>9, SPRINGMOUNT, WATERFORD RD, KILKENNY</b>
e-mail address	<b>gmkapr@live.ie</b>
Telephone no.	<b>056-776-5992</b>

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input checked="" type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

### 3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name JAMES CODY & SONS SOLICITORS

Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?	
	<input type="checkbox"/> Applicant	<input checked="" type="checkbox"/> Respondent		
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party		
	<input type="checkbox"/> Petitioner			
Yes		<input checked="" type="checkbox"/>	No	

Solicitor			
Name of firm			
Email			
Address	Telephone no.		
	Document Exchange no.		
	Ref.		
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means? DON'T KNOW

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name			
Email			
Address	Telephone no.		
	Document Exchange no.		
Postcode			

Counsel			
Name			
Email			
Address	Telephone no.		
	Document Exchange no.		
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	<u>THE PARADE, BAGINAWSTOWN, CO. CARLOW</u>
e-mail address	<u>WWW.JAMESCODY-IE</u>
Telephone no.	<u>059-972-1303</u>

Has this party agreed to service of documents or communication in these proceedings by any of the following means? UNKNOWN

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

#### 4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

The relevant orders and findings made in the High Court and/or in the Court of Appeal \*

APPEAL FROM (a) THE ENTIRE DECISION

FACTS FOUND:-

1. DEFENDANTS FAILED TO APPEAR ON THE MOTION. THEY DECIDED NOT TO APPEAR. THEIR NON-ATTENDANCE WAS NOT EXCUSABLE.
2. THE HIGH COURT ON THE 6/5/14 WAS RIGHT IN ITS DECISION TO GRANT THE APPLICATION BECAUSE THERE WAS A BREAKDOWN OF TRUST
3. THE DEFENDANTS INSTRUCTIONS TO THEIR SOLICITORS LACKED REALISM AS THE SOLICITORS HAD FILED AN APPLICATION TO COME OFF RECORD.

#### 5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

Please list (as 1, 2, 3, etc) concisely the reasons in law:

- i. why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court and
- ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court

SEE ATTACHMENT HEREWITH

\* ORDER OF MR. JUSTICE BIRMINGHAM OF THE 6<sup>th</sup> MAY 2014  
IN THE HIGH COURT CORK.

ORDER OF COURT OF APPEAL OF 15<sup>th</sup> JUNE 2014

**6. Ground(s) of appeal which will be relied on if leave to appeal is granted**

Please list (as 1, 2, 3, etc) concisely:

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

SEE ATTACHMENT HERE TO

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

GERALD KELLEHER & ANN KELLEHER (APPELLANTS IN PERSON)

**7. Other relevant information**

Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

\_\_\_\_\_

References to Law Report in which any relevant judgment is reported

\_\_\_\_\_

**8. Order(s) sought**

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

ORDER QUASHING BOTH THE ORDER OF THE HIGH COURT (OF 6/5/14) AND THE ORDER OF THE COURT OF APPEAL (15/6/16)  
COSTS TO THE APPELLANTS

What order are you seeking if successful?

Order being appealed: set aside  vary/substitute

Original order: set aside  restore  vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

**Are you asking the Supreme Court to:**

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: *Ann Kelleher Gerald Kelleher*  
(Solicitor for) the applicant/appellant

**Please submit your completed form to:**

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

**together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.**

**This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.**

APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT

Court of Appeal Record No. ~~2014/01248~~ 2014/01251  
(High Court Record No. 2012/3492P)

BETWEEN/

**PATRICK MULLINS, JULIET LYNCH AND JOAN BYRNE  
PRACTISING UNDER THE STYLE AND TITLE OF  
MULLINS LYNCH BYRNE SOLICITORS**

PLAINTIFFS/RESPONDENTS

AND

**GERALD KELLEHER AND ANN KELLEHER**

DEFENDANTS/APPELLANTS

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The background to this application is:-

1. The proceedings herein for legal fees were commenced by Civil Bill in the Circuit Court Cork and served in September 2009.
2. In early June 2011 solicitors James Cody & Sons came on record on behalf of the defendants. Prior to that the defendants had no legal representation in these proceedings.
3. In October 2011 James Cody & Sons also came on record for the defendants in negligence proceedings (1276P/2006) arising on the same legal services, The Circuit Court transferred the fees claim herein out of Cork to the High Court Dublin to be consolidated with the professional negligence case. The defendants paid substantial legal fees for the application to transfer. The purpose of the transfer was obstructed and the claim herein proceeded now as a High Court action in Dublin where it was first listed for hearing.
4. On the 15<sup>th</sup> April 2014 under same cover post the defendants were served by their solicitors James Cody & Sons with two identical Notices of Motion each one returnable to the High Court Dublin on the 12<sup>th</sup> May 2014 at 11.00am or as soon thereafter as the application may be heard for an order permitting the solicitors off record in the proceedings herein and related proceedings.
5. Without consent and without any application the proceedings herein went back to Cork for hearing on the 6<sup>th</sup> May 2014. The defendants were given no notice of the hearing date by their solicitors.
6. The defendants solicitors, informing the clients the evening before of their intention, moved one of their applications to come off record (in respect of the case for hearing on the 6<sup>th</sup> May ) before the Court in Cork on Friday 2<sup>nd</sup> May 2014. The Court was informed the defendants were not consenting to the application. On 6<sup>th</sup> May 2014, the Court made an order to the effect that James Cody & Sons had ceased to be the solicitors acting for the defendants in the matter herein. The case then proceeded to hearing before a different judge who without sight of an Order that the defendants solicitors were off record was, as the court transcript shows, unclear as to the situation .

The order of the Court stated that it was pursuant to Notice of Motion dated 14<sup>th</sup> April 2014 and there being no attendance by the defendants and it was perfected on the 6<sup>th</sup> May 2014. The said Notice of Motion had a return date for hearing of the 12<sup>th</sup> May 2014 so pursuant to it, it was incorrect to say the defendants were not in attendance. The Court order declaring that the defendants' solicitors ceased to be on record was absurdly perfected six days before the application seeking leave for them to cease was due to be heard.

7. With reference to the return date of the 12<sup>th</sup> May 2014 on the Notice served on them, the defendants exercised their right to resist the application by filing a Reply Affidavit on the 9<sup>th</sup> May 2014 in the Central Office Dublin in the related application and which they had been prevented from doing in the application herein. Their solicitors sought an adjournment of the return date to give them time to file a reply affidavit to the defendants reply. ( Due process gave the solicitors their right to reply by affidavit to the defendants claims whereas the defendants, denied their right to due process, were not given time to file their reply affidavit to the solicitor's grounding affidavit). Indeed, the observance of due process resulted in the filing of four lengthy reply affidavits and a hearing which lasted in excess of a full day and a half and notably the solicitors being refused leave by the High Court Dublin to come off record in the related application.

#### **Reasons why leave to appeal should be granted in the interests of justice**

1. The interests of justice require that all citizens be treated as equal before the law and be afforded the same protection under the law. This necessarily entails a right to fair procedures and due process in all matters that come before the courts. In the interests of justice, arising on the instant case, it is necessary that the Supreme Court determine :-
  - (a) whether once served the parties in applications to the High Court are entitled to rely on the essential information contained in the Notice of Motion document as filed with the Court in respect of when and where the hearing is to take place
  - (b) whether after service of the Notice on the parties the applicant is entitled to put the application to the court in advance of the return date and/or in a location different to that given in the Notice. If so what protections are due the respondent parties under natural justice.
  - (c) the meaning of the wording in the Notice document “ **or as soon thereafter as the application may be heard**” and whether the wording rules out the hearing of the application **before** the date given in the Notice document once served.
2. The interests of justice require that the Supreme Court determine whether the fundamental principle of justice- the right to procedural fairness, requires substantial compliance with the Rules of Court.
3. On foot of the contents of the judgement it has to be established whether clients have a right to instruct their solicitors in matters before the court at all times for as long as the solicitors are on record.



4. The Supreme Court has a duty:-
  - to ensure that the requirements of natural justice have not been ignored by the appellate court.
  - to ensure that matters of grave impropriety to obstruct the course of justice have not been ignored.
5. The defendants filed two interrelated appeals against the separate orders of the High Court on the 6<sup>th</sup> May 2014. Since the appeals and the issues therein were inextricably linked the defendants sought at a Directions hearing that both appeals be heard together. The Court agreed to this but subsequently heard the matter herein on the 15<sup>th</sup> June 2016 and deferred the other appeal to the 27<sup>th</sup> July 2016. However, at the hearing on the 15<sup>th</sup> June 2016 it referred to a claim advanced in the grounds of the other appeal that the solicitor's applications to come off record resulted from serious legal malpractice and had the purpose of concealing same. If the defendants are deprived of leave to the Supreme Court the higher courts will have been allowed to be instrumental in facilitating the concealment. The interests of justice absolutely require an appeal to the Supreme Court to prevent this.

#### **Grounds of Appeal if application is granted**

1. The appellate court failed in its duty to uphold the Constitution and ensure that the violation of natural justice in the hearing before the lower court was righted.
2. The appellate court erred in law and in fact in its judgement as:-
  - it made no determination on the grounds of appeal and the submissions thereto. It completely ignored the grounds and the submissions.
  - the defendants did not fail to appear on the Motion. The court disregarded the fact that the defendants had no notice or document of any kind requiring them to attend court on the 6<sup>th</sup> May 2014. The Court judgement focused on the date of the 6<sup>th</sup> May 2014 and determined wrongly that the defendants were required to appear on that date and not on the 12<sup>th</sup> May 2014 as they were informed by the Notice served on them. It held in effect that the defendants had not appeared on the Motion because they did not appear on the 6<sup>th</sup> May.
  - The Court in its determination wrongly took account of a fact (that the substantive matter was listed on the 6<sup>th</sup> May 2014) unrelated to the matter at issue
  - judgement was based on evidence from affidavits and correspondence which was not before the lower court at the hearing from which the order made was being appealed. The affidavits were in fact not sworn until after the hearing being appealed from. The affidavits were the basis for another order of the High Court on 28<sup>th</sup> January 2015 which did not grant the solicitors application to come off record.
  - judgement was based *inter alia* on the merits of the application before the lower court which was irrelevant to and did not form part of the grounds of appeal
3. The Court's determination that the defendants should have appeared on the application on the 6<sup>th</sup> May 2014 was unreasonable and unfair. It ignored the defendants' rights to a reasonable and adequate opportunity to respond to the application before the Court. It ignored their rights to due process not least

their right to file a reply affidavit in advance of the return date of the 12<sup>th</sup> May 2014. The Court failed to take account of the preference given to the solicitor's interests over those of his clients and failed to ensure that the defendants and their interests were accorded equal status before the court in the matter.

4. The appellate court failed to comply with the Rules of the Superior Courts. and deprived the appellants their right to fair procedures.
5. The appellate court failed to take due account of the evidence in the transcript of the proceedings before the lower court.
6. The appellate court made passing reference to the defendants assertion (in the related appeal) that the application to come off record related to a cover up of legal malpractice. The Court failed in its duty to take due account of a claim of such gravity by treating it dismissively.
7. The Court failed to comply with the direction made on foot of a Directions that both appeals, which are inextricably linked, be heard together. This was unfair and adverse to the defendants.

The grounds of appeal come within natural justice/constitutional law and the defendants rely on;-

- (a) United Nations Declaration of Human Rights(1948) Articles 7&8
- (b) United Nations Covenant on Civil & Political Rights Articles 14&16
- (c) Constitutional Rights in Articles 34 &40:3
- (d) The European Convention of Human Rights Article 6(1) and the European Convention of Human Rights Act 2003 Section 3(1)
- (e) The Charter of Fundamental Rights of the European Union
- (f) Rules of the Superior Courts ( Order 52 & Order 86A & Order 36)