



AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2022:000118

[2024] IESC 24

O'Donnell C.J.
Dunne J.
Charleton J.
O'Malley J.
Hogan J.
Murray J.
Edwards J.

Between/

ANGELA KERINS

Applicant/Appellant

-and-

DÁIL ÉIREANN, IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 18th day of June, 2024.

Background

1. It is unusual for this Court to hear an appeal in respect of discovery, but these proceedings have a long history, have been strenuously contested and are anything but routine. They concern proceedings before a committee of Dáil Éireann which have already given rise to decisions of the High Court, Court of Appeal and two judgments of this Court already. In this instance the resolution of the application for discovery requires the Court to address an issue of fundamental constitutional importance: can the claim for damages, in this case, be maintained in the light of the privileges and immunities for members of the Oireachtas, and proceedings in the Oireachtas contained in Article 15 of the Constitution?

2. The facts in this case are well known and set out in some detail in the judgment of the Divisional Court of the High Court in this matter: *Kerins v. McGuinness and ors (No. 1)* [2017] IEHC 38, [2017] I.L.R.M. 403, and in two decisions of the Supreme Court: [2019] IESC 11, [2019] 1 I.R. 1 (“*Kerins (No. 1)*”), and [2019] IESC 42, [2019] 2 I.L.R.M. 361 (“*Kerins (No. 2)*”). The facts are also surveyed in the judgment of the High Court ([2022] IEHC 489 (Unreported, High Court, Owens J., 29 July, 2022)) which is the subject of this appeal. Accordingly, I propose only to set out so much of the factual background as is necessary to set in context the legal issue arising in this case. For a full account of the relevant facts, recourse should be had to the judgments set out above.

3. Angela Kerins the applicant and appellant herein became Chief Executive of the Rehab Group (“Rehab”) in 2006 and held that position until she resigned in consequence of the events giving rise to these proceedings. Rehab is a company

limited by guarantee and a registered charity, formerly known as the Rehabilitation Institute and Rehabilitation Institute Limited. It is an independent not-for-profit company and comprises of a mix of charitable and commercial companies operating in Ireland, England, Scotland, Wales, Poland, the Netherlands and Saudi Arabia with a total staff in excess of 3,500. It is an independent entity operating in the private sector.

4. Ms. Kerins was a private sector employee and not a public servant. Rehab, the group of which she was CEO, received public funding as a result of a competitive tendering process whereby it entered into service level agreements with the Health Service Executive (“HSE”) pursuant to the provisions of s. 39 of the Health Act, 2004. The payments received on foot of those agreements were in consideration for the provision of specified health and social care services by Rehab. Rehab was also in receipt of payment for services from Solas, another state agency, under a contract between Solas and Rehab and in addition received a certain amount of funding via the Department of Justice and Equality under the Charitable Lotteries Scheme, which had been established to compensate charities with existing lotteries affected by the creation of the State-owned national lottery. Rehab was not within the remit of the Comptroller and Auditor General and was never audited by him.
5. The original respondents in these proceedings were the individual members of the Public Accounts Committee (“PAC”) in 2014, an institution with a long-standing history which is the principal mechanism under which the Dáil performs its function of supervising the expenditure of public funds. As such, it is composed exclusively of members of the Dáil. It is established pursuant to

Order 163 of Standing Orders of Dáil Éireann and is defined by s. 2 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act, 2013 (“the 2013 Act”), as being “*the committee of Dáil Éireann established under the rules and standing orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General*”.

6. For reasons set out in *Kerins (No. 2)* and which will be discussed later, Dáil Éireann has been substituted as a respondent for the fifteen individual members of the PAC who were the initial respondents to the proceedings. However, it remains the case that the proceedings arise out of the conduct and behaviour of certain members of the PAC in 2014, in particular during two hearings of that body, the first conducted on 27 February, 2014 and the second on 10 April, 2014. This Court concluded that the conduct of certain members of the PAC was attributable to the PAC itself and that Dáil Éireann can be said to be responsible in law for the actions of the PAC for the purposes of making a declaration as to the legality of those actions.
7. After media interest in the salaries of executives in the charity sector and of Ms. Kerins in particular, the PAC wrote to Ms. Kerins on 22 January, 2014 inviting Rehab to address the question of Rehab’s funding. On 24 January, 2014 Ms. Kerins met privately with the chair of the PAC to discuss her attendance. On 18 February, 2014, the PAC wrote to Ms. Kerins inviting her to appear on 27 February of that year, indicating that it was proposed to examine three matters:-
 - i. Payments made by the HSE to Rehab under s. 39 of the Health Act, 2004;

- ii. The operation of the Charitable Lotteries Scheme and payments made to Rehab from the Department of Justice and Equality; and
 - iii. Payments made by Solas to Rehab for the provision of specialist vocational training.
- 8.** On 27 February, Ms. Kerins attended the committee. She was not represented or accompanied by any lawyer, although she had consulted with her lawyer before attending and there had been some contact between the applicant's solicitors and the PAC on the day preceding her appearance at the Committee. She made an opening statement. She was then questioned for seven hours, with one short break. The Divisional Court of the High Court was in no doubt that the questioning went far beyond the issues notified in the letter of 18 February, 2014 and that many of the matters put to her were matters of which she had no prior notice. Moreover, the manner in which the questions were put to her, was hostile. The meeting is described at paragraphs 20-22 of the judgment of the Divisional Court. That Court, while considering itself significantly constrained to the extent to which it could comment on any utterances made by any member of the Oireachtas, nevertheless felt it possible and necessary to express its clear view that many of the matters put to Ms. Kerins on that occasion were damaging to her reputation, both personally and professionally.
- 9.** The meeting was broadcast and extensively reported in the media. The events of the meeting were traumatising for Ms. Kerins. She was admitted to hospital and remained there between 2 and 11 March, 2014 and attempted to take her own life on 14 March of that year. On 13 March, 2014 the PAC wrote to her,

inviting her to attend again before the PAC on 10 April, 2014. In April, 2014, Ms. Kerins resigned from her position as Chief Executive of Rehab.

10. Ms. Kerins did not attend the aforementioned meeting of 10 April. It went ahead in her absence and was attended by the chair of Rehab, three members of the board of Rehab and a Rehab executive. Although notified by letter the previous day of Ms. Kerins' illness, the chair of the PAC, having wished her a speedy recovery, then criticised her non-attendance in trenchant terms. The Rehab representatives who attended the meeting were invited to criticise Ms. Kerins. The tone of the meeting overall was extremely critical of her. Again, the Divisional Court felt required to express its conclusion – again with some understatement – that what transpired at the meeting “...was, by any standards, extremely damaging to Ms. Kerins' reputation”. The meeting is described at paragraphs 26-30 of the judgment of the Divisional Court.
11. The PAC continued to pursue the issue. It is to be noted that Ms. Kerins had been invited to attend the meeting of 27 February, 2014 and had done so voluntarily. The PAC did not have the power to compel her attendance of its own motion, or indeed, compel the attendance of any other person. For that purpose, it was necessary to seek powers of compellability under Part 7 of the 2013 Act from the Committee on Procedures and Privileges (“CPP”). The CPP gave its decision on 16 July, 2014 and concluded that, in seeking to investigate Rehab (and, by extension, Ms. Kerins), the PAC was acting *ultra vires* its powers. The CPP concluded:-

“The main issue in this application is whether the PAC would be acting intra vires in pursuing this matter. The powers of all Committees are

derived from Standing Orders, the Inquiries Act, the Constitution and case law. In its submission of 1 July, the PAC accepts that Rehab is not audited by the C&AG. However, the Committee argued that it is implicit in the PAC's role to make inquiries of bodies in receipt of public money.

It is clear to the CPP, and this position is corroborated by the independent legal advice provided both internally and externally, that under SO 163(1) the PAC is only empowered to proceed with examination of an account or a report after it is presented to Dáil Éireann. As no such account or report exists or has been presented to Dáil Éireann, the examination into the internal affairs of Rehab is ultra vires the PAC. The PAC does not have the implied power to investigate the use of monies by any person or company or other body simply because they are in receipt of money from a body that is itself lawfully subject to scrutiny by the PAC.” (emphasis in original)

12. The effect of this determination was to bring an end to the further pursuit by the PAC of these matters. However, it should be noted that the PAC did not accept this ruling was determinative of the status of its proceedings and sought in these proceedings to maintain that it was acting within its powers as a committee of Dáil Éireann.

The proceedings

13. Ms. Kerins commenced proceedings seeking judicial review by way of prohibition and/or injunction restraining the respondents sitting as the PAC from further pursuing any examination of the affairs of Rehab insofar as such an examination related to the applicant's work with Rehab or from publishing a

report arising out of the examination by the PAC making findings concerning the remuneration or employment of the applicant from Rehab; her appearance or non-appearance before the PAC; or which impugned the applicant's character or good name, as well as certain ancillary orders and declarations. The proceedings also sought, *inter alia*, a declaration that the procedures adopted by the PAC were unfair and resulted in proceedings that were unlawful and null and void, and sought further an order staying any further examination by the respondents of the expenditures of Rehab Group. Finally, and importantly for present purposes, at sub-paragraph 9, the following was sought:-

“Damages (including damages for breach of the Applicant’s right to constitutional justice and/or damages for personal injury and/or damage to reputation arising from the unlawful examination by the Respondents as members of the Public Accounts Committee of expenditure by the Rehab Group...”

Paragraph 31 of the Statement of Grounds claimed such damages for misfeasance of public office and/or breach of constitutional rights.

Application for discovery

- 14.** The applicant brought an application for discovery identifying eight categories of documents and *inter alia* sought documents relating to meetings of the PAC, including private meetings considering the investigation into Rehab and communications between members. The High Court delivered judgment on 8 May, 2015 ([2015] IEHC 293 (Unreported, Kennedy J.)) in which Kennedy J. ordered discovery under four headings, considered three of the additional categories to be superfluous, and postponed one further category to a later point

in the proceedings. She was of the view that any claim for damages should be addressed after the determination of whether there was any unlawfulness on the part of the respondents in what has been described in the proceedings as a modular hearing, and accordingly, adjourned the question of discovery in relation to that issue until the determination of the first module, i.e., until the lawfulness of the committee's conduct had been determined. The Court of Appeal delivered judgment on 10 December, 2015 ([2015] IECA 267 (Unreported, Finlay Geoghegan J.; Ryan P. and Hogan J. concurring)). It allowed the respondents' appeal against the discovery order. It considered that since the issue of jurisdiction was to be determined first, it was inappropriate to order discovery on any issue pending the determination of the jurisdiction issue.

Decision of the Divisional Court

15. The judgment of the Divisional Court (Kelly P., Noonan and Kennedy JJ.) in *Kerins (No. 1)* has already been touched upon. In a judgment delivered on 31 January, 2017, the Divisional Court dismissed the application. The Divisional Court accepted that it was a matter for the courts to determine whether or not the respondents were acting *intra vires*. The Divisional Court considered that a committee of the Oireachtas was properly seen as the alter ego of the Oireachtas and entitled to invoke any privilege attaching to the Oireachtas. It considered that Ms. Kerins' case was largely jurisdictional in the sense that her legal claim was a challenge to the jurisdiction of the PAC to proceed as it did on the dates in question, but the Court concluded that the jurisdiction did not arise because Ms. Kerins had attended voluntarily and the Court considered the issue of jurisdiction "...can only arise where compellability powers are being

exercised...” (paragraph 82). In so much as there was a claim for damages, the Court considered that the statements complained of were clearly expressions of opinion by the relevant members devoid of any legal force, and therefore, no more than utterances, “...and as such Article 15.13 has the effect of ousting the court’s jurisdiction. The essence of the applicant’s case is a claim for damages arising from those utterances which seeks to make the Oireachtas respondents amenable to the jurisdiction of the court. That cannot be done” (paragraph 107).

16. Without over-reading the judgment of the Divisional Court, three conclusions can be deduced from it: first, the claim for damages was precluded by Article 15.13; second, a claim that the PAC was acting in excess of jurisdiction was in principle maintainable; and third, the jurisdictional issue only arose where an individual’s attendance at a meeting was compelled. These conclusions set out a clear background against which the decision of this Court on appeal may be understood.
17. It is notable that in considering the issue of costs ([2017] IEHC 217 (Unreported, High Court, Kelly P., Noonan and Kennedy JJ., 5 April 2017)), the Divisional Court returned to the events of the meeting of 27 February, 2014 and 10 April, 2014. While the Divisional Court considered that it was limited by the terms of the Constitution from making comment which would touch directly on the utterances of any member of the PAC, the Court nevertheless considered that it could not be gainsaid “*that much of what was put to her [the applicant], and said about her, in the course of this meeting [of 27 February, 2014] was damaging to her reputation personally and professionally*” (paragraph 20), and that the institution of proceedings was a proportionate reaction on the part of the

applicant to the situation arising from what took place before the PAC. Accordingly, the Court ordered that Ms. Kerins recover two thirds of the costs of the proceedings against the respondents notwithstanding the fact that she had been unsuccessful in her claim.

18. It is worth pausing to note that, as set out above, the decision in the Divisional Court on the jurisdictional issue rested on the narrow basis that it considered jurisdiction was closely linked to compelled attendance. That decision was reversed by a judgment of this Court in *Kerins No. 1*. The analysis of Clarke C.J. (with whom the other members of the Court agreed) is important not merely because it is the decision on the first limb of the present case, but because the central issue considered in the judgment is of continuing relevance to the issues which this Court has to decide.
19. Clarke C.J. observed that the central issue was the extent of the constitutional privileges or immunities of the Oireachtas, including those expressly conferred by the Constitution, and any limitations against the Oireachtas which could be said to be deduced from the separation of powers. This was an issue which could not be determined by an easy analogy with what was assumed to be the current or historic practice in the United Kingdom, for example. It was plain that there was no blanket prohibition on claims involving proceedings of the Oireachtas. At paragraphs 8.21 and 8.22 of the judgment, reference was made to the terms of the Irish Free State Constitution, and the observation of Leo Kohn in *The Constitution of the Irish Free State* (G. Allen & Unwin 1932) at page 229 that “[t]he wide sphere of parliamentary privilege, the repository in the British Parliament of latent powers of extensive scope, has been restricted by the Irish

Constitution within the narrow limits of practical expediency". The historical background is important and useful, but the issue of the precise extent of a parliamentary privilege in Ireland cannot be determined by the nature, extent or limits of the privilege accorded in any other jurisdiction as a matter of fact.

- 20.** It was clear moreover, that the courts had on a number of occasions considered evidence of what transpired in the Oireachtas, with a view to determining the lawfulness of the actions of the Oireachtas. This was true of *Re Haughey* [1971] I.R. 217, *Maguire v. Ardagh* [2002] IESC 21, [2002] I.R. 385 and *Callely v. Moylan* [2014] IESC 26, [2014] 4 I.R. 112 (see paragraph 9.4). This much was clear, and accepted by the Divisional Court, which had however, considered that these cases were distinguishable on the basis that in each case there could be said to be an element of compulsion. While this was true of each of the cases, it was not, in the view of the Chief Justice, a defining consideration as a matter of law. The absence of compulsion did not mean that an issue of jurisdiction did not arise, or that a court could not determine if the PAC in any given case was acting within or in excess of its jurisdiction, particularly where that might have an effect on a citizen.
- 21.** This conclusion meant that the Court had to go further and confront the question of whether it could in that case determine the lawfulness of the actions of the PAC, without infringing the specific privileges conferred under the Constitution by Articles 15.10, 15.12 and 15.13 and in particular the latter two provisions protecting utterances made in either House, whenever published (Article 15.12) and precluding any member of the Oireachtas from being made amenable to any court in respect of any utterance made in either House (Article 15.13).

22. The judgment of the Chief Justice acknowledged that this was a real issue in the case, and that there was and must be a “...*significant area of privilege and immunity*” (paragraph 9.6). It followed logically, that there must be areas where a citizen could be said to have suffered damage and for which there was no remedy in law because of the prohibitions and privileges contained in Articles 15.12 and 15.13. Furthermore, if such privilege applied, it must be upheld by the courts. If a privilege applied “...*it is the obligation of the Court to give such privilege full and indeed generous application*” (paragraph 7.2).
23. These considerations led the Chief Justice to consider that it was not appropriate for proceedings to continue against the individual members of the PAC with consequent potential exposure to costs, since even that relatively formal step might be said to make such members amenable to a court in respect of utterances made in the Oireachtas contrary to the express privilege set out in Article 15.13. He considered, however, that it could be possible to maintain an action against the Dáil itself in respect of the jurisdictional question at least, if two considerations were satisfied: (a) the Dáil could be said to be responsible for the acts of the PAC, and (b) if the conduct by individual members could properly be attributed to the PAC generally. After a further hearing, the Court having heard argument on the point by reference to the evidence of the proceedings determined that in this case it was possible to attribute the actions complained of to the Dáil (*Kerins (No. 2)*).
24. It is noteworthy that the judgment of the Chief Justice in *Kerins (No. 2)* drew some careful distinctions. Article 15.12 was designed to ensure freedom of debate, but it did not follow that evidence of what was said in the Houses or

their committees could not be used to determine the actions of the House or committee concerned, or that the actions of the relevant House or committee were necessarily immune from suit (paragraph 9.13). That in turn gave rise to some difficult questions, one of which was to consider “...*what might properly be regarded as an “action” of a House or committee which could be divorced from “utterances” so as to be capable of being reviewed without impinging on the immunities conferred on the Houses*” (paragraph 9.14). This distinction was undoubtedly fine, and difficult to draw in a particular case, but is central to the reasoning in *Kerins (No. 1)*. There was no blanket immunity from proceedings, but that conclusion did not mean that *any* action could be pursued against the Oireachtas, or its members. Indeed, at paragraph 6.2 of the judgment, the Chief Justice had expressly considered the possibility that the courts might have jurisdiction in certain circumstances for the purpose of providing certain types of remedies but not in other circumstances, or conceivably, to provide other types of remedies.

25. In addition to considering whether the claim was precluded by the express terms of Article 15, the Chief Justice also considered whether, in the light of the separation of powers, it was appropriate to proceed to consider the lawfulness of the conduct of the committee. A number of considerations were identified at paragraph 10.2 as factors which had the potential to meet a threshold whereby the Court would intervene and scrutinise the actions of the Houses of the Oireachtas or their committees. These were: the decision of the CPP; the fact that it was alleged that the questioning far exceeded the matters indicated in the invitation to Ms. Kerins; the assertion that many of the matters sought to be pursued were outside the jurisdiction or alleged to be outside the terms of

reference of the PAC; and the assertion that no appropriate action was taken by the Houses of the Oireachtas after the decision of the CPP. Accordingly, the Chief Justice considered that the Court should proceed to consider and determine whether the PAC had been acting lawfully or not. As we know, after a subsequent hearing, the Court decided unanimously, that the threshold identified in *Kerins (No. 1)* had been met. It was no longer necessary to grant an injunction or prohibition, but the Court did make a declaration in the following terms: -

“A declaration that, by conducting a public hearing in a manner which was significantly outside of its terms of reference and which also departed significantly from the terms of an invitation by virtue of which a citizen was requested to attend, the Public Accounts Committee of Dáil Éireann acted unlawfully”.

- 26.** The judgment also considered the separate question of the damages claim. It was axiomatic that the mere finding of unlawfulness did not itself give rise to an entitlement to obtain damages. However, the Chief Justice concluded that it had been determined in the High Court that there should be a modular hearing, and that any question of damages should await a determination on lawfulness and the parties had proceeded on that basis in the Supreme Court. It followed that the issue of damages could not be addressed or determined in the course of the Supreme Court appeal. However, the judgment did make important observations at paragraphs 12.4-12.8 as to the “...*very significant legal issues which would need to be addressed in the context of any claim for damages*”. It expressly pointed out that it “...*by no means would necessarily follow from a*

decision of this Court to the effect that the PAC had acted unlawfully that Ms. Kerins would be entitled to damages. A whole range of issues would need to be considered". The Chief Justice observed that the considerations which the Court had addressed in the context of the jurisdiction of the Court to make a declaration, applied with even greater force in the context of a claim for damages. Even if damages were in principle permissible, it would be necessary to establish a causal link between any unlawfulness and any damage suffered. This followed from the fact that damage did not necessarily flow from the mere fact that the PAC could be said to have exceeded its terms of reference; instead, any damage to the reputation of Ms. Kerins could be said to have been caused by the manner in which members of the PAC expressed themselves (which might be said to be privileged under Article 15.13). Furthermore, in that context, regard would also have to be had, for example, to the fact that the same things might be said during the course of a Dáil debate, and there could be no question of any declaration of unlawfulness.

27. It is plain, therefore, that the judgment considered that any claim for damages would have to address the question of how such a claim could be maintained without directly infringing the terms of Article 15.13. A court, in any such claim, would be obliged to give full effect to that privilege. It was clear that there remained a wide area of non-justiciability in respect of the actions of the Houses or their committees. In light of that area of non-justiciability and the obligation on courts to give full effect to the clear prohibitions expressly set out in the relevant articles of the Constitution on the amenability of a member of the House of the Oireachtas to a court in respect of something said in the House or on a committee, it seemed to the Court to follow that "*...that which cannot be*

achieved directly cannot be achieved by collateral means” (paragraph 9.21). It would be impermissible to ask a court to intervene in a way which would, by necessary implication, require the court to make a member amenable to the jurisdiction of the Court even indirectly, or breach a privilege conferred on a member. Thus, there was a clear area of non-justiciability which surrounds utterances made in the Houses or their committees or matters which were “...sufficiently closely connected to such utterances as to enjoy the same privileges and immunities” (paragraph 9.21). These matters were all relevant to any claim for damages.

28. Further light is cast on the underlying reasoning in *Kerins (No. 1)*, by the decision of the Supreme Court in the companion case of *O’Brien v. The Clerk of Dáil Éireann* [2019] IESC 12, [2020] 1 I.R. 90 (“*O’Brien*”), which was heard and decided at the same time. In that case the plaintiff had obtained an injunction which restrained the publication of private information. That information was disclosed in the Dáil, which had the effect of undermining the injunction granted. The plaintiff complained to the CPP, which, however, held that the members had not breached Standing Orders. The plaintiff then commenced proceedings challenging the decision of the CPP and seeking declarations that the defendants had exceeded their constitutionally defined role as legislators and had trespassed on the judicial domain. The claim was dismissed because the High Court ([2017] IEHC 179 (Unreported, High Court, Ní Raifeartaigh J., 31 March, 2017)) concluded that it was non-justiciable in the light of the privilege afforded to the respondents in respect of their utterances, by Article 15.13 and that decision was upheld by this Court on appeal. Notwithstanding the framing of that claim in terms of jurisdiction, the High Court and this Court concluded

that the claim could not be maintained: in substance it involved making members of the Oireachtas amenable to the court in respect of utterances made in a House of the Oireachtas.

Post-Kerins (Nos. 1 and 2) claim for damages and reactivated application for discovery

29. In the aftermath of the decision of this Court in *Kerins (Nos. 1 and 2)*, the applicant then proceeded with the claim for damages, and reactivated the application for discovery. The applicant repeated and amplified her request for discovery by seeking, on what was described as a reciprocal basis, documents which the respondents had for their part sought by way of cross-application for discovery relating to the decision to invite the applicant to attend before the PAC and its understanding/anticipation of the scope of the hearing; communications between the applicant and the chairman of the PAC; and documents relating to the cessation of the applicant's employment with Rehab. The applicant further sought eight categories of documents relating to the terms of reference of the PAC; the decision made to commence the examination of the payments made to Rehab; documentation sought by the PAC or provided to or available to the PAC in five different respects, including legal advice; documents relating to the decision to make an application to the CPP for an order under part 7 of the 2013 Act; documentation of any meetings of the PAC since 1 December, 2013 discussing Rehab, the applicant and the questioning and examination generally; documentation and correspondence between the PAC and other public bodies; documentation relating to communications or correspondence between members of the PAC itself and between the PAC and/or its members in any

other body or individual; and documentation relating to the order seeking compellability powers in respect of the applicant.

30. The respondent contended that such discovery was futile, as it was argued that all possible documents under the identified categories were entitled to a form of privilege, whether constitutional, as set out in Article 15 or in consequence of the separation of powers, or by virtue of the provisions of Standing Orders of the Dáil, or s. 92 of the 2013 Act.
31. Taken on its own terms, the request for discovery and the response to it, raised important issues of legal privilege and even the necessity of making discovery given the extensive evidence already available in the public domain on which reliance had been placed in the proceedings culminating in the decisions of the Supreme Court. However, it is not necessary to address these issues in detail in this judgment because the decision in the High Court turned on an even more basic preliminary question: could the claim for damages *in this case* be maintained in the light of the constitutional privileges contained in Articles 15.10, 15.12 and 15.13?

The decision in the High Court

32. In an admirably succinct judgment, Owens J. in the High Court concluded that the claim for damages in this case inevitably involved the making of members of the Oireachtas amenable (whether directly or indirectly) to a court in respect of utterances made in the Oireachtas and was inconsistent with freedom of debate within the Oireachtas protected by Article 15.10.

33. At paragraph 13 of his judgment, Owens J. concluded that he was precluded in particular by Article 15.13 of the Constitution from entertaining the application “...because the gravamen of her claim calls for judgment on speech and debate by members of Dáil Éireann”. Owens J. observed that the first module of the Supreme Court hearing had made a limited determination that the PAC had acted unlawfully in two respects. First, the PAC did not have the power to carry out the investigation which was the subject of Ms. Kerins’ attendance at the public session on 27 February, 2014. Secondly, the PAC had subjected her to questioning and to comment which departed significantly from the terms set out in the invitation to her to attend. Owens J. further observed that the declaration made by this Court in *Kerins (No. 2)* made reference only to the public session of the PAC on 27 February, 2014. It did not extend to comments made about the applicant in the later public session on 10 April, 2014. The applicant however, complained about those comments and also comments made at another public session of the PAC on 13 March as part of the claim for damages and misfeasance of public office.
34. Observing that the Supreme Court had identified Dáil Éireann as in privity with the PAC because the members of the PAC acted in unison in matters covered by the declaration, Owens J. concluded at paragraph 23 that “[m]embers of the Committee are immune from suit in courts in respect of speech and debate in public and private sessions of the Committee, irrespective of whether they act with malice or ill will or abuse their constitutional immunity and even if such abuse involves members acting in concert”. This statement if made in respect of speech of members of the Oireachtas in public session is undoubtedly correct and was not challenged. It follows from the conclusion of the Supreme Court in

respect of the first module, that the statement must be treated as correct in the context of utterances of members of the PAC. The protection afforded to members for utterances under Article 15.13 was absolute. Owens J. considered that the non-justiciability or protection can be extended to utterances made in committees and to matters sufficiently closely connected to such utterances as to enjoy the same privileges and immunities, citing *Kerins (No. 1)* at paragraph 149. If, therefore, a member of the House was not directly amenable to a court in respect of such utterances or matters closely connected with utterances, the amenity could not be avoided or achieved by collateral means. The conclusion of Owens J. was set out at paragraphs 54-58 of his judgment as follows:-

“The protection extends to voting and to participation in the preparation of reports and for hearings of committees. These are ‘...sufficiently closely connected...’ to utterances to attract the protection. The protection also extends to the work and documents of the secretariat of a committee and any minute or recording of the proceedings of a committee, be they formal or informal. The protection extends to legal advice provided to a committee, irrespective of whether it is followed. It also extends to the work product of those who assist members of a committee in preparing for sessions. These are also ‘...sufficiently closely connected...’ to utterances to attract the protection.

The speech and debate protections given by Article 13.15 of Constitution, if they are to mean anything, must extend to all activities

of committees within the Houses of the Oireachtas and to all documents held by or for such committees.

I have already set out what must be proved to establish the tort of misfeasance in public office. The applicant's proceedings relate to what was said about her and how she was treated by members in public sessions of a committee of Dáil Éireann. It follows that the subject matter of current element of this litigation is, irrespective of what the cause of action is identified in pleadings, firmly within both the protections given to members of the Houses by Article 15.12 and Article 15.13 of the Constitution and the exclusive supervisory role given the Houses by Article 15.13.

If a House of the Oireachtas was to be held by a court responsible in law for utterances of a member in that House, whether the basis of such liability be actual fault or privity or vicarious liability or responsibility based on some non-delegable obligation, this would, of necessity, require that court to pass judgment on the propriety of such utterances”.

- 35.** This conclusion led Owens J. to dismiss the application. He also considered however, that the request was captured and precluded by Standing Order 153(4) of the Standing Orders of Dáil Éireann Relative to Public Business, 2020 and which provided protection for public and private papers of members pursuant to Article 15.10 of the Constitution. At paragraph 49 of the judgment, he stated that it was difficult to envisage any exception to the absolute prohibition on the privilege accorded to utterances other than those referred to in Article 15.13

itself, being treason, offences within the conceptual framework of crimes formerly classified by law as felonies, and breaches of the peace committed during or in connection with proceedings in the Houses. Finally, he considered that if there was what was described as a *Callely v. Moylan* exception to the immunity to the privileges provided by the Constitution, such an exception did not apply in this case. This was a reference to the observation at paragraph 249 of the joint judgment of O'Donnell and Clarke JJ. in *Callely v. Moylan*, where it was suggested that proceedings which amounted to a fundamental departure from the dictates of the Constitution, which were neither prevented nor remedied by the Oireachtas itself, might oblige the courts to act to maintain the constitutional balance.

Does this claim involve the amenability of members of the Houses of the Oireachtas to the Court for utterances?

- 36.** The arguments of the parties on this appeal have focused upon the clear conclusion of the High Court that the claim for damages could not be maintained in the light of Article 15 of the Constitution. Although the issue is important, novel and difficult, the relative contentions were simple. On behalf of the applicant, it was argued that the decision of the High Court was itself inconsistent with the terms and logic of the decision of this Court in *Kerins (No. 1)*. That judgment had found no obstacle to receiving evidence of what had been said or done within the Oireachtas and the PAC and in adjudicating thereon. It was argued that not only was the same thing being done here, but it was by reference to precisely the same matters. It was argued that in this respect, the evidence of what was said went to a consideration of conduct, and to permitting

an assessment of the actions of the committee. In the same way as the issue debated in *Kerins (No. 1)* related to the conduct of the committee, the claim for damages related, it was said, to what was done to Ms. Kerins, and which was said to constitute the tort of misfeasance of public office, i.e., the exercise of public powers in the knowledge that the actor is not acting within the scope of his or her legal authorisation. It was repeatedly asserted that while the applicant's case focused on the words used, the court was really being invited to consider what was said only to determine what had been done.

37. There can be little doubt that the proper limits of judicial review of matters within the Oireachtas under the Irish Constitution is one of the most difficult questions of constitutional law. As was referred to at paragraph 196 of the joint judgment of O'Donnell and Clarke JJ. in *Callely v. Moylan*, it had been observed in Canada in the case of *Canada (House of Commons) v. Vaid* [2005] 1 S.C.R. 667 at paragraph 4 that: -

“There are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred powers, namely the executive and the courts.”

It was also said in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319, at page 389 that: -

“Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts

play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.”

These observations apply with equal force in Ireland.

- 38.** Apart from the conceptual issues involved for Irish courts there is the fact that neither the Constitution of 1937 nor its predecessor in 1922 says much about the position of the Oireachtas, or its members. It is, however, clear that the position adopted was a deliberate departure from the Westminster model and that a more limited conception of parliamentary privilege was being established by the new constitutional order. It is also clear however, that within that narrower sphere the issue of privilege whether expressed in the Constitution or derived from the separation of powers, is a constitutional value which the Court must uphold and enforce, and to which it must give full effect. On the other hand, it falls to the courts to determine the limits of any immunity or privilege. Where it is established that conduct, actions or words fall outside of those limits and affect the rights of a citizen, then it is equally the Court’s function and duty to enforce the limits of that immunity and to vindicate the law, and therefore, the rights and interests of the citizen involved.
- 39.** The issue cannot be resolved by rules of thumb, either of deference to parliamentary practice and procedure on the one hand, or an unlimited assertion of jurisdiction on the other. In the Scottish case of *Whaley v. Lord Watson* [2000] S.C. 340, the Scottish courts had to consider a claim made that a member of the newly devolved Scottish Parliament was acting in breach of the parliamentary rules relating to members’ interests. In the Outer House ([2000]

S.C. 125), it had been held that the Court should exercise a self-denying ordinance in relation to interfering with the proceedings of the Scottish Parliament by analogy with the approach the courts of the United Kingdom had long adopted in respect of the Westminster Parliament. However, in the Inner House, Lord Rodger rejected that analysis. He considered that the Scottish Parliament was established by law, and it was the function of the courts to uphold that law. The basis for the deference of courts of the United Kingdom to Westminster, including Article 9 of the Bill of Rights 1689, was lacking in the case of the Scottish Parliament. He continued:-

“While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a parliament which is sovereign; on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a ‘self-denying ordinance’ which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law”.

A similar point can be made here. It is the function of the Courts to establish the limits of any privilege accorded to the Oireachtas and its members, and to uphold it within those limits. But outside of those limits, the Courts must just as forcefully uphold the rights of other parties under the law.

- 40.** In essence the dispute between the parties resolved itself to a sharp difference as to the interpretation and application of the decisions of this Court in *Kerins (Nos. 1 and 2)*. There is no doubt that those decisions were expressed in qualified and limited terms but also permitted scrutiny of what had been said by members of the Dáil on the basis that it was relevant to conduct for the purpose of determining jurisdiction. For the applicant it was argued that notwithstanding the cautious language of the judgments, they should be understood as establishing a general principle that a court could consider the words used by members of the Oireachtas where that was relevant to any claim of wrongdoing and extended to a claim for damages. If words could be seen as conduct for the purposes of determining jurisdiction they could properly become the basis of a claim for damages. For the respondents it was argued that the decisions were a very narrow and limited development of the law, and those limitations were central to the reasoning in the two judgments, and based on constitutional principle. For reasons I will address shortly, I consider that the respondents are correct in this submission. I have read in draft the judgment of Murray J. which contains a careful analysis of this question, and wish to say that I agree fully with it.
- 41.** There is little doubt that the sequence of cases commencing with *Re Haughey* in 1971, and leading to *Kerins (No. 1)* and *O'Brien*, are significant decisions of constitutional law, and involve some degree of court scrutiny of parliamentary proceedings that might not have been permissible under other systems. But it is also the case that they are incremental and careful developments that show an awareness of the existence of important constitutional privileges that must also

be upheld even if the outcome may be in a particular case to deny to a plaintiff a remedy.

42. This is particularly true of the decision of Clarke C.J. in *Kerins (No. 1)*. While the judgment is undoubtedly significant, it was cautious, careful and limited. The applicant was not permitted to obtain any relief against the individual members of the PAC since it was considered that granting such relief would appear to infringe the Article 15.13 guarantee of non-amenability of individual members to any court in respect of utterances made within the Houses. The judgment also required further submissions before concluding that the PAC could be said to have acted collectively and that the Dáil could be properly said to be fixed with responsibility for such actions. Even then the Court considered that it was only because of the existence of four inter-connecting factors that the Court was justified in exercising the jurisdiction in this case, as set out at paragraph 25 above. For present purposes it is particularly noteworthy that the judgment was quite clear that the decision did *not* mean that a decision on liability for damages in tort had been made in favour of the applicant, and that all that remained was an assessment of those damages; on the contrary it was said that the granting of declaratory relief did not mean that the applicant was necessarily entitled to maintain *any* claim for damages.

43. I cannot accept the argument therefore, that this Court should simply recharacterise the words and utterances of the members of the committee as conduct and actions, for which the committee, and through it the Dáil, can be sued and a remedy in damages obtained. To take that simple course would be inconsistent with both the logic and reasoning of the decision in *Kerins (No. 1)*,

and, in my view, also inconsistent with the decision in the companion case of *O'Brien*. Perhaps more importantly in my view, to simply recharacterise privileged words as justiciable actions and conduct, would effectively remove the privilege of members of the Oireachtas in respect of utterances made. That would be contrary to the obligation of this Court to uphold and give full force and effect to the provisions of the Constitution in respect of the privileges of members of the Oireachtas and to avoid any course which would directly or indirectly undermine those privileges which are considered essential for the parliamentary process.

44. It is necessary therefore, to consider the claim made in these proceedings more closely in order to determine if Owens J. was correct to conclude that the claim here sought to make members amenable to the Court in respect of their utterances, and whether it can be said that the claim for damages now made against Dáil Éireann is in respect of what was said (and, it is argued, done) by members of the Oireachtas. The claim undoubtedly scrutinises, and would attach liability in damages for the conduct of members. The only question is whether that conduct complained of amounts in truth to utterances or is so closely connected with them, as to come within the scope of the constitutional protection properly understood.
45. One starting point is the fact that the claim for damages relates to damage to the applicant's reputation and good name. The Divisional Court observed that what transpired at both meetings of 27 February and 10 April, 2014 was undoubtedly damaging to her reputation and good name. It seems very clear that the damage to reputation referred to, and in respect of which a claim for damages was made,

together with the claim for distress and injury, do not relate to the mere fact that the proceedings exceeded the terms of reference and the terms of the invitation issued to the applicant, as interpreted by the Court but rather to what was said about the applicant on those occasions. If the discussions had been civil, respectful and polite, then there could still have been a declaration that the proceedings were unlawful because they exceeded the terms of reference, but they would not have given rise to a claim for damages. This points strongly towards the fact that the applicant's claim for damages relates to what was said on these occasions.

46. Second, one of the facts considered by Clarke C.J. in *Kerins (No. 1)*, as of some relevance to any claim, was the fact that the claim for unlawfulness depended on the fact that the hearing was being conducted by a committee, pursuant to terms of reference from the Dáil itself, and subject to the terms of an invitation issued by it. However, he considered the Court might be required to take into account the fact that identical statements could have been said about the applicant directly in the course of a debate in the Dáil, where it was accepted no claim would lie. This, however, is indicative that the complaint was understood to relate to utterances, since it is only such matters which would be entitled to privilege.
47. Finally, and perhaps most importantly, is the manner in which the claim was originally made. The Statement of Grounds is a clear guide to the claim as always made, and now maintained, by the applicant. That claim was that questions were pursued “*in a hostile manner*”; questions were put to the applicant which were “*improper*”; and members of the PAC made comments

which were “*prejudicial, hostile and damaging*” in relation to the applicant. The Statement of Grounds also provided an itemised list of questions, exchanges with witnesses or comments stated to be “*examples of improper questions*”, or “*prejudicial, hostile and damaging*” in relation to the applicant in the PAC hearings of 27 February and 10 April 2014. This list of examples runs to ten pages and quotes, *verbatim*, almost fifty different questions or exchanges with witnesses. It is clear therefore, that the claim explicitly called for the Court to consider and adjudicate upon the propriety and content of what was *said* by individual members of the PAC.

48. It is enough to say that in my view Owens J. was correct to conclude that however labelled, the gravamen of the applicant’s complaint in this case was that she had suffered damage to her reputation, and to her health, by reason of what was *said* on the occasions in question. If the original proceedings had not been amended by the substitution of the Dáil as a respondent for the 15 members of the PAC, it would have been impossible to argue that these proceedings did not seek to make those members amenable to a court in respect of utterances. The substitution of the Dáil as respondent cannot lead to a different conclusion in this regard. As was observed in *Kerins (No. 1)*, “*what cannot be achieved directly cannot be achieved by collateral means*”. It is clear that the substance of the claim would still involve members of the Oireachtas being obliged to defend what they said in the course of proceedings, and the Court being invited to adjudicate upon the propriety of what was said. Accordingly, in my view, Owens J. was correct in concluding that the claim for damages here as formulated in this case, is precluded by the provisions of Article 15 and in particular Article 15.13 of the Constitution. It is unnecessary to consider the

further argument based upon the Standing Orders relating to members' papers and purporting to give effect to Article 15.10 of the Constitution. But the fact that the Constitution itself contemplates documentation being put beyond the power of any authority other than the Oireachtas itself, is a further illustration of the limitations on proceedings relating to what is said or done in the Houses of the Oireachtas.

The Callely v. Moylan exception

- 49.** It remains to consider if the claim comes within what has come to be known as the possible *Callely* exception. It may be recalled in the joint judgment of O'Donnell and Clarke JJ., it was observed *obiter* that it could be argued that circumstances could arise where a fundamental departure from the dictates of the Constitution could oblige the court to act to maintain the constitutional balance. However, as the joint judgment stated at paragraph 249, it is not to be readily assumed that such circumstances will ever arise which would amount to such a fundamental departure from the dictates of the Constitution, which was neither prevented nor remedied by the Oireachtas. It is sufficient to say that the facts in this case do not approach the standard required for intervention by the Court under this heading. Ní Raifeartaigh J. observed in *O'Brien* the circumstances in which it would be appropriate to do so would be truly exceptional and would seem to contemplate some grave threat to the democratic order of the State.
- 50.** This conclusion should not cause us to lose sight of the fact that, while a claim for damages cannot be maintained in these proceedings and that accordingly discovery cannot be ordered in support of such a claim, this does not mean that

the applicant did not have any constitutional rights when she came to deal with the PAC. On the contrary, as was emphasised in *Kerins (Nos. 1 and 2)* and indeed since at least the report of the All Party Oireachtas Committee on the Constitution in 1967, the Oireachtas is itself obliged to fulfil the duty on the State under Article 40.3 of the Constitution, to defend and vindicate the personal rights of the individual. If anything, that obligation is heavier where there are significant limitations on the remedy which may be provided in court proceedings. In the course of argument, the Court was referred to the revised Standing Orders of the Dáil Relative to Public Business 2020 with effect from 27 January 2021 in response, it appears, to the decisions in *Kerins (Nos. 1 and 2)*. Orders 71, 71A and 71B set out procedures where an individual may consider that their reputation, or in respect of dealings or associations with others; occupation, trade, office or financial credit; or privacy has been adversely affected by statements made in the Dáil or any committee proceeding. The Standing Orders also provide for the chair of the committee to determine the action in response to a submission by a person that they had been adversely affected by an utterance, or for an adjudication by the Committee on Parliamentary Privileges and Oversight as to whether such a statement amounts to a breach of privilege and the making of recommendations that the committee be instructed by the Dáil to take such action that the Committee on Parliamentary Privileges and Oversight determines or that a member be censured. Where the Committee on Parliamentary Privileges and Oversight finds that an abuse of privilege has occurred, the Standing Orders provide that the member who made the utterance be required to withdraw the utterance, or if that is not forthcoming, for the reading of the Committee on Parliamentary

Privileges and Oversight's finding on the utterance and the naming of the relevant member for suspension from the Dáil and its committees. Standing Order 93A now provides for a Committee Review Oversight Committee which has power to determine whether a committee is acting in excess of its terms of reference.

51. The Court was also referred to a statement made by the Ceann Comhairle in June 2019 referring to what had happened as a finding that the committee had trampled on the rights of a citizen and personally apologising to Ms. Kerins and expressing "*our absolute determination to make sure that in future that type of situation would not happen again*". The applicant for her part, handed in a newspaper report from three days later, in which the Ceann Comhairle stated that the apology he had offered was in a personal capacity and that he did not have the authority to make such a statement on behalf of the Dáil. These matters were referred to in passing and do not form part of this appeal. However, it is worth recalling and adapting the observation made by FitzGibbon J. in a related context in *Cane v. Dublin Corporation* [1927] I.R. 582 that it is "[t]he Oireachtas alone [which] can do justice to the plaintiff..." in that case. That adapted observation applies with greater force under the 1937 constitutional order which emphasises, as it does in Articles 40.3.1° and 40.3.2°, the State's duty to protect and vindicate in the case of injustice done, the personal rights of the citizen, including the right to a good name, something that must be balanced with the privilege of free speech guaranteed to members of the Oireachtas, but is not obliterated by it. In this context it is necessary to recall that the Oireachtas itself has the obligation to protect and defend the personal rights of the individual, and to vindicate those rights in the case of injustice done, and that

how the Oireachtas performs, or does not perform this function in any given case is a matter to which the courts must consider in determining if it is necessary, or appropriate having regard to the separation of powers, to embark upon proceedings which scrutinise in any way the conduct of the Oireachtas.

52. Finally, I should emphasise that consistent with the approach of this Court in *Kerins (No. 1)*, my conclusion relates solely to an analysis of the claim made in these proceedings. I conclude that, however framed, the claim in these proceedings seeks damages, and cannot be advanced without reference to and reliance on utterances made in the Houses of the Oireachtas, which necessarily involves making the members either collectively or individually amenable in a most direct way to a court in respect of such utterances in breach of the privilege required for such utterances, and indeed for the members and the House, by the Constitution itself. Whether claims for damages can be advanced in any other respect or in any other circumstances would require assessment in the light of the specific circumstances of any case. By the same token, I would reserve for another day, the question of whether the provision in Article 15.13 in respect of utterances is limited in the same way as the privilege from arrest in going to and returning from either House. That issue did not arise on this appeal, and accordingly, argument was not addressed to it. I would, accordingly, reserve that question also to a case where it was necessary to decide it. Otherwise, I would uphold the decision of Owens J. and the reasons given by him. I would dismiss the appeal.