THE SUPREME COURT

[Appeal No: 116/2016]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

BETWEEN/

STUDENT TRANSPORT SCHEME LIMITED

APPLICANT

AND

THE MINISTER FOR EDUCATION AND SKILLS

RESPONDENT

AND

BUS EIREANN

NOTICE PARTY/RESPONDENT

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 29th of March, 2021.

1. Introduction

1.1 These proceedings have a very long history but the issue to which this judgment relates is novel and important. The plaintiff/applicant ("Student Transport") commenced these proceedings alleging various breaches of law against both the respondent ("the Minister"), in respect of the conduct of elements of a scheme designed to provide transport for school students, and against the notice party/respondent ("Bus Eireann"), as the party who was operating those parts of the scheme which were argued by Student Transport to be in breach of law.

1.2 The proceedings failed in the High Court (see- *Student Transport Scheme Ltd. v. Minister for Skills and Education* [2012] IEHC 425) and in the Court of Appeal (see- *Student Transport Scheme Ltd. v. Minister for Skills and Education* [2016] IECA 152). Student Transport then sought leave to appeal to this Court. For the reasons set out in a determination dated 10th October, 2016 (see- *Student Transport Schemes Ltd. v. Minister for Skills and Education* [2016] IESCDET 123), this Court declined to grant leave to appeal so that the proceedings were, substantively, at an end.

1.3 However, Student Transport has recently sought to bring an application before this Court on foot of what is regularly referred to as the "*Greendale*" jurisprudence (see- *Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514), under which it is possible, in very limited circumstances, to seek to reopen a matter such as the failed application for leave to appeal in this case. In accordance with Practice Direction SC17, the question of whether Student Transport should be allowed bring such an application was considered by the Chief Justice, who came to the view that it was appropriate, in all the circumstances, to allow the application to be brought. Thereafter, the application was the subject of case management at which Student Transport, the Minister and Bus Eireann were represented. The substantive application, in which it is sought to permit the question of leave to appeal to be reopened, is currently listed for hearing before this Court next month.

1.4 However, in the context of that application, it was suggested on behalf of Student Transport during case management that it should be entitled to discovery of certain documents. It is to that issue that this judgment is directed.

2. The Procedure

2.1 The procedure for bringing a *Greendale* application is set out in Practice Direction SC17. In cases where permission to bring the application is given, the substantive matter is dealt with, in accordance with that practice direction, by originating motion.

2.2 When the question of discovery arose during case management, directions were given requiring all three parties to set out their position. In the context of Student Transport, it was required that correspondence be sent to the other two parties, and copied to the Court, setting out the discovery which was sought and setting out its argument as to why such discovery should be ordered. In that context, specific attention was drawn during case management to the need to address the question of the circumstances in which it might be appropriate to direct discovery in the unusual circumstances of an application such as this, where there has been a final order of this Court bringing proceedings to an end but where it is sought to reopen the proceedings through the mechanism of a *Greendale* motion.

2.3 Both the Minister and Bus Eireann were required to respond by correspondence, again to be filed in court, setting out the position of those parties both on the matter of principle as to the proper approach to discovery in circumstances such as this and their submissions on the specific request for discovery to be made by Student Transport. Thus the issues between the parties in respect of this discovery matter were set out in correspondence filed as a result of directions from the Court.

2.4 An oral hearing followed on 18 March, 2021. Having considered the written and oral submissions, the Court communicated to the parties that it would not direct discovery. It was further intimated that reasons for coming to that conclusion would be set out in a judgment to be circulated later. This judgment is directed towards setting out those reasons. It seems to me to be appropriate to turn first to the issue of principle.

3. The Principle

3.1 The starting point has to be to acknowledge the important constitutional framework within which these issues arise. Article 34.5.6 of the Constitution is in brief but clear terms. It states "the decision of the Supreme Court shall in all cases be final and conclusive". In cases such as *Greendale* itself, but also in *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, it has been recognised that there may be "rare and exceptional" cases where this Court can properly exercise a jurisdiction to set aside a final judgment of this Court and thus, in substance, bypass Article 34.5.6. However, it is also clear that the jurisdiction in question can only be exercised "where there was a clear breach of a constitutional right or justice" (see- *Bula* at p. 438).

3.2 It is for that reason that the procedures contained in Practice Direction SC 17 have been put in place. To simply allow a party to bring an application to set aside a final order of this Court, without any filter, would be a breach of the clear language of Art. 34.5.6 and

would be contrary to the "rare and exceptional" nature of the jurisdiction to set aside. It is for that reason that a party wishing to bring such an application must file the papers on which it intends to rely so that they can be considered either by a judge or a panel of judges. The purpose of that procedure is to enable the judge or panel, as the case may be, to ascertain whether there is any sufficient basis for considering that the "rare and exceptional" jurisdiction might be exercised. If the judge or panel concerned is not so satisfied, then the application will not even be permitted to be brought.

3.3 However, it seems to me that the clear language of Art. 34.5.6., and the very limited nature of the *Greendale* jurisdiction as set out in the jurisprudence, also carries with it additional implications for the process. In that context, I fully agree with the submissions principally made by counsel for Bus Eireann (but also adopted by counsel for the Minister), which suggested that an application for discovery in the context of a so-called *Greendale* motion could not be determined on the same basis as an ordinary application for discovery made while a case was, for example, pending trial in the High Court. To treat a discovery application arising in the context of the "rare and exceptional" jurisdiction to set aside a final order of this Court in the same way as an ordinary discovery application would, in my view, be to ignore the strong weight to be attached to finality in the constitutional regime. It would mean that a party could seek to reopen a final decision of this Court and then engage in a potentially protracted discovery application designed to bolster its case.

3.4 In that context, it is important to note that Art. 34.5.6 gives rise to two separate but interlinked and complementary requirements. The first is the principle of finality itself. It is clear both from the text of that article, and from the analysis contained in the judgments in cases such as *Greendale* and *Bula*, that the Constitution affords very high weight to finality as a matter of principle. Thus ignoring or watering down the concept of finality would be a breach of a significant constitutional principle.

3.5 However, it seems to me that the Constitution also gives a derived right to a person who has the benefit of a final decision of this Court. Such a person may be a plaintiff or applicant who has succeeded and has the benefit of an appropriate court order, or may be a defendant or respondent who has persuaded the courts that the claim brought against them is unmeritorious. In either case, a person having the benefit of a beneficial final order of this Court is entitled, as a matter of constitutional law, to a strong presumption that the proceedings (and the issues raised in them) are at an end. Indeed, there is a sense in which an unsuccessful *Greendale* motion operates as a breach of that derived right.

3.6 Where a *Greendale* motion is successful then, for the reasons addressed in the jurisprudence, it is necessary to interfere with the derived right in question. However, where, with the benefit of hindsight, it transpires that the *Greendale* motion was unmeritorious, then it follows that the party against whom that *Greendale* motion was brought was put to the trouble and expense of renewed litigation, which impairs their derived right to finality. That impairment is, of course, the price that must be paid to

permit the Court, in an appropriate case, to consider whether the *Greendale* jurisdiction must be exercised. But it is a right which should be interfered with to the minimum extent necessary to allow for the proper exercise of the *Greendale* jurisdiction.

3.7 It follows, in turn, that exposing a party who is a respondent to a *Greendale* motion to an order of discovery operates itself as a further impairment of the derived right to finality which that party enjoyed by reason of the final decision of this Court. In those circumstances it could only be the case that discovery can be ordered when it had been demonstrated that same was absolutely necessary in the circumstances of the case in question.

3.8 For reasons which I will shortly address, I do not consider it necessary to determine whether it is appropriate to adopt the precise parameters for ordering discovery, in the context of a *Greendale* motion, which were suggested by both Bus Eireann and by the Minister. I agree that it would be unwise, for the very type of reasons identified in the judgments of this Court in *Greendale*, to rule out the possibility that there might not be a truly exceptional case where a requirement to disclose a very limited category of information might not be absolutely necessary to the proper exercise of the *Greendale* jurisdiction. As this Court noted in *Greendale* itself, the constitutional requirement of fairness may very occasionally require the exercise of a jurisdiction which impinges on the principle of finality or impairs the derived right of the party against whom the application is brought.

3.9 However, it also follows that the circumstances in which such an order could or should be made must necessarily be very limited indeed. It seems to me that there was a failure on the part of Student Transport to engage properly with the weighty constitutional arguments put forward for suggesting that the entitlement to discovery on a *Greendale* motion must necessarily be significantly more limited than the entitlement to discovery in ordinary litigation. Student Transport's case seemed to suggest that this Court should consider the current application for discovery in much the same way as any court would consider a typical discovery application before it. In my view, Student Transport were incorrect in adopting that approach. The entitlement to discovery in the context of a *Greendale* motion must be very limited indeed and would require exceptional circumstances where the legitimate interests of justice override the important value of finality and the derived right of the respondent. There are, however, a number of other matters which must also be brought into the equation on an application such as this. I now turn to those factors.

4. Relevant Factors

4.1 The first matter which must be considered is the identification of the order of this Court which it is sought to revisit or set aside. The order concerned was a determination by this Court that the constitutional threshold for leave to appeal had not been met. As has been pointed out in many determinations of this Court since the establishment of the Court of Appeal, this Court is no longer, at least ordinarily, a court whose constitutional function it is to correct what might be argued to be errors in lower courts. The mere fact, therefore,

that it might be said that the Court of Appeal was in error will not normally give rise to an entitlement to appeal to this Court.

4.2 In order to argue, therefore, that a determination of this Court declining to grant leave to appeal should be set aside, it is necessary for a party seeking such an order to engage with the question of why it is said first that this Court was potentially wrong to decline leave but more importantly how it is said that the process leading to the decision in question of this Court was such that there was a clear breach of constitutional rights or constitutional justice. Given that the decision of this Court is not based on the merits of whether the High Court or the Court of Appeal was correct, but rather is concerned with whether the constitutional threshold for leave to appeal has been met, then the question of whether there has been any clear breach sufficient to warrant invoking the *Greendale* jurisdiction must engage with the question of why it is said that this Court, in its determination, operated in a fashion which gave rise to such a clear breach.

4.3 Next it is important to emphasise that the mere fact that there may be new evidence or materials which might suggest that the High Court or the Court of Appeal were in error is not, in itself, a reason to breach the principle of finality and enable a successful *Greendale* application to be brought. Something more is necessarily required.

4.4 In that context, it is important to note that this Court, in both *Din v. Banko Ambrosiano SPA* [1991] 1 I.R. 569 and also in *Belville Holdings Limited v. Cronin* [1994] 1 ILRM 29, envisaged the possibility that a final order of this Court might be set aside in the case of fraud. It is true that those cases also envisaged that the threshold which must be met in order for any Court to set aside a final order of this Court on the grounds of fraud is a very high one. However, importantly, it is clear that the proper procedure to adopt in any case where a party wishes to seek to set aside a final order of this Court on the grounds of fraud is by means of plenary proceedings commenced in the High Court. In such proceedings, a party may well be entitled to apply for discovery provided it can be demonstrated that the documents whose discovery is sought are relevant to the issue of fraud as pleaded.

4.5 It follows, therefore, that the issues which properly arise on a *Greendale* motion require the establishment of something more than that this Court, or the court in respect of which this Court entertained an appeal (or, in the circumstances of this case, an application for leave to appeal), might be shown to be wrong on the facts or the law. A *Greendale* application will also not ordinarily involve a suggestion that the judgment of any relevant court was procured by fraud for the proper process to follow in such a case is, as I have noted, to bring plenary proceedings. I should emphasise that this latter point is not a mere procedural technicality but rather is an issue of substance for the question of whether there was, or was not, a fraud on the Court is one which needs to be considered at first instance by a court which has available to it all of the relevant procedures including hearing and testing oral evidence together with the various disclosure mechanisms appropriate to a first instance trial. An application for leave to appeal to this

Court, or, indeed, a substantive appeal, is not the appropriate vehicle to attempt to establish that judgments in lower courts were procured by fraud.

4.6 I emphasise these points for, in the context of any discovery application, it is necessary to identify the issues which properly arise. The starting point has to be to identify those issues, for it is only if documentation can be said to be relevant to the issues concerned, that its discovery could even be considered in the first place. When one adds to that the constitutional framework within which a *Greendale* application is made, it follows that it must be necessary for a party seeking discovery, at a minimum, to specify how the documents sought are clearly material to the issues which arise. In addition, and in the particular context of the constitutional framework underlying a *Greendale* motion, it seems to me that the onus on a party seeking disclosure is to establish to the satisfaction of the Court that the disclosure sought is absolutely necessary to avoid a real and substantial risk that an order of this Court which should, in accordance with the jurisprudence, to be treated as a nullity, might otherwise stand. It also seems to me to be clear that a very high threshold must be met by a party seeking to meet that standard.

4.7 It should also be noted that, on this application to revisit or set aside the determination of this Court refusing leave to appeal, it will be necessary for Student Transport to engage with the need to explain how there is a sufficiently egregious breach of constitutionally guaranteed procedures or fairness in the conduct of the application for leave to appeal such as would render it appropriate for this Court to treat its previous determination as being, in essence, a nullity. Student Transport will bear a heavy onus in seeking to make out such a case but it must, of course, be emphasised at this stage that the Court takes no view on the question of whether it may or may not meet the high threshold involved. It is as against those principles that it is necessary to consider the current application for discovery.

5. Application of Principles to the Facts of this Case

5.1 As noted earlier, it seems to me that Student Transport's application for discovery was, in substance, predicated on the incorrect assumption that an application for discovery in the context of a *Greendale* motion ought be considered on much the same basis as any ordinary discovery application. The discovery sought was wide-ranging.

5.2 In essence, the case which Student Transport wishes to make is that the defence which the Minister (supported by Bus Eireann) made, both before the High Court and before the Court of Appeal, has now been demonstrated to be false by reason of matters which have subsequently arisen involving both certain interactions between the European Commission and Ireland, and also a report of the Comptroller and Auditor General. However, it became clear at the hearing of this application that at least one of the central matters relied on by Student Transport, being the question of whether Bus Eireann simply recovered its costs on foot of its arrangements with the Minister or whether a surplus was earned, had appeared to become irrelevant by the time this case came before the Court of Appeal.

5.3 It is true that the issue in question was significantly debated by the High Court which found against Student Transport on that point. However, developments in the jurisprudence of the Court of Justice of the European Union ("CJEU"), which occurred in the period intervening between the High Court and the Court of Appeal, would appear to have made that issue irrelevant. Any potential defence to the proceedings which might have relied on a contention that all that was involved was cost recovery would appear to have disappeared as a result of the decision of the CJEU in *Azienda Sanitaria Locale di Lecce, Università del Salento v. Ordine degli Ingegneri della Provinci di Lecce* (Case C-159/11) (ECLI:EU:C:2012:817). (See in that context, para. 69 of the judgment of Hogan J. speaking for the Court of Appeal). On that basis, those questions would not appear to have been live at the time when the application for leave to appeal was brought so that, in turn, it is difficult to see how such issues could have any bearing on the question of whether it might be appropriate to set aside the refusal of leave to appeal.

5.4 It is also, however, clear, from paras. 70 and 71 of the judgment of Hogan J., that the reasons why Student Transport's appeal to the Court of Appeal failed were first based on a conclusion that any relevant arrangements fell outside the scope of Directive 2004/18/EC (the Public Procurement Directive) because the arrangements in question were found to be of indefinite duration. A second reason for coming to a similar conclusion was the finding that the scheme was an administrative arrangement with no concluded contract in writing.

5.5 In light of those findings of the Court of Appeal, the only basis on which leave to appeal to this Court could have been granted would have been if this Court were satisfied that the constitutional threshold was met in relation to a potential appeal, which suggested that the Court of Appeal was wrong on the actual grounds on which that court ultimately decided to dismiss Student Transport's appeal and uphold the decision of the High Court. The focus of any *Greendale* motion must, therefore, engage with how it is said that the *Greendale* threshold is met in the particular context of the decision of the Court of Appeal which, after all, was the foundation on which the application for leave sought to appeal, which is now sought to be revisited, was based.

5.6 In my view, Student Transport has not demonstrated that any of the documents sought would have a material bearing on whether it could be demonstrated that there was a sufficient want of fundamental constitutional fairness in relation to the specific decisions concerning that constitutional threshold which were the subject of the determination, so as to warrant exercising the very exceptional jurisdiction to order disclosure in the context of a *Greendale* motion. In addition, Student Transport did not, in my view, demonstrate that there was a real and substantial risk that the absence of disclosure of any or all of the documents sought might lead to an order which ought, in accordance with the *Greendale* jurisprudence, be considered a nullity, nonetheless standing.

5.7 Fundamentally the obligation on a party who wishes to go behind the high constitutional presumption of finality is to put forward its own case for suggesting that the threshold in question is met. It is not sufficient, and would be contrary to that high constitutional

principle and to the derived right of a respondent to finality, to permit a party to simply make an accusation, put forward some evidence in respect of it, and hope to make out its case by discovery or other disclosure procedures. It is only in very exceptional circumstances that a jurisdiction to order disclosure could be permitted. I was not satisfied that Student Transport had demonstrated that such very exceptional circumstances existed. On that basis, I agreed with the view of the Court that the application for discovery should be refused.

6. Conclusions

6.1 For the reasons set out earlier in this judgment, I have specified the very high threshold which must be met before this Court could order discovery (or, indeed, any other form of disclosure) in the context of a *Greendale* motion. That view underlay the decision of this Court to refuse the discovery sought by Student Transport, which decision has already been communicated to the parties.

6.2 I have also set out the reasons why I supported that decision of this Court. I did not consider that Student Transport had demonstrated that there was a real and substantial risk that the absence of disclosure of any or all of the documents sought might give rise to a situation where an order which ought, in accordance with the *Greendale* jurisprudence, be considered a nullity, would nonetheless stand. In those circumstances, it will now be a matter for Student Transport to seek to persuade this Court that the high *Greendale* threshold has been met on the basis of the materials already filed.