THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 63
Court of Appeal Record Number 2019/53

Costello J.
Haughton J.
Binchy J.

BETWEEN

DIAMREM LIMITED

APPLICANT/
APPELLANT

- AND -

CLIFFS OF MOHER CENTRE LIMITED AND CLARE COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 09 day of March 2021

Introduction

1. This judgment relates to an application by the appellant to admit new evidence pursuant to O. 86A, r. 4(c) of the Rules of the Superior Court. The parties accept that the test to be applied by this court is that established by the Supreme Court in the case of *Murphy v. Minister for Defence* [1991] 2 I.R. 161, 164 where Finlay C.J. said that the applicable principles were:-

> *"1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;*

2. *The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;*

3. *The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."*

2. The only issue in dispute in this case is whether the evidence sought to be adduced by the appellant satisfies the first of these principles and, in particular, whether the evidence could not have been obtained with reasonable diligence for use at the trial by the appellant.

The proceedings

3. The appellant is a company which operates a park and ride business for visitors to the Cliffs of Moher Visitor Centre. The first named respondent is a company incorporated by the second named respondent to develop and operate a new Visitor Centre to be built at the Cliffs of Moher. The second named respondent is the local authority and the planning authority for the area.

4. The appellant sought an order pursuant to s. 160 of the Planning and Development Act 2000 ("the Act of 2000") in respect of a 481-space car park operated by the respondents at the Cliffs of Moher Visitor Centre in County Clare. The first named respondent was granted planning permission (the "Permission") by An Bord Pleanála in 2002 for the development of the Cliffs of Moher Visitor Centre (Planning Register Reference 01/333, ABP Ref. 03/128695). The Permission allowed for the development of a permanent car park for 249 car parking spaces at the western side of the R478 and a temporary car park *"during the period of construction"* on the eastern side of the road.

5. It is common case that the permitted permanent car park on the western side of the R478 was never constructed. Instead, the respondents asserted that, by reference to two decisions taken under the Planning and Development Regulations 2001, known as Part 8

decisions, a decision had been made *"to relocate the car park for which planning permission was granted in December 2002 to the site of the temporary car park."* The appellant's case is that the car park on the eastern side of the R478, referred to in the proceedings as the temporary car park, is an unauthorised development within the meaning of s. 160 of the Act of 2000. It seeks various declaratory and enforcement reliefs on this basis.

6. By originating notice of motion issued on 20 July 2016, the appellant sought orders compelling the respondents, *inter alia*, to remove the temporary car park on the grounds that this was required in order to comply with Condition No. 3 and Condition No. 7 of the Permission.

The respondents' defence of the proceedings

7. A number of grounds were advanced by the appellant to support its claim and a number of grounds of defence were set out by the respondents in the exchange of affidavits between the parties. Mr. Gerard Dollard, the Director of Services of the second named respondent, and a director of the first named respondent, swore four affidavits on behalf of the respondents. The defence of the respondents was based, *inter alia*, on the fact that there had been two Part 8 processes undertaken by the County Council, the effect of which, Mr. Dollard says, was to permit the continued functioning of the temporary car park as a car park. In his affidavit of 5 May 2017 he averred as follows:-

> *"8. I say and believe that certain modifications to the design proposals for which permission had been granted by An Bord Pleanála were the subject of public consultation and permission under Part VIII of the Planning and Development Regulations 2001. …*

9. In the course of its proposal application dated 30 September 2004 on behalf of the developer to the Council in respect of Part VIII Application LA 04-08, Reddy O'Riordan Staehli Architects ("RORSA") stated:

> *"in complying (sic) with the An Bord Pleanála decision it was a deemed appointment (sic) that the proposed car parking area be re-located outside of the Visitor Centre site. The proposed remote temporary Car Parking facility is situate on the East side of the existing roadway away from the Visitor Centre and the Cliffs walks. ... Status of the coach parking to the temporary car park will be revisited upon implementation of the park and ride arrangement."*

I beg to refer to a true copy of the said submission regarding Part VIII application LA 04-08 upon which marked "GD1" I have signed my name prior to the swearing hereof.

10. A separate submission dated 31 March 2005 was made by RORSA to the Council in relation to compliance with the 19 conditions attached by An Bord Pleanála to the Planning Permission. The Grounding Affidavit sworn by Mr. Flanagan on behalf of the Applicant at paragraphs 5, 6 and 7 thereof references and quotes excerpts from the said compliance submission by RORSA to the Council in relation to condition no. 3 scheduled to the Planning Permission. I beg to refer to a true copy of the said compliance submission dated 31 March 2005 upon which marked "GD2" I have signed my name prior to the swearing hereof. I say and believe that the said compliance submission neither envisaged nor recommended that vehicular access to the Cliffs of Moher Visitor Centre would be confined to coaches and a park and ride facility. On the contrary, the compliance submission indicated an intention to retain the "temporary" car park for an indeterminate period after

construction of the Centre had been completed. The Council, as Planning Authority, responded to the said compliance submission by letter dated 25 May 2005, indicating in respect of condition no. 3, that "the present position is noted. Details of proposed Mobility Management Strategy shall be submitted to the Planning Authority prior to occupation of the development."

No abandonment of car parking.

11. I say that it was never envisaged, proposed or accepted by the members of the Council, as the Planning Authority, that the proposal to provide a permanent car park for the Cliffs of Moher Visitor Centre be abandoned. I say and believe that it was proposed that such a car park would be re-located, as one of the modifications stated in the RORSA submission dated 30 September 2004. I say and believe that this was one of the modifications accepted by the members of Clare County Council in their resolution dated 13 December 2004, in which they resolved that:

> *"pursuant to the Part VIII Planning and Development Regulations 2001, Clare County Council proceed with the development work/modifications to the Cliffs of Moher Visitor Centre project."*

12. I say and believe that it was at that time the Council's intention to re-locate the permanent car park and to continue the operation of the "temporary" car park. I say and believe that references to the car park being temporary, after the Part VIII process, reflected an established description of the car park as such and related to its construction being unsurfaced and unlined, an absence of formal walkways and its presentation otherwise as being in the nature of a temporary construction, rather

than being references to its intended function since the approval of the Part VIII planning submission in 2004.

13. I say and believe that the Part VIII applications permitted the continued function of the car park beyond the period of construction of the Visitors Centre and that the duration of the car park's function was not therefore limited to the duration of works on site."

8. While the letter of 30 September 2004 from RORSA was exhibited by Mr. Dollard, he did not exhibit the other documents generated as part of the Part VIII process.

Part 8 of the Regulations of 2001

9. The reference to the Part VIII applications and process is to Part 8 of the Planning and Development Regulations 2001, although, as roman numerals were used consistently in the affidavits and the judgment of the High Court, I shall continue to describe the process as a Part VIII process or decision. These regulations apply to certain developments (of which the development at the Cliffs of Moher is one) which are carried out by, or on behalf of, or in partnership with a local authority. The local authority must give notice of the proposed development in an approved newspaper and erect a site notice on the land. The notice must indicate the nature and extent of the proposed development. The plans and particulars must be available for public inspection (regulation 81). The documents available for inspection shall include a document describing the nature and extent of the proposed development, a location map, a layout plan and various specified drawings (regulation 83). Members of the public may make submissions or observations on the proposal within the time allowed.

10. The manager of the local authority prepares a written report in relation to the proposed development which is submitted to the members of the local authority. The

report sets out the nature and extent of the proposed development and other matters specified in the regulations and the manager's recommendation whether or not the proposed development should be proceeded with as proposed, or as varied or amended, or not at all. The elected members then consider the report and by resolution either agree to the proposed development as set out in the report, reject it, or vary or modify the proposed development.

The Part VIII file

11. As I mentioned, there were two Part VIII applications referable to the Cliffs of Moher development, one under file reference LA 03/25, and another under file reference LA 04/08. During the course of the hearing of this appeal, the parties agreed that only the latter is relevant for the purpose of this application. The appellant seeks special leave to admit in evidence certain documents generated during the Part VIII Application LA 04/08, which neither party adduced in evidence before the High Court. It does so primarily for the purpose of establishing that this Part VIII decision did not have the effect of modifying the conditions of the Permission relating to the provision of car parking at the Cliffs of Moher Visitor Centre, as contended by the respondent in its defence. The documents concerned are the site and newspaper notices, enclosures to the RORSA letter of 30 September 2004 comprising drawings, plans and elevations and a letter from Arup Consulting Engineers dated 28 September 2004, the planning report of 6 December 2004 and the accompanying letter of Mr. Dollard of same date to the elected members and the Resolution of the council that the second named respondent proceed with the development taken on 13 December 2004.

12. Mr. Dollard says that the letter of 30 September 2004 is evidence upon which he relies to support his belief that the effect of the Part VIII decision, LA 04/08, was to modify the terms of the grant of planning permission by An Bord Pleanála and to permit

the development of a permanent car park on the site of the temporary car park authorised by the grant of planning permission. He does not purport to rely upon any other documents to support his view. The appellant says that the Part VIII decision does not, and as a matter of law could not, have that effect, and it is one of the major issues in the appeal. It is no part of this court's role on an application to admit new evidence to comment on the strength or otherwise of the respondents' defence and the appellant's appeal. But it is apparent that, whatever the merits of the reliance placed by the respondents on the Part VIII decision, they were relying on it, and this is clear from the passages quoted from Mr. Dollard's affidavit.

13. It was not contested that the documentation now sought to be admitted was available for public inspection on the planning file and that it was at all times possible for the appellant to inspect the file and to take copies of the documents. It, therefore, could have put the documents now sought to be adduced before the High Court.

14. It is also important to note that in February 2017, a director of the appellant had, in fact, inspected the relevant file. While a case could be made that the significance of the documents might not have been apparent in February 2017, the same could not be said once Mr. Dollard's affidavit of 5 May 2017 had been delivered. Potentially, these documents were significant and were easily obtainable by the appellant. On the face of it, therefore, the appellant fails the first limb of the test in Murphy because it could, with reasonable diligence, have placed the documents in evidence before the trial judge.

The appellant's case

15. In answer to a question why this was not done, counsel on behalf of the appellant, who had not acted for the appellant in the High Court, made a number of points. The first is a legal point. He says that as a matter of law it is not possible that any Part VIII decision can *"modify"* a grant of planning permission. As this is a legal point, the documents

sought to be admitted are not necessary to enable the appellant to advance this argument on the appeal.

16. The second point was that the defence based on the alleged modification of the grant of planning permission was perceived to be *"flimsy"*. Effectively, the argument is that because the appellant did not believe that the respondents would succeed on this point, they did not attempt to inspect the file and ascertain whether they could challenge the conclusions Mr. Dollard asserts flow from the Part VIII LA 04/08 decision. However, this is precisely what the authorities have consistently held is not a basis for admitting further evidence on appeal. In *Emerald Meats Limited v. The Minister for Agriculture, Ireland and the Attorney General* [2012] IESC 48, at a well-known passage at para. 36, O'Donnell J. held:-

> *"The rules on the admission of fresh evidence on an appeal are quite strict. This is as it should be. There are very few cases in which the losing side does not regret that different witnesses were called, evidence given or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained. It is important that parties are aware of the finality of litigation, and bring forward their best case for adjudication. Cases develop organically and unpredictably. One of the benefits which litigation brings at some cost is certainty. A party may reasonably dispute the merits of a conclusion, but cannot doubt that it is a conclusion. The court must make its decision on the evidence and case advanced on the day, or in this case, over the 17 days. It is partly for this reason that the rules and practice of the courts go to such elaborate lengths to attempt to ensure that both sides are fairly apprised of what is in dispute and have an adequate opportunity to prepare for the litigation. It is also why appellate courts have developed rigorous*

tests on applications to admit fresh evidence. There are few cases which in hindsight could not be rerun with different witnesses, evidence, arguments, or advocates, but to consider that such a course is in the interests of justice is to engage in the delusion that endless litigation is a desirable rather than a tormented state." (emphasis added)

17. In *Student Transport Scheme Limited v. Minister for Education & Skills* [2015] IECA 303, at para. 34, Hogan J. said:-

"... the Murphy principles serve to protect the principles of legal certainty and the proper conduct of procedure since they are designed to ensure that all relevant ***existing*** *evidence upon which the parties wish to rely will be available at first instance to the court of trial."* (emphasis added)

18. Quite clearly, the onus is on the parties to *"bring forward their best case for adjudication"*. The fact that they omitted to bring before the court evidence which, after judgment, appears might well have been useful, is not sufficient to satisfy the *Murphy* principles.

19. The appellant relies on the following passage of O'Donnell J. at para. 37 of *Emerald Meats*:-

"... the test that the relevant evidence could not with reasonable diligence have been available for the trial is a reasonably flexible test. I would not wish to rule out the possibility that where a trial takes an unexpected turn, the mere fact that some information was available and could have been obtained for the trial, should not mean that it should be excluded on appeal, particularly when the issue may be decisive, the evidence cogent, and its potential relevance could not have been known in advance of the trial."

20. Thirdly, the appellant argues that this is a case for flexibility because the case took an unexpected turn when, at the end of the case, the respondents argued that the development was exempted development. The appellant says that this defence was not apparent from the affidavits filed and that, in effect, it was deprived of the opportunity to deal with this point, which would have involved assessing the Part VIII files and, by implication, adducing at the trial, the evidence it now wishes to adduce for the hearing of the appeal. The respondents say that there was no unexpected turn of the trial and deny that the appellant was not alerted to this ground of their defence of the proceedings.

21. In my judgment, when the question whether the development was exempted development was first raised is a red herring, as the importance of the Part VIII decision to their defence was clear from the affidavit of 5 May 2017, whether or not it also grounded an argument that the development was exempted development (an argument I confess to having some difficulty in following insofar as it is said to relate to the Part VIII decision). The fact is, the appellant missed an opportunity to adduce evidence to rebut a point which, contrary to its expectations, went against it and it cannot now rely on a different ground of defence raised (apparently) late in the day as an excuse for its earlier omission.

22. It is important to note that the flexibility referred to by O'Donnell J. is inherent in the application of the *Murphy* principles themselves. This was stated by Hogan J. at para. 35 of *Student Transport*:-

> *"It is important to state, however, that the Murphy principles are not in themselves inflexible. If, for example, the evidence was not available at the time of the hearing in the High Court despite the reasonable diligence of the party in question, then such evidence will, in principle, be admissible on appeal, provided that the evidence is likely to have an important influence on the outcome of the case and is credible. Given the nature of our appellate structure, rules of this kind are important to*

protect the orderly administration of justice and, by extension, principles of legal certainty. If it were otherwise and new evidence was admissible on appeal more or less at will, a disappointed litigant could effectively force this Court to accede to a new trial by pointing to the existence of fresh evidence which might have had a bearing on the outcome of the hearing, even if such evidence was, with reasonable diligence, available to him or her at the time of the trial."

23. It follows that the flexibility is generally to be found, not by going outside the *Murphy* principles, but by applying them. Insofar as we were invited to employ a flexible approach, which avoids or sidesteps a *Murphy* assessment, I reject that submission on the facts of this appeal.

24. Fourthly, the appellant tries to say that the fault lay with the respondents and, accordingly, it should not be prejudiced and should be given special leave to admit new evidence based on the default of its opponent. It says that the respondents ought to have put before the court all of the material relevant to the Part VIII process, upon which they relied. Counsel said that there was an obligation on the respondents to introduce this evidence as it was part of their defence. In this regard, the appellant relies on the *County Council of the County of South Dublin v. Balfe* (Unreported, High Court, Costello J., 3 November 1995). Costello J. was dealing with a s. 27 application (the pre-cursor to s. 160). Having noted that under s. 27, the proceedings are brought by notice of motion supported by an affidavit, to which the respondent replies, he said:-

"Thus the issue for determination by the court will be found, not in pleadings, but in the parties' affidavits. In my view, a respondent is not entitled to raise at the hearing of the motion a point by way of defence not raised in the affidavit."

He noted that none of the affidavits filed on behalf of the respondents suggested that the permission to use the lands for business purposes was not required because they enjoyed a

pre-October 1964 use. He deprecated the fact that the point was first taken in counsel's closing submissions and the applicant had no opportunity to consider it and adduce evidence in relation to it, but as he held that the point in any event was not a valid one and rejected that ground of defence, it was not necessary to take any steps to rectify the prejudice occasioned to the applicant.

25. I do not believe that *Balfe* assists the appellant. Here, the respondents put forward their evidence in support of their defence. The evidence exhibited was not the complete file in relation to the Part VIII decision, but it should have been clear to the appellant that they were relying upon the decision taken pursuant to the Part VIII LA 04/08 process as a defence to the s. 160 proceedings, and Mr. Dollard asserted that they were permitted to operate a car park at the site of the temporary car park as a result of that process and decision.

26. It was obvious that the evidence put forward by Mr. Dollard was incomplete and he was not even asserting that he had put before the court the entire file. He put before the court the evidence upon which the respondents sought to rely, and if he omitted relevant material, it was at their risk. I am not prepared to hold, insofar as it is alleged that the respondents sought to mislead the court in so acting, that the respondents acted in a misleading or less than *bona fide* manner, not least because it was at all times so simple for the appellant to exhibit the entire file had it so wished, and so to unmask any such reprehensible behaviour. The inference this court is asked to draw is not justified on the facts of this case and I do not draw it.

27. The onus is on an applicant who seeks relief under s. 160 to satisfy the court that there has been development and that there has been unauthorised development. The defence raised by the respondents does not alter this burden and, for this reason, the fact that the respondents did not adduce the evidence cannot assist the appellant in the

assessment by this court as to whether the appellant, with reasonable diligence, could not have adduced the evidence it now seeks to have admitted for the hearing of the appeal. If this material was relevant to the issue whether the development was unauthorised development, then it was relevant to a matter which the appellant had to prove to establish its case.

28. Fifthly, the appellant argues that, as there is a duty of candour owed by an applicant in s. 160 proceedings, so there must be, or ought to be, an equivalent duty of candour imposed on a respondent. Counsel advanced no authority for this proposition. It is important to emphasise the distinction between a s. 160 enforcement application and a judicial review of a decision by a planning authority. I accept that in judicial review proceedings, respondents are required to approach the matter on the basis of *"cards on the table"*. On the other hand, it would be surprising indeed if a duty of candour of the scope contended for by the appellant were to be imposed upon a respondent to a s. 160 application: that is, to adduce evidence upon which it does not wish to rely but which the other side might believe to be relevant. The fact that the second named respondent is a planning authority, and the first named respondent its subsidiary, does not impose a duty of candour of the kind contended for by counsel which does not apply to other respondents. In stating this, I should emphasise that this in no way detracts from the obligation on all parties to any proceedings not to mislead the court. That, as I have said, is not an issue here.

29. Finally, counsel relied upon the supervisory function of the court in s. 160 applications and referred to the decision of Morris J. in the High Court in *Kildare County Council v. Goode* [1997] IEHC 95. His argument was that because of the supervisory function of the court in an application brought pursuant to s. 160, the court should permit the admission of evidence even where the moving party cannot satisfy the principles in

Murphy. He said that this court should treat the application as an exception to the criteria in *Murphy* and invited the court not to follow the decision in *Student Transport*, where Hogan J. held at para. 11 of the judgment that the principles apply *"indistinctly"* to all types of appeals.

30. I am not persuaded that there is, or ought to be, an exception to the application of the *Murphy* test, as contended by counsel for the appellant. In *Goode* (which was a decision of the High Court at first instance), the trial judge requested the parties to identify the issues in the case prior to the hearing. This was done, though the respondent later argued that there was no proof of the County Manager's order which it was asserted was an essential proof by the local authority applicant in the case. Morris J. permitted the manager's order to be handed in to court at the end of the hearing as the absence of the manager's order had not been identified as an issue in the case, as he had requested, and the applicant thus had no prior notice of the point. In the circumstances, he held that it would be unjust to the applicant to refuse liberty to present the formal proof at the conclusion of the respondent's submissions when it became clear that it was in fact an issue. The order had been disclosed in the affidavit of discovery of the applicant and so there was no doubt that the order had been made. In this context, Morris J. held at the conclusion of the trial that *"the Court, acting in its capacity as guardian and supervisor of matters relating to planning, has a duty to receive all relevant evidence."* This is an uncontroversial statement in the context of the admission of evidence by a trial judge.

31. But, that is not to say that the principle can be simply transposed to an application for special leave to admit additional evidence for an appeal. By that logic, the rules for the admission of evidence in a trial court, which are predicated on doing justice as between the parties, should apply equally to an appeal. Clearly this is not the law and the Supreme Court authority to that effect is binding on this court. I see no principle which would

permit this court to disapply the law so clearly stated in *Emerald Meats* and, certainly, I am not persuaded that *Goode* is of assistance in this regard.

Conclusion

32. The new evidence which the appellant seeks leave to admit for the hearing of the appeal in this case was in existence prior to the trial. It was on the planning file in the offices of the second named respondent which is open to the public for inspection. A director of the appellant, in fact, inspected the relevant file in February 2017, ten months prior to the trial. The relevance of the Part VIII LA 04/08 decision was clear, at the latest, from the date of the delivery of the affidavit of Mr. Dollard of 5 May 2017. There was every opportunity available to the appellant to adduce the evidence now sought to be admitted. The explanations why this was not done do not, to my mind, assist the appellant. I am not satisfied that the appellant could not, without reasonable diligence, have adduced this evidence at trial. For these reasons, I would refuse this application.

33. I am provisionally of the view that the respondents are entitled to their costs of the motion, to be adjudicated in default of agreement, on the basis that it was a discrete application on which they have been entirely successful. However, there should be a stay on execution pending the determination of the appeal. If any party wishes to argue that there should be an alternative order as to costs, or a stay, it may apply to the Office of the Court of Appeal within ten days for a short hearing on the question of costs. If it seeks such a hearing and it is unsuccessful, the costs of the additional hearing will be awarded against it.

34. As this judgment is being delivered electronically, Haughton J. and Binchy J. have indicated their agreement with this judgment and the orders I propose.