THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 248

[2016 No. 92]

The President

BETWEEN

UNIVERSITY COLLEGE CORK – NATIONAL UNIVERSITY OF IRELAND

RESPONDENT

AND

ELECTRICITY SUPPLY BOARD

APPELLANT

Judgment of the President delivered on 22nd September 2017

The Motion

1. The appeal in which this procedural motion arises is in respect of the judgment and orders made by the High Court whereby the ESB was held liable to UCC for damage by flooding that happened in November 2009 and UCC was held blameworthy of contributory negligence. In a lengthy judgment dated 5th October 2015 the High Court concluded that the apportionment of liability was 60% to be borne by the ESB and 40% by UCC. The ESB appeals against the finding of liability in favour of UCC and the latter contests the finding of contributory negligence. The appeal is fixed for hearing over a number of dates in November 2017. The motion the subject of this judgment concerns additional or further evidence that UCC intends to adduce on the hearing of the appeal, if it is permitted to do so. The evidence sought to be introduced is contained in a report of Duncan Faulkner of 13th March 2017 concerning events during storms that occurred on two dates in December 2015. UCC maintains that it is not required to apply for or to obtain any special leave to adduce the evidence but the ESB contends otherwise. The matter arose in the course of case management and the parties are in accord that it is desirable and even necessary that the position regarding the evidence should be clarified in advance, which is the procedure approved generally by the Supreme Court. In view of UCC's position as to its entitlement to put the disputed evidence before the court, the ESB brought its motion to have the evidence excluded. Since it is a procedural question arising in an appeal I have jurisdiction to decide the issue.

The Further Evidence sought to be Introduced

2. Mr. Duncan Faulkner, a member of the firm of JBA Consulting, is a hydrologist who gave evidence at the trial in the High Court. He produced a report in March 2017 based on information obtained from the ESB. At paragraph 1, he sets out the purpose of his report as follows:

> "In this note, I make some observations on the operation of the Lee Reservoirs during the floods of December 2015. I have concentrated on two events: Storm Desmond on 4-6 December and Storm Frank on 29-30 December. I have noted several aspects of the reservoir operation that appear to differ from what was stated during the trial."

3. Mr. Faulkner provides information as to reservoir levels, inflows and discharges as stated in data provided by the ESB on 25th April 2016, and based on the data supplied, he calculated inflows to the reservoirs and discharges. He provides details under headings as to levels in advance of floods, spilling in advance of floods, spilling during floods and spilling in aftermath of floods. He does not identify the statements made during the trial with which this material is inconsistent, but it is to be understood that his information and conclusions or comments reflect his view that the information provided by the ESB as to what happened during these two storms in December 2015 describes "several aspects of the reservoir operation that appear to differ from what was stated during the trial".

4. Counsel for UCC, Mr. Declan McGrath SC submitted that the new report will ground the submission that on the occasions of these significant flood events in December 2015 the ESB were able to manage their dam and provide flood alleviation without having a standard and were also able to reduce their water levels down to the top operating level for non-flood conditions by spilling and not solely by generating.

The Rules

5. The rules relevant to the question that arises on the motion are contained in O 86A, r. 4(a), (b) and (c). They are as follows:

> "4. Subject to the provisions of the Constitution and of statute—
>
> (a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,
>
> (b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,
>
> (c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds)

UCC's Case
6. UCC argues that special leave is not required to adduce the report because it comes within the provision of O. 86A, r. 4(b) as evidence "as to matters which have occurred after the date of the decision from which the appeal is brought". Although the rule does not say so, according to the authorities the court has a discretion as to whether to admit the evidence, which should be exercised in this case in favour of admission.

7. Mr. McGrath SC submitted that the evidence in Mr. Faulkner's report is relevant first because of a contention by the ESB in the High Court and in their Notice of Appeal that it is simply not possible for the ESB to engage in flood alleviation without having a standard to which they can operate. UCC wants to introduce the evidence to demonstrate that in December 2015, the ESB were able to operate their dams in a way that reduced or almost eliminated downstream flooding without having a standard in place and so they did not need a standard.

8. Secondly, he argues that the ESB's position is that water cannot be spilled down to desired or appropriate levels but rather can only be generated down and this evidence demonstrates that they can and did on this occasion spill water to get down to the specified level in advance of these storms taking place and floodwaters coming into the reservoirs, and again, that deals with the point that is raised in the Notice of Appeal.

9. Thirdly, it was said that advance discharges are limited to the downstream channel capacity of 150 cubic metres per second and this further evidence demonstrates that in relation to these storms, advance discharges took place at a level higher than that, even when the inflows to the reservoirs were below 150 cubic meters per second.

10. Mr. McGrath referred to the ESB's cited case of *Rye Investments v Competition Authority* [2012] IESC 52 that the touchstone of the exercise of the discretion is relevance. Counsel said that these facts in the Faulkner report assist UCC in establishing that the ESB criticisms of the judgment are not well-founded. It is submitted that if the report is not admitted, UCC will be deprived of evidence that is supportive of its opposition to ESB's appeal. It is therefore clearly in the interests of justice that the report is admitted.

11. On the question as to how the evidence of Mr. Faulkner, if permitted to be adduced, would be tested, Mr. McGrath said that there was no need to test it because it is information entirely provided by the ESB and:

> "There is very little by way of analysis in the sense of he is not expressing opinions in relation to matters. He is just simply, if you like, taking ESB data and has presented it to the court in a user friendly and legible form."

12. He said that is not expressing opinions and is not revising opinions he gave in the High Court. However, it seems to me that he is undoubtedly saying that this material is in conflict with evidence given by the ESB in the High Court.

Relevant Grounds of Appeal and Issues
13. The ESB's Notice of Appeal grounds 21(d) and 30 are as follows.

> "21. The Lee Regulations do not fail to 'deal with' floods less than the design storm."

14. Ground 21 begins:

> "The trial judge erred in law and in fact in holding that the Lee Regulations were deficient by failing to 'deal with' floods less than the design storm (paragraph. 1069)."

15. Item (d) says:

> "In the absence of a defined a priori flood alleviation standard, it is not possible for a hydroelectric operator to determine what method of operation of a dam, including spill levels and discharge sequences, is sufficient in law to provide appropriate flood reduction."

16. Ground 30 is under the heading 'Duty to Alleviate Flooding cannot be imposed without Specifying the Standard to be achieved':

> "The trial judge erred in fact and in law in imposing a duty of flood alleviation without reference to any standard of achievement in relation to such alleviation (287: 1,001, 1,004).
>
> (a) Flood alleviation is not a thing in itself, but exists only by reference to the standard for which it is intended, such as alleviation of the 50-year or 100-year flood.
>
> (b) No such standard was identified by the trial judge.
>
> (c) The trial judge erred in law in imposing a duty of flood alleviation on the Lee Scheme without any information as to how an appropriate standard for alleviation would be derived for the Lee Scheme on the basis of the relevant scientific principles and public policy."

17. ESB's issues 4 and 5 come under the heading 'Breach of Duty (Operation of Dams)'. They are as follows:

> "ESB's issue 4: if ESB has such a duty in negligence or nuisance to alleviate flooding, to what standard of operation and for what level of alleviation should the Lee Hydroelectric Scheme be operated?
>
> ESB's issue 5: if ESB has such a duty in negligence or nuisance to alleviate flooding, is the standard of operation and level of alleviation represented or capable of being represented by the restriction of water levels in the Lee Reservoirs to TTOL?"

ESB Submissions
18. Mr. David Hardiman SC for the ESB cited paragraphs 21(d) and 30 of the grounds of appeal submitting that the issue in the case and on the appeal is the nature of the duty and how that is to be identified and specified, whereas Mr. Faulkner's report deals with

the factual measurement of steps to remediate flooding, practical questions of who did what and when whereas the real issue is the duty. On the question of fact, he said that his clients had admitted, and it was a subject of debate in the case, that the dams can be operated in a different manner. "I say, now, here, formally, the dams can be operated in any way. So, this report proves nothing, nor did the same fact at the time of the trial." The dams were operated differently in 2015 to how they were operated previously. His point is not that any particular method of releasing water is impossible, but rather that the ESB does not do it in that way. The essential question is the nature of the obligation. In the circumstances, the facts of 2015 are totally irrelevant and different. How that flood was managed is a wholly different matter.

19. Counsel argued that the matter sought to be put before the court by Mr. Faulkner was something that the trial judge dealt with. It was within the field of adjudication, which put it in a category of new evidence that was excluded by the authorities, in support of which he cited the quotation from Lord Wilberforce [set out below] that was approved by the Supreme Court. The authorities hold that fresh evidence ought not to be admitted when it bears upon matters decided by the trial judge; that was the case here. Basic assumptions common to both sides had not been falsified by subsequent events, so the second category did not apply. Thirdly and finally, to refuse the evidence would not affront common sense or a sense of justice; in fact the contrary was the situation.

20. Mr. Hardiman's authorities included cases on the point that changes made subsequently in respect of an accident, practice or locus or arrangement or system are not evidence of prior fault. That is excluded as a matter of principle. Change does not prove fault previously. [See*: Hart v. Lancashire & Yorkshire Railway Co.* [1869] 21 LT 261*; Hughes v. National Coal Board* [1971] 12 KIR 419 and *Versloot Dredging BV v. HDI Gerling Industrie* [2013] EWHC 1666 (Comm.)].

The Law

21. Rule 4 (b) provides that "further evidence may be given without special leave . . . in any case as to matters which have occurred after the date of the decision from which the appeal is brought".

22. The law as set out in the authorities cited by the parties may be summarised as follows. Although the rule does not actually say it, the appeal court has a discretion as to whether to admit further evidence that is permissible under the provision. [See: *Fitzgerald v Kenny* [1994] 2 IR 383]. The essential criterion of admissibility is relevance to the appeal before the Court [See: Rye Investments Ltd v Competition Authority]. The Courts have not suggested a comprehensive rule to cover all situations. In Fitzgerald v Kenny, the Supreme Court adopted the three principles proposed by Lord Wilberforce in his speech in the House of Lords in *Mulholland v Mitchell* [1971] AC 666 at 679/80. These are first that evidence will not be admitted when it is something that the trial judge has decided. Secondly, it may be admitted if some basic assumptions common to both sides had been falsified by subsequent events, particularly if this happened by the act of the defendant. Thirdly, there is a broad undefined category when to refuse to admit the evidence "would affront common sense, or a sense of justice." Another principle which is a classic of legal logic is that changes made after an event are not in themselves evidence of a prior deficiency or failure: one must be careful to avoid the error of post hoc ergo propter hoc. This means as it seems to me that the evidence must be of events that happened after the trial; that it is relevant to the appeal; that it is not revisiting something decided at the trial; and that it is reasonable and just to admit and consider the evidence at the appeal. The primary question in this case is relevance.

23. In *Fitzgerald v. Kenny*, the plaintiff had been awarded damages for personal injuries against the defendant and had appealed against the quantum of general damages. He subsequently applied to the Supreme Court to amend his Notice of Appeal to include an appeal against the award for future loss of earnings and to introduce evidence of the fact that he had lost his job four years after the trial on medical grounds, which was a possibility that was not envisaged by either side at the trial of the action, and he also claimed that his other injuries had seriously deteriorated. The Supreme Court approved the approach adopted by Lord Wilberforce in Mulholland v Mitchell. At pages 391 of the report, O'Flaherty J. cited with approval the observations of Lord Wilberforce in his speech in the House of Lords in *Mulholland v. Mitchell* [1971] AC 666 at pp. 679 and 680 where he said:

> "I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree (Murphy [1969] 1 W.L.R. 1023, 1036). Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

24. The court held that the loss of his job by the plaintiff was a new matter that had arisen after the trial and special leave was not required, although the court had to exercise a discretion as to whether the evidence should be given. The discretion had to be exercised in a fair and just manner, although it might not be possible to lay down a general rule to cover all circumstances and each case had to be approached as requiring the exercise of the discretion in relation to its own facts. So this was a case where the plaintiff had suffered injuries and had pursued his action for compensation in respect of them. His case at trial was that he would be restricted in the activities that he could carry out, but there was no suggestion that his employment itself was in jeopardy. In the interim between the hearing of the action in the High Court and pending the plaintiff's appeal to the Supreme Court in respect of the damages award, he lost his job because of the injuries that he had sustained in the accident the subject of the claim. In those circumstances, the Supreme Court held that the plaintiff did not require special leave but, as O'Flaherty J. held at p. 392:

> "Nonetheless, this Court must apply a discretion. Like any discretion, it must be exercised in a fair and just manner though in may be impossible to lay down a general rule that will cover all circumstances. Each case must be approached as requiring the exercise of the discretion in relation to its facts. In the circumstances of this case I hold that the possibility that a serious injustice would be suffered by the plaintiff must prevail over the desirability of having finality in litigation."

25. In *Rye Investments Ltd v Competition Authority*, speaking for the Supreme Court, Clarke J. held as follows:

> "4.3 However, in *Fitzgerald v Kenny* [1994] 2 I.R. 383, Blayney J. indicated that the court nonetheless retained discretion as to whether evidence should be admitted in respect of events which occurred after the decision of the High Court. It seems to me that the reason for this is obvious. In the ordinary way, and at least in very many cases, evidence of what occurred after a decision in the High Court will not be relevant. It would not be in accordance with the requirement that appeals to this court be conducted in an orderly fashion that a party could simply place before the court irrelevant evidence not considered by the High Court and invite this court to take such evidence into account on an appeal. This court clearly retains a discretion (the rule speaks of 'full discretionary power') to exclude additional evidence, even where that evidence arises in respect of events which occurred after the High Court had concluded the case. Unless there is some realistic basis on which it can be argued that the evidence in question could be relevant to the issues which this court has to decide on appeal, then it seems clear that the evidence should be excluded."

26. Clarke J. said that the Supreme Court had an inherent jurisdiction to rule out evidence relating to facts which occurred after the High Court decision on the grounds of relevance. He observed that it was desirable, generally speaking, for the issue of additional evidence to be decided in advance of the hearing of the appeal. That was subject to exceptions which were bound to arise.

Discussion

27. The courts do not take an absolute position in regard to further evidence on appeal. Rule 4 accommodates a reasonably flexible approach. A party may make a case to the Court of Appeal for special leave to adduce further evidence in circumstances that call for that. Rule 4 (b) provides for evidence that does not require special leave but the court nevertheless has a discretion, as discussed above. It is open to a party to update the court on what has happened in matters relevant to the case and the appeal since the trial in the High Court. Post-trial events or developments relevant to the decision of the trial court and the appeal in respect of it would for example be destruction of the subject matter of the case; further encroachments by a party in defiance of an injunction; alteration of the legislative or regulatory context of the appeal that made a difference to the outcome, which could perhaps happen in a claim for an injunction. This evidence is not of that character, however. UCC invites the Court to adopt a new inquisitory role which I think is not part of its function and I do not think that it can be permitted.

28. The first and fundamental point is that this is an appeal from the decision of the High Court. A party is not entitled to make a case on appeal that he has performed further experiments or calculations and is now in a position to show that the evidence given at the trial was not correct or not fully correct or was in some other way undermined. The appeal process is a review of the decision of the High Court on well-settled principles.

29. Mr. Faulkner's report was prepared following the storms of December 2015, so in point of time it came after it came after the date of the decision in the appeal. That is a necessary but not a sufficient condition for admission of the proposed evidence. A party may not revisit the High Court case under appeal with new facts that contradict the evidence given and considered by the trial judge. The connection here is more remote: the trial judge held that liability was established as claimed by UCC and the evidence is intended to rebut the ESB case on the appeal rather than to effect any change in the findings made by the High Court.

30. It is to be adduced for the purpose of contradicting the ESB evidence and defeating the appeal.

31. Relevance is a condition of admissibility of evidence generally. If it is not relevant to any issue or connected issue in a case, it is, in principle, not admissible. Therefore, the fundamental question that has to be considered is whether Mr. Faulkner's new report is relevant to any issue in the appeal, and if so, to what issues and in what way. If it is not relevant, no further question arises and the material is excluded. If it is relevant, the court looks to the tests identified by the authorities. There can be a somewhat circular process of reasoning on the discretion because the cases in some dicta return to relevance for a criterion but I do not think any such complication requires to be addressed in this case.

32. The proposed evidence is not relevant to the Grounds of Appeal and issues as cited above because they do not refer to any matter of fact. They do not represent an assertion or contention or submission by the ESB that it is impossible to discharge water in one way or another in order to alleviate flooding. These Grounds of Appeal and issues relate to a question of legal liability. The ESB's point is that the court of trial erred in imposing liability without identifying some standard of approach or conduct that the ESB had breached. It could not be said that the defendant did something wrong without identifying the standard that it was required to meet. What was the legal basis for the judge's findings of failure on the part of the ESB? It may be that it ought to have done the thing in question, but that is not the point. In this case, the complaint is – obviously I do not know whether it is correct or incorrect – that the trial judge erred in failing to say what was the appropriate standard for the ESB to have observed. The ESB's point is that Mr. Faulkner's report that the ESB did actually alleviate flooding on some other occasion in a manner different from its conduct in the floods of 2009 is not relevant to the duty issue it raises in its grounds of appeal and issues. I accept this argument.

33. The High Court found that the ESB was liable to UCC arising out of the management of its plant and this evidence addresses that question with a view to showing that the ESB evidence at the trial was wrong because it was contradicted by the defendant's subsequent behaviour during the storms of December 2015. Admission of the evidence on the appeal would offend the first of Lord Wilberforce's principles which were approved by the Supreme Court in the authorities cited above. It would not be compatible with the appeal function of this Court. Assuming that the evidence of how the ESB dealt with the later storms is or could be relevant to the dispute between the parties, a matter to which I will refer in a moment, that is a different question from relevance to the appeal. This distinction is reflected in the principle that later discovered evidence may not be adduced to revisit matters that were decided by the trial court.

34. It also seems to me that the evidence is not even relevant to the dispute between the parties. The ESB expressly concedes the possibility of dealing with storm conditions in different ways and maintains that it made that acknowledgement clear at and during the trial in the High Court. It was not suggested in argument that this was incorrect. But if the acknowledgement were disputed, the specific statement by counsel could be cited. The fact that an appellant or respondent dealt differently with a later event of a similar or broadly similar kind is not in itself evidence of fault on the previous occasion. Other evidence would be required to establish liability or fault; the point is that the mere fact that a party behaved differently subsequently does not establish previous error. In fact, there are strong arguments based on principle why that should not be so.

35. If Mr Faulkner's report were to be admitted on the appeal, the evidence would have to be evaluated by the court in regard to its stated purpose of contradicting or undermining the ESB evidence at trial. Oral testimony including cross-examination and the entitlement to call rebutting evidence would be required or permitted. That would give rise to separate and distinct determinations by the Court of Appeal of the issues so raised, which could include exploration of any reasons for the mode of operation in 2015. That is another reason why admitting the evidence would be contraindicated.

36. In my judgment, Lord Wilberforce's categories outrule the evidence in issue. It bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate was previously been made. Basic common assumptions have not been falsified by subsequent events. And refusing to allow it would not affront common sense or a sense of justice.

37. Procedural matters do not admit of absolute positions because some new circumstance or situation will arise where justice demands that some leave or liberty be given to a party. This is not one of them.

38. Overall, it seems to me that the proposed further evidence is inadmissible on grounds of relevance, it is unnecessary, it would be very inconvenient and for no material gain in respect of doing justice in the case. It would be contrary to principle and authority to permit it. My decision, accordingly, is to exclude Mr Faulkner's report.