**THE COURT OF APPEAL**

**Record No. 2014/665**

**[Article 64 transfer]**

**Ryan P.**
**Peart J.**
**Hogan J.**

**BETWEEN/**

**STUDENT TRANSPORT SCHEME LIMITED**

**APPLICANT/APPELLANT**

**AND**

**THE MINISTER FOR EDUCATION AND SKILLS**

**RESPONDENT**

**AND**

**BUS ÉIREANN**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 18th day of December 2015**

1. The school transport system is an essential feature of rural life, as it is by this mechanism that thousands of primary and post-primary children are brought to and from school every day during the course of the school year. The scheme is an administrative one and (so far as primary school children are concerned) may be regarded as an effectuation of the State's constitutional duty as provided in Article 42.4 of the Constitution to "provide for free primary education."

2. The present scheme dates from 1967 and is operated by Bus Éireann as agents of the Minister for Education and Skills, albeit that some 90% of actual school transport services are tendered by Bus Éireann to private contractors.

3. The applicant in these proceedings is a private company which maintains that there exists a contract between the Minister and Bus Éireann for the school year 2011-2012 which ought to have been put out to tender and was not. The applicant then commenced judicial review proceedings which were first admitted to the Commercial Court. Following a lengthy exchange of affidavits, the matter was resolved adversely to the applicant by McGovern J. in a reserved judgment delivered on 23rd October 2012: see *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425.

4. The applicant then originally appealed this decision to the Supreme Court. For the purposes of that appeal the applicant first sought leave to admit certain additional evidence pursuant to the provisions of the (now superseded) Ord. 58, r. 8 RSC, which was the rule then governing the admission of new evidence in appeals from the High Court to the Supreme Court . The Supreme Court directed that the applicant identify the additional evidence sought to be admitted for the purposes of the appeal. Five such documents were identified by the applicant and the admissibility of three of these documents was agreed between the parties. There remains for consideration two disputed categories of documents. These may be termed the Farrell Grant Sparks report (2009) ("the FGS Report") and documents arising from a general review of Departmental expenditure in 2011. I will return presently to the significance of these disputed documents.

5. Having heard submissions on the remaining two documents, on 25th July 2014 the Supreme Court directed the parties to file additional composite affidavits addressing:

> (i) the question of the admissibility of the documents having regard to the test set out by the Supreme Court in *Murphy v. Minister for Defence* [1991] 2 I.R. 161;
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> (ii) the context of and/or relevance of any such new evidence to the appeal, assuming it were so admitted.

6. Following the establishment of this Court on 28th October 2014, the Chief Justice (with the concurrence of the other members of the Supreme Court) directed the transfer of this appeal to this Court in accordance with Article 64 of the Constitution.

7. Although this application is formally moved before this Court as an application to admit fresh evidence pursuant to Ord. 86A, r. 4(c), there are, in reality, two questions which arise on this motion. First, should the documents in question be admitted as fresh evidence before this Court by reference to the *Murphy* principles (*i.e.,* the question already identified by the Supreme Court)? Second, if the answer to that is in the negative, must those principles be varied in some way having regard to the fundamental principles of EU law in general and, specifically, public procurement law in particular?

8. It is, perhaps, appropriate first to describe the *Murphy* principles before proceeding to examine these questions.

**The *Murphy* principles**

9. In *Murphy* the Supreme Court set out the principles governing the admission of new evidence on appeal in the following terms:

> "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;
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> 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."

10. The three criteria are, of course, cumulative, so that any prospective party wishing to adduce additional evidence on an appeal to this Court which evidence was in existence at the time of the trial of the action in the High Court must satisfy all three criteria.

11. The first thing to note is that these principles apply indistinctly to all types of appeals. The extensive subsequent case-law shows, moreover, that these principles have been applied in a flexible manner. Thus, for example, the Supreme Court has stated that fresh evidence will be admitted if the underlying premise of the High Court "has been falsified by subsequent events" or where to do otherwise would "affront a sense of justice": see *Fitzgerald v. Kenny* [1994] 2 I.L.R.M. 8, 20, *per* Blayney J.

12. Second, it is clear that these principles serve important policy goals associated with legal certainty and the necessity for finality, not only in litigation as such, but also in respect of the process of evidence gathering. These objectives were eloquently explained by O'Donnell J. in *Emerald Meats Ltd. v. Minister for Agriculture and Food* [2012] IESC 48:

> "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."

13. It is true that Article 34.4.1 of the Constitution does not in terms specify the form which the right of appeal from the High Court to this Court should take. But it has been clear from the general structure prescribed by the Rules of the Superior Court and established practice that the right of appeal from the High Court to the Supreme Court during the period from June 1924 (following the establishment of the Supreme Court) to October 2014 *generally* took the form of an appeal based on the evidence already given and arguments heard in the High Court. Following the establishment of this Court in October 2014 the same has been true for appeals from the High Court to this Court under Article 34.4.1.

14. In this context, I use the term "generally" advisedly, because as O'Donnell J. pointed out in *Lough Swilly Shellfish Growers Co-Operative Ltd. v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227, both the law and existing practice permitted departures from this general rule, both in terms of the admission of new arguments and of new evidence. So far as new arguments are concerned, O'Donnell J. rejected the contention that the admission of new arguments was *in itself* inconsistent with the nature of the Supreme Court's (then existing) appellate jurisdiction under Article 34.4.3 of the Constitution when hearing appeals from the High Court. Much the same can be said – if only by analogy – in terms of the admission of new evidence on an appeal to this Court from the decision of the High Court under Article 34.4.1 of the Constitution.

15. Exceptions to this general structure of the right of appeal (*i.e.,* an appeal based on arguments and evidence presented to the High Court) are, in any event, expressly contemplated by the Rules of the Superior Courts. The former Ord. 58, r. 8 permitted new evidence to be admitted on an appeal from the High Court to the Supreme Court with the leave of that latter Court. The same is now true in respect of appeals from the High Court to this Court. Where the appeal is an interlocutory matter, additional evidence may be admitted as of right: see Ord. 86A, r. 4(b). The same sub-rule permits additional evidence to be given with out leave in respect of events which have post-dated the High Court judgment. In a case such as the present one, however, where the evidence was in existence at the date of the High Court hearing, a party seeking to rely upon additional evidence requires the leave of this Court. Furthermore, Ord. 86A, r. 4(c) requires that any such application must be brought "by motion of notice setting out the special grounds."

16. Just as the Supreme Court made clear in *Lough Swilly* that there is no inflexible rule which prevents an appellate Court – whether it be this Court or the Supreme Court – entertaining arguments which were not canvassed in the High Court, it is implicit in the reasoning of O'Donnell J. in that case that the jurisdiction to permit additional new arguments is confined to those cases where such is mandated in the interests of justice. The Supreme Court had previously stressed this point in *KD v. MC* [1985] I.R. 697, 701 where Finlay C.J. stated that:

> "It is a fundamental principle, *arising from the exclusively appellate jurisdiction of this Court in cases such as this that*, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice." (emphasis supplied)

17. Similar principles underpin the provisions of Ord. 86A, r. 4(c) which regulate the admission of new evidence on an appeal to this Court. Inasmuch as this sub-rule insists that the party seeking to admit new evidence which pre-dated the hearing in the High Court must demonstrate the existence of "special grounds" (*i.e.,* in effect, satisfying the Murphy criteria), a balance is thereby struck between the need to protect the orderly administration of appellate justice in the interests of finality and certainty on the one hand and the need to accommodate exceptional or unusual cases in the interests of fairness on the other.

**Whether the evidence now sought to be admitted would meet the *Murphy* criteria**

18. At the heart of the present proceedings lies the contentions advanced by the applicant that there exists a form of public contract between the Department and Bus Éireann and that such was made on or before the commencement of the 2011-2012 school year. There seems little doubt but that in the High Court the applicant argued that it was sufficient so far as the public procurement rules were concerned to demonstrate that the scheme was a contract which operated for pecuniary interest and that it was not necessary to show that there was a profit element involved in any such contractual arrangement. It was, indeed, accepted in the High Court that the scheme operated on a costs recovery basis.

19. As it happens, McGovern J. found against the applicant on the basis that the scheme was an administrative scheme which was not a "contract" for the purposes of the procurement rules as reflected in the autonomous definition of this term by Directive 2004/18/EC. It is unnecessary – indeed, it would be inappropriate – to express any view on the correctness of these conclusions which, in any event, were not the subject of formal argument before us on the hearing of the present application to admit fresh evidence. It suffices to say that these questions are essentially questions of law which go to the heart of the merits of the appellant's appeal.

**Whether the FGS report could have been discovered with reasonable diligence**
20. As I have already indicated, the present application concerns the question of whether the appellant can rely on two categories of documents, namely, the FGS report and a review of Departmental expenditure (including school transport) dating from September 2011.

21. So far as the FGS report is concerned it is necessary to observe that this issue first arose in the course of the discovery process before the High Court. The appellant sought discovery on a voluntary basis in February 2012. The respondent replied in March 2012 taking issue with the relevance and necessity of certain of the documentation sought. The respondent nonetheless agreed to make discovery of the following two categories of documents:

> "All documents in the possession of the respondent relating to any financial agreement in respect of the School Transport Scheme between the respondent and Bus Éireann for the academic year 2011/2012.
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> All documents in the possession of the respondent relating to any change to the functions of the School Transport Scheme as described at paragraph 2.6 of the School Transport – Value for Money Review of the School Transport Scheme published on March 2011 for the academic year 2011/2012."

22. The appellant's solicitors originally appeared to accept the additional discovery on these terms. On 2nd May 2012, however, the appellant sought further discovery, including access to the FGS report. On the following day, however, the Chief State Solicitor's Office wrote to the appellant's solicitors to say that they did not accept that the FGS report came within the scope of the voluntary discovery which had been offered. The letter writer continued:

> "The Farrell Grant Sparks is a report dated October 2009 and constituted a review of costs relating to the operation of the School Transport Scheme. As such it falls within neither category of discovery agreed. Insofar as you are advancing a fresh category of discovery, no indication is given of the relevant or necessity of discovery of this document for the purposes of the proceedings."

23. The letter writer continued by stating that it was open to the appellant to seek further and better discovery by making an application to the High Court for this purpose. As it happens, Kelly J. had already given the appellants liberty to bring a motion for this purpose on 21st May 2012. A few days later on 11th May 2012 the appellant's solicitors responded to the effect that it had instructions not to bring any further application for discovery.

24. It is clear, therefore, that the applicant was aware of the existence of the FGS report. Not only was its existence disclosed to it, but the appellant had requested voluntary discovery of this report. It is clear that, on any view, this document could have been obtained with reasonable diligence: all that was in principle necessary for this purpose was for the appellant to issue a motion for discovery for 21st May 2012 seeking this document. For its own reasons it elected not to do so.

25. The appellant contends that the statement contained in the Chief State Solicitor's Office letter of 3rd May 2012 was apt to mislead. In particular, it submits that the applicant could not have known from this description that the FGS report would deal with questions of costs, including indirect costs and actual or notional profit elements.

26. For my part, I cannot agree. The letter simply stated that the FGS report dealt with a "review of costs associated with the operation of the scheme", as indeed it did. It does not require a great deal of imagination to assume that any review of costs of the school transport scheme from a firm of reputable accountants such as FGS would examine the entire costs of the operation, including the question of any ascribed or notional profit element. The issue of any misleading description does not arise. The applicant was fully put on notice of the existence of the FGS report in a very fair manner. It was up to it to pursue the question of discovery and it elected for its own reasons not to do so.

27. In these circumstances, the appellant must be deemed to have failed to satisfy the first limb of the Murphy test inasmuch as the FGS report was a document which was in existence at the time of the trial and which it could have obtained with reasonable diligence. In these circumstances given that this application failed the first limb it is unnecessary to examine the other requirements of the *Murphy* test.

**Whether the Department's Review of Current Expenditure could have been obtained with reasonable diligence?**
28. The other document in dispute is entitled *Department of Education and Skills: Comprehensive Review of Current Expenditure*. Part 2.4 of this Review deals with the school transport system. It is accepted that this document dates from September 2011 and thus ante-dated the decision of the High Court.

29. It is also not disputed that the document was published on the Department's website in December 2011, some months before the discovery process took place in February to May 2012. On any view, given that this document was already in the public domain several months before the discovery process was concluded, it is clear that this document could have been obtained with reasonable diligence on the part of the appellant.

30. Just as with the FGS report, given that the appellant cannot satisfy the first of the *Murphy* criteria, it follows accordingly that the document should not be admitted as additional evidence for the purposes of the appeal to this Court.

**Whether the *Murphy* principles must be varied in order to meet the requirements of either EU law in general or the requirements of public procurements in particular**
31. The appellant contends that even if it cannot satisfy the requirements of the *Murphy* criteria, given that the present appeal engages EU law and, specifically, public procurement law, these principles must accordingly be mitigated or varied, so that a less stringent test for the admission of new evidence on appeal should apply in public procurement cases. While EU law recognises the primacy of the autonomy of national procedural law, it is equally clear that in prescribing their own procedural law, Member States must respect and uphold the twin principles of equivalence and effectiveness.

32. The principle of equivalence requires that the national rule in question be applied indistinctly, irrespective of whether the infringement alleged is of European Union law or national law, where the purpose and cause of action are similar: see*, e.g.,* Case C-326/96 *Levez* [1998] E.C.R. I-7835, para. 41; Case C-78/98 *Preston and Others* [2000] E.C.R. I-3201, para. 55; and *Pontin* EU:C:2009: 666 [2009] ECR I-10467, para. 45). In the present case, it is clear that the *Murphy* rules apply indistinctly to all categories of appeals so far as the admission of new evidence is concerned. Nor can it be suggested that the Murphy rules indirectly penalise or affect litigants seeking to assert rights derived from EU law. It follows, therefore, that there can be no question of any infringement of the principle of equivalence.

33. So far as the principle of effectiveness is concerned, this requires that national procedural rules must not "render practically impossible or excessively difficult the exercise of rights conferred by European Union law" see, e.g., Case C-432/05 *Unibet* [2007] E.C.R. I-2271, para. 43; Joined Cases C-222/05 to C-225/05 *van der Weerd* [2007] E.C.R. I-4233, para. 28 and *Bulicke* EU:C: 2010:418 [2010] E.C.R. I- 7003 at par. 35. As the Court of Justice explained in *Bulicke*:

> "As regards application of the principle of effectiveness, the Court has held that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14; *Unibet,* paragraph 54; Case C-40/08 *Asturcom Telecomunicaciones* [2009] E.C.R. I-9579, paragraph 39; and *Pontin*, paragraph 47)."

34. This analysis is particularly pertinent so far as the present application is concerned. As we have already seen, 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. As the appellate structure provided for by Article 34.4.1 of the Constitution tacitly assumes (even if it does not actually so require or specify) that the Court of Appeal will *generally* be pronouncing on the correctness of the High Court decision by reference to the materials available to that Court as part of the decision making process, the *Murphy* principles promote these objectives by *generally* excluding the admission on appeal for the first time of evidence which was in existence at the time of the hearing but which was not made available to the High Court, save for just cause.

35. 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.

36. Nor can it realistically be said that the *Murphy* rules makes the exercise of EU rights practically impossible or excessively difficult. All that is asked of a party seeking to have such evidence admitted is to show that the evidence upon which they now wish to rely on appeal was not available with *reasonable diligence* at the court of trial. Thus, for example, the key requirement of the *Murphy* test is satisfied where the opponent has effectively suppressed evidence or where, for example, the existence of the evidence in question could only realistically have been known by the opposing party: see, *e.g., Inland Fisheries Board v. O'Baoill* [2015] IESC 45.

37. Given the flexibility that is inherent in the application of these rules and, specifically, the requirement that the applicant seeking to admit such evidence need only demonstrate that he or she exercised reasonable *diligence* in procuring such evidence, I would reject the argument that the *Murphy* rules have made the exercise of EU rights practically impossible or excessively difficult. There are, after all, many instances – not least on the facts of *Murphy* itself where the Court held that a circular internal to the defendant Defence Forces of which the plaintiff was unaware could not have been obtained with reasonable diligence – where appellants will be able to satisfy these tests.

38. The *Murphy* rules accordingly stand in complete contrast to cases such as *Hi* EU:C: 2002: 379, para. 63 where the Court of Justice indicated that the review power in public procurement matters given by the transposing legislation of the competent national courts could not be confined to the question of whether the contracting authority acted arbitrarily, but must extend to a review of the legality of the decision. Formal proof that a contracting authority acted *arbitrarily* in a procurement case – as distinct from proof that the authority acted unlawfully – would, of course, be all but impossible, save in the most exceptional of cases.

39. Nor is there any reason for any different conclusion so far as the public procurement rules in particular are concerned, since the Court of Justice has repeatedly stated that in this sphere as well the twin principles of equivalence and effectiveness remain the dominant considerations in any assessment as to whether national procedural rules are inconsistent with general principles of public procurement law. As the Court of Justice stated in EU:C; 2014: 440 *Croce Amica* at para. 45:

> "In the absence of specific EU legislation in the field, the detailed provisions governing judicial review must be established by national procedural rules, subject to compliance with the principles of equivalence and effectiveness…"

40. There is accordingly no room for doubt that the procedural autonomy of Member States is thereby acknowledged by the Court of Justice, even in procurement cases, subject only to the twin requirements of the principles of equivalence and effectiveness.

41. It is for these reasons that I would reject the contention that *Murphy* principles must be changed or altered in some way to accommodate the requirements of either EU law in general or EU public procurement rules in particular.

**Conclusions**

42. Summing up, therefore, I would refuse the applicant permission to admit the additional categories of evidence sought pursuant to Ord. 86A, r. 4(c) for the following reasons:

43. First, the documents in question – the FGS report (2009) and the Department of Education's Review of Departmental expenditure (2011) – could both have been obtained with reasonable diligence on the part of the applicant. As such, as the applicant cannot satisfy the first of the three cumulative requirements specified in the *Murphy* criteria, it follows that the documents in question cannot be admitted as fresh evidence for the purposes of an appeal to this Court.

44. Second, the *Murphy* criteria fulfil important objectives in relation to legal certainty and finality in relation to evidence taking at the court of trial and do not infringe general principles of EU law. The criteria apply indistinctly to all types and categories of appeal, so there is no question of breaching the EU principle of equivalence. The *Murphy* criteria are, moreover, applied flexibly and simply require an appellant to show in principle that the fresh evidence it is sought to adduce could not with reasonable diligence have been obtained prior to the hearing in the High Court. As such, these criteria do not infringe the principle of effectiveness, since they do not make the exercise of EU rights unduly difficult or impossible.

45. Third, it follows, therefore, that the Murphy principles are not in conflict with the requirements of equivalence and effectiveness, whether as viewed in relation to the principles of EU law generally or with reference to the principles of public procurement law in particular.