[2018] IEHC 282

THE HIGH COURT

2017 No. 233 CA

Between:

WICKLOW COUNTY COUNCIL

Plaintiff/Appellant

– and –

ROY BEATTIE

Defendant/Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 17th May, 2018.

1. Mr Beattie seeks to appeal the judgment and orders of the Circuit Court in an application brought by Wicklow County Council pursuant to s.160 of the Planning and Development Act 2000, heard over 29th and 30th June, 2017, and adjudicated upon on 30th June. In the within application Mr Beattie seeks an order under O.61, r.8 of the Rules of the Superior Courts 1986, as amended and/or the inherent jurisdiction of the court for the admission of fresh evidence on appeal.

2. To understand the rationale for the within application it is necessary briefly to turn to the history of these proceedings before the Circuit Court:

> – at the call-over of the Circuit Court list on 29th June, Mr Beattie instructed that application be made for the adjournment of the hearing in order that a replying affidavit (to be sworn by Mr Taylor, planning advisor to Mr Beattie) might be filed to an unsworn, unfiled affidavit which had been received the previous day (and which, presumably, it was intended to have sworn and then filed). The unsworn affidavit received on the 28th contained Wicklow County Council's reply to an affidavit of Mr Beattie that was sworn and filed on 23rd June, 2017.
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> – at the afternoon session of the Circuit Court on 29th June, 2017, (i) initially the learned Circuit Court judge admitted the (by now sworn) affidavit of Wicklow County Council and then adjourned proceedings to end-July, (ii) following further submissions by counsel for the Council, the said affidavit, at the election of the Council, was withdrawn, the learned Circuit Court judge then ordering that the proceedings should proceed forthwith as the necessity for an adjournment was now gone.
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> – in the course of his submissions, counsel for the Council, over the objections of counsel for Mr Beattie, made various submissions concerning facts contained in the withdrawn affidavit.
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> – the Circuit Court gave its judgment on 30th June. That judgment makes reference to certain of the facts contained in the withdrawn affidavit.

3. Counsel for Mr Beattie contends that the fresh affidavit evidence which it is sought to submit on appeal (being, in effect, the affidavit of Mr Taylor that would have been sworn up for the July 2017 hearing of the Circuit Court proceedings, had they not proceeded in June 2017 on the basis described above) is evidence that would have been in existence at the time of the hearing of the Circuit Court proceedings had they been adjourned as originally intended. He also contends that had that affidavit evidence been before the Circuit Court it would most probably have had an important, if not decisive influence in his client's favour. A copy of the proposed affidavit has been exhibited before this Court.

4. The manner in which the type of discretion enjoyed by the court in the context of the within application falls to be exercised has been considered on a number of occasions by the Supreme Court, most notably perhaps in *Lynagh v. Mackin* [1970] IR 180, *Murphy v. Minister for Defence* [1991] 2 IR 161, and *Fitzgerald v. Kenny* [1994] 2 IR 383. However, when one has regard to the facts underpinning those cases, it does not appear to the court that any of them are 'on point':

> – in *Lynagh*, the evidence of the silo workers could have been obtained before the initial trial but just was not obtained. As Ó'Dálaigh C.J. observes, at 185, "*The plaintiff has not made the case that this evidence was hard to come by: on the contrary, the position would appear to be simply this—no inquiries whatever were directed by the plaintiff towards obtaining this evidence*". In other words Ms Lynagh just wanted to do a better job on appeal evidence-wise than she had done at trial in circumstances where there was no reason why the evidence could not have been procured in advance of the trial.
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> – in *Murphy*, the case was confronted with a classic example of evidence that had existed at the time of the trial (the army circular), of which the appellant and his advisors had no knowledge and where there was no want of diligence in failing to ask for same.
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> – in *Fitzgerald*, the appellant sought to amend his notice of appeal so as to refer to, and admit fresh evidence concerning, events that had occurred post-trial.

5. As can be seen the facts at play in the context of the within application are notably different from those at play in the just-mentioned cases. This is not a case:

> – as in *Lynagh*, where evidence was not obtained for no other reason than it just was not obtained;
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> – as in *Murphy*, where evidence was in existence and through no fault of the appellant was not sought;
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> – as in *Fitzgerald*, where it is sought to admit evidence of post-trial events.

6. This is a case where:

> (i) the appellant sought time of the trial court to create a replying affidavit;

(ii) the trial judge was satisfied to grant the time sought;

(iii) the need for that replying affidavit was obviated when the affidavit to which reply was to be made was withdrawn;

(iv) the appellant then found himself confronted with a situation in which the very factual points to which he had intended to direct the replying affidavit entered into the discussion by way of submission; and

(v) the said factual points demonstrably impacted on the end-judgment of the Circuit Court.

7. In the very particular circumstances presenting, the court recalls the following observation of Lord Wilberforce in *Mulholland v. Mitchell* [1971] AC 666, 679 (quoted with approval by O'Flaherty and Blayney JJ. in *Fitzgerald*), which observation was itself made in part by reference to an observation of Lord Pearson in *Murphy v. Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023. Admittedly both *Mulholland* and *Stone-Wallwork* concerned the admission of evidence concerning post-trial events; even so, the observations of Lord Wilberforce, it seems to the court, have a resonance within the context of the within proceedings. Per Lord Wilberforce:

> *"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….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."*

8. It seems to the court that it is that "*sense of justice*" to which Lord Wilberforce refers that points the court most clearly, when it has regard to the facts at play in the within application, to it being proper and correct to accede to the application now made. The court will therefore make the order sought.