

SUPREME COURT

Ambiorix Limited, Earlsfort Centre (Developments), Ryde Developments (Ireland) Limited And Sharnbrook Limited v Minister For The Environment, Minister For Finance, Ireland And The Attorney-General And Irish Life Assurance Plc

1991 No 163

23 July 1991

FINLAY CJ:

This is an appeal brought by the first four defendants against the order of the High Court made the 10 May, 1991, by Lardner J disallowing a claim of privilege made by the defendants upon an order for further and better discovery in respect of certain scheduled documents.

The real issue which arose in the case is contained in ground 6 of the grounds of appeal inserted as an additional ground in an amended notice of appeal. That ground reads as follows:-

"The learned judge misdirected himself in ordering the discovery and inspection of documents which are memoranda for Government and other Cabinet documents the discovery of which is contrary to the necessary requirements of confidentiality of Cabinet, Government and Ministerial communications and discussions and which could prejudice the confidentiality and the collective responsibility of the Government."

In effect, the issue thus raised had not been argued before Lardner J in the High Court by reason of the fact that the contentions in support of this ground sought to be made on behalf of the defendants included a submission that this court should reconsider its decision in *Murphy v Corporation of Dublin* [1972] IR 215 and should conclude that the principles laid down in that decision were in part, at least, in error.

Submissions of the defendants

On behalf of the defendants it was submitted that a class or category of documents consisting of documents emanating at the level of not below assistant secretary in the public service and being documents for the ultimate consideration of Ministers of the Government or of the Government itself, relating to the formulation of policy or proposals for

legislation, were absolutely exempt from production and should not be examined by a judge before privilege was granted to them, unless the judge was dissatisfied with the accuracy of the description of the document.

The reasons put forward for the making of such a claim of privilege on behalf of the executive organ of the Government were contained in the affidavit of John Hurley of the Department of the Taoiseach, at para 4 thereof, in the following terms:-

"I object to producing these documents on the grounds that confidential matters relating to the Government and the Cabinet and communications of this nature, together with communications made between the concerned public servants, should be protected from disclosure in the interests of good government and the efficient and proper running of the public service. The disclosure of such documents would tend to hinder the free communication necessary for such government and the proper running of the public service. I believe that to refuse privilege to documents of this nature would be contrary to the public interest as the proper working of the Government and state departments would be affected, as officials might tend where possible to make their comments or suggestions or recommendations orally rather than in written format, and such a tendency would not be either in the interest of the public or in the interest of the efficiency of the public service."

As an alternative submission, counsel on behalf of the defendants contended that even if the Court were to reject the submission thus made it should conclude that the proper principle applicable to documents of this class, when privilege was claimed for them, was that the onus would be on the party seeking their production, and would be a heavy onus of establishing exceptional circumstances before the privilege claimed on behalf of the Executive should be disallowed. To a large extent, the submissions made were based on the development of the law relating to public interest exemption or privilege in England, following upon the decision in *Conway v Rimmer* [1968] AC 910. Particular reliance was placed on the decision in *Burmah Oil v The Bank of England* [1980] AC 1090 and also on *Evans v The Chief Constable of Surrey* [1989] 2 All ER 236.

The plaintiffs' claim in the action

The plaintiffs in the action claim a declaration that the decision and order made by the first defendant with the consent of the second defendant, pursuant to the provisions of s 6, sub-s 2 of the Urban Renewal Act, 1986, in so far as it purports to declare the George's Quay site owned by the fifth defendant and situate at George's Quay in the city of Dublin as an area to be a designated area for the purposes of the Act of 1986 is ultra vires the powers of the first and second defendants and is contrary to the purposes of the said section and of the Act of 1986 is null and void and of no effect.

Amongst the grounds on which the plaintiffs seek this relief are grounds that the decision was reached on criteria which are inappropriate or outside the objects and functions of the

Act of 1986 and on material which was not appropriate or without sufficient material.

Quite clearly, and there is no dispute about this in the appeal before us, memoranda and other documents coming into existence for the purpose of enabling the first and second defendants and indeed the Government, to reach decisions with regard to the exercise by the first defendant with the concurrence of the second defendant of his powers under s 6, sub-s 2 of the Act of 1986 are clearly relevant to the issues which will arise on the hearing of the action.

The law

I have carefully considered the submission that this Court should resile from the decision formerly reached by it in *Murphy v Dublin Corporation* [1972] IR 215. I have come to the conclusion that it should not, and that that decision correctly states the law in Ireland concerning this question of a claim of "privilege" to exempt certain documents from production in litigation on the basis of the public interest.

It appears to me that the fundamental flaw in the submission made on behalf of the defendants that a proper development of the law in this country concerning this question of privilege by the Executive in regard to documents dealing with Government decisions should follow a line of authority which appears to have developed in recent times in the English courts on that same issue, is that it ignores the fundamental constitutional origin of the decision of this Court in *Murphy v Dublin Corporation* [1972] IR 215 which, of course, has no application to the consideration of English courts dealing with the same question of privilege.

It appears to me appropriate that I should re-state by way of summary, but not by way of expansion or qualification, what appear to me to be the clear principles laid down by this Court in the judgment of Walsh J in *Murphy v Corporation of Dublin* [1972] IR 215 and which, in my view, are a correct statement of the law on this topic. They can be summarised as follows.

1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.
2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.
3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide

which public interest shall prevail.

4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.

5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision.

These principles lead to certain practical conclusions which are applicable to a claim of privilege by the Executive of the nature which arises in this case, and they are as follows:-

(a) The Executive cannot prevent the judicial power from examining documents which are relevant to an issue in a civil trial for the purpose of deciding whether they must be produced.

(b) There is no obligation on the judicial power to examine any particular document before deciding that it is exempt from production, and it can and will in many instances uphold a claim of privilege in respect of a document merely on the basis of a description of its nature and contents which it (the judicial power) accepts.

(c) There cannot, accordingly, be a generally applicable class or category of documents exempted from production by reason of the rank in the public service of the person creating them, or of the position of the individual or body intended to use them.

In the judgment of Walsh J in *Murphy v Corporation of Dublin* [1972] IR 215 reference is made to the possible existence of documents the mere disclosure as distinct from production of which could be privileged, where, at p 234 of the report, he states as follows:-

"Again, taking the example of the safety of the State, it might well be that the court would be satisfied to accept the opinion of the appropriate member of the executive or of the head of the Government as sufficient evidence of the fact upon a claim being made for non-disclosure or non-production, as the case may be, on that ground. I have referred to non-disclosure and non-production as distinct matters because in certain circumstances the very disclosure of the existence of a document, apart altogether from the question of its production, could in itself be a danger to the security of the State. As this is not such a case it is unnecessary to deal further with this aspect of public interest."

I would emphasise that the facts of the instant case on the submissions of counsel for the defendants quite clearly do not introduce any such question of safety of the State, such as is dealt with in this passage, and I would, as did Walsh J, prefer to leave over further

consideration of that particular issue until it arises for decision in a case.

As I have indicated, the justification for the principles and the practical application of the principles which I have just outlined in this judgment, derives from the clear constitutional position as between the different organs of government. It is not, therefore, necessary to justify it in relation to any particular consequence which any other approach might have, but I do accept as an illustration of the necessity of the application of this principle the contention made on behalf of the plaintiff that if a privilege of the nature and in the manner contended for on behalf of the defendants in this case were accepted as a general standard or proposition by the Court, then one of the consequences of so doing would be that the right of any individual citizen to challenge a decision made by the Government or by a Minister of the Government, on the basis that it was made without material which supported it or having regard to the consideration of material which was wholly irrelevant to it could never even be mounted. This Court in *O'Keefe v An Bord Pleanala* [1992] ILRM 237 in particular, the judgment of McCarthy J, pointed out that the capacity of an individual to challenge the decision of a non-judicial person or body in certain types of cases depended on his right, in the procedures of the courts, to avail of the procedures of interrogatories and discovery of documents.

In the High Court, having regard to the course of the argument in which the defendants submit that they could not ask the High Court judge to depart from the principles laid down in *Murphy v Corporation of Dublin* [1972] IR 215 the learned High Court judge examined all the documents. No serious challenge has been made to his conclusion that if they were not in a protected class, but had to be looked at on their individual contents, that the public interest involved in their production for the purposes of the litigation before the court, clearly outweighed any harm that might arise to the executive organ of the Government by the disclosure of them. It is not suggested that consideration of the individual documents as distinct from a consideration of the nature and character of the documents involved could lead to any other conclusion.

One other matter which arose during the course of the hearing and was touched on without being fully argued was a particular category of documents which constituted representations made to government departments by third parties seeking to have their properties included within the designated areas. Mr Matthews, principal officer with the Department of the Environment in the course of his affidavit of the 2 May, 1991, stated at para 8 that he believed that all of those documents were written to the Department by the various writers in the belief that their correspondence would be treated in confidence. He then continued: -"\$state of their business, for example their solvency, detail of discussions and communications with the planning authorities, contractual matters with their parties, both companies and banks."

During the course of the hearing on the appeal it was pointed out that since the plaintiffs were development companies information with regard to the financial affairs and

contractual obligations, including obligations to banks, of the owners of sites in the city could be of very considerable commercial value to them.

I am satisfied these communications are not the subject matter of any privilege which can be properly asserted on behalf of the defendants in this case. There is not any public interest, in my view, in keeping immune from production communications between citizens and departments of the government seeking a particular decision which would favour their interest.

As a matter of general principle, of course, a party obtaining the production of documents by discovery in an action is prohibited by law from making any use of any description of such documents or the information contained in them otherwise than for the purpose of the action. To go outside that prohibition is to commit contempt of court.

Furthermore, the Court has an inherent jurisdiction, I am satisfied, to take such steps as are necessary to regulate the production of documents so as to prohibit any infringement of this restriction.

In these circumstances, I am satisfied that either by a method of editing the documents which are referred to in this section of Mr Matthews' affidavit or by restricting their inspection to lawyers engaged on behalf of the plaintiffs who would give to the Court an undertaking that they would not reveal their contents to their clients, except with special leave of the court, the commercial and financial interests of the parties who made these representations should be protected.

I would hear counsel for the plaintiffs and the defendants further on this particular issue in the hope that a simple formula could be devised between them which would give to the plaintiffs adequate information concerning the material matters contained in this particular collection of documents, and would give to the persons who wrote to the Department adequate protection of their commercial and financial interests.

Subject to the resolution of that problem, I would disallow the appeal.

HEDERMAN J:

I agree.

McCARTHY J:

I agree that this appeal must be dismissed.

Order 31 Rule 12 of the Rules of the Superior Courts provides for an Order "directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein." Such an Order has been made; it is not contested that there are many documents in the possession of the several Defendants and the Taoiseach which are related to the matters in question. Since the decision in *Murphy v Dublin Corporation* [1972] IR 215 there have been a series of cases in which the procedure laid down in *Murphy v Dublin Corporation* [1972] IR 215 has been followed. These are the cases to which reference was made during the argument;

Folens v Minister for Education (1981) ILRM 21.

Hunt v Roscommon Vocational Education Committee (unreported) -- High Court, 1.5.1981.

Incorporated Law Society v Minister for Justice (1987) ILRM 42.

Private Motorists Provident Society v PMPA -- unreported -- High Court -- 31.10.1989.

Ahern v Minister for Industry and Commerce (1990) 1 IR 55.

But there may be others. They lend an empirical answer to the statements made on affidavits by several deponents that "the disclosure of such documents would tend to hinder the free communication necessary for such Government for the proper running of the public service." The decision in *Duncan v Cammell, Laird and Company Limited* [1942] AC 624 was adopted as a correct statement of the law in this jurisdiction in *Attorney-General v Simpson* [1959] IR 105 and applied in the High Court in *O'Leary v Minister for Industry and Commerce and others* [1966] IR 676 where this Court did not find it necessary to proceed to a close examination of the case law.

In *Conway v Rimmer* [1967] 2 All ER 1260 the Court of Appeal in England, following *Duncan v Cammell Laird and Company Limited* [1942] AC 624 upheld the claim to privilege. In a prescient article in 1 *Irish Jurist* [1967] 88 M Russell foresaw "that the end of the road is in sight for a long-recognised privilege of the State." He quoted the memorable observation of O'Dalaigh CJ in *AN STAT (Quinn) v Ryan Agus Duine Eile* [1965] IR 70: "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows that no-one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires." Echoing these words, Walsh J in *Murphy v Dublin Corporation* [1972] IR 215 at 237 said "In my view, the principles enunciated in support of our law being in accord with *Duncan v Cammell-Laird and Company* [1942] AC 624 were based on considerations which are inconsistent with

the supremacy of the judicial power and of the Constitution in the administration of justice." Counsel for the Taoiseach and the Ministers in analysing the development of this aspect of the law in England since the final decision in *Conway v Rimmer* [1967] 2 All ER 1260 has submitted that in the cases of "public interest immunity" the onus is on the Plaintiff seeking discovery to displace the immunity. *Burmah v Bank of England* [1979] 2 All ER 461 [1980] AC 1040. *Aer Canada v Secretary of State* [1983] 1 All ER. *Evans v Chief Constable of Surrey* [1989] 2 All ER 594. Whatever be the precise reason for the decision in *Conway v Rimmer* [1967] 2 All ER 1260 it is clear beyond question that the decision in *Murphy* was based upon the separation of powers and the exclusive role of the judiciary in the administration of justice as guaranteed by the Constitution. In *Murphy v Dublin Corporation* [1972] IR 215 at 235 Walsh J said -- "In my view, once the Court is satisfied that the document is relevant, the burden of satisfying the Court that a particular document ought not to be produced lies upon the party, or the person, who makes such a claim." This was echoed in the Court of Criminal Appeal in *Re O'Kelly* [108 ILTR 97] where Walsh J, delivering the judgment of the Court, said -- "As was pointed out by the Supreme Court in *Murphy v The Dublin Corporation and the Minister for Local Government* [1972] IR 215 it would be impossible for the judicial power under the Constitution in the proper exercise of its functions to permit any other body or power to decide for it whether or not certain evidence would be disclosed or produced. In the last resort the decision lies with the Courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses and the production of evidence and, a fortiori, the answering of questions by witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent.

As was pointed out in that case, there may be occasions when different aspects of the public interests may require a resolution of a conflict of interest which may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the Courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege." This increased freedom of information can be identified in other jurisdictions in cases cited during the hearing of this appeal.

Lanyon Property Limited v Commonwealth (1972) 129 CLR 650.

Sankey v Whitlam 21 ALR 505.

Australian National Airlines Commission v Commonwealth (1975) 132 CLR 582.

United States v Nixon (1973) 418 US.

In my judgment, to depart, as we are invited to do, from the reasoning and the decision in *Murphy's* case would be to lessen or impair judicial sovereignty in the administration of

justice. The Constitution guarantees fair procedures in the administration of justice; discovery of documents is part of those procedures. The Plaintiffs here allege a case of unfair competition, contending that tax concessions made to the last named Defendant were based on invalid considerations, the exact nature of which must be contained in the documents for which privilege is claimed. Yet, it is said that the Plaintiffs are to be denied inspection of at least some of these documents; they would thus be precluded from identifying the strength of their case; it is accurately described as a "Catch 22" situation.

I reject the challenge made to the decision in Murphy; in particular I reject the claim that documents may be withheld from production simply because they belong to a particular class.

O'FLAHERTY J:

I agree.

EGAN J:

I also agree.