The High Court

Commercial

Record No. 2010/1353P

Between

Joseph Condron

plaintiff

and

ACC Bank plc trading as ACC Bank, Harmony Row Financial Services Limited trading as Financial Engineering and Financial Engineering Network

defendants

The High Court

Commercial

Record No. 2010/2473P

Between

Patrick Cuttle

plaintiff

and

ACC Bank plc trading as ACC Bank

defendant

Judgment of Mr. Justice Charleton delivered on the 11th day of October 2012

1. These cases are listed for trial in November 2012. They are optimistically expected to have a duration of six weeks. The cases are being tried together with three other actions as test cases in the sense that some 200 other plaintiffs have agreed that the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings. All of the cases arise out of the sale by ACC Bank of a product known as the "Solid World Bond 5". This was an investment in stocks that the plaintiffs all claim was marketed in an attractive manner, but without proper warning as to risk and, as regards most of them, on a borrow to invest basis.

Issue

2. This motion is brought by ACC Bank to seek an order that the plaintiffs be prohibited from calling a handful of extra witnesses beyond those whose witness statements have already been served. Since the claim is made in misrepresentation and breach of contract, crucial to the outcome is what was said, and notified in writing, to each individual investor by each of the bank officials who set up their investment in the product. In that regard, my understanding is that witnesses to this area of fact will constitute each of the five plaintiffs with one other witness called in addition. The defendant bank had different bank officials dealing with each plaintiff and their evidence will be required. In addition the defendant bank is calling evidence as to how this product was to be set up, marketed, what relevant instructions were given to the bank officials and how training was conducted. All of these witnesses will testify as to fact, but they are not alone. Expert witnesses will make up the bulk of the case: ten or more of these; some for the plaintiffs, some for the defendant bank, each saying the same thing in different ways or contradicting each other in their approach and in their conclusion.

3. There are four extra witnesses that the plaintiffs wish to call. These witnesses would be plaintiffs in that number of the separate actions that depend on the outcome of this litigation had their case been tried individually. Their complaints regarding the defendant bank are similar to those of the plaintiffs in the test cases. A list of issues has helpfully been prepared for the court of trial. One of the paragraphs puts this before the court: "Whether and if so to what extent was the product marketed and/or sold by ACC [Bank] as a borrow to invest product and the implications, if any, of same".

4. Keenly contested at the trial will apparently be the issue of what was said to investors by officials of the defendant bank on the issue of borrowing money to purchase the product. Each plaintiff will have their own evidence to give as to their encounters with the officials of the defendant bank. Each bank official will no doubt give contradicting evidence. As noted, the bank is entitled, in addition, and intends, to call those who were not involved in these encounters on the basis that it is logically probative of what their employees may have done in interacting with customers as to how they were trained or instructed to sell this product. It is also logically probative on the issue of training and instruction as to whether there was any discernible pattern in the approach of the bank officials to others, apart from the plaintiffs, to whom the products were sold. To put it another way, the defendant bank seems to be saying that no one could have been misled as their approach was not misleading; and the customers may be saying that they were all misled, whether they be plaintiffs in the test cases or others who bought the defendant bank's product, because broadly similar misrepresentations were made to them. It is said that any evidence from other investors apart from that of each individual

plaintiff will amount to inadmissible similar fact evidence.

Similar fact issues

5. That inventive argument is not correct. The doctrine of similar fact evidence developed in the course of criminal cases in response to the need to control the prejudice that naturally arises in the mind of a jury that has to be told about the commission by the accused of offences other than those on which a defendant stands trial. That evidence might be, for instance, that he had gained a particular skill in consequence of a prior incarceration; the classic example being *The People (A.G.) v. Bernard Kirwan* [1943] 1 I.R. 279, where the accused was tried for murder and the body of the victim had been cut up and disposed of with professional skill. Evidence was admitted that the accused had previously been imprisoned and whilst in jail had been trained, by way of rehabilitation for life after release, as a butcher.

6. Similarity of allegation and the cross-corroboration of witnesses often arise from the actions of paedophiles. Sexual cases are notorious for the repetition of offences against a number of vulnerable children and adolescents. If victims have similar stories to tell, the account of one is capable of supporting the account of another. Severing an indictment of several offences against a number of complainants can be wrong as it disguises that true picture from a jury. Trying civil cases of alleged assault on a number of plaintiffs separately would equally carry the same danger. Because of the danger of prejudicial effect, the evidence of offences on other occasions than that at trial must be stronger than would ordinarily render it admissible. In the past, courts looked for a striking similarity or trademark in the commission of offences; but this is not necessary even in criminal cases. To be admitted, evidence of the commission of offences other than those at trial has to be relevant and has to have a probative value which outweighs any prejudicial effect. Evidence may be especially relevant if it rebuts a defence otherwise open to an accused. Evidence may be called that the accused had the skill to butcher a human corpse because otherwise his defence would be that he lacked this competence. Evidence may be called that the bodies of children were found in the gardens of places where the accused lived prior to the house where it is claimed that he murdered a child victim, because the lack of likelihood of the circumstances being coincidental and accidental deaths renders logical the claim by the prosecution that the death of the victim could not have occurred by accident.

7. In Scottish criminal law, no one can be convicted on uncorroborated evidence. Where a number of young ladies claimed to have been molested in a drapery shop by the owner, each allegation was held on appeal before the Court of Session to support that of the others; *Moorov v. H.M. Advocate* (1930) J.C. 68. It was later argued before the Senators that this approach was confined to sexual violence cases and that the admissibility of cross-corroborative evidence should be circumscribed in favour of some variant of the calling card or striking similarity test. That was rejected in Scottish law. Usefully, in *Hughes v. H.M. Advocate* 2008 S.C.C.R. 399, Lord Eassie noted at para. 2:

> It thus appears that, notwithstanding the approach adopted in *Moorov*, the law has developed to the extent that identity of the crimes charged is not a prerequisite for the application of the doctrine associated with that case. It was not suggested in this case that *McMahon* or *Carpenter* or *Smith* was wrong as being inconsistent with the Full Bench decision in *Moorov.* What is now critical, it appears, is, apart from similarity of time, place and circumstance, "similarity of the conduct described in the evidence". The rule is, after all, a rule of evidence, not a rule of substantive law. Although the complainers in *McMahon* were all children, there is no suggestion in the reasoning that the extension of the application is restricted to crimes against children.

8. Any attempt to exclude evidence on the sole basis that it is not strikingly similar is incorrect both in Scotland, England and Ireland. The test argued for here as enabling me to exclude this evidence in advance of the trial was ultimately discarded by the House of Lords in *D.P.P. v. P* [1991] 2 A.C. 447. There, the accused had been convicted of the rape of his two daughters. The Court of Appeal had subsequently allowed an appeal on the basis that there had not been striking similarities between their two accounts as to his attack on them and that the trial judge had supposedly fallen into error in refusing to direct separate trials. The House of Lords disagreed however, and affirmed the primacy of a simple balancing test. Lord Mackay, delivering the unanimous judgment of the Court, stated as follows at p. 460:

> As this matter has been left in *Reg. v. Boardman* I am of opinion that it is not appropriate to single out 'striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech on the passage which I have quoted indicates that he had that type of case in mind.
>
> From all that was said by the House in *Reg. v. Boardman* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that of which *Reg. v. Straffen* and *Reg. v. Smith*, provide notable examples. But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle.

9. In Ireland a most compelling judgment is that of Budd J. in *B. v. D.P.P.* [1997] 3 I.R. 140 in which the applicant attempted to prohibit his trial in advance by judicial review because a number of his alleged victims would be giving evidence against him in the one trial. Budd J. stated at p. 154 as follows:

> More recently stress has been laid on the positive probative value of the evidence rather than the use of "striking similarity" as the test for admissibility in cases. This is because striking similarity is just one of the ways in which evidence may exhibit the exceptional degree of probative force required for admissibility, so that to insist upon it to an equal degree in all cases would be incorrect. I have set out the above principles because the principles to be applied in cases of multiple charges and accusations do not differ materially from those applicable where similar fact evidence is used to rebut an explanation otherwise open to an accused. Indeed, the function of evidence of multiple accusers is often to rebut such an explanation.

10. On this basis, Budd J. refused to prohibit a single trial of the applicant, involving multiple counts of indecent assault and rape of his three daughters, despite the absence of strikingly similar circumstances in those attacks. The historical analysis that he takes from the judgment of Lord Mackay in *D.P.P. v P*, at p. 460, is illuminating:

> From all that was said by the House in *Reg v. Boardman* , I would deduce the essential feature of evidence which is to be

admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that, of which *Reg v. Straffen* [1952] 2 Q.B. 911 and *Rex v. Smith* (1915) 11 Cr. App. Rep. 229 provide notable examples. But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle. Hume on Crimes 3rd ed. (1844) Vol. II p. 384, said long ago:—

> 'the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts.'

Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

Relevance

11. It is clear that the evidence sought to be adduced in this case may be probative of the cases of each of the plaintiffs. The assessment of that evidence is a matter for the trial judge. Moreover, in civil cases, the issue of the prejudicial effect of evidence before a professional judge, as opposed to a jury, is not likely to have any real impact. In my judgment, the sole question should be that of relevancy. In *Von Gordon v. Helaba Dublin Landes Bank Hessen-Thuringen International* (Unreported, The Supreme Court, Fennelly J., 17th December 2003) the defendants resisted the discovery of evidence on the basis of an argument about the exclusion of what they claimed to be merely similar fact evidence. Fennelly J. commented on p5 of the text on the rule in Irish civil proceedings:

> If there were a clear rule excluding from evidence the type of material sought by the plaintiff, discovery would, no doubt, not be ordered. However, the question of admissibility seems, on the authorities, to involve the exercise of judicial discretion in balancing competing considerations of relevance, probative value and oppression.

12. In England and Wales this issue has resolved itself as one of relevance. In *O'Brien v. Chief Constable of South Wales Police* [2005] UKHL 26 the claimant was serving a life sentence for murder and brought an action against the Chief Constable of South Wales Police. He claimed that he had been framed by the police for a murder he did not commit. It was sought to introduce evidence on his behalf of similar impropriety in obtaining confessions by the officers responsible for his incarceration. At the case management conference before this trial, the judge declined to exclude the evidence. This decision was confirmed by the Court of Appeal. On appeal to the House of Lords the defendant argued that similar fact evidence in a civil trial could not be introduced unless it had "enhanced probative value". Lord Bingham uttered a truism in stating at p. 1040 that "similar fact evidence has proved a contentious and uncertain area of the law, particularly in criminal cases but also in civil cases like that before the House." At p. 1042, he took this as his starting point:

> Any evidence, to be admissible, must be relevant. […] As Lord Simon of Glaisdale observed in Director of Public Prosecutions v Kilbourne [1973] AC 729, 756, 'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof […] relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

According to Lord Bingham at p. 1042:

> In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties.

Lord Phillips at p. 1054 noted that as a "general rule," evidence on similar facts has been inadmissible as "its prejudicial effect is likely to outweigh its probative value". While he acknowledged that in criminal cases test in *Director of Public Prosecutions v. P* required an "enhanced relevance or substantial probative value" he saw "no warrant for the automatic application of either of these tests as a rule of law in a civil suit. To do so would build into our civil procedure an inflexibility which is inappropriate and undesirable."

13. These observations are helpful. This issue is one of principle. Evidence is admissible only if it is relevant to some fact in issue in the proceedings. In a civil case these are initially defined by the pleadings and in a criminal case by the nature of the allegations made by the prosecution against the accused, and the nature of the defence, if any, offered. During the course of any trial, civil or criminal, the facts in issue are further defined by the focus of the arguments of the parties. Therefore the evidence as adduced may require other evidence and witness statements to be furnished; commercial cases may require evidence already supplied to be supplemented, or even in rare cases some extra witness to be allowed to be introduced with a new witness statement even in the course of trial. The building blocks of every case, and of the defence to that case, differ from that of every other case. These building blocks determine whether a fact is in issue in the proceedings, or whether the determination of any other fact may illuminate a fact in issue. Where one person alleges that he has lent another person money, it is relevant for the defendant to prove that at the time of the loan, the plaintiff did not have the wealth to enable the loan to be made. Admissibility is a matter of judicial logic and of experience as applied to the facts of varying cases. In J.S.R. Cole, *Irish Cases on Evidence*, 2nd Ed. (Kildare, 1982), at pp. 1 and 2, the author states:

> It must be borne in mind that in its ordinary meaning "relevance" denotes something which is variable and elastic: variable because a particular fact may be relevant in one context and irrelevant in another, elastic because the relevance of any relevant fact may vary in degree from being only minimally of interest to being highly or compulsively persuasive.

14. In essence, a fact is relevant if the acceptance of that fact is either essential to prove the case made by a party (it is an element of a tort, like damage in negligence, or an element of a crime, like the threat of violence in robbery) or if that fact renders the occurrence of an essential fact more probable. Stephen, *Digest of the Law of Evidence*, 12th Ed., (1948), at article 1, defines "relevant" in this context as:

> Any two facts to which it is applied or so related to each other that according to the common course of events, one either taken by itself or in connection with other facts, either proves or renders probable the past, present or future

existence or non-existence of the other.

15. Where an objection that evidence is inadmissible because of irrelevancy is raised, the correct approach is firstly to determine what facts are in issue in the proceedings and secondly to ask whether, if proven, the fact, or facts, objected to as irrelevant has, or have, a tendency to prove or disprove any of the facts in issue.

16. It is clear to this Court that the evidence sought to be adduced is admissible. It is also argued that the admissibility of the evidence of dealings between other investors than the plaintiffs in the test cases is outside the scope of the agreement as to the disposal of the cases to be tried and the cases which will depend on that litigation as test cases. That attractive argument would have more weight were it to be the case that notwithstanding the agreement, multiple plaintiffs nonetheless wanted to have their day in court by complaining about what had happened to them through iterating irrelevant evidence. Instead, the approach of the plaintiffs in the test cases is more than reasonable. It is to confine the experience of others to what is relevant and to keep concise the issue on which those witnesses are to be called.

Pre-trial exclusion of evidence

17. Lastly, it is argued that a court apart from the court of trial has jurisdiction to hear an argument as to admissibility in advance of the trial and to exclude evidence. It must firstly be noted that the trial judge is in the best position to judge the real issues in the case: when the case is opened; when the papers are read and as the case develops, what is crucial to the disposal of the case becomes increasingly obvious. It would very rarely occur that a judge, in advance of the trial, with access to only affidavit evidence and limited papers would even be in a position to make an informed decision. Such an approach of pre-trial motion on the admissibility of evidence would interfere with the discretion of the trial judge to run the trial in the way that best enables admissible evidence to be called and justice to be done. It is also contrary to the approach of the High Court in *Byrne v. Grey* [1988] I.R. 31 and *Berkeley v. Edwards* [1988] 1 I.R. 217, which were cases on excluding evidence through judicial review whereby a search warrant was sought to be declared invalid. I notice that my approach in this regard is similar to, but more restrictive than, that of Mann J. in *Wilkinson v. West Coast Capital and Others* [2005] EWHC 1606 [2005] All E.R. 321. There, the application at issue in the Chancery list was to strike out paragraphs in witness statements on the grounds that they were irrelevant and disproportionate to the issues in the case. At paras. 4 and 5 of his judgment, Mann J. stated:

> 4. Re *Unisoft Group Limited* (No 3)[1994] 1BCLC 609 was a case in which Harman J observed (in the context of a s.459 petition) that the courts had to be careful not to allow the parties to trawl through irrelevant grievances. In *Vernon v Bosley* [1999] PIQR 337 Hoffman LJ approved a passage from the judgment of Sedley J below, in which Sedley J had said:
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> > "A point comes at which literal admissibility has to yield to the constraints of proportionality… such proportionality may in any one case depend on issues of remoteness, fairness, usefulness, the ratio of cost benefit in terms of time or money and other things besides."
> >
> > Hoffman LJ approved that, with one slight modification:
> >
> > "I think I would prefer 'relevance' to 'literal admissibility' but the general tenor of this passage expresses the principle which I have tried to explain in my own words, namely that in some cases a ruling on admissibility may involve weighing a degree of relevance against 'other things'."
>
> 5. Those cases, and indeed others in a similar vein, illustrate the very important powers of the court to control proceedings before it to make sure they remain manageable, proportionate and fair to the parties. If one were constructing a list of cases to which that power might be thought to be particularly appropriate, unfair prejudice petitions would be fairly high on the list. However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial. It is noteworthy that the two cases which I have referred to above were both cases in which the issues as to evidence arose during the course of trials. By the time that the issue arises in that context, the judge is likely to have a much fuller overall picture of the issues in the case and of the evidence which is going to be adduced in support of them. In a large number of cases, he or she is likely to be in a better position to make judgments which turn on the real value of the line of evidence in question and its proportionality, and in very many cases its admissibility. A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time- and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden.

18. The power sought in aid of this motion to control the proceedings by excluding evidence in advance of the trial is said to arise from O.63A of the Rules of the Superior Courts and in particular r.5, which provides:

> A judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of these proceedings.

19. It is clear that a judge may, whether during a trial or in advance of a trial, strike out a pleading which is scandalous and that a judge may, where an extreme situation warrants it, strike out either an entire witness statement or a portion of a witness statement because it is either deliberately prejudicial to the case or is demonstrably of no possible assistance to the issues at trial. The burden in that regard will rarely be met. Expert witnesses are not in this category of relevant evidence since they are not witnesses as to fact. The purpose of an expert witness is to enable the court to be instructed on arcane disciplines which are outside the experience of a judge or jury. Experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them so that, armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion. Experts are also privileged by being able to express a view on the ultimate issue before the court; no other witness is so entitled. This is because the unusual nature of the issue that requires their expertise permits a view to be expressed, sometimes but not in every case, on an issue upon which the case may turn.

It is clear that expert evidence, in contrast to evidence as to fact, may be controlled either by rules of court or by the entitlement of a court to hear cases in a focused manner. For the benefit of the constitutional right of access, to the courts may exclude repetition and take such steps as are necessary to render hearings a fair contest. Such control serves to establish a balance between those who may be rich enough to engage several experts and those who have limited funds. Hearings are very expensive. Long hearings made repetitive by multiple experts addressing the same issue for the same party are prohibitively expensive. The courts are entitled to control their own procedures in the interests of fairness. That is what the Constitution predicates by establishing an entitlement to fair trials.

Result

20. The burden of excluding evidence as to fact in advance of a trial is indeed a heavy one. That burden is not met on this motion. I will refuse the application. The defendant bank should have the redrafted witness statements to be called in addition to those already furnished within two days of the date of this judgment. If the defendant bank wishes to call concise evidence in reply, witness statements must be furnished in that regard to the plaintiffs by the 25th October 2012.