Neutral Citation [2008] IEHC 93

THE HIGH COURT

2001 No. 7739P

BETWEEN

**CORK PLASTICS (MANUFACTURING)
AND BY ORDER HAMINEX (IRELAND) LIMITED,
CORK PLASTICS, AND CORK PLASTIC SYSTEMS LIMITED**

PLAINTIFFS

AND

**INEOS COMPOUND U.K. LIMITED
(FORMERLY KNOWN AS EVC COMPOUNDS LIMITED)
AND BY ORDER TIOXIDE EUROPE LIMITED**

DEFENDANTS

AND

2005 No. 955P

BETWEEN

FLOPAST LIMITED

PLAINTIFF

AND

CORK PLASTICS (MANUFACTURING)

DEFENDANT

AND

**INEOS COMPOUND U.K. LIMITED
FORMERLY KNOWN AS EVC COMPOUNDS LIMITED
AND TIOXIDE EUROPE LIMITED**

THIRD PARTIES

Judgment of Mr. Justice Clarke delivered the 7th March, 2008.

1. Introduction

1.1 The first proceedings referred to above ("the principal proceedings") have already been the subject of a number of previous interlocutory rulings and one judgment (*Cork Plastics and Others v. Ineos Compounds and Others* [2007] IEHC 247). The principal proceedings, in which the Plaintiffs ("Cork Plastics") generally claim for significant damages arising out of an allegation that they were supplied with defective product which, in turn, caused "pinking" in products produced by Cork Plastics for the building industry, have been under case management for some time. A more detailed description of the issues in the principal proceedings as a whole, and some of the interlocutory issues which have required detailed consideration, can be found in the above judgment.

1.2 The principal proceedings are now at stage were they are close to trial. It will be shortly necessary to give pre-trial directions. In that context a fundamental difference of view has arisen between the parties as to whether there should be a single trial of all issues or a modular trial whereby all issues of liability and questions of principle concerning the approach to quantum, should first be tried with questions concerning the calculation of any damages which might be due as a result of the first hearing being left over for subsequent determination. The parties filed written submissions and this judgment is directed towards the question raised. In their written submissions (although less so at the oral hearing), the defendants ("Ineos and Tioxide") questioned, at least to some extent, the jurisdiction of the Court to direct a modular trial in the absence of the agreement of all parties.

It will be necessary, therefore, to turn to that jurisdiction in early course.

1.3 It is also necessary to note that there is second set of proceedings in which Floplast Limited ("Floplast") are Plaintiffs ("the Floplast proceedings"). Floplast appears to be in substantially the same beneficial ownership as the various Cork Plastics Companies. Floplast purchased product from the first named plaintiffs in the principal proceedings ("Cork Plastics (Manufacturing)") and claims damages arising out of the same general circumstances as arise in the principal proceedings. Ineos and Tioxide have been joined as Third Parties in the Floplast proceedings and the issues which arise as and between Cork Plastics (Manufacturing) on the one hand, and Ineos and Tioxide on the other hand, in those Third Party proceedings, appear to be the same as those which arise in the principal proceedings. The manner in which those third party issues are to be tried by reference to the trial of the principal proceedings also requires to be determined at this stage.

1.4 Against that background it is appropriate to turn briefly to the question of jurisdiction.

2. Jurisdiction to Order Modular Trial

2.1 In *P.J. Carroll & Company Limited v. Minister for Health and Children* [2005] 3 I.R. 457, Kelly J. observed as follows:-

> "The Plaintiffs accept however that there is an inherent jurisdiction which would enable the Court to make an order of the type sought in an appropriate case. In making that concession I believe the Plaintiffs are correct. There is a jurisdiction inherent in the Court which enables it to exercise control over its process by regulating its proceedings, by preventing the abusive process and by compelling the observance of process. It is a residual source of power which the Court may draw upon as necessary wherever it is just inequitable to do so". (At p. 466).

The issue with which Kelly J. was concerned was not a split or modular trial but nonetheless the general principle advanced seems to me to be applicable to the question of the Courts jurisdiction in this matter.

2.2 In *Millar- v – Peeples,* [1995] N.I. 6, the Court of Appeal in Northern Ireland accepted that a jurisdiction existed to direct a split trial where it was just and convenient. The Court noted that a broad and realistic view of what is just and convenient should be taken, assessing, as appropriate, questions of the avoidance of unnecessary expense and the need to make effective use of Court time. It was also noted that the Court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money and a lengthy hearing should not be incurred. The Court also noted that undue weight should not be allowed to any tactical advantage which might accrue to either party by the presence or absence of a split trial.

2.3 It is, therefore, in my view, unnecessary to consider the precise provisions of the rules of Court. The somewhat narrow circumstances in which a formal preliminary issue can be directed under the rules of Court are identified in the jurisprudence with precision for good reason. Experience has shown that the formal separation out of a preliminary issue can often make the apparent shortest route, the longest way home. However the conduct of complex litigation in a modular fashion is not the same thing as the formal separation of preliminary issues. Rather it involves the Court exercising its inherent jurisdiction as to how a single trial of all issues is to be conducted. Is the whole trial to be conducted at one go, or should the Court proceed to hear and determine certain issues in advance of others? Dealing with the single trial in such a modular fashion is simply the exercise by the Court of its inherent jurisdiction to order the manner in which a trial is conducted.

2.4 Likewise there is a distinction to be made between the formal consolidation of two sets of proceedings (which involve the proceedings being, in effect, turned into a single case), on the one hand, and the linking, for particular purposes, of two cases which have a large overlap, on the other hand. The later simply involves the exercise by the Court of its inherent jurisdiction to order the trial of cases listed before it in a proper fashion. Exactly how such linkage should progress is a matter for consideration on the facts of each individual case. The two cases may be tried one after the other. However, where there is a significant body of evidence which is common to both, it may be that the Court will consider it best to try both at the same time. Precisely how such a situation is addressed is again a matter within the inherent jurisdiction of the Court, which will be dealt with on the basis of the just and convenient test.

2.5 At the level of principle, I am, therefore, satisfied that I have jurisdiction to direct the way in which both the principal action and the Floplast proceedings are to be tried. I am persuaded that the reasoning of the Court of Appeal in Northern Ireland in *Millar –v- Peoples* represents the broad approach which should be taken to any such consideration. The Court should determine what is just and convenient by reference to a broad and realistic view which should include the avoidance of unnecessary expense and the need to made effective use of Court time. The Court should accord, in its considerations, due weight to the public interest and should not place over regard on perceived tactical advantages or disadvantages of the parties concerned.

2.6 Before going on to apply that general principle to the facts of this case it is appropriate to engage in a brief analysis of why most straight forward litigation is unlikely to be justly or conveniently tried in a modular fashion.

3. The Default Position

3.1 There can be little doubt but that the default position is that there should be a single trial of all issues at the same time. In order to analyse what circumstances might legitimately lead to a proper departure from that position, it is important to start by analysing why it is normally just and convenient to have such a single trial.

3.2 The perceived advantage of a modular trial is that, if the result of earlier modules goes in one way, subsequent modules may either become unnecessary or may be capable of being dealt with in a much more focussed fashion. Thus, the most common division between liability issues and quantum issues can give rise to a saving of court time and expense in the event that the Plaintiff does not succeed on liability. In those circumstances, of course, neither the parties nor the Court are put to the time and expense of having to deal with quantum issues which do not arise. However such a result, of course, is only a possibility. If the Plaintiff succeeds, then quantum will have to be dealt with in any event. Where the litigation is straightforward and relatively concise, then there is every risk that time and expense will be added by a modular trial in the event that the Plaintiffs succeed. In simple and straightforward litigation which might be expected to last one or a small number of days at hearing, should all issues be tried together, there is a real risk that separating the issues into, for example, liability and quantum questions, could lead to more time being spent in Court and significant additional expense being incurred by the parties in having to reassemble on a second occasion. A two to three day action in any of Court lists and which involves broadly equivalent liability and quantum issues might nonetheless turn into two separate two day hearings if divided as to liability and quantum.

3.3 Therefore, in any straightforward litigation, and in the absence of some unusual feature (such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment), the risk that the proceedings will be longer and more costly if divided will be seen to outweigh any possible gain in Court time and expense in the event that the Plaintiff fails on liability.

3.4 What then might lead to a different view being taken? The first and most obvious factor is the complexity and length of the likely trial. If, rather than the example which I have taken, a Court was faced with two broadly equivalent liability and quantum issues which were estimated to take a total of four weeks at trial, a very different situation might well arise. There is no doubt that the risk that I have identified as inherent in a split trial (i.e that it may take a little longer and be somewhat more costly) will still exist. However as a proportion of the total costs and time of a four week trial, the risk of, perhaps, an extra day in Court as a result of a split trial will be much less significant. The potential saving of cost and Court time in relation to the anticipated two weeks which might have to be devoted to a quantum hearing which might turn out to be unnecessary would be a much more significant factor in a such a case. Thus, in any event, lengthy cases were both quantum and liability are, of themselves, significant matters, have the potential to lend themselves to modular trials.

3.5 There are, of course, a whole range of other factors which must legitimately be taken into account.

3.6 The first is the question of what is to happen in relation to any possible appeal. It was, correctly so far as it goes, pointed out on Counsel on behalf of Ineos and Tioxide, that difficulties can be encountered in relation to a modular trial as to whether there should be an immediate appeal by a party dissatisfied with the result of the first module. There is no doubt that this is a factor to be taken into account. However, it does seem to me that it is possible to take appropriate measures to minimise any disadvantage under this heading. If the Plaintiff succeeds on liability then the Court will, in any event, have to go on to consider quantum. In those circumstances it is possible for the Court to refrain from making any order in respect the liability issue, if that is considered appropriate, so that time for an appeal will only run from the conclusion of the quantum hearing. If the Plaintiff loses on liability then, of course, quantum will not be determined, nor, as was pointed out by Counsel for Ineos and Tioxide, will quantum evidence be heard by the Court. In those circumstances it will not be possible for the Supreme Court, on appeal, to deal with the question of quantum. If the Plaintiff were to succeed on appeal, the only course of action open to the Supreme Court in those circumstances would be to remit the matter back to the High Court for an assessment of damages. Whether such a process would be burdensome, would, in truth, heavily depend on whether the case was of a type where it was likely that the High Court would, in a unitary trial, even if dismissing the Plaintiff's claim on liability, go on to assess the damages which would have been awarded in the event that liability had been established. In such a case there may be a disadvantage in a split trial because of the difficulties with an appeal which I have identified. If, however, the case is of a type where it would be unlikely, whether for practical or principled reasons, that the High Court would assess damages in any event, then it seems most unlikely that the Supreme Court would, in such a case, even if there had been a unitary trial at which the Plaintiff lost on liability, proceed to assess damages itself without the benefit of High Court findings. In such a case, where a plaintiff loses on liability but succeeds on appeal, a referral back of any question of damages to the High Court is almost inevitable.

3.7 One might, as an illustration, contrast the case of a personal injury action where the injuries suffered by the Plaintiff were fairly clear and not in significant dispute with a complex commercial case. In the former case it might well be that the Supreme Court, provided that the relevant evidence was on the record, would be happy to obviate the necessity of the matter being referred back to the High Court for an assessment of damages, by assessing the appropriate damages itself on the basis on the evidence.

3.8 At the other end of the spectrum may be cases where there may be a whole range of bases upon which damages might be approached and where it would be very difficult, if not impossible, for a Judge of this Court to say anything useful about damages, in circumstances where the liability basis upon which those damages were to be assessed had not, in the view of the Judge concerned, been made out. In such a case it is inevitable that a successful appeal against an adverse finding against the Plaintiff on liability, would, in any event, even after a unitary trial, result in the question of damages being referred back to the High Court.

3.9 A second important factor can, in an appropriate case, stem from the need to insulate a party, who is involved with only some of a wide range of issues, from the expense and time of having to attend a lengthy trial, much of which is of no relevance to the issues which involve the party concerned.

3.10 A third and potentially relevant factor, concerns cases where there are a range of approaches to the calculation of damages depending on the basis upon which liability may be established. In many simple (and even some not so simple) cases the question of the approach to the calculation of damages will be fairly clear if liability is established. However, that will not always be the case. Where there are a range of bases upon which liability may be, in whole or in part, established, and where the whole approach to the proper calculation of damages may differ significantly dependent on how liability is made out and the way in which various issues of defence raised may be resolved, then there is an added downside to the unitary trial. The unitary trial will require the plaintiff to present its evidence on quantum against a whole range of theoretical possibilities. In such a case the advantage of a modular trial is that, assuming liability to be established, the basis of the courts approach to damages will also be clear and the parties will be absolved from the necessity of addressing all of the other theoretical bases upon which damages might have been calculated in the event that liability was established in some other way, or aspects of the defence on liability (or, indeed, causation in an appropriate case) might have been successful.

3.11 A further factor which will frequently need to be assessed is the likely relative length and complexity of the respective modules which might be proposed. Again taking the simple division between liability and quantum as an example, it would seem unlikely that any sufficient advantage could be found in a modular trial where the quantum issues arising in the event that liability were established would be straightforward and unlikely to occupy a very great deal of court time. On the other hand a case which involved only a very net issue on liability but was complex in relation quantum would, *prima facie*, be a particularly appropriate candidate for such a modular trial. In truth it is likely that the length and complexity of subsequent modules (in the above example the quantum hearing) is the issue which is likely to weigh most heavily in the courts consideration of the basic advantage of the modular hearing. This is because what is saved by the modular hearing is the risk that an unnecessary quantum hearing will have to take place. If that later hearing would not be lengthy or complex, then the possibility that it might turn out be unnecessary would not weigh very heavily in the balance. That is not to say that, in an appropriate case, the length and complexity of the earlier module (such as a liability module in the example with I have given) may not also weigh heavily.

3.12 In addition the question of the extent to which there might be significant overlaps in the evidence or witnesses that would be relevant to all modules needs to be taken into account. While it is unlikely that the evidence relevant to quantum, for example, will be the same as the evidence relevant to liability, it may, nonetheless, be the case that many of the same witnesses will require to be called in respect of both. In such an eventuality the advantages of a modular hearing will be diminished, even though it may be possible to separate out the evidence which any individual witness might have to give in respect of the two discreet hearings proposed. In some cases, of course, this problem will be compounded by any difficulty in defining the boundaries of the modules with sufficient precision. Care should, in my view, be taken to note that witnesses whose primary function may relate to one or other of liability and quantum can, in many cases, nonetheless, have a legitimate role in respect of the other. For example an expert medical witness called principally to verify the injuries suffered by a plaintiff in a personal injury action may, nonetheless, have evidence to give which would be relevant to liability concerning such matters as the consistency of the injuries of the plaintiff with a particular account of how the accident is alleged to have occurred, or as to an early account given by the plaintiff of the relevant incident. Many other examples could be considered. There would be little to be gained by a modular hearing in such a case where the medical experts evidence would have to be available, in any event, at a liability hearing.

3.13 Finally, it is important to note that the courts should place significant weight on any real suggestion that true prejudice (rather than a perceived tactical prejudice) might occur by the absence of a unitary trial. If there were established to be a real risk that the courts view on earlier modules might legitimately be influenced by evidence which would more properly arise in a later module, or conclusions to be reached in relation to such evidence, then it would be difficult to envisage that the court could countenance a modular trial. Obviously the extent to which it can be said that any such risk exists needs to be realistically assessed.

3.14 There may well, of course, be a whole range of other special or unusual circumstances that may arise on the facts of any individual case and may need to be given all due weight. I have sought to identify the general considerations that are likely to apply in many cases and which seem to be most relevant to the assessment which needs to be made in this case to which I now turn.

4. Application to the Facts of this Case

4.1 Applying those considerations to the facts of this case I note that there are some differences between the parties as to the likely length of both the suggested liability hearing and the quantum hearing. However, on the basis of the submissions of the parties and my own understanding of the issues which appear likely to arise, it seems to me that both hearings are likely to be significant in themselves in any event. In those circumstances I am satisfied that at least the basic condition for considering a modular hearing is present in this case. There is at least a basis for believing that the possible benefit of obviating an unnecessary quantum hearing might outweigh any additional time and expense which might be incurred in the event that there would have to be two separate hearings with the parties being required to re-assemble with their relevant witnesses on a second occasion.

4.2 That situation applies with even greater force on the facts of this case where there are a whole range of possibilities as to the manner and extent to which the various plaintiffs may be able to establish a case on liability. There are, in addition, a number of issues raised by way of defence on liability which, if successful, at least in some respects, have the potential to significantly limit the basis on which damages could properly be awarded. It should be emphasised that what is proposed is that the first module involve issues of liability including questions which go to the principle of the basis upon which any damages might be assessed. This is, therefore, a case where, if there is a unitary trial, it is likely that the claim as to damages will need to be presented on a number of different bases to cover the range of possible eventualities (favourable to a greater or lesser extent to the plaintiff) which the court might find to exist if it were persuaded that Cork Plastics should succeed to some extent. There is, for that very reason, an even greater potential saving of time and expense than might normally be attributable to a modular hearing. If Cork Plastics succeed on

liability the Court will have to determine the precise basis upon which damages are to be calculated. That determination will obviate the necessity for the presentation of evidence which would go towards the assessment of damages which would, theoretically, have arisen had Cork Plastics succeeded in some other way (or had the issues of defence on liability raised by the Ineos and Tioxide been otherwise determined). Thus, on the facts of this case, it seems to me to be highly probable that, even if Cork Plastics succeeds, there will, nonetheless, be an overall saving by virtue of a modular hearing because any additional time and costs that would be caused by a second hearing, would be more than offset by the fact that the quantum hearing will be more focussed in the light of the findings at the first hearing, than it could have been had quantum evidence had to be presented (as it would at a unitary hearing) to cover all eventualities. On the facts of this case the downside of a modular hearing is, therefore, less. Whatever may be the accuracy of the estimates given for the length of time that the various modules might take at trial, there is no doubt that there is at least a real prospect of time being saved even if Cork Plastics succeeds on liability and a certainty of significant time being saved if Cork Plastics were to fail on liability.

4.3 Furthermore it seems to me that this is not the kind of case where it would be easy to, and therefore likely that the Court would, assess damages in the event that Cork Plastics fails on liability. I take this view not least because of the number of different ways in which quantum might theoretically have to be approached depending on just how Cork Plastics were to succeed on liability. It would not be realistic to deal with all of those possibilities. This is not, therefore, a case where, for the reasons I have sought to analsize earlier, there is any significant downside to be included in the balance by reference to appeal complications.

4.4 It is, of course, the case that some Cork Plastics witnesses may have to give evidence in relation to both liability and quantum. Subject to one point to which I will have to return, I am not satisfied that there is any significant overlap between the evidence which they would be required to give in the respect of the separate modules. Any marginal disadvantage to such witnesses having to give evidence twice is, therefore, just that – a very marginal consideration. In addition I am satisfied that the division of issues proposed by Cork Plastics does not have any significant ambiguity as to the divisions between the modules.

4.5 For all of those reasons I am satisfied there is a very strong case indeed for taking the view that the logistical advantages of the modular trial proposed on behalf of Cork Plastics are likely to significantly outweigh any possible disadvantages. Subject to one point, I am, therefore, persuaded that this is an appropriate case in which to direct a modular hearing. The point concerned is one of an alleged prejudice, which, for the reasons which I set out earlier, is a matter to which the Court must attach significant weight, if it be established.

4.6 The point made is this. It is said that one aspect of Cork Plastics' case on liability is, at least, dependent on witness credibility. The issue concerns exclusion clauses which would appear to have been present in various standard form documents emanating from Ineos and received by Cork Plastics. It does not appear to be disputed that the documents in question were, in fact, received and had the various relevant clauses printed on them. The question of whether those clauses are of legal effect and the extent to which such clauses might properly influence the Court's decision on liability will, in my view, largely be determined as a matter of law. There is, however, a possibility that the extent to which the clauses concerned came to the attention of the principals of Cork Plastics at any material time might, possibly, be relevant. In that very limited way some question of credibility may arise in relation to the liability claim (or more strictly, a defence to that claim). It is also said that credibility questions arise in relation to the quantum claim made by Cork Plastics which, it is asserted, is significantly exaggerated. I should note that the accusation that the claim is in any way improperly made is hotly disputed, although it is, of course, accepted that there are likely to be significant issues as to the proper approach to be adopted to the calculation of damages.

4.7 On that basis it is asserted on behalf of Ineos and Tioxide that it would be unfair to direct a modular trial when there is, it is said, a real risk that the view which the Court might take as to the credibility of the claim put forward by Cork Plastics on quantum might affect the credibility issues which arise on liability which I have identified. I have to confess that I am not persuaded that there is any sufficient connection between the two matters to justify finding that there is a real risk of injustice. However, it seems to me that I should, at least in part, adopt the suggestion made by Counsel on behalf of Cork Plastics to the effect that I should defer a final decision on this aspect of the issue until witness statements have been exchanged, by which time it will be possible to have a significantly more focussed view on the likelihood of credibility playing any significant role in the determination of liability. I am, however, also persuaded by the argument put forward by Counsel on behalf of Cork Plastics, that it would defeat the whole purpose of directing a modular trial (or at least a significant aspect of it), if I were now to direct that witness statements be exchanged, not only in relation to liability issues but quantum issues as well. A very significant amount of work would have to go into the preparation of witness statements on quantum issues which would be unnecessary, at least at this stage, if I were ultimately to direct a modular trial. In particular one of perceived benefits of a modular trial on the facts of this case, is that the quantum evidence can be directed to the precise basis (if any) on which Cork Plastics succeeds. If witness statements have now to be prepared against the range of possible bases on which Cork Plastics might succeed, then there is a real risk that a great deal of unnecessary work will have to carried out.

4.8 With that in mind I propose expressing a provisional view that this trial should be conducted in the modular fashion suggested by Cork Plastics. I propose directing that witness statements be exchanged on that basis, i.e. that there will be a modular trial. The witnesses statements will, therefore, be confined to liability issues in the wide sense in which that term has been used. I will, however, afford Ineos and Tioxide an opportunity to reapply when those witness statements have been exchanged. I should say that the only issue which gives me any concern at all is the question of prejudice which I have now analysed. It will not be open to Ineos and Tioxide to raise again any of the other issues which must now be considered to have been determined. If, however, in the light of the witnesses statements as filed, it is possible for Ineos and Tioxide to persuade me that there is a real risk of injustice inherent in a modular trial then I will, of course, revisit this decision.

5. The Floplast proceedings

5.1 It follows from what I have said in relation to the principal proceedings that, *prima facie*, all liability issues in the Floplast proceedings should also be dealt with separately from quantum issues. It is clear that the issues which arise in the Third Party proceedings as and between Cork Plastics on the one hand and Ineos and Tioxide on the other hand, are largely the same, so far as liability is concerned, as the equivalent issues which arise in the principal proceedings. There would be a very great saving in Court time and expense if, therefore, the liability issues in the Floplast proceedings are tried at the same time as the liability issues in the principal proceedings.

5.2 It is said on behalf of Floplast that it would be difficult to get those proceedings ready in time. I am not, frankly, persuaded that this is so. It should be noted that Floplast is in the same, or broadly the same, beneficial ownership as the various companies in the Cork Plastics group. In those circumstances it would be wrong to afford Floplast an opportunity to gain what might amount to a second bite of the cherry. Unless, therefore, there is some insurmountable problem in having the liability issues which arise in the Floplast proceedings determined at the same time as the liability issues which arise in the principal proceedings, then it would be my intention to direct that liability in the Floplast proceedings be tried at or immediately after the equivalent issues in the principal

proceedings.

5.3 I propose putting in place appropriate procedural directions to ensure that the relevant liability issues in the Floplast proceedings are ready for trial at an early stage. This should not give rise, in my view, to any insurmountable difficulties. The boundaries of discovery have already been well established and dealt with in the principal proceedings. It is difficult to envisage circumstances were any significant additional discovery will be required for the purposes of the Floplast proceedings. Likewise it is by no means clear that the evidence required will be different to any material extent save for such evidence as may be necessary to establish the legal relationship between Floplast and Cork Plastics and the course of dealing engaged in between those companies. This should hardly be a difficult matter given that both companies are in the same beneficial ownership.

5.4 When the parties have had the opportunity to consider this judgment I will, at a very early stage in the Easter term, arrange a further case management meeting at which I would expect that there will have been agreed between all of the parties to the Floplast proceedings, a series of measures designed to ensure that the liability aspects of those proceedings can catch up with the liability aspects of the principal proceedings, so that all can be tried together without imposing any significant delay on the principal proceedings.

5.5 I will also expect that the parties to the principal proceedings will have agreed to a timetable for the exchange of witness statements in the manner set out earlier in this judgment.