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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 22/01/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BRESLIN AND OTHERS

Plaintiffs;

-and-

MURPHY AND DALY

Defendants.

_____

GILLEN J

Application

[1] This application concerns the circumstances in which a court may refuse to admit hearsay evidence, which is prima facie admissible under the terms of the Civil Evidence (Northern Ireland) Order 1997 ("hereinafter called the 1997 Order").

[2] The background to this case is that on 8 June 2009 Morgan J, following a protracted trial, concluded that the 12 plaintiffs in this action, who had sought damages against a number of defendants for personal injuries sustained by them as a result of the explosion of a bomb in Omagh town centre on 15 August 1998, had sustained their claim for damages for trespass to the person against, amongst others, the two defendants in this action ("the first trial").

[3] In a judgment on 7 July 2011 the Court of Appeal in Northern Ireland allowed the appeals of Murphy and Daly and ordered a retrial of the claims against both these defendants. The instant application has arisen in the course of the retrial.

Background facts

[4] The plaintiffs wish to admit under the terms of the Order hearsay evidence of Terence Morgan ("TM"), which is contained in answers given by him to police during the course of interviews between 21 February 1999 and 25 February 1999. At this time police were interviewing him concerning the circumstances of his possible involvement in the Omagh bombing which had occurred on 15 August 1998.

[5] It is the plaintiffs' case that these interviews revealed that TM had lent his mobile telephone terminating in the number 980 (mobile 980) to the first defendant the day before the Omagh bombing and that mobile 980 was subsequently used by those who were involved in the bombing incident.

[6] The plaintiffs contend that in order to provide context for the evidence of those answers given by TM, it is necessary to put before the court the questions posed by the police that elicited the relevant answers.

[7] Mr Fee QC who appeared on behalf of Murphy with Ms McMahon resisted the admission of some of the police questions on the grounds that these questions contained material which was unproven, was not going to be proved by the plaintiffs and was grossly prejudicial to the defendants. Whilst he conceded that the police questioning did on occasions arguably provide necessary context for answers given by TM, that concession did not extend to questions that contained largely irrelevant or prejudicial material against his client outweighing any probative value of the answers

[8] In short Mr Fee contended that such material would:

- unfairly create the impression of apparent bias on behalf of the court in that it could be exposed to hearing grossly prejudicial material contrary to the tenets of a fair trial pursuant to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch. 1 to the Human Rights Act 1998 ("the Convention").

- in any event such material was not *evidence* within the protection of the 1997 Order but purely contextual material. It was entirely within the remit of my discretion to exclude it notwithstanding the contents of the 1997 Order.

[9] Ms Higgins QC, who appeared on behalf of the second defendant Daly with Mr Sharp, dealing with that part of the hearsay evidence that allegedly implicated him in the bombing incident, boldly asserted that no police questioning was admissible since that contextual material fell outside the hearsay evidence of TM which the plaintiffs sought to be admitted. She adopted the purist approach that only the evidence of TM could be admitted under the 1997 Order irrespective of the fact that, without the contextual setting of the questions, the answers given by TM might in most circumstances be incomprehensible.

[10] For the plaintiffs, Mr Lockhart QC who appeared with Lord Brennan QC and Mr McGleenan QC contended as follows:

- Under the terms of the 1997 Order, all hearsay evidence was admissible in civil proceedings.

- There is no authority for the exclusion of hearsay evidence on the ground that its prejudicial effect outweighs its probative value in civil proceedings.

- Even if the court did have discretion to exclude evidence prima facie admissible on the grounds of unfairness, the contextual material contained in the police officer's questions was necessary in order to provide a foundation for the court to make an assessment of the weight to be given to the evidence of TM. Insofar as Mr Lockhart QC recognised that the unfolding account given in this hearsay evidence by TM was, at least in the initial stages, arguably less than forthcoming and contained contradictions, it was necessary to see the police questions to test his reaction to assertions by the police concerning the defendant Murphy, his antecedents, the company that he kept, who was present in the Emerald Bar on the night of the bombing, the circumstances of his assertions concerning Daly, and why he might be afraid or reluctant to be forthcoming .

- Each of the defendants is in a position to deal with the issues raised and can do so if they give evidence.

The Civil Evidence (Northern Ireland) Order 1997

[11] The 1997 Order provides where relevant as follows:

> "Admissibility of hearsay evidence
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> 3.-(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
>
> (2) All common law rules providing for exceptions to the rule against hearsay in civil proceedings are superseded by this Order.
>
> (3) In this Order—
>
> (a) 'hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and

(b) references to hearsay include hearsay of whatever degree

……..

Considerations relevant to weighing of hearsay evidence

5.—(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.

(3) Regard may also be had, in particular, to the following—

(a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to

> suggest an attempt to prevent proper evaluation of its weight."

Discussion

[12] The 1997 Order reflects the modern approach to litigation, which emphasises refining issues and a more open approach to evidence. For the first time it made provision for hearsay evidence to be admitted in civil proceedings outside the limited circumstances permitted by the common law exception to the hearsay rule.

[13] The scheme of the Order sets out procedures for the purpose of ensuring that hearsay evidence is given appropriate weight. This legislation clearly does not violate the right to a fair trial under article 6 of the Convention (see R (McCann) v Crown Court at Manchester [2002] UK AC 39).

[14] In Breslin and Others v McKevitt and Others [2011] NICA 33, Higgins LJ said at [41]:

> "[41] It is important to bear in mind that the courts at common law have disclaimed any general discretion in civil cases to exclude evidence on the ground of unfairness. There is no discretion to exclude evidence on the ground that it is unlawfully obtained.
>
> ……
>
> There is no authority for the exclusion of evidence on the ground that its prejudicial effect outweighs its probative value (see Phipson on Evidence 17th Edition at paragraph 39.34)."

[15] I find no inconsistency with this assertion in recognising, as Phipson makes clear in the course of paragraph 39.34, that there are exceptions to this generalisation. Obvious examples are claims to exclude evidence on grounds of public interest immunity or privilege (neither which applies here) where a balancing exercise is to be performed by the court. Phipson adds:

> "The courts have exercised discretion to limit the admission of similar facts evidence."

[16] The rights of all parties under Article 6 of the Convention are clearly still intact notwithstanding the 1997 legislation. Article 6 declares that in the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law.

[17] These rights were helpfully discussed by Morgan J in Breslin and Others v McKenna and Others [2009] NIQB 50 at paragraphs [171] and [172]. There the learned judge pointed out that:

> "The entitlement to a fair hearing will often involve consideration of many of the issues identified as minimum rights within Article 6(3) and that in that case it was necessary to examine whether the admission of the evidence and the giving of weight to it would render the hearing unfair. Whilst the balance in a civil case is different from that of a criminal trial, nonetheless the requirement for a fair hearing required the observance of the principle of equality of arms and the principle that proceedings as a whole should be adversarial…….In litigation involving opposing private interests this requires that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis a vis his opponent."

[18] However Morgan J in considering the general discretion under Article 5(1) of the 1997 Order to have regard to any circumstances from which any inference could reasonably be drawn as to the reliability or otherwise of the evidence approached the matter by considering how the weight of the evidence was affected by the court's obligation to ensure that the parties have a fair trial complying with the requirements of Article 6 of the Convention. The submissions of Mr Fee and Ms Higgins have a different thrust. They pose the question as to whether the impugned evidence should be admissible at all in order to ensure fairness to the defendants. In particular Mr Fee asserts that the police questioning is purely contextual material rather than the evidence of TM, which is the substance of the hearsay application. Hence my discretion is much wider in that regard.

Conclusion

[19] Under the terms of the 1997 Order, all hearsay evidence is prima facie admissible. I am satisfied that this must include the required desideratum of contextual material, which serves to make sense of the evidence of TM. Otherwise the purpose of the legislation becomes frustrated. On the other hand, as outlined in Phipson (supra), there are limited exceptions to that principle. In O'Brien v C.C. [2005] UKHL 26 the House of Lords considered the admission of similar fact evidence of methods used by the police in circumstances where the plaintiff had made a claim for misfeasance in public office and relied upon similar facts of such methods used by the police in other instances. Lord Bingham set out his now much cited dual test of admissibility of similar fact evidence in a civil action. The first test

was that of relevance, namely that the material to be adduced was potentially probative of an issue in the action. Clearly therefore that is the first test that I must apply in the instant case because if the hearsay evidence was irrelevant I would not admit it.

[20] Turning to the second test, Lord Bingham said at paragraph [5]:

> "The second stage of the inquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which part of it), which ex hypothesi is legally admissible, should be admitted. For the parties seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.
>
> 6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided … It is often a potent argument, particularly where the trial is by jury. Secondly and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting

> party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increase costs and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed or thought to be closed; the loss of documentation, the fading of recollections. …. 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."

[21] I recognise that in a trial by judge alone, the likelihood of the court being distracted by collateral issues or prejudice is much less likely than in trials by a jury. Nonetheless the indispensable requirement of public confidence in the administration of the rule of law and the need to achieve a trial process fair to all requires that justice must not only be done but must also be seen to be done in the eyes of the fair-minded and informed observer.

[22] I recognise that there is strength in Mr Lockhart's submission that the thrust of the 1997 Order is to eschew an exclusionary approach to the management of hearsay evidence. Moreover the risk of apparent bias on the part of the court is much less likely when the informed observer of the fair trial is aware that legally represented defendants can both challenge evidence so admitted and call their own evidence to rebut any adverse inference.

[23] Nonetheless, I am satisfied that even in the context of the 1997 Order the overarching presence of Article 6 Rights under the Convention cannot be ousted notwithstanding the fact that the evidence is ex hypothesi legally admissible in civil cases. The overriding purpose must always be to promote the ends of justice by a trial process fair to all parties.

[24] Hence I have concluded that there may well be circumstances in the instant case where I should carry out balancing exercise adumbrated by Lord Bingham in O'Brien. Thus for example in the present case, I refused permission to adduce contextual questioning by the police which I was informed contained alleged admissions by Murphy going to the heart of the issue that I was to determine in this case notwithstanding that the plaintiffs were not intending to rely on or to prove such admissions. Mr Lockhart conceded that whilst this contextual material was being adduced purely to permit evidence from TM to prove consistency in his account, there were other examples of his consistency which could be found elsewhere in the evidence and which were not challengeable on these grounds. In those circumstances, in order to ensure that justice was seen to be done, that the trial process was fair and that wholly prejudicial material was not put before the court

unnecessarily, I decided to refuse to admit such contextual material notwithstanding that the hearsay evidence of TM's replies was ex hypothesi legally admissible.

[25] I was not persuaded of this danger on other occasions where I considered that the relevance of the hearsay evidence of TM was such that I should hear the context that allowed me to make sense of what he was saying and then accord to it such weight as I deemed appropriate within the terms of the 1997 Order bearing in mind the need to achieve a fair trial. An example of this arose when the hearsay evidence of TM alleged that Murphy had taken possession of mobile phone 980 from TM in Dublin on the day before the Omagh bombing. Police, in the course of questioning, suggested to TM that Murphy had denied being in Dublin at that time or having taken the mobile phone at all. I admitted that questioning as context for the assertions of TM that this was what had occurred. In so doing I took into account matters such as whether the impugned contextual material was of peripheral or limited relevance or whether it would lead to significant additional investigation on collateral issues. I also bore in mind that the defendants were in a position to rebut this or give evidence on their own behalf. Moreover as a judge sitting alone I can readily recognise that the alleged claims of Murphy's account were never going to be evidence against him based as they were only on police assertions of what he had said. I could readily rid my mind of any prejudicial effect.