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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

KEVIN EUGENE O'KANE

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HART J

[1] This is an application by the prosecution to invoke the provisions of s. 17 of the Domestic Violence, Crime and Victims Act 2004 (the 2004 Act) to substitute an indictment consisting of 28 sample counts to be tried by a jury and a further 143 counts to be tried by a judge alone for the original indictment consisting of 171 counts to be tried by a jury. I understand from counsel that there had been two previous cases in Northern Ireland where this procedure was to be invoked, but as the defendant in each case pleaded guilty it proved unnecessary to decide whether the s. 17 procedure should be used. Both counsel are unaware of any reported decision as to how a court should approach a s. 17 application.

[2] The defendant is charged on the original indictment with 171 offences relating to about 70 complainants in respect of about 200 transactions involving total payments of £5,425,000, whereas Part 1 of the proposed indictment contains only 28 counts with 7 complainants in respect of payments amounting to £525,000. Part 2 of the proposed indictment contains the remaining 143 counts.

[3] The allegation against the defendant is that between 2005 and 2008 he sold a large number of properties in a development of holiday properties known as Golden Beach Villas near Bodrum in Turkey. The prosecution case is that the defendant sold some properties directly to the purchasers, other properties were sold through an estate agent called Kelly & Company in Maghera, County Londonderry. Some purchasers handed over payments in a small number of instalments, others made a larger number of smaller payments, but in most cases the total payments amounted to over £60,000.

The prosecution allege that the defendant obtained these payments by falsely representing that he was the landowner, builder and developer of Golden Beach Villas with authority to sell them. Mr Chambers on behalf of the prosecution said that the alleged deception by the defendant was conveyed to each complainant in one of three ways.

(1) The defendant said to the investor he was the developer, etc, or

(2) he told the estate agent that he was the developer, etc, or

(3) the investor relied upon what he was told by a third party who told the investor what the defendant had told the third party.

[4] This application has been brought because the prosecution originally lodged the indictment containing 171 counts, and when the matter first came before the court it was indicated to the prosecution by the court that the indictment was overloaded, and that a much smaller number of counts would be more appropriate. The application to invoke s. 17 of the 2004 Act is the prosecution's response to that indication.

[5] Mr John O'Hare for the defendant accepts that the original bill could not be tried by a jury, and I am satisfied that is the case. The evidence consists of 36 lever arch files, and if, as Mr O'Hare suggests, the issue in relation to each of the 70 odd complainants is not that money was paid over, but what representations were made to each complainant, a jury would be required to assimilate, and then reach a verdict upon, evidence relating to about 200 individual transactions in order to reach verdicts on 171 counts. This would clearly be an enormously burdensome task for any tribunal, particularly for a jury because of the time required for the trial, and because of the multiplicity of individual transactions that a jury would be required to consider. In my opinion the combination of the number of counts, the volume of evidence, the number of individual transactions, and the length of any trial is such to render a trial before a jury of all of these counts impracticable as required by s. 17(4) of the 2004 Act.

[6] It might of course be suggested that this difficulty could be addressed by simply reducing the number of counts for the jury to consider and not proceeding on the remainder. However, the difficulty with such a course is that were the number of counts to be drastically reduced, it may well be that in the event of a conviction on some or all of the smaller number of counts the amount involved in those counts would be inadequate to reflect the defendant's alleged criminality. It has to be remembered that when the court comes to sentence an accused it has to have regard to the principle enunciated

in R v. Kidd [1998] 1 All ER 42 where it was held that a defendant may be sentenced only for an offence of which he has been convicted, or which he has asked the court to take into consideration, and it is that difficulty that the 2004 Act seeks to address.

[7] An objection made by Mr O'Hare is that the sample counts in Part 1 of the proposed indictment are not truly representative of the counts in Part 2 (the linked counts) connected to the sample counts in Part 1. He developed this argument by suggesting that the Part 2 counts had to be representative of each of the three categories of dishonesty suggested by the prosecution. I should say that the structure of Part 2 of the proposed indictment is that it is divided into groups of counts each numbered by reference to a count in Part 1, thus count 1.1, 1.2, etc.

[8] Section 17(4) of the 2004 Act provides –

> "The second condition is that, if an order under sub section (2) were made, each count or group of counts which would accordingly be tried with a jury can be regarded as a sample of counts which could accordingly be tried without a jury."

The 2004 Act does not define what is meant by a "sample", but a sample in this context may be regarded as something representative of the whole, in which case Mr O'Hare argues that each group of linked counts ought to include examples of each of the three categories of dishonesty or deception alleged by the prosecution. However, all that is required by s. 17(4) is that the sample count in Part 1 is representative of the group of cases linked to that count in Part 2. Whether the sample count in any instance is representative of the linked counts must depend upon the facts of the sample count and the linked count. Unless the circumstances of each are absolutely identical, which may not always be the case; it must be the case that in order for a count to be a sample the sample count must share sufficient factual and legal characteristics with the linked count(s) to allow the sample count to be regarded as representative of the linked count(s).

[9] Provided that the sample can be said to be legally and factually representative of its linked counts that is sufficient. Whether that is the position in any case will ultimately be for the court to decide in the light of the circumstances of each case, and that decision will inevitably be fact specific. I do not see why it should be necessary that each group of linked counts include examples of all three categories of deception. It is for the prosecution to frame the indictment in a fashion that it considers appropriate in order to enable the criminality alleged against the defendant to be clearly and appropriately laid before the court. There is no suggestion in the present case, other than Mr O'Hare's suggestion that each group of linked counts should include examples

of all three categories of deception, that the sample count is not representative of the linked group of counts in any of the proposed groups.

[10] A further objection by Mr O'Hare relates to the hearsay and bad character applications made by the prosecution. These were not the subject of this hearing, but they were referred to in general terms as Mr Chambers explained that, were the prosecution to be successful in this application under s. 17 of the 2004 Act, it would seek to call as witnesses in the Part 1 trial those complainants (37 in all) whose transactions are the subject of counts in Part 2 who spoke directly to the defendant. This would be solely to controvert his assertion that he never spoke to anyone about his role as the developer, etc of these properties, but the prosecution would not seek to adduce the evidence of these witnesses about their own transactions other than in this limited respect. Mr O'Hare's riposte to this was to argue –

(1) that this would render the jury trial fundamentally unfair because the jury's verdict on the 28 counts on Part 1 would not indicate whether they believed any of the 37 complainants from Part 2; and

(2) as this would mean that the 37 complainants would be repeating much of their evidence on another occasion in the non-jury part of the trial that would result in verdicts upon their allegations being arrived at in Part 2, and as a result there should simply be one large jury trial dealing with all of the allegations.

[11] As the bad character applications remain to be decided, I propose merely to observe that whilst evidence such as Mr Chambers describes could be admissible in principle in the Part 1 trial of the proposed indictment as similar fact evidence to prove a propensity on the part of the defendant to make the alleged statements by virtue of DPP v. P [1991] 2 AC 447, one of the dangers in admitting such evidence is that it may generate satellite disputes as to what was or was not said on occasions other than those the jury is required to consider in order to reach its verdict. Such a proposal could therefore lend support to Mr O'Hare's objection that in such circumstances there should simply be one large jury trial dealing with all of the allegations. One way of reducing the risk of generating satellite disputes would be to reduce the number of complainants from Part 2 being called from 37 to a lower number, as Mr Chambers suggested.

[12] The third condition that has to be satisfied is that under s. 17(5) the court has to be satisfied that it is in the interests of justice that an order under s. 17(2) should be made. The 2004 Act does not lay down criteria to be met before s. 17(5) can be satisfied, and in the absence of experience from other decided cases it would be unwise to attempt to define all of the circumstances that may be

relevant when considering s. 17(5). One consideration would be whether the intention of the prosecution to seek to rely on similar fact evidence in the jury trial will result in the use of evidence before the jury which will be at the centre of the non-jury trial. If such evidence materially extended the jury trial in terms of its length and complexity, and then had to be gone over again at similar length in the non-jury part of the trial, then there is plainly a risk that the sum of the length of both parts of the trial might not be materially different to the length of a jury trial of all of the counts, thereby defeating one of the objects of the 2004 Act. That is not to say that the evidence admissible during the second part is inadmissible in the first part, or vice versa, only that when considering whether such a trial is in the interests of justice the court should consider very carefully whether the course proposed by the prosecution might not deprive the defendant of his right to a jury trial for a substantial part of both parts of the trial without materially shortening the overall length of the proceedings.

[13] In the present case, were the prosecution to seek to rely on a further 37 complainants, even on the limited basis proposed by Mr Chambers, in addition to the 7 complainants who ground the 28 counts in Part 1, who are only 7 out of a total 44 complainants who allegedly spoke directly to the defendant, or approximately one sixth of this element of the total number of complainants, there is a significant risk that the Part 1 element of the trial would be unduly extended and complicated, especially if the principal area of dispute is not whether the money was paid, but what is alleged to have been said by the defendant to each of the complainants who spoke directly to him. Mr Chambers no doubt had in mind the force of this objection when he said that the court could consider allowing a lesser number of complainants from the non-jury part to be called in the jury part of the trial if the court considered 37 complainants to be unduly burdensome.

[14] I consider that if the evidence of any of the 37 additional complainants is admissible as bad character evidence (which remains to be decided) then were all 37 additional complainants to be permitted to give bad character evidence against the defendant in the first part of the trial this would not be in the interests of justice. I consider that it would –

(1) create the risk of prolonging the first part of the proceedings to an unjustifiable extent due to the prospect of a large number of satellite disputes being ventilated before the jury, and

(2) would effectively inflict upon the defendant the burden of contesting a very large number of allegations twice, firstly during the first part of the trial in front of the jury and again during the second part of the trial before a judge alone.

To what extent the court could restrict the prosecution from relying upon evidence that may otherwise be admissible must involve a somewhat rough and ready judgement, but in this case I consider that at most a further 7 complainants from Part 2 would be as many as could be properly admitted in part 1 of the trial. In such an eventuality it would be for the prosecution to put forward the 7 additional complainants upon which it would seek to rely.

[15] I am satisfied that, provided the prosecution undertake to seek to call no more than 7 complainants from Part 2 of the proposed trial in the course of the evidence before the jury in Part 1 of the proposed trial, it is appropriate to make an order that the trial of the defendant take place upon the basis that only counts 1 to 28 as contained in the proposed indictment will be conducted with a jury, and all of the remaining counts will be conducted without a jury. Before making such an order, I will give the prosecution 14 days to consider whether it is prepared to give such an undertaking, and if so to identify the additional complainants upon whose evidence it will seek to rely as bad character evidence in Part 1 of the proposed trial.