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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

(1) PATRICK ASKIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PATRICK ASKIN (DECEASED) AND ON BEHALF OF THE DEPENDANTS OF THE DECEASED

(2) ALAN WHITE BY HIMSELF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET PEGGY WHITE (DECEASED)

(3) DEREK BYRNE

Plaintiffs

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

First Defendant

and

MINISTRY OF DEFENCE

Second Defendant

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Third Defendant

_____

Mr Frank O'Donaghue KC leading Mr Stephen Toal BL
(instructed by KRW Law) for Mr Askin
Mr Brian Fee KC leading Mr Nick Scott (instructed by KRW Law)
for Mr White
Mr Cormac Ó Dúlacháin SC leading Mr Malachy McGowan
(instructed by KRW Law) for Mr Byrne
Mr Paul McLaughlin KC (instructed by the Crown Solicitor) for the defendants
Mr Adrian Colmer KC leading Ms Julie Ellison (instructed by the Attorney General)
proposed fourth defendant

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MASTER HARVEY

Index	*Page number*
Introduction and background	1-8
Pleadings	8-22
Defence submissions	23-28
Plaintiff submissions	28-34
Legal principles	34-58
Consideration	58-66
The Court's determination and Conclusion	66-68
The Human Rights claim	68-77

Introduction

[1] It is difficult to contemplate a graver subject matter than that forming the basis of the current claims. These cases relate to the alleged activities of a terrorist gang, allegedly including serving or former members of the police, army and informers acting within the structure of the state which have resulted in the mass murder and maiming of dozens of people.

[2] At about 5.30pm on Friday 17 May 1974, three car bombs exploded in Dublin city centre at Parnell Street, Talbot Street and South Leinster Street. Ninety minutes later, another car bomb exploded in Monaghan Town on the North Road. Thirty-three people, including one pregnant woman, died from these explosions. This remains the highest number of people killed in a single day of the Troubles. The bombings were assumed to be the work of one or more loyalist paramilitary groups. An investigation into all four bombings was carried out by Garda Síochána detectives but no successful prosecutions were ever brought.

[3] There are four applications before the court, two of which are brought by the defendants. The first of these is essentially seeking to strike out the plaintiffs' claims. Alternatively, they seek a direction that limitation is tried as a preliminary issue and further seek a jurisdictional ruling on the law governing limitation. The plaintiffs bring applications to consolidate the claims from three into one and a proposed amended application to join the Attorney General for Northern Ireland as a defendant to the claims. This judgment deals with the strikeout application but for ease of reference, I have set out the background applicable to all four applications within this document.

[4] This action was heard over two days, thereafter, as some legal issues remained, I permitted the parties to deal with them by way of written submissions and a timetable for receipt of these was set. The court received numerous submissions and authorities over the course of the following weeks, and in the circumstances the court imposed a final deadline for the receipt of all outstanding written submissions. I am grateful to all parties for the degree of collaboration the legal representatives exhibited throughout, the collation of the electronic trial

bundles which ran to some 2,195 pages and the focused written and oral submissions of the various counsel which greatly assisted the court.

Background

[5] The first plaintiff Patrick Askin (junior) is the son and personal representative of the estate of Patrick Askin. Patrick Askin was 6 years old at the time of his father's death. He was at home with his mother and other young siblings when the bomb exploded at approximately 7.00pm shaking the windows of their home. He went with his mother into Monaghan Town to look for his father following the explosion. The second plaintiff is Alan White, the son and personal representative of the estate of Margaret White. Margaret White was in or near Greacen's bar in Monaghan when the Monaghan bomb exploded. She was an employee of a cafe located above the bar in when the bomb exploded. The third plaintiff is Derek Byrne who, confined to a wheelchair as a result of his injuries and having travelled by train from his home in Dublin to attend court in person on the first day of hearing, sadly passed away just a few days later. Derek Byrne was working as a petrol pump attendant at Westbrook Motors, Parnell Street, Dublin when the Parnell Street bomb exploded at or around 5.28pm on 17 May 1974. He also witnessed the death of Mr Patrick Fay, whose petrol tank he had just filled.

[7] Patrick Askin and Margaret White were injured by the explosion in Monaghan Town and subsequently died as a result of their injuries. Derek Byrne suffered very serious personal injuries in the Parnell Street, Dublin bomb and as a consequence lost some of the amenities of life, his course of employment was very significantly affected, and he suffered loss and damage. He died on the 18 November 2023. Each of the plaintiffs seek general damages as well as aggravated and exemplary damages in respect of the deaths and injuries that were incurred.

[8] The plaintiffs' case is that the explosions were the result of the planning and preparation of a group of loyalist terrorists based in Northern Ireland who instigated the planned attack from Northern Ireland by means of members of a gang travelling to the Republic of Ireland with weaponry, explosives and all necessary ancillary equipment previously stored in Northern Ireland.

[9] The gang allegedly comprised serving and former serving police officers, soldiers as well as informants used and financed by the Royal Ulster Constabulary (RUC), the Ministry of Defence (MOD) and other agencies. The plaintiffs' claim the terrorists were known to the Government of the United Kingdom and the Government of Northern Ireland, and the defendants made available to them sensitive and non-sensitive materials and although knowing of their terrorist acts, failed to disrupt or stop them.

The defendants' applications

[9] The defendants issued applications, firstly seeking an order pursuant to Order 18, rule 19 striking out the paragraphs which are set below of the composite "third amended statement of claim" dated 3 March 2023 on the grounds that:

(i) They do not disclose the particulars of material facts or particulars of knowledge necessary to support any of the causes of action pleaded contrary to Order 18, rules 7 and 12, and/or;

(ii) In the alternative, they do not disclose a reasonable cause of action, may prejudice, embarrass or delay the fair trial of the action and/or constitute an abuse of process (the relevant provisions can be found at Order 18, rule 19 (a) (c) and (d) of the Rules of Court of Judicature (Northern Ireland) 1980 ("the Rules").

[10] The paragraphs which are the focus of the application are as follows:

a. The assault claim at paragraphs 15, 19, 24, 25, 26;

b. The misfeasance in public office claim at paragraphs 27-33;

c. The conspiracy claim at paragraph 34;

d. The negligence claim at paragraph 34(a) to (p) against the first and second defendant and paragraph 34(a) to (f) against the third defendant

e. The breach of statutory duty claim and the human rights claim in their entirety.

[11] The defendants further seek:

(i) An order pursuant to Order 33 of the Rules that the issue of limitation should be tried as a preliminary issue and providing directions for the trial of that issue.

(ii) An order pursuant to Order 33, rule 3 of the Rules that, as part of its determination of limitation as a preliminary issue, the court determine in the first instance, as a matter of private international law, which law (or laws) applies (or apply) for determination of limitation.

[12] The defendants state that as to whether limitation should be tried as a preliminary issue, the court is not asked at this stage to determine whether the claims are statute barred, nor whether limitation should be tried separately and in advance of the main action. They state that these procedural issues can be determined at a later stage and the court is therefore only asked to make an order that limitation should be tried as a preliminary issue and which limitation law governs the plaintiffs' claims.

The plaintiff's applications

[13] The plaintiffs have issued the following applications:

(i) Pursuant to Order 4 rule 5 of the Rules seeking consolidation of the claims from three actions into one, or that the court otherwise order that these claims be tried together.

(ii) Pursuant to Order 15 rule 6 of the Rules for an order that the Attorney General for Northern Ireland be substituted as the third defendant in the above-entitled action; in place of the current third named defendant, the Secretary of State for Northern Ireland. At hearing it was clarified that the plaintiff now seeks to amend this application to reflect the fact the plaintiffs instead seek joinder of the Attorney General as an additional defendant, the consolidated statement of claim refers to the Attorney as the fourth defendant. I grant leave to amend the application accordingly.

Chronology

[14] A brief chronology of the proceedings in the three actions was helpfully set out in the skeleton argument of defence counsel, I largely adopt this as follows:

(i) Writs were issued on 24 July 2014 ("Byrne") and 12 January 2016 ("Askin and White").

(ii) Statements of claim were served in materially identical terms by each of the three plaintiffs on dates between January and May 2016.

(iii) Defences were served by each defendant along with detailed notices for particulars in each action in July 2017.

(iv) Replies to particulars were served in each action in February 2018. The replies expanded upon the allegations in the statements of claim, albeit they were in materially identical terms in each claim.

(v) On 23 November 2018, the defendants issued a summons in each action seeking, inter alia, further particulars.

(vi) The plaintiff's solicitor replied in open correspondence confirming that they had no further particulars to provide.

(vii) On 19 December 2018, Master McCorry ordered that a revised statement of claim be served, incorporating all allegations and particulars in one document.

(viii) Moreover, on 19 December 2018 the Master made discovery orders against the defendant. The order was varied on appeal on the ground that the interlocutory issues in this application should be determined prior to discovery.

(ix) The plaintiff was ordered to regularise the claim against the third defendant.

(x) On 22 January 2019, the three plaintiffs responded to the Order of 19 December 2018 by issuing a single conjoined statement of claim, which named all three plaintiffs on the same pleading and also named the Attorney General for Northern Ireland as third defendant in lieu of the Secretary of State. The conjoined statement of claim was served without first making application for amendment or consolidation.

(xi) On 3 February 2020, the applications were listed for hearing. The plaintiffs applied on the morning of the hearing for an adjournment, in order to allow further amendments to the statement of claim.

(xii) On 15 October 2020, a proposed amended statement of claim (consolidated) was served ("the consolidated statement of claim"). Progress in the action was then disrupted by the covid-19 pandemic.

(xiii) In March 2022, the defendants served amended summons in each action, for strike out of the proposed consolidated statement of claim.

(xiv) On 3 March 2023, the plaintiffs served a further proposed amended consolidated statement of claim.

(xv) On 10 July 2023, the defendants served a further notice for particulars in relation to the October 2020 consolidated statement of claim.

(xvi) On 4 October 2023, replies to particulars were served on the defendants.

The causes of action

[15] The plaintiffs claim the defendants and each of them are liable to the plaintiffs by reason of:

(a) The trespass, batteries and assaults perpetrated upon Patrick Askin, Margaret White and Derek Byrne.

(b) The negligence of the defendants and each of them.

(c) Misfeasance in Public Office.

(d) Conspiracy to cause unlawful acts.

(e) Breach of Statutory Duty including breach of Articles 2 and 3 ECHR and section 6 of the Human Rights Act 1998.

While the claims inevitably overlap, they are different. A summary of each is below, save for the human rights claim which I will turn to separately as the parties did not address it at hearing.

Assault and battery

[16] The plaintiffs plead this tort in a single paragraph claiming that the defendants perpetrated the attacks by "planning, perpetrating, instigating, and executing the detonation of the bombs" and of "intentionally causing lethal and grievous injury."

Negligence

[17] The allegations of negligence fall into a number of broad categories:

(i) Members of paramilitary organisations had infiltrated the membership of one or other defendant and that they had not been removed or detected. It is also alleged that this continued after the defendants knew of the affiliations.

(ii) Failing to detect paramilitary activities of former members of the police or military.

(iii) Handling unspecified informants and "allowing them to remain as active members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings."

[18] It is asserted that the defendants took "'positive action" to recruit members of paramilitary organisations into their ranks and also to recruit them as agents and their "knowledge" that those positive actions, even if unintentional "had led" to the bombings.

Misfeasance in public office

[19] The pleaded particulars involve a number of different elements. They include elements of both the vicarious liability claim and the knowledge claim:

(i) The actual participation in the attacks by serving members.

(ii) Members of one or other defendant who "knew of the involvement" of other serving officers but "failed to inform their superiors" or otherwise take action to remove them or prevent them from using information to assist their activities.

(iii) Members of the security forces who knew of the fact that loyalist paramilitaries had been recruited into their ranks but failed to take action to remove them.

(iv) Particulars of misfeasance relating to events after the bomb are also pleaded.

Conspiracy

[20] This claim is also related solely to the activities of serving officers. The plaintiff repeats all of the particulars and contends that the conduct constitutes a "conspiracy to perform an unlawful act." The claim therefore depends upon the facts pleaded at paragraphs 15, 19, 24 and 25.

[21] The plaintiffs plead that members of the defendants "entered into an agreement with members of a paramilitary organisation" to do acts such as supply vehicles, formulate plans, provide weaponry and explosives, provide training etc.

The pleadings - statement of claim

[22] On 3 March 2023, the plaintiffs served a further proposed amended consolidated statement of claim. A summary and extracts from the key sections are set out below.

[23] Paragraphs 15, 19, 24, 25 and 26 make up the bulk of the document and along with paragraphs 27-34 form the basis of the strike out applications. I will set these out in some detail.

[24] The other paragraphs can be briefly summarised as follows:

(a) Paragraphs 1-6 set out the parties to the action.

(b) Paragraphs 7-14 provide the factual background to the claims for each of the three plaintiffs.

(c) Paragraph 16 states that loyalist paramilitaries caused the deaths and injuries to the plaintiffs.

(d) Paragraph 17 sets out the five torts which form the basis of the claims.

(e) Paragraph 18 briefly sets out the three defendants and their role.

(f) Paragraph 20 states the plaintiffs rely not on their own knowledge but the findings of investigations, findings and factual circumstances.

(g) Paragraph 21 states the plaintiffs have been denied an Inquiry.

(h) Paragraph 22 states that it was not until the work of the Historical Enquiries team had been advanced that enough factual and opinion evidence had been gathered to enable the plaintiffs to prove the facts at paragraph 19.

(i) Paragraph 23 states the plaintiffs have set out the source for the primary facts pleaded and the reasonable inferences of fact they will seek the court to draw.

(j) Paragraphs 35-56 set out the damages and loss claim on behalf of each of the plaintiffs and where relevant, their dependants, as well as seeking aggravated and exemplary damages, damages for loss of amenity, interest and costs.

Paragraph 15

[25] Paragraph 15 of the amended consolidated statement of claim states:

> "The explosions were the result of the planning and preparation of a group of loyalist terrorists based in Northern Ireland who, thereafter, instigated the planned

attack from Northern Ireland by means of members of the gang travelling to the Republic of Ireland with weaponry explosives and all necessary ancillary equipment previously stored in Northern Ireland. These terrorists were, and were known by the Royal Ulster Constabulary, the Ministry of Defence, the Government of the United Kingdom and the Government of Northern Ireland, to be terrorists in the years preceding and leading up to the 17th May 1974. This terrorist gang comprised serving and former serving police officers, serving and former soldiers and informants used by and financed by the Royal Ulster Constabulary, Ministry of Defence and other state agencies of the Government of the United Kingdom and/or Northern Ireland. Not only were the Royal Ulster Constabulary, the Ministry of Defence and the Governments of the United Kingdom and Northern Ireland aware of the existence, composition and activities of this gang but they were also aware of or had access to the following information for an unknown period of time in the lead up to the 17 May 1974:

(a) That the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, had been engaged in obtaining, storing, training with and distributing weaponry and explosives for the purpose of attacking members of the Roman Catholic community or those who identified as Irish rather than British.

(b) That the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, had access to both sensitive and non-sensitive information held by the Royal Ulster Constabulary, the Ministry of Defence and other agencies of the Governments of the United Kingdom and/or Northern Ireland relating to the activities of the Security Forces in Northern Ireland. Access to such information will have allowed the members of the Gang to avoid detection and arrest as well as information as to their intended targets for assassination or attack.

(c) That serving and former officers or agents of the defendants were members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang.

(d) That the defendants had admitted to their forces and regiments those who engaged in and supported loyalist

paramilitarism and who were members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, or who were so closely connected to these paramilitaries that they were supporting their activities.

(e) That informants used by, and paid for by the Royal Ulster Constabulary, Ministry of Defence and the agencies of the Government of the United Kingdom and/or Northern Ireland were members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang.

(f) Further and/or in the alternative the defendants and each of them took steps to ensure that those responsible for the bombing would not be the subject of an independent effective investigation. This failure continued following the coming into force of the Human Rights Act 1998, despite fresh evidence coming to light that suggested that agents of the state were responsible for the bombings."

Paragraph 19

[26] At paragraph 19, it states:

"The defendants and each of them are liable to the plaintiffs by reason of the following facts:

(a) Each of the defendants stands jointly and severally liable vicariously for the tortious acts of those members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, who were, at the time of the explosions, serving police officers, soldiers or were otherwise servants or agents of the defendants.

(b) Each of the defendants stands jointly and severally liable vicariously for the tortious acts of those members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, who were, at the time of the explosions, former serving police officers and former soldiers, on the grounds that these persons and their activities remained so closely connected to the Royal Ulster Constabulary and the Ministry of Defence that it is proper to hold each vicariously liable to the plaintiffs.

> (c) Each of the defendants stands jointly and severally liable for the tortious acts of those members of the loyalist paramilitaries responsible for the Dublin and Monaghan bombings, including the group described as the Glenanne Gang, who were, at the time of the explosions, informants, whether paid or otherwise, of the defendants and each of them. Even if the informants were not employees of the defendants, they were so closely connected with their handlers and with the relevant authorities that it is proper that the defendants shall be held liable vicariously for the unlawful acts of the informants/agents and their associates within the Gang.
>
> (d) Further and/or in the alternative, the defendants recruited paramilitaries and thereafter permitted them to continue to engage in paramilitary activity or otherwise acquiesced in them engaging in such activity.
>
> (e) Further and/or in the alternative, with knowledge or means of knowledge or suspecting such persons to engage or be engaged in the planning preparation instigation and execution of acts of terrorism, failed to take any or any adequate steps either to prevent and/or disrupt such activity, to seek adequate assistance to eradicate the impugned conduct or to warn the general public that their ranks had been infiltrated by paramilitaries who continued or were suspected of continuing with their paramilitary activities."

Paragraph 22

[27] Paragraph 22 states:

> "It was not until after the work of the Historical Enquiries Team into the activities of the Glenanne Gang was sufficiently advanced that there was available to them a sufficiency of factual and opinion evidence from which to prove the facts asserted at paragraph 19 to a competent court as to the liability of the defendants and each of them."

Paragraph 24

[28] At Paragraph 24 (1.2) the plaintiff alleges that four named individuals were part of the Gang behind the bombings, and were serving members of the military at that time. The plaintiff alleges that two members of the Gang were working as security force informants at the time [24(1.3)].

[29] Notwithstanding the averment that named individuals were serving members of the military, it is also pleaded that they were "being run as agents" for the military "before and after the bombing" [24(1.4)].

[30] It is claimed that a named individual perpetrated a different murder [24(1.5)]. It is claimed that a military intelligence officer had intelligence of "the names of the bomb suspects" four months after the bombs [24(1.6)].

[31] An individual had been "'collecting fertilizer for use in making explosives" the same month as the bombing. It does not state that he participated in the bomb attack or that he had any connection to the defendants [24(1.7)].

[32] Some members of the military held the belief that the explosives emanated from security sources and that the attacks were perpetrated with the assistance of security force personnel [24(1.8)].

[33] Former members of the security forces had infiltrated the UVF in and around Portadown to run them and their leaders as informers [24(1.9)].

[34] John Weir is a former RUC officer who swore an affidavit in which he made admissions about membership of the "Glenanne Gang". It is alleged that he named another named individual as a member of the Gang and member of the security force at the time of the bombing [24(2.2)].

[35] Another named individual who Weir believed to be a Captain was working in the UDR [24(2.2)].

[36] The plaintiffs claim from Weir and unidentified members of the Gang the identities of the persons involved in the bomb attacks. [24(2.5)].

[37] It is alleged that the farm of a serving member of the RUC was used in several operations including assembly of the bombs. [24(2.4)].

[38] This individual believed that the explosives were provided by another named individual [24(2.7)]. He also believed that there was knowledge of the activities of the Gang among unidentified senior members of the RUC [24(2.8)].

[39] A former military information officer stated to a third party organisation that in 1974 he had been told by unnamed sources that a named individual was working for the military and that two other individials had been working for RUC Special Branch. It is not alleged that they were involved in or perpetrated the attack. No particulars are pleaded regarded the basis for the allegation that they were working for the RUC [24(3.2)].

[40] Further reference is made to an individual working as a covert source for Special Branch. No allegation is made that he was involved in the bomb attack or the role which he is alleged to have played [24(3.3)].

[41] The plaintiffs also plead summary extracts from the "Joint Committee on Justice, Equality, Defence and Women's Rights Interim Report on the Report of the

Independent Commission of Inquiry into the Dublin and Monaghan Bombings December 2003" ("The Barron report").

[42] The pleaded facts refer to passages in which a named individual refers to other individuals who "had been involved" in the bomb attacks and who "worked closely" with Special Branch and "British Intelligence". The individuals named are referred to in generic terms and by surname only. A further assertion of "involvement' is made about several individuals. It is asserted that they were not targeted for intelligence operations, on the basis that they were working as informants for the security forces [24(4.10) and (4.11)].

[43] The only other facts arising from the report are statements of belief, which the defendants assert are insufficient and impermissible pleadings [24(4.18) - (4.21)].

[44] The plaintiffs also refer to a 1973 report prepared by the Military on the issue of "Subversion in the Ulster Defence Regiment (UDR)". The pleadings contain reference to some of the conclusions about weapons thefts from the military and the associations between serving members of the UDR and loyalist paramilitaries. As highlighted by the defendants, this section of the pleadings arguably does not advance any of the plaintiffs' key claims.

[45] The plaintiffs refer to Historical Enquiries Team ("HET") reports relating to murders in mid-Ulster between 1972 and 1978. It is suggested that the reports demonstrate involvement by members of the security forces in "a significant number of murders committed by the Glenanne Gang". The pleadings record that no HET report was prepared in relation to the Dublin Monaghan bomb attacks.

[46] The plaintiffs plead to the contents of a book by a journalist who it is claimed investigated many of the murders in the mid-Ulster area and had access to relevant material. While some facts are pleaded about potentially collusive acts between members of the security forces and members of loyalist paramilitaries, none of the facts pleaded relate to the Dublin and Monaghan bombings.

[47] The plaintiffs also refer to the decision in the case of *Re Barnard* [2017] NIQB 82 which related to a different bomb attack for which a perpetrator was identified and convicted. Discovery in the *Barnard* case included an incomplete draft of a HET report related to murders in the mid-Ulster area in which there were suspicions or evidence of state participation in the crimes. The plaintiffs do not plead any reference to facts in the draft report or judgment related to the Dublin and Monaghan attacks [24.8].

Paragraph 25

[48] Paragraph 25 of the statement of claim repeats verbatim each of the facts pleaded at Paragraphs 15 and 19 and lists the sub-paragraph numbers within paragraph 24 which are relied upon as particulars of the facts pleaded. Paragraph 25 does not therefore add to the facts pleaded in paragraph 24.

Paragraphs 26-34

[49] These paragraphs set out the particulars of trespass to the person, assault and battery, misfeasance in public office, conspiracy to perform an unlawful act, negligence and breach of statutory duty/the human rights claim.

The annexes to the statement of claim

Annex A

[50] The plaintiffs attach three annexes to the statement of claim. At paragraph 3, they refer to what is described as the "Glenanne Series". They contain an assertion that the Dublin and Monaghan bombings were launched from Northern Ireland. [Annex A, para 3].

[51] At paragraph 14 they also contain an allegation that the authorities had advanced intelligence or information that the attacks may be carried out. No details are given about the content of the information, who received it and when [Annex A, para 14].

Annex B

[52] This contains a list of attacks which it is contended are attributable to the Glennane Series. In relation to the Dublin and Monaghan attacks, a list of individuals is provided, different to the names provided in the body of the statement of claim. Some of the named individuals are said to have been RUC or military agents.

Annex C

[53] This contains a list of individuals who are associated with some of the Glenanne attacks. Some of the individuals are listed as "involved' in the Dublin and Monaghan bombings.

The plaintiff's replies to particulars

[54] The defendants sent a series of 148 questions in a notice for further and better particulars served on the plaintiffs on 10 July 2023. The plaintiffs served replies to this notice on the 4 October 2023. Below is a brief summary of the main issues arising therefrom.

[55] By way of a preamble to the replies, the plaintiffs state:

> "…in answer to the defendants' notice for further and better particulars the plaintiffs reply as follows, expressing as they do the general observation that the consolidated statement of claim sufficiently pleads out the case made by the plaintiffs and that the vast majority of these particulars are systematically elaborative and prolix and are oppressive, vexations and unreasonable in the context of the action and amount to an attempt to engage in trial by particulars as opposed to trial by evidence at hearing. The particulars raised disregard the

> fact that the plaintiffs are not and could not be personally privy to and have a minute and forensic knowledge of the inner workings of the security services and paramilitary organisations. Nor is this, or much of the information sought, required to establish liability."

[56] The replies variously repeat the plaintiff's assertion that "this has been sufficiently particularised in the statement of claim" and "beyond what is contained in the statement of claim the information sought is not known by the plaintiffs." Further, the plaintiffs stated that "the precise acts and omissions engaged in are outside the knowledge of the plaintiffs, and in any event the information sought is within the knowledge of the defendant."

The replying affidavit of Kevin Winters

[57] In a replying affidavit dated 3 September 2019, in response to the defendant's applications, the plaintiff's solicitor Mr Winters exhibits:

> "documents that provide the evidential foundation, at this stage, to the Dublin and Monaghan bombing actions. These documents set out the limited knowledge that the plaintiffs have of the circumstances of the bombings."

The Hidden Hand programme

[58] In 1993, Yorkshire Television broadcast a documentary on the bombings entitled the "Hidden Hand". The programme purported to give a detailed account of how the bombing operations had taken place. It named several loyalist paramilitaries whom it believed were or ought to have been on the Gardaí's list of suspects. It also suggested that the Garda investigation had ended prematurely because of a lack of assistance from the authorities in Northern Ireland. Finally, it raised the possibility that members of the security forces in Northern Ireland may have assisted in planning or carrying out the bombings. The issues and allegations raised by it were the catalyst for a campaign by Justice for the Forgotten and others. It was as a result of that campaign that the Government set up a Commission of Inquiry.

[59] The programme was the subject of a Garda inquiry to establish whether those who made the programme had any substantive evidence which might lead to persons being made amenable for the bombings. No such evidence was found. Following criticisms of the report of this inquiry by the Department of Justice, Gardaí interviewed a number of contributors to the programme, as well as certain persons named in the programme as possible suspects for the bombings. Again, no evidence capable of sustaining a prosecution emerged from these interviews. (Page 26 and 27 Joint Committee on Justice, Equality, Defence and Women's Rights Interim Report on the Report of the Independent Commission of Inquiry into the Dublin and Monaghan Bombings December 2003 – "The Barron report").

The affidavit of John Weir

[60] This is a statement by John Weir dated 3 January 1999. He is described in the Barron report as a former RUC Sergeant and a convicted criminal. Between 1980 and 1992, he served a prison sentence for his part in a murder. During and after his imprisonment he had made a number of allegations involving members of the RUC, UDR and RUC Reserve, as well as known loyalist paramilitaries. His allegations were based on personal knowledge as well as on information from third parties. His claims have been the subject of inquiries by the RUC and An Garda Síochána. He claims to have been part of a group of policemen, UDR officers and loyalist extremists who carried out a series of attacks in the mid-1970s. He says many of their operations were planned and prepared at a farm owned by a RUC reserve officer at Glenanne, Co. Armagh. He names this person and a UVF member who allegedly confessed their own involvement in the Dublin and Monaghan bombings to him, and gave him the names of a number of others who they said were also involved. The Barron report concluded that:

> "the amount of details on which he has been proven correct suggests that his sources were authentic and contemporary. Bearing in mind that Weir was an active member of the security services, and that his allegations relating to the period from May to August 1976 have received considerable confirmation, the Inquiry believes that his evidence overall is credible, and is inclined to accept significant parts of it. Some reservation is appropriate in relation to his allegations against police officers having regard to his possible motive in going public, and also in relation to his own part in the offences which he relates. This view is one based also on a meeting with Weir, in which he came over as someone with considerable knowledge of the events which were taking place in the areas where he was stationed and who was prepared to tell what he knew. The Garda officers who interviewed him were of the same opinion. In the light of all the above, the Inquiry agrees with the view of An Garda Síochána that Weir's allegations regarding the Dublin and Monaghan bombings must be treated with the utmost seriousness."

The Barron Report

[61] After the broadcast of the "Hidden Hand" documentary in 1993, the Irish Government set up two private inquiries into the allegations.

[62] An Independent Commission of Inquiry into the Dublin and Monaghan bombings was established in January 2000 and was concluded in 2003. The report of the Commission of Inquiry (the Barron report) was published on 10 December 2003. It was published through the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, as an Interim Report. A sub-committee of the Joint Oireachtas Committee was then established to consider the report and produce

recommendations. These recommendations were published as a Final Report in March 2004.

[63] The terms of reference for the Barron report were:

> "To undertake a thorough examination, involving fact finding and assessment, of all aspects of the Dublin and Monaghan bombings and their sequel, including - the facts, circumstances, causes and perpetrators of the bombings; - the nature, adequacy and extent of the Garda investigation, including the cooperation with and from the relevant authorities in Northern Ireland and the handling of evidence, including the scientific analyses of forensic evidence; - the reasons why no prosecution took place, including whether and if so, by whom and to what extent the investigations were impeded; and the issues raised by the Hidden Hand TV documentary broadcast in 1993."

[64] The report of Judge Henry Barron concluded it was likely police officers and soldiers participated in, or were aware of, preparations for the bombings, on 17 May 1974, but found no evidence of collusion at a senior level. He stated that he believed the loyalist bombers were capable of carrying out the attack without help and added:

> "It is likely that the farm of James Mitchell at Glenanne played a significant part in the preparation for the attacks. It is also likely that members of the UDR and RUC either participated in, or were aware of those preparations."

[65] The original police investigation and Government of the day were also criticised by Judge Barron. He found that vital forensic evidence and government files relating to the bombings had mysteriously disappeared. In his report, Judge Barron said:

> "There are grounds for suspecting that the bombers may have had assistance from members of the security forces."

However, he said any collusion between the UVF bombers and the security forces remained a matter of inference.

[66] The conclusions of the report were as follows:

> "1. The Dublin and Monaghan bombings were carried out by two groups of loyalist paramilitaries, one based in Belfast and the other in the area around Portadown/Lurgan. Most, though not all of those involved were members of the UVF.

2. It is likely that the bombings were conceived and planned in Belfast, with the mid-Ulster element providing operational assistance.

3. The bombings were a reaction to the Sunningdale Agreement - in particular to the prospect of a greater role for the Irish Government in the administration of Northern Ireland. The timing of the attacks may have been inspired by a number of important events around that time including: (i) a statement of the Taoiseach in April 1974 in which he expressed the hope that formal ratification of the Agreement would take place in May; (ii) statements by Northern Ireland Secretary Merlyn Rees (also in April) proposing the phasing out of internment and a gradual reduction of the British Army presence in Northern Ireland; (iii) the advent of the Ulster Workers Council strike.

4. A finding that members of the security forces in Northern Ireland could have been involved in the bombings is neither fanciful nor absurd, given the number of instances in which similar illegal activity has been proven. However, the material assessed by the Inquiry is insufficient to suggest that senior members of the security forces in Northern Ireland were in any way involved in the bombings.

5. The loyalist groups who carried out the bombings in Dublin were capable of doing so without help from any section of the security forces in Northern Ireland, though this does not rule out the involvement of individual RUC, UDR or British Army members. The Monaghan bombing bears all the hallmarks of a standard loyalist operation and required no assistance.

6. It is likely that the farm of James Mitchell at Glenanne played a significant part in the preparation for the attacks. It is also likely that members of the UDR and RUC either participated in, or were aware of those preparations.

7. The possibility that the involvement of such army or police officers was covered-up at a higher level cannot be ruled out; but it is unlikely that any such decision would ever have been committed to writing.

8. There is no evidence that any branch of the security forces knew in advance that the bombings were about to take place. This has been reiterated by the current

Secretary of State for Northern Ireland and is accepted by the Inquiry. If they did know, it is unlikely that there would be any official records. Such knowledge would not have been written down; or if it was, would not have been in any files made available to the Secretary of State. There is evidence that the Secretary of State of the day was not fully informed on matters of which he should have been made aware. On that basis, it is equally probable that similarly sensitive information might be withheld from the present holder of that office.

9. The Inquiry believes that within a short time of the bombings taking place, the security forces in Northern Ireland had good intelligence to suggest who was responsible. An example of this could be the unknown information that led British Intelligence sources to tell their Irish Army counterparts that at least two of the bombers had been arrested on 26 May and detained. Unfortunately, the Inquiry has been unable to discover the nature of this and other intelligence available to the security forces in Northern Ireland at that time.

10. A number of those suspected for the bombings were reliably said to have had relationships with British Intelligence and/or RUC Special Branch officers. It is reasonable to assume that exchanges of information took place. It is therefore possible that the assistance provided to the Garda investigation team by the security forces in Northern Ireland was affected by a reluctance to compromise those relationships, in the interests of securing further information in the future. But any such conclusion would require very cogent evidence. No such evidence is in the possession of the Inquiry. There remains a deep suspicion that the investigation into the bombings was hampered by such factors, but it cannot be put further than that.

11. As stated, there are grounds for suspecting that the bombers may have had assistance from members of the security forces. The involvement of individual members in such an activity does not of itself mean the bombings were either officially or unofficially state-sanctioned. If one accepts that some people were involved, they may well have been acting on their own initiative. Ultimately, a finding that there was collusion between the perpetrators and the authorities in Northern Ireland is a matter of inference. On some occasions an inference is

> irresistible or can be drawn as a matter of probability. Here, it is the view of the Inquiry that this inference is not sufficiently strong. It does not follow even as a matter of probability. Unless further information comes to hand, such involvement must remain a suspicion. It is not proven."

[67] The Joint Oireachtas Committee recommended that the Irish Government establish a Commission of Investigation Inquiry to deal with the outstanding issues raised by the report. The Commission of Investigation, set up on 13 May 2005 under the sole membership of Mr. Patrick MacEntee, S.C., Q.C. The Final Report (the "MacEntee report") was published on 4 April 2007.

The judgment of Treacy LJ [2017] NIQB 82 and the Court of Appeal [2019] NICA 38

[68] In these cases, the applicant was the older brother of Patrick Barnard, murdered aged 13 by a bomb placed outside the Hillcrest Bar in Dungannon on 17 March 1976. The applicant was 19 at that time. The Historical Enquiries Team ("the HET") considered that this bombing was part of the "Glenanne series" of cases. The applicant sought relief arising from a failure/refusal on the part of the HET to conduct a lawful, effective and independent investigation into the murder of his brother, particularly by the failure/refusal of the HET to complete and publish an overarching thematic report regarding the linked Glennane Gang cases.

[69] At first instance, the learned Judge concluded that:

> "[209] The unfairness here is extreme – where the applicant had believed that the murder of his brother would finally be considered in context for the purposes of discovering if there was any evidence of collusion in the murder, that process is now completed and will not be taken up by any other body. The frustration of the HET commitment communicated by the ACC completely undermined the …primary aim [of the HET] to address as far as possible, all the unresolved concerns that families have. It has completely undermined the confidence of the families whose concerns are not only still unresolved but compounded by the effects of the decisions taken by the then Chief Constable. It is a matter of very grave concern that almost two decades after the McKerr series of judgments decisions were taken apparently by the Chief Constable to dismantle and abandon the principles adopted and put forward to the CM to achieve Article 2 compliance. There is a real risk that this will fuel in the minds of the families the fear that the state has resiled from its public commitments because it is not genuinely committed to addressing the unresolved concerns that the families have of state

> involvement. In the context of the Glennane series, as I said earlier, the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of state actors in this series of atrocities including whether they could be regarded, as the Applicant argued, as part of a 'state practice'. I consider that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the package of measures."

[70] On appeal, the Court of Appeal concluded that the respondent to the appeal (Mr Barnard) could not rely on Article 2 of the Convention because of the passage of time but accepted that he had a procedural legitimate expectation that an analytical report on collusion would be carried out by an independent police team.

[71] At para [74] they stated:

> "We have found that the legitimate expectation generated was procedural. That will require a fresh approach by independent officers determining the appropriate response to the expectation generated. It is not the function of this court to direct how those independent officers should proceed. The Chief Constable's task is to appoint independent officers who should then determine how to respond to the expectation. We do not consider that this is an appropriate case for an order of mandamus since we can give very limited meaningful direction to the independent team so appointed. If, however, the Chief Constable unduly delays in appointing independent officers he would be at risk of further proceedings challenging such a failure."

Lethal Allies: British Collusion in Ireland, by Anne Cadwallader

[72] This was not attached to the exhibits but is quoted in the affidavit from Mr Winters. The publisher (Mercier Press Limited) provides this synopsis:

> "Farmers, shopkeepers, publicans and businessmen were slaughtered in a bloody decade of bombings and shootings in the counties of Tyrone and Armagh in the 1970s. Four families each lost three relatives; in other cases, children were left orphaned after both parents were murdered. For years, there were claims that loyalists were helped and guided by the RUC and Ulster Defence Regiment members. But, until now, there was no proof.

> Drawing on 15 years of research, and using forensic and ballistic information never before published, this book includes official documents showing that the highest in the land knew of the collusion and names those whose fingers were on the trigger and who detonated the bombs. It draws on previously unpublished reports written by the PSNI's own Historical Enquiries Team. It also includes heartbreaking interviews with the bereaved families whose lives were shattered by this cold and calculated campaign."

The minutes of a meeting with the Police Ombudsman for Northern Ireland ("PONI") on 17 July 2013

[73] Present at this meeting were: Paul Holmes, Tony Doherty and Michael Mulholland from OPONI; Kevin Winters, Aidan Carlin and Niall O' Murchu from KRW Solicitors; Cormac O' Dulachain SC, Anne Cadwallader and Margaret Urwin.

[74] The minutes exhibited to the affidavit state as follows:

> "Paul Holmes confirmed that the new Police Ombudsman for NI, Dr. Michael Maguire, is very close to defining collusion - it has been the subject of much consideration. Paul Holmes announced that PONI has accepted the Dublin and Monaghan bombings for investigation. It will be part of the Glenanne series. It will be possible to add Dundalk and Castleblayney bombings and the murder of John Francis Green at a later date. They will be investigating the RUC' s response to the bombings. They said the actions of the Garda Siochana will not be part of their remit. However, they would make every effort to engage with the Gardai. Their efforts to engage on another case have been resisted. Cormac made the point that the Gardai have already co-operated with other inquiries with regard to Dublin and Monaghan, etc. - Barron Inquiries, MacEntee Inquiry. Paul Holmes stressed that the case will take a number of years. They will take formal statements of complaint from Paddy Askin and Derek Byrne. Margaret Urwin will also make a formal statement of complaint. It will be necessary to submit those by the end of August. They will take the statements from Paddy and Derek on separate days. Cormac suggested that MacEntee's Schedule of Documents will be useful for them. Margaret will provide them with a copy.

> Kevin suggested that they meet with Colin Wallace, John Weir and Fred Holroyd. They have already interviewed Colin Wallace and John Weir."

The minutes of a meeting with PONI on 16 June 2016.

[75] The minutes exhibited to the affidavit can be summarised as follows. Paul Holmes from the Police Ombudsman's Office outlined their role. They would look at criminality or misconduct by members of the police. In relation to the jurisdictional issue, he stated that the conspiracies were "hatched in the north and involved members of the RUC". Their office was starting the investigation into the Glenanne Gang "which included Dublin and Monaghan, Dundalk and Castleblayney bombings" and that there would be a need to open discussions with the Garda. This is a complex investigation, there are 43 different complaints, relating to 33 incidents and 89 deaths (including the deaths in the Republic). Other murders and attacks may become part of the investigation as it progresses. The aim was to complete by the end of 2017 but this may move depending on where the investigations take them. He went on to outline the sequence of the work they would undertake and their terms of reference.

Defence submissions

[76] Very extensive efforts have been made for the plaintiff to plead the action to the fullest extent possible. The defendants' key submission is that, notwithstanding the revisions to the pleadings and the most recent replies, they remain inadequate. The plaintiffs contend that the defendants are vicariously liable for terrorist murders but do not plead the necessary material facts which, if proved, could support such a claim.

[77] The court is not conducting an inquiry or investigation into the Dublin and Monaghan attacks or other broader acts of possible collusion. The court is concerned only with adjudicating upon a private tort action between specific parties, based solely upon the allegations made by the plaintiffs.

[78] In short, the plaintiffs do not identify the actual perpetrators (with sufficient facts to support their involvement) and/or do not plead sufficient facts to support a claim for imposition of vicarious liability, particularly in relation to allegations that the perpetrators acted as agents of the state authorities at the material time.

[79] It is insufficient to make bare assertions, rather it is necessary to plead the facts which it is intended to prove to support the claim, with sufficient particularity.

[80] The inadequacies in the pleadings also amount to an abuse of process insofar as they may unfairly require a Closed Material Proceeding ("CMP"), simply to be able to maintain a denial defence.

[81] At the heart of the defendant's objection to the pleadings is that they do not disclose the key facts which are essential to sustain the claims, nor do they do so with the particularity which a claim of this nature requires that enables the defendants to know and understand the case which they are required to meet.

[82] There are two key factors which frame the particularity required in this case:

(i) The gravity of the allegations; the plaintiffs allege participation in mass murder. They are at the highest end of the scale and simply cannot be more serious. The authorities show that serious and complex allegations require detailed particulars.

(ii) The case is founded upon vicarious liability for individuals who are not defendants. It is a minimum requirement that the defendant know the identity of the individuals, the conduct for which it is alleged they are vicariously liable and the relationship which provides the basis for the claim of vicarious liability.

[83] The pleadings contain a number of references to "sources" which the plaintiffs intend to rely upon. Leaving aside issues of admissibility, the pleaded facts are entirely insufficient either to support a claim that any of the individuals were "involved" or that they were "agents" for one or other defendant at the relevant time.

[84] Despite naming some individuals who are alleged to have participated in the bombings, the plaintiffs have chosen not to join any of them as defendants. At the very least, the defendants are entitled to know the identity of the individuals for whose actions it is claimed they are responsible and the facts which it is intended to prove in order to establish their role or the existence of a relationship which could give rise to vicarious liability. If it is intended to prove either matter by way of a circumstantial case, the facts which provide the foundation for the necessary inferences must be pleaded.

[85] In light of the complexity of the facts, the vintage of the claim, the resources involved and the potential sensitivity of some of the materials these obligations should not be underestimated.

[86] The procedures of the court cannot be used for any collateral purpose other than the fair determination of these claims. They cannot therefore be used as a means of collateral investigation, information gathering exercise or fishing expedition. This is a key distinction between adversarial litigation under the common law system and an inquisitorial system.

[87] The point is of particular importance in this case where many individuals are named in the pleadings as having been "involved' in some unspecified manner in the bomb attacks and even to have been an "agent' or "informer". Many of these people may still be alive. None are named as defendants and therefore cannot defend themselves. None have ever been convicted of perpetrating the bomb. It would be wrong in principle, contrary to the overriding objective of the just determination of claims and an abuse of court process for allegations against individuals to be permitted to proceed, unless clear and proper grounds are set out to support their alleged participation in a criminal enterprise of this magnitude. Pleadings which contain these allegations can be read in open court or can form part of public judgments. The mere publication of these allegations can have enormously

damaging effects upon personal lives, resulting in stigma, intimidation or even risks to life.

[88] The court will be well aware of the consequences for litigation in terms of time, delay and resources where a CMP is involved. The costs of a special advocate must also be borne by the relevant defendant, placing the defendant at a financial as well as procedural disadvantage. In cases such as the present, where named individuals are not joined as defendants, the court will also be aware of the potential for damage to those individuals for allegations of this nature to be made in public, where they have no opportunity to defend themselves. Even if the individuals are joined as defendants, there is a possibility that they may themselves require a special advocate to act in their interests. The possibility of proceedings which are wholly disproportionate can become very real.

[89] The court may also take judicial notice of the fact that once a CMP is permitted, the course of the litigation may be altered irrevocably, and the cases can become much harder to resolve on a consensual basis. This will depend upon the extent to which the sensitive material is key to the issues in the case. The problem arises because once the special advocate has seen the sensitive material, communication between the special advocate and the plaintiff is prohibited, without the leave of the court. It is therefore more difficult for the parties to engage in any type of informed discussions. Even if discussions take place through the medium of a special advocate, these will require to be highly regulated if there is a potential for breach of a "neither confirm nor deny" defence.

[90] In addition to procedural difficulties (and perhaps because of them), the court must be alive to the possibility that allegations of agency relationships could be deployed in pleadings for collateral or inappropriate purposes. These might include a desire to increase in commercial pressure upon defendants; an intention to cause the defendants to incur expenditure or, at worst, an attempt to identify agents. Any such purpose would be an abuse of the court process and would justify a strike out of the relevant pleadings.

[91] For these reasons, allegations involving the existence of agency relationships are inherently capable of altering the course of the litigation in a manner which could give rise to unfairness or an inequality to defendants. The appropriate safeguard against any possibility of unfairness or abuse is to ensure that pleadings are sufficiently detailed to enable careful scrutiny by the court and requirements should be observed fully. Pleadings of this nature should therefore be struck out unless they are supported by sufficient particulars of all material facts which are necessary to sustain a claim that an agency relationship existed.

[92] The court should consider the Omagh bombing case by way of comparison. In the civil claim, the case was issued directly against the perpetrators. The type of evidence to prove participation of the perpetrators included mobile phones, recognition evidence and detailed evidence to prove who they were. That was not a vicarious liability case. In the "Miami showband" claim, there had been convictions of two former UDR soldiers, meaning the stages one and two of the vicarious

liability test were established. There have been no convictions in this case, no direct perpetrators were joined as defendants.

[93] A plaintiff cannot engage in a fishing expedition and use civil procedures as a form of inquiry which is an abuse of process of the court. It is not an abuse of process if properly pleaded. In order to seek damages, the plaintiffs have to plead the case with adequate facts. It becomes an abuse of process once the procedural machinery is initiated and the commercial dynamic changes as parties can use this to their advantage and incentivise certain courses of action. While the defendant is not claiming this is case here, but the court should safeguard against abuse where an agency relationship is alleged.

[94] With regard to misfeasance in public office, they cannot simply say they must have been involved and ask the court to draw an inference, the plaintiffs must set out all facts to support the ability to draw that inference.

[95] The defendants in this case do not know the case they have to meet, they can say that with absolute candour. This would require the defendants to open the cupboards to all national intelligence security from the 1970's to determine which individual did it, assess were they adequately controlled and what knowledge did the defendants have of them. The lack of clarity hinders discovery process also. It is a grossly disproportionate task, if not impossible.

[96] The defendants can accept the point that the plaintiffs might not know which officers failed to report to senior officers but still need particulars of what was the knowledge of the institution about these specific serving officers and prior attacks and activity not passed up the line. Once again, it is an allegation but not the facts.

[97] The alleged misfeasance was also perpetrated by officers who controlled information from informants including the Glenane Gang. They allege they were handling agents or had access from agents who perpetrated the bomb and nothing was done to remove them or disrupt their activities which would have stopped the attack. That is an allegation not the facts. If the plaintiff pleads there were people who had that information, the defendant needs the facts to plead to that.

[98] There are individuals named but the facts to support their involvement are not. There are inconsistent pleadings regarding the status of certain individuals. None of those that are named were ever convicted. They are not defendants, they cannot defend themselves. The defendants are entitled to know what they did and why they should be vicariously liable for them and entitled to expect it to be pleaded in the same way those individuals would expect to be told if they were named in the claim.

[99] The plaintiffs cannot rely on journalists, inquiry conclusions, TV programmes or what one person said in an affidavit. The plaintiffs have to set out the facts they intend to prove.

[100] There are several pleadings of belief. A case could conceivably be made we know there must have been security force involvement or assistance as here are the

characteristics of the attack, or here are the materials used and that must have come from security forces and the plaintiffs could then attempt to prove the facts from which seek to make an inference about involvement. That is not this case. It pleads a belief from someone in Lisburn that explosives were provided from security force sources or an unnamed UDR officer provided fertiliser.

[101] In John Weir's affidavit, there is a belief the Gang activities had been authorised at the highest level of the RUC. That is the closest to an allegation the RUC allowed them to take place and they had subversives in their ranks and authorised it. It is all based on a statement of belief with no facts to support it.

[102] There are individuals named, including serving soldiers but do not allege participation in the attack. It includes an allegation they had information about the suspects and believed some unnamed individuals were working closely with them, but that is the height of the intelligence allegation.

[103] The HET provided reports on other attacks in the Glenanne series and gave them to victims. The work is continuing under the auspices of Operation Kenova. An incomplete HET report was disclosed but do not take the particulars any further as they are just generally supportive of some element of collusion between security forces and paramilitaries at this time in mid-Ulster. They are not particulars or facts.

[104] While the plaintiffs will argue how could they possibly know all this information to plead their case, the rules of civil procedure are clear and there is a minimum standard a pleading must meet. The defendant respectfully states that noone expects them to know but they have alleged it and they should not do so unless they provide the particulars which civil procedure requires. The court cannot achieve a finding on a fact unless it has been pleaded.

[105] When exercising judgment, the court must take account of what is involved when vague generalised allegations of this severity are made. This is not a disproportionate burden on the plaintiffs. The threshold is a sufficiently pleaded allegation. The burdens on the defendant are high, the defendant concedes this is not inappropriate if the facts are properly set out.

[106] The plaintiffs seek to adduce an affidavit from Kevin Winters which references a number of sources, however, this is an application under Order 18 rule 19 (1) (a) meaning affidavit evidence is not admissible for that purpose, however I pause to observe it is admissible under Order 18 rule 19 (c) and (d).

[107] It could be abuse of process to make an allegation of agency to force the defendants into a CMP bringing huge resource and expense consequences all with a view to shifting the commercial dynamic of the litigation. The way to safeguard this potential abuse is through the pleadings. The defendants should not have to search through reports, affidavits and judgments to work out what the case is. The purpose of the pleading is to make the case clear and set out the facts to justify the allegation they are making.

[108] While the application is to strike out, the court has power to stay the action. Staying will not improve the position. If there is a strike out it will not be a finding of fact meaning if in future, further information comes to light, a dismiss would not preclude such a further action.

[109] It is nigh on impossible that discovery could lead to an improvement in the pleading. There is a difference where it meets the requisite standard and discovery adds to that, but the baseline is that the core facts in the statement of claim must meet the requisite standard. Normally, if a defendant brings a strike out application, it leads to an amendment application. This case had a hearing in February 2020 at which the plaintiff asked for more time and since then had more replies to particulars. It is safe to assume at this stage the plaintiff has not held back facts they propose to prove. The defendants have given the plaintiffs every opportunity in time and substance, as has the court given the number of previous appearances.

[110] The defendants are not suggesting improper pressure is being applied by these plaintiffs, but it is important to insist on correct procedural standards. The discovery exercise is a nigh on impossible when one does not know the parameters of the case.

[111] The defendants are not inviting the court to make an assessment of the admissibility, credibility or strength of evidence they are only asking the court to look at facts and whether they are enough to substantive the allegations. It is not enough to set out equivocal facts.

[112] The discovery exercise is disproportionate, unfair and uncertain as the defendants do not know the parameters of the case the plaintiff is seeking to prove.

[113] The defendants stand by their primary submission but concede a stay of proceedings is a better alternative than to refuse the application. The parties could await the review as part of operation Denton which is better than commencing a discovery exercise.

Plaintiff's submissions

[114] It is important not to lose sight of the context of this case. In one of the claims, Patrick Askin was blown up and died from his injuries, he was 48 years old and worked in a sawmill. The plaintiff is the eldest of four children and recollects going into Monaghan town to look for his father. The family never fully recovered. This is especially so when the plaintiffs hear defence submissions regarding the impact on resources.

[115] Order 18, rule 7 states that the pleading must only contain a "statement in a summary form of the material facts", but not the evidence. Order 18, rule 12 simply requires pleadings to contain the necessary particulars and, in particular, when malice is pleaded, the "particulars of the facts on which the party relies" must be pleaded and the court may order a party to serve particulars of facts relied upon to allege knowledge or notice.

[116] The essential object of pleadings is to ensure that the opposing party is aware of the case which they have to meet and that they are not embarrassed by a pleading which is scandalous or oppressive.

[117] A pleading does not become oppressive because a party has pleaded evidence. The issue is not whether the defendants have identified breaches of the rules of pleading but whether they adversely affect the right of all parties to a fair hearing on the merits per *Breslin and others v McKenna and others*; Ruling No.4 [extraneous matter in pleading] [2008] NIQB 5 (see also *Lavery Ltd v Morton Newspapers Ltd* [2010] NIQB 61).

[118] Order 18, rule 19(1)(a) must be determined on the face of the pleading without evidence (Ord.18 r.19(2)), and the cause pleaded must be unarguable or almost uncontestably bad: *Lonrho v Fayed* [1992] 1 AC 448.

[119] If the pleadings disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out: *Rush v Police Service of Northern Ireland and the Secretary of State* [2011] NIQB 28.

[120] The Supreme Court recently made relevant observations, albeit in the context of summary judgment, in *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20. The Supreme Court specifically noted:

> "44. The extent to which the absence of disclosure of defendants' documents may impede claimants in demonstrating a triable issue depends of course upon what are said to be the defects in its case…I make no apology for having suggested during argument that it is blindingly obvious that the proof of that particular pudding would depend heavily upon the contents of documents internal to each of the defendant companies, and upon correspondence and other documents passing between them, currently unavailable to the claimants, but in due course disclosable.
>
> 45. This poses a familiar dilemma for judges dealing with applications for summary judgment. On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue: see *Tesco Stores Ltd v Mastercard Inc* [2015] EWHC 1145, per Asplin J at para 73."

[121] Accordingly, in the circumstances of the present case the court should give due weight to the comments of the Supreme Court, namely that the plaintiffs must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial and that the court cannot ignore reasonable grounds which may be disclosed at this stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue.

[122] It is right that a pleading which omits required particulars is not void. It can be cured by amendment. It would be too savage a sanction to strike out the plaintiffs' action if it can be cured by amendment. The fact that the plaintiffs set out their belief is not a reason to strike out the pleading. Per *Breslin*, the issue is not whether the defendants have identified breaches of the rules of pleading but whether they adversely affect the right of all parties to a fair hearing on the merits.

[123] It cannot be said that defendants cannot get a fair trial in circumstances where the plaintiffs cannot access relevant material because the defendants claim a prohibition on its release. I note here that the defendants assert they do not prohibit release but the difficulty is in identifying the documents given the ambiguity in the pleadings.

[124] The decision of the Supreme Court in *Vedanta Resources* is entirely apt. The materials exhibited in the affidavit of Mr Winters demonstrates that there are reasonable grounds to make the assertions contained in the statement of claim. I pause to observe that affidavit is not permissible in an Order 18 rule 19 1 (a) application.

[125] The defendants make reference to *Three Rivers v Bank of England* [2001] 2 All ER 513. This must be seen in context. While it is recognized that "the more serious the allegation…the greater is the need for particulars to be given…", the key issue is that the plaintiffs must be in possession of the facts that enable the plaintiffs to give particulars. Otherwise, the defendants are able to rely on *Three Rivers* to shut out the plaintiffs from litigation in a situation where they hold relevant material.

[126] It would be egregious if a plaintiff were to be denied a valid action by a strike out on the basis of lack of particulars when the defendants have not provided material that shows the plaintiffs would have had a successful claim.

[127] At present, the plaintiffs do not know if that is the position in this action; the risk that such a position exists is clear. The *Three Rivers* position could easily be met following discovery, at which point the plaintiffs could fully and fairly amend their pleadings to give full particulars once they are in possession of relevant documentation. Such an approach would also be in keeping with *Vedanta*.

[128] "Legacy" cases such as this are different to virtually any other situation before the courts. Any allegation that the plaintiffs have pleaded a vague case has to be seen in this context. If the plaintiffs are not in possession of material because it has been withheld by the defendants, then the plaintiffs cannot be criticized for pleading a case based on the peripheral materials that they can access. The plaintiffs cannot have personal knowledge of who was a state agent or what precise role any

individual had in a terrorist incident unless that information is put in the public domain.

[129] By piecing together the material in the public domain, including the piecemeal disclosure to date from the state authorities, the plaintiffs have identified, as far as possible, the central facts and allegations that support this action.

[130] The test is whether the defendant is provided with sufficient information from the statement of claim of the case it has to meet. It does not seem to the plaintiffs that the defendants can suggest they have any difficulty in knowing the case they have to meet here. The plaintiffs have summarised the core case and allege that serving soldiers and policemen, former soldiers and policemen and informants were a part of the Glenanne Gang which carried out the bombings along with a huge string of other crimes.

[131] The defendants knew this Gang comprised people in those categories and knew they were carrying out horrendous crimes and instead of taking effective action to stop them, they facilitated them.

[132] If the plaintiff's case is right, the defendants have soldiers and policemen who took part in the bombing, they have access to intelligence materials which will reveal what each of those people did and yet they criticise the plaintiffs and seek to stop the claim until the plaintiffs say what each of these people did. This defies common sense. What is pleaded is the best that can be provided at present. When further information becomes available the plaintiffs will amend the pleadings, that is normally what happens.

[133] In the Omagh bomb and Miami showband cases that were cited by defence counsel, a "tonne of information" became available in discovery which was relevant to the pleadings and preparation for trial. The normal course is that discovery is crucial.

[134] This is not a case where the plaintiffs are making a bare assertion. They are stating that members of police and army were in the Glenanne Gang, here is all the information we have, here are the names of 30 soldiers or police we say were in the Gang. Two or three were convicted of matters related to the Glenanne Gang series of cases. Having given this general context, here are all the crimes: 60 murders, various other serious acts of criminality set out in annexes to the statement of claim, who was in the Gang etc. The plaintiffs have given the information available to them and after discovery is complete they anticipate they can supplement it.

[135] The plaintiffs do not believe the court should be in any way influenced by the fact that if the plaintiffs make the allegations and the defendants have to defend them, that in order to deal with intelligence materials, there may have to be a CMP, the plaintiffs say "so be it". If they have the information and there is a mechanism by which that information can be made available to court, it may be expensive but so be it.

[136] It is clear from the "*white book*" (Supreme Court Practice 1999) going back to first principles in these applications that it is really only in exceptional cases or clear and obvious cases that pleadings should be struck out. If a defect can be remedied, for example if it appears likely or possible that discovery can fill in the gaps, then provided the defect is not a result of a disregard on the part of the pleader for court orders or directions then the court should regard strike out as a last resort.

[137] In order to examine collusion, the court needs to have regard to the fact the Gang carried out a huge series of very serious criminal attacks over a number of years. It is only by linking up individuals in different attacks that can present sufficient information to allege collusion. This was accepted by Treacy LJ in *Barnard* in the Court of Appeal. That is why the plaintiffs refer to a variety of serious criminal misconduct, not just the Dublin and Monaghan bombings.

[138] The plaintiffs name five soldiers. In one example, the person is deceased. He took part in a number of murders and criminal activity prior and subsequent to the bombings. The defendants can check their documents to see if they prove or disprove the allegations. The plaintiffs allege that some soldiers infiltrated the Gang and provided information to police or army or both and in return were allowed to continue to carry out whatever activities they were involved in at the time.

[139] The plaintiffs also named three police officers. One of them only became a police officer after the bombing and this is made clear. The plaintiffs allege his farm and buildings were being used to store weapons and hold meetings in preparation for a lot of these crimes. The bombs used in Dublin and Monaghan were assembled at his farm. They have information of his involvement that is highly relevant to the allegation about knowledge or means of knowledge on the part of defendants. This is a "million miles away from a bare assertion case".

[140] The plaintiffs take issue with a submission that somehow the bar is lower for defendants when trying to strike out for lack of particularity as opposed to cases where it is an unarguable case. The principles remain the same, it is only in clear and obvious cases where defendants have not been given sufficient information to make it aware of the case it has to meet. It is a draconian remedy and to find this an unarguable case for lack of particularity, the bar is set high.

[141] The plaintiffs accept the discovery exercise is a difficult task, but this is a part of a series of cases. There has been considerable work by the police and an unfinished HET report. It is inconceivable that it did not consider similar material. The ongoing investigation in light of *Barnard* is due to report in the summer of 2024. That includes the Glenanne events and the Dublin and Monaghan bombings. The discovery process may be burdensome, expensive and difficult but it is not so difficult the court should baulk at it, as most of it would have been done for the Glenanne series in any event.

[142] One individual is not just named for the first time. That person featured in the Miami showband case. These figures do not turn up in only one case and when the plaintiffs name people the discovery exercise should not be too difficult as it has already been looked at. Many hours have already been spent on collating, analysing

and summarising the information. The task should not be too difficult and must be seen in the context of state authorities colluding in mass murder. It would be astonishing if there is no discovery relating to him. Most of the names are not names that will lead to the defendants claiming they never heard that name before or never heard he had some role to play.

[143] This is not a new area or novel area of law. There is no distinction between the test to be applied for a strike out between an unarguable case and on the basis pleadings are defective and have a lack particularity. If the court strikes out all the offending paragraphs, there is no case left.

[144] If the court is of the view there is merit in the strike out application, the plaintiff's fallback position is to seek a stay proceedings. An effective reason to do so would be to wait until the report is available from the new investigating body known as Operation Denton.

[145] The statements of belief in the statement of claim relate to journalistic opinion and are also taken from an Inquiry report and reviews. Sometimes the wording is "believe" or "opinion" as taken from the Barron report. That is getting to a pedantic level and the court should forget the terminology and look at the material. Those are matters of style but the information remains the same. The plaintiffs will produce more by way of evidence at a later stage as by then discovery will have been provided and Operation Denton reported.

[146] One of the plaintiffs senior counsel asserted that there was "nothing wrong with the statement of claim." It goes well beyond that which is required by the Rules.

[147] There are a number of issues regarding the Ombudsman report, HET report and Barron report. There are source materials which will have be stripped out in the fullness of time. There is an affidavit from John Weir which can be admitted under the Civil Evidence Order if he is not able or willing to give evidence. The facts at paragraph 24 to which he is attributed at section 2 are facts as to his state of mind and what those people were doing. The defendants can quibble over style but not substance. The factual matrix at paragraph 15 sets out the causes of action.

[148] At paragraph 19 the facts are in generic terms. There is a limit to what the plaintiffs know but they are going over and beyond what is actually required. The sources are set out very clearly in paragraph 24. They include sources, some of which may be admissible in limited form, some may contain facts or evidence that can be proved but some withstand admissibility in their own right, eg John Weir's affidavit is admissible.

[149] The statement of claim has even gone so far as to indicate to the defendants they may want to look at the affidavit as the Barron report in 2003 observed the amount of detail in which John Weir was proved correct made it authentic and credible. The Barron report may not be admissible at trial.

[150] The evidence of Colin Wallace, a former army officer is pleaded directly. He wrote a letter in 1975 which named people having taken part in the bombings. That letter is a document which is itself admissible. If it no longer exists, it may turn up in discovery. The facts and sources are provable and go to demonstrate the claim.

[151] It ill behoves the defendants to say they do not know what this case is about, The "dogs in the street know what this is about". The plaintiffs allege police and army officers and informants attacked the catholic community in the north and south of Ireland. This is all very well set out. The plaintiffs are not aware of any other legacy case and other cases where applications were brought to strike out pleadings. In this type of case there is a huge raft of sensitive documents.

Legal principles

Order 18 Rules of Court of Judicature

[152] Order 18 of the Rules, where relevant to this action, is in the following terms:

> "…
>
> *Facts, not evidence, to be pleaded*
>
> 7.–(1) Subject to the provisions of this rule, and rules 10, 11, 12 and 23, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits.
>
> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party unless the other party has specifically denied it in his pleading.
>
> (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.
>
> (5) A party must refer in his pleading to any statutory provision on which he relies, specifying the relevant

section, subsection, regulation, paragraph or other provision, as the case may be.

…

Particulars of pleading

12. - (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-

(a) particulars of any negligence, breach of statutory duty, misrepresentation, fraud, breach of trust, wilful default, undue influence or fault of the plaintiff on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

…

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party-

> (a) where he alleges knowledge, particulars of the facts on which he relies, and
>
> (b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

…

Striking out pleadings and indorsements

19.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading. "

The purpose of strike out applications

[153] There are numerous cases from this jurisdiction and further afield in relation to "strike out" applications. In *Aine and Daniel McAteer v PSNI and Craig* [2018] NIMaster 10, the Master at para 8 observed:

> "The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts."

[154] It has been held that rule 19 and the inherent jurisdiction to strike out proceedings does not offend against ECHR Article 6, because a right to a fair trial does not require a plenary trial where the plaintiff clearly does not have a case to make: *McAteer* v *Lismore* [2000] NI 471 (Girvan J).

[155] What is clear from the authorities is that it is a power used in exceptional cases given it denies the plaintiff an opportunity to have the case heard on its merits.

No reasonable cause of action – Order 18 rule 19(1)(a)

[156] Any application pursuant to Order 18 rule 19(1)(a) must be determined on the face of the pleading without evidence, though the court may look to evidence to consider whether the pleading can be cured by an amendment: *Cooke (F) v K Cooke and M Cooke* [2013] NICh 5 (Deeny J).

[157] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[158] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal stated that an order of the nature sought in this case was only to be used in "plain and obvious" cases. They concluded that it should be reserved for cases where the cause of action was "obviously and almost incontestably bad" and that an order striking out should not be made "unless the case is unarguable."

[159] In the case of *E (a minor) v Dorset CC* [1995] 2 AC 633 at 693 -694 Sir Thomas Bingham indicated that judges are uneasy about deciding legal principles when all the facts are not known, but that:

> "…applications of this kind are fought on ground of a plaintiff's choosing since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases."

[160] As was also observed by Gillen J in *Rush v PSNI & Ors* [2011] NIQB 28 for the purposes of the application, all the averments in the statement of claim must be assumed to be true in line with the decision of the court in *O'Dwyer*.

[161] The case of *Rush* involved a claim of negligence against the police arising from the Omagh bomb atrocity on 15 August 1998 in which 29 people were killed, including nine children, a woman pregnant with twins and three generations of one family. An application was brought to strike out the claim on the ground that it disclosed no reasonable cause of action or alternatively that it was vexatious or frivolous. The plaintiff alleged that police and other state authorities knew of the details of a terrorist plan to bomb Omagh town centre including details of transportation of the bomb, but failed to prevent it being planted or to organise evacuation of the town centre. The issue was whether in principle the police owed a duty of care to the public and if not then it rendered the claim unarguable or whether it was arguable that the claim could fall within an exceptional category of cases where the absence of a remedy would be an affront to the principles underlying common law. Finally, the question was whether evidence had been put forward showing the claim to be vexatious or frivolous. Master Bell had ordered the plaintiff's action be dismissed pursuant to Order 18 rule 19(1)(a) and (b). At paras 10-12 Gillen J, overturning the strike out, stated:

> "Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the statement of claim or the particulars disclose some cause of action, or

raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

Evidence by affidavit is admissible so that the courts can explore the facts under Ord 18 r. 19(1)(b)-(d). Thus I am entitled to rely on the affidavit of Mr Murray on behalf of the defendants. However a court at this stage must be careful not to engage in a minute and protracted examination of the documents or the facts of the case. I draw attention to the comments of Danckwerts LJ in *Wenlock v Moloney* [1965] 2 All ER 871 at 874G where he said of the comparable English rule under Order 18 rule 19 (as it then was):

> `There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, and affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to an abuse of the inherent power of the court and not a proper exercise of that power.'

The alternative ground relied on by the respondent in this case under O18 r19(1)(b) is that the amended statement of claim is frivolous and vexatious. By these words are meant cases which are obviously frivolous and vexatious or obviously unsustainable. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court" (per Jeune P in *Young v Holloway* (1895) P 87 at 90."

[162] In another claim arising from the Omagh bombing *Breslin and others v McKenna and others Ruling No. 4 [extraneous matter in pleading]* [2008] NIQB 5, Morgan J heard an application by two of the defendants for an order, inter alia, that the plaintiffs' claim be struck out or stayed on the basis that it disclosed no reasonable cause of action and failed to comply with rules of court. The claim related to the defendants' alleged responsibility for the bombing. He observed, at paras 9-10 and 13-14:

"[9] The court's power to strike out a claim in whole or in part is exercised pursuant to the supervisory jurisdiction of the court. It is a draconian remedy which prevents the opposing party proceeding with its claim despite the absence of a hearing on the merits. Accordingly it is a power which will be exercised sparingly. The jurisdiction to stay may not have the same draconian effect but does have the effect of at least temporarily bringing the litigation to a halt thereby delaying a hearing on the merits. It also, therefore, is part of the supervisory jurisdiction which protects the defendant from an oppressive claim.

[10] The essential object of pleadings is to ensure that the opposing party is aware of the case which he has to meet and that he is not embarrassed by a pleading which is scandalous or oppressive. A party is entitled to raise any issue of law and in certain cases is required by Ord 18 r 8 to do so. A party ought not to plead the evidence by which he intends to prove his claim.

…

[13] I accept that there are proper criticisms to be made of the form of the plaintiffs' pleading. The plaintiffs have clearly pleaded some of the evidence on which they intend to rely in the statement of claim contrary to the Rules of the Supreme Court. The court's task is to ensure that the pleading does not thereby become oppressive. In my view in this case the effect of the pleading is to alert the defendants to the way in which the plaintiffs will seek to make their case and thereby enable them to prepare more effectively to defend it. Apart from the assertion that the pleading is scandalous I have seen no basis for any prejudice affecting these defendants. Indeed, an appreciation of the evidence on which the parties intend to rely in a sizeable case of this nature enables the court to manage the case so as to ensure that no prejudice is caused to any party at the hearing. This may also be necessary in order to secure the attendance of relevant experts for each of the parties in the course of the hearing.

[14] The issue is not whether the defendants have identified breaches of the rules of pleading but whether the circumstances found by the court adversely affect the right of all parties to a fair hearing on the merits. I find no evidence of such prejudice and accordingly consider that it would not be a proper exercise of the supervisory

> jurisdiction to strike out or stay the plaintiffs' pleading on that basis. The efforts of all parties should be on ensuring that they are ready for the trial which will commence on 7 April 2008."

[163] In a very recent case in this jurisdiction, the Court of Appeal for Northern Ireland in *Magill v Chief Constable* [2022] NICA 49 affirmed the principles to be applied in strike out applications on the basis that there was no reasonable cause of action. McCloskey LJ endorsed the decisions in *O'Dwyer* and *E (A Minor) v Dorset CC*, at para 7, stating:

> "(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
>
> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
>
> (iii) In approaching such applications, the court should be cautious in any developing field of law…
>
> (iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.
>
> (v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.
>
> (vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out…
>
> We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

At para 27, the court noted this was a finely balanced case, adding:

> "It is otiose to add that this decision, a purely interlocutory one, betokens no forecast of ultimate success for the plaintiff. The final outcome will be determined by the future course of these proceedings which will include discovery of documents and, possibly, interrogatories and admissions."

Abuse of process - Order 18 rule 19(1)(d)

[164] In addition to no reasonable cause of action, the defendants seek a strike out of the plaintiff's claim on this ground also. In *Ewing (Terence Patrick) v Times*

Newspapers Ltd [2010] NIQB 7 Coghlin LJ, delivering the judgment of the court, at para 37 stated:

> "As Lord Phillips, MR, noted in *Jameel v Dow Jones and Company* [2005] QB 946:
>
> > `An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field then to referee any game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.'
>
> Today it is necessary to clearly bear in mind the overriding objective contained in Order 1 rule 1A of the Rules which requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals."

[165] Under the inherent jurisdiction and Order 18 rule 19(1)(b)-(d), evidence by affidavit or otherwise is admissible; the court can explore the facts fully but should do so with caution: *Mulgrew* v *O'Brien* [1953] NI 10, at 14 (Black LJ).

[166] In *McDonald's Corp v Steel* [1995] 3 All ER 615 involving a defamation action, the Court of Appeal considered the correct approach to an application under Order 18, r 19(d) to strike out a pleading for abuse of process and held at (623):

> "The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases…it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."

Neill LJ further held that unless the defence or the particulars could be described as "incurably bad" because there will be no evidence to support them, the pleadings "should be left until trial."

Prejudice, embarrass or delay the trial of the action – Order 18 rule 19(1)(c)

[167] Examples of pleadings struck out as scandalous or embarrassing are:

(1) the defendant admits liability but has no means to pay (*Connor* v *Kelly* [1957] Ir Jur Rep 41),

(2) A plea that the writ was irregularly served (*Maher* v *Hibernian Development* (1906) 36 ILTR 212),

(3) The opposing party is of bad character (*Devonsher* v *Ryall* (1877) IR 11 Eq 460),

(4) An unintelligible pleading (*Mulgrew* v *O'Brien* [1953] NI 10,

(5) The amount claimed is too trivial (*Hannay* v *Graham* (1883) 12 LR Ir 413) where a general minimum of £2 was set for High Court actions, which would now be about £500,

(6) Ambiguity (*Franklin* v *Walker* (1870) IR 4 CL 236),

(7) Stating conclusions of law without facts (*Potts* v *Plunkett* (1858) 9 ICLR 290, at 300),

(8) Mixing together separate claims (*Hoban* v *McPherson* (1905) 39 ILTR 15).

Vicarious Liability

[168] In *Fish & Fish Ltd v Sea Shepherd UK and others* [2015] UKSC 10 the claim was for loss and damage allegedly suffered by the claimant in an incident in the Mediterranean Sea when conservationists mounted an operation designed to disrupt the bluefin tuna fishing activities of the claimant. The appeal arose from the determination of a preliminary issue as to whether the incident was directed and/or authorised and/or carried out by the first defendant, its servants or agents, and whether the first defendant was liable, directly or vicariously, for any damage sustained by the claimant. At paras 54 and 55, Lord Neuberger referring to the proper legal test, stated:

> "The claimant contends that it has suffered damage as a result of a tort committed by one person, `the primary tortfeasor', and that another party, `the defendant', who did not directly join with the primary tortfeasor in actually committing the tort, and was not the primary tortfeasor's agent or employee, is also liable for the tort, because he assisted the primary tortfeasor to commit the tort.
>
> It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant. As

> Lord Toulson says, this analysis is accurately reflected in the statement of the law in Clerk and Lindsell on Torts, 7th ed, p 59, cited by all members of the Court of Appeal in The Koursk [1924] P 140, 151, 156, 159."

The purpose of court pleadings

[169] Lord Edmund-Davies succinctly explained the purpose of pleadings in *Farrell v Secretary of State for Defence* [1980] NI 55 at 84E:

> "The primary purpose of pleadings is to define issues and thereby inform the parties in advance of the case they have to meet and take steps to deal with it."

[170] In *Jody Nesbitt and Diana Nesbitt v Robin Swann & Ors* [2022] NIMaster 8, the Master stated at para 61 that:

> "The law reports are replete with explanations as to how pleadings must be drafted. In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J said:
>
> > "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and no background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

[171] In *Morrow v Strathclyde Police* [2011] NIMaster 2 [2011] 4 BNIL 54, a case involving a personal litigant, the Master addressed the issue of defective court pleadings, at para 21 stating:

> "Paragraph 18/19/13 of the Supreme Court Practice 1999 (The White Book) states that where a pleading is defective only as to particulars to which the other side is entitled, an application should be made for particulars and not for an order to strike out the pleading. It notes that even a serious want of particularity in a pleading may not justify striking out if the defect can be remedied and that defect is not the result of a blatant disregard of court order and cites *British Airways Pension Trustees Limited (Formerly Airways Pension Fund Trustees Limited) v Sir Robert McAlpine & Sons Limited & Ors* 72 BLR 26 (CA) as authority for the proposition."

[172] In a recent legacy troubles case *Cortney McWilliams v Chief Constable* [2022] NIMaster 2, in which cross applications had been made by the parties for discovery

and replies to particulars, the Master examined the purpose and requirements of pleadings, stating:

> "[8] The defendant began by stating the purpose of particulars, as approved by Edmund Davies LJ in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611:
>
> > `The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs." Supreme Court Practice (1970), vol 1, (para 18/12/2).'
>
> The defendant then invited me to adopt the views of Cockerill J in the recent Commercial Court decision of *King v Stiefel* [2021] EWHC 1045 (Comm) where she set out her views on the purposes and requirements of pleadings:
>
> `145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:
>
> > `a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial.'
>
> 146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases …

147. This is a point which feeds into the dictum of Teare J in Towler v Wills [2010] EWHC 1209 (Comm), at [18]-[21]:

> `The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies.'

148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.

149. Particulars of claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation."

[173] In *Lavery Ltd v Morton Newspapers Ltd* [2010] NIQB 61 the case involved an application by the defendant to strike out various portions of the plaintiff's statement of claim which related to an article which appeared in the Newsletter. At para 9, the court stated:

> "In its pleadings the plaintiff must only state the facts which are to be proved because they are material facts to sustain the cause of action, rather than the evidence to prove the cause of action."

Alternatives to striking out - can the pleading be cured by amendment or provision of discovery?

[174] Rather than strike out a pleading the court may cure it by amendment or allowing the party to amend: *Nicholson* v *Armstrong*, QBD, NI (Carswell LJ) 2 May 1996, or by ordering further and better particulars: *Curran* v *Micheals* (1880) 14 ILTR 30; *Sun Fat Chan* v *Osseous* [1992] 1 IR 425, at 428.

[175] In *Connolly v RTZ Corp Plc (Plc No 3)*, [1999] CLC 533 involving a claim against an English company for an injury that occurred in Namibia, the defendant had brought an application to strike out the statement of claim at pages 6-9, Wright J stated:

> "It is accepted that a pleading that is otherwise defective can be saved by appropriate and permissible amendment then the court should have regard to that possibility and in the circumstances the argument on the hearing of this application, while focusing primarily upon the amended statement of claim, has been conducted with one eye upon a draft re-amended statement of claim which the plaintiff seeks leave to introduce.
>
> …
>
> whether these allegations are true is something that I am now in position to judge upon the material that I am permitted to consider for the purposes of determining the question."

[176] As was stated in the *McDonald's Corp v Steel* case cited above, it was considered that it will only be in a "few cases" at an interlocutory stage, before full discovery, that an allegation is deemed incapable of being proved.

The requirement for particulars

[177] The requirement for detailed particulars in a complex case involving serious allegations of criminal conduct is consistent with the requirement for cogent evidence in order to discharge the evidential burden in such a case, even on the balance of probabilities. In *R (on the application of D) v Life Sentence Review Comrs (*Northern Ireland*)* [2008] 1 WLR 1499 Lord Carswell explained the relevant principles. At para 27, he approved an earlier analysis, stating:

> "27. Richards L] expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] OB 468 at paragraph 62 where he said:

> `Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus, the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'"

[178] The authorities show that the particularity required should also reflect the complexity of the claim and the seriousness of the allegations made. This has been expressly recognised by the House of Lords in *Three Rivers v Bank of England* [2001] 2 All ER513, which I will discuss in more detail shortly:

> "[151] ... it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud (per Lord Hope)".

[179] The standard of pleading referred to in that judgment for allegations of fraud and misfeasance in a public office provide an analogy for the minimum standard required to support the allegations. See in particular Lord Millet:

> "(186) The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is normally a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case

> of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

[180] This approach has been followed in this jurisdiction. By way of example, in *Beechview Aviation v AXA Insurance* [2015) NIQB 106, the defendant refused a claim on an insurance policy on the basis that the claim was fraudulent and dishonest. Stephens J applied very close scrutiny to the pleadings and in relation to several aspects of the defence. He found that general assertions of dishonesty were insufficient and that facts were necessary (para 11).:

> "The defence of this case involves allegations of fraud in relation to the collision. Those allegations should be distinctly alleged and should be pleaded with the utmost particularity."

[181] Moreover, at para 34 he stated:

> "Circumstantial evidence can be relied on in both civil and criminal cases. In the context of this civil case the defendant relies on circumstantial evidence to establish that Mr Orr, Mr Massey and Mr Barr were involved in an insurance fraud. This involves the defendant relying upon evidence of various circumstances relating to the case which taken together the defendant contends establishes that there is no liability on the part of the defendant because the proper conclusion to be drawn on a balance of probabilities is that there was an insurance fraud."

[182] The principles were applied recently by Master McCorry in *Gordon v Ulster Bank & Ors* [2022] NIMaster 5. Allegations of bad faith were made against the Prudential Regulatory Authority and the Financial Conduct Authority. The Master struck out the claims under Order 18, rule 19 for a lack of particularity. Applying *Three Rivers* and *Beechview Aviation*, he held at para 26:

> "…what is required is that the plaintiff set out coherently the facts on the basis of which the court will be asked to find that there has been bad faith or reckless intent the plaintiff would argue that when the pleaded narrative is read along with the allegations of the wrongful acts it is clear that what the plaintiff is alleging. Senior counsel submitted that it was not a case of improving the pleading, it is rather, a case of whether or not there is any cause of action. I take it from this that they have pleaded the best case they can and invite the court to deal with the

> matter on that basis. However, even when one does link the very long narrative (which appears to be more a summary of the evidence as opposed to a concise summary of the relevant facts that Order 18 requires) with the allegations of wrongful acts at para [129], with its long litany of wrongs, the defendants are still left with a lack of clarity as to the particulars of bad faith, and the pleading does not therefore achieve what the rules of court and the authorities, require them to do. The plaintiff cannot escape the basic principle that the purpose of a statement of claim is to set out the plaintiff's case in clear concise terms, enabling a defendant to understand the case it must meet, and can plead to. The plaintiffs' pleading in this case falls far short of the standard required for that to be achieved."

The overriding objective

[183] In making an assessment of the sufficiency of the particulars, the court is required to give effect to the overriding objective of dealing with the case justly in accordance with Order 1, rule 1A which is in the following terms:

> "1A.–(1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to –
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule."

[184] In *Towler v Wills* [201 O] EWHC 1209 (Comm) Teare J stated at [118]:

"... Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies."

[185] In the earlier cited judgment of *Lavery Ltd v Morton Newspapers Ltd,* at para 13, the court stated:

"Mr O'Donoghue argued that insofar as the Rules require a distinction to be drawn between pleading material facts and not pleading evidence the Overriding Objective contained in rule 1A has now to be taken into account, and he laid particular emphasis upon 1A(3)(a) and (b) which provide that:

`The Court must seek to give effect to the overriding objective when it:

(a) Exercises any power given to it by the Rules; or

(b) Interprets any rule.'

The overriding objective is intended to ensure that the court exercises its powers in a manner that will reduce, and if possible, eliminate procedural problems which arise in civil litigation conducted in the High Court. No authority was cited, nor am I aware of any, which supports the implied assertion that the overriding objective has had the effect of altering the fundamental rules of pleading."

The burdensome nature of discovery

[186] The issue of discovery and its burdensome nature was referred to by both parties in this action. In *Flynn v The Chief Constable* [2017] NICA 13, the plaintiff was assaulted by an informant who was an alleged servant or agent of the defendant who was also alleged to have been involved in placing a bomb under his car. The plaintiff brought his claim after publication of the Ballast report by the Police

Ombudsman in January 1997. That report dealt with police handling and management of identified informants from the early 1990s onwards. The report concluded that police officers colluded with the informant in the full knowledge that he was a UVF terrorist and rather than investigate the crimes, paid him money and shielded him from prosecution. At para 29 and 30 the court stated:

> "Further, it appears clear to us that the discovery exercise in this case is not one which is starting from scratch because considerable work has already been undertaken to compile the material for the Ballast report. This, in our view, significantly undermines the argument that the burden of discovery outweighs the benefit.
>
> Also, in this case, after a scoping exercise which has been described at some length in the affidavits filed on behalf of the Appellant, five documents appeared. There has been no real explanation given for this. So we are not convinced by the arguments in relation to proportionality. We accept that discovery may be a complicated process and there will be expense involved but we consider that the benefit of providing this discovery outweighs the burden."

[187] In *Fynn* at first instance, the Court of Appeal noted that the learned judge decided that the answer to various questions posed would determine whether or not the defendant is responsible for the torts alleged and also the extent of any misfeasance in public office. The learned judge considered that there must be material relevant to the issues that he had identified. Further, the learned judge stated:

> "[41] In a case such as this given the grave allegations that have been made against the agents of the state, resources arguments are unattractive. In the course of the hearing I was referred to various decisions of the European Court of Human Rights in relation to the obligation of a state to comply with its Article 2 obligations. Whilst I accept that a finding on civil liability may be one element of the state's obligation to comply with Article 2, the cases to which I was referred were contextually very different from the circumstances of this case. We are not dealing here with a public inquiry, a criminal investigation into alleged murder committed by or on behalf of the state or with a coroner's inquest. The plaintiff is seeking a private law remedy. He seeks damages for torts alleged against the defendant.
>
> …

> [42] Nonetheless, I think the position is fairly represented by the comments of Moore-Bick LJ in R (HYSAJ) v Secretary of State [2015] 1 WLR 2742 as follows:
>
> > `I am well aware that the resources of many public authorities are stretched to breaking point, but in my view, they have a responsibility to adhere to the Rules just as much as any other litigant.'
>
> [43] Whilst I do accept that an order for specific discovery in this action may well be laborious and time consuming I consider that there is a force in the plaintiff's submission that the defendant has not taken its discovery obligations seriously at least prior to the admission defence."

Three Rivers

[188] This case was heavily referred to by counsel and touches upon many of the issues which require consideration in the present action. As such it requires detailed analysis. In the case of *Three Rivers District Council and others v Bank of England* (No 3) [2001] UKHL/16, the Bank of England granted a licence to BCCI to carry on business as a deposit-taking institution. BCCI collapsed owing to fraud on a vast scale perpetrated by its senior staff. A non-statutory private inquiry was set up leading to the production of the Bingham report setting out the sequence of events based on oral and written evidence from a large number of witnesses. It also contained numerous findings of fact and expressions of opinion. Subsequently, several thousand depositors brought proceedings against the Bank. They claimed that the Bank was liable in the tort of misfeasance in public office. On the hearing of preliminary issues, the judge, relying heavily on the Bingham report's findings and conclusions, held that the material before him contained no arguable support for the depositors' case and that there were no reasonable grounds for supposing that further evidence relating to the Bank's state of mind would become available. Accordingly, he concluded that the claim was bound to fail and therefore struck it out. That decision was upheld by the majority of the Court of Appeal who followed the judge's approach to the Bingham report. On the depositors' appeal to the House of Lords, their Lordships determined the proper test for misfeasance in public office and adjourned the appeal for further argument. Subsequently, the depositors served new draft particulars on the Bank. When the matter came back before the House of Lords, the Bank submitted that the claim was plainly and obviously unsustainable, that the decision to strike out the claim should therefore be upheld and that it should be given summary judgment.

[189] The second question that arose was whether the action was an abuse of the court's process in that it has no realistic prospect of success. This was the more difficult and controversial aspect of the appeal and the Court of Appeal was divided on the issue. The Lords stated that the court may strike out a statement of case if it

appears to the court (a) that it discloses no reasonable cause of action or (b) that it is an abuse of the court's process and observed that:

> "There is no exact dividing line between these two grounds (see Civil Procedure (2000 edn) vol 1, para 3.4.2)."

[190] At para 47 the court considered the adequacy of the pleadings and the sufficiency of the particulars.

> "It is whether, assuming the facts alleged to be true, a case has been made out in the pleadings for alleging misfeasance in public office by the Bank. If it has, then the question whether the pleading is supported by the evidence is normally left until trial."

The above case was decided under the old CPR in England before the advent of the exchange of witness statements which reduced the need for extensive pleadings.

[191] At para 92, the Lords referred to the need to give effect to court rules while also dealing with cases justly having regard to human rights considerations and the overriding objective:

> "The overriding objective of the CPR is to enable the court to deal with cases justly (see r 1.1). To adopt the language of art 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (set out in Sch 1 to the Human Rights Act 1998) with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule (see r 1.2). While the difference between the two tests is elusive, in many cases the practical effect will be the same…
>
> In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important than a search for the precise meaning of the rule..."

[192] The Lords referred to the case of *Swain v Hillman* [2001] 1 All ER 91 in which Lord Woolf MR at para 93 cautioned against conducting a mini-trial at the strike out stage, stating:

> "Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt

> 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[193] At paras 99 and 100 the court considered there was enough in the pleadings to notify the defendant as to the case they were facing:

> "My approach to this issue can therefore be summarised against this background as follows. For the reasons which I have already given (in section (3)), I consider that the claimants' pleadings give sufficient notice to the Bank of the case which they wish to present and that the facts pleaded are capable of satisfying the requirements of the tort. That being so, I would be inclined to hold that this highly complex case should not be decided on the documents without hearing oral evidence but should go to trial. This view is reinforced by what I have said about the Bingham report. I would leave out of account the findings and conclusions in that report which the parties are agreed would at any trial be inadmissible. It is not just that, strictly speaking, they are irrelevant to any decision that might be made by the trial judge. I also believe, for the reasons that I have just given, that it would be contrary to the overriding requirement of fairness for them to be taken into account in reaching a decision as to whether this case can be decided without hearing oral evidence.
>
> I would also examine the question whether the claim has no real prospect of succeeding at the outset from a totally neutral standpoint. By that I mean that I would not make any assumptions either one way or the other about the competence or integrity of the Bank or its officials as a prelude to examining the available evidence. I accept that conduct amounting to misfeasance in public office is not to be inferred lightly. That is true as a general proposition, whatever may be the task or status of the impugned public officer. But I think that it would be to risk pre-judging the case to attempt to evaluate the action's prospects of success by considering at this stage, before hearing evidence, whether the claimants' case against the Bank as regulator is inherently implausible or scarcely credible. These factors, taken as a whole, seem to me to point clearly against giving a summary judgment in the Bank's favour under CPR Pt 24."

[194] I find the words of Lord Millett most apt in the circumstances of this case where at para 106 and 107 he stated:

> "I agree with my noble and learned friend Lord Hobhouse that the overriding objective of dealing with cases justly includes dealing with them in a proportionate manner, expeditiously, fairly and without undue expense. As he says, each case is entitled only to an appropriate share of the court's resources. Account has to be taken of the need to allot resources to other cases. But I do not believe that the course which I favour offends against these important principles. The most important principle of all is that which requires that each case be dealt with justly. It may well be that the claimants, on whom the onus lies, will face difficulties in presenting their case. They must face the fact that each and every allegation of bad faith will be examined rigorously. A trial in this case will be lengthy and it will be expensive. There is only so much that astute case management can do to reduce the burdens on the parties and on the court. Nevertheless it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial. I do not think that one should be influenced in the application of this test by the length or expense of the litigation that is in prospect. Justice should be even-handed, whether the case be simple or whether it be complex. It is plain that the situation in which the claimants find themselves was not of their own making, nor are they to be blamed for the volume and complexity of the facts that must be investigated. I would hold that justice requires that the claimants be given an opportunity to present their case at trial so that its merits may be assessed in the light of the evidence.
>
> Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out other parts of it. A great deal of time and money has now been expended in the examination of the preliminary issues, and I think that this exercise must now be brought to an end. I would reject the Bank's application for summary judgment."

[195] At para 158 the court observed:

> "…the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the

> assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters."

[196] An issue that was also considered was the extent to which further evidence might emerge prior to trial which could strengthen the plaintiff's claim. At para 160:

> "Therefore the courts have in the present case recognised that they must have regard not only to the evidence presently available to the plaintiffs but also to any realistic prospect that that evidence would have been strengthened between now and the trial. Indeed, it was the submission of Mr Stadlen QC, for the defendants, that Clarke J (at first instance) had applied the right test when he said:
>
> > `In my judgment the question in the instant case is whether the bank has persuaded the court that the plaintiffs' case is bound to fail on the material at present available and that there is no reasonable possibility of evidence becoming available to the plaintiff, whether by further investigation, discovery, cross-examination or otherwise sufficiently to support their case and to give it some prospect of success. If the bank discharges that burden, it will follow that the plaintiffs' claim is bound to fail. In that event to allow the action to proceed would serve no useful purpose. It would only involve the expenditure of time and money—in this case a very great deal of both. Neither party would have any legitimate interest in such expenditure because it could not benefit either.'"

Changing the commercial dynamic and the impact on the parties

[197] In *Khosravi v Al Aqili Trading LLC & Ors* [2016] EWHC 123 (QB), a case involving the supply and alleged smuggling of cigarettes into Iran, the High Court in England heard several applications from some of the defendants which included a strike out application. The judgment, at para 33, refers to the need to "establish cogent and solid grounds as the basis of his claim" as a safeguard against the plaintiff calculating that the defendants "would be more likely to make a substantial commercial payment to avoid becoming bogged down in lengthy and expensive litigation."

[198] The court further considered the impact on the respective parties:

> "[41] I was invited to err on the side of generosity, having particular regard to the stress and poor health with which the claimant has had to contend in recent years. On the other hand, the defendants too are entitled to consideration and fair treatment in the litigation process. The longer the case is allowed to drag on, the greater the time and expenditure they will have to devote to it (with little prospect of recovering their costs if ultimately successful). They are entitled not only to clarity in the formulation of the claim, but also to be able to see at least the prospect of light at the end of the tunnel. This is especially so where the claim in question depends upon events alleged to have taken place many years ago.
>
> [42] Sometimes where a claimant's difficulties can already be seen as attributable to wrongdoing on the part of the defendant (as often happens in personal injury or clinical negligence cases), it may be appropriate for the court to show a degree of forbearance if the claimant has to overcome hurdles in coping with the litigation in consequence. There may be circumstances in which a defendant should not be permitted to take unfair or tactical advantage of its own wrongdoing. Here, however, there is a fundamental issue as to whether any of this claimant's problems should be laid at the door of these defendants at all."

Stay of proceedings

[199] The court rules at Order 18 rule 19 provide not just for a strike out but also a stay of proceedings which is something the court must consider. In the case of *Begley (on behalf of David Begley (dec'd)) v William Cowlin & Sons Ltd and others* [2015] NIQB 62, which was an appeal in relation to discovery and a strike out Order in an asbestos exposure case. As stated by Stephens J:

> "[18] The adversarial system requires a plaintiff to both allege and to prove his claim, *Graham v E & A Dunlop Limited* [1977] NIJB 1, *Savage v McCourt* [2014] NIQB 38. If a plaintiff launches an action with no evidence to support it then it may be struck out or stayed as an abuse of the process of the court under Ord 18 r 19(d).
>
> …
>
> [30] However I am not so persuaded and accordingly I allow the appeal in relation to each of those defendants against the order striking out the plaintiff's claim but instead impose a stay of the plaintiff's action against each of them except in relation to the application for specific

> discovery of documents and except in relation to any application by the plaintiff for interrogatories. This will permit the plaintiff to obtain information that could and should have been obtained at an earlier and more appropriate stage. The stay can be removed depending on the outcome of the discovery and interrogatory process or alternatively at that stage the action could be struck out as against any of those defendants."

Consideration

[200] The role of this court in dealing with the application before it must be seen in context. This is not a public or independent inquiry from which the victims seek answers in their search for truth or for those responsible to be identified and held accountable. It is a civil claim for damages against three defendants, and proposed fourth defendant, seeking compensation on the basis those defendants are responsible in civil law for the deaths and injuries occasioned to the plaintiffs. Some facts may emerge from the discovery process which will aid their quest but ultimately the court's role is to dispassionately assess the pleadings and material put together by their legal team, which is the basis of their claim to determine whether it complies with the rules and, having regard to the various authorities and the overriding objective, determine whether the pleadings should be struck out.

The rules of court – Order 18

[201] The rules of court require that the statement of claim must contain a "statement in a summary form of the material facts", but not the evidence and that the pleadings contain the necessary particulars. Their essential object in the adversarial nature of civil litigation is to ensure that the defendant is aware of the case which they have to meet.

[202] Since only material facts may be included, Order 18 rule 7 also precludes the inclusion of statements of belief. Beliefs do not constitute facts which a plaintiff proposes to prove. The minimum requirements in each case will inevitably depend upon the context, nature of the claim and the complexity of the facts upon which it is founded, however the pleading must contain "the necessary particulars of any claim." The court has power to order particulars of the claim (Order 18, rule 12(3)) on such terms as it thinks just. This would be futile in this case given the plaintiffs all but concede the current statement of claim and replies to particulars are the best they can muster.

[203] The facts as currently pleaded and set out in a composite statement of claim run to some 35 pages. The plaintiffs assert they will seek to prove these when further discovery becomes available. It is certainly a lengthy document and goes well beyond what one would normally expect in a typical civil claim. I do not agree with plaintiff's senior counsel who claimed there was "nothing wrong" with it. It is deficient in that it contains statements of belief and relies on opinions from a variety of sources including an Inquiry report. I consider that if this action is to proceed beyond the discovery stage, many of the source materials will have to be stripped

out. There is reference to an alleged affidavit of John Weir which can be considered in the context of the defendant's application under Order 18 rule 19 (c) and (d). There is also reference to a letter from a former army officer in 1975 which named individuals having taken part in the bombing. At the very least these are matters which the plaintiffs claim they can seek to prove at trial.

[204] It is clear that the defendants can rightfully point to breaches of the rules of pleading but the question that was posed in *Breslin* was whether they adversely affect the right of all parties to a fair hearing on the merits. In order to answer that question, one must consider the wider circumstances here where the plaintiffs do not have access to material which may serve to bolster or even prove their case. In such circumstances the rules of court should not be seen as a straitjacket as the interests of justice and the need to achieve fairness between the parties are also valid considerations.

Is the plaintiff's claim unarguable?

[205] It is important to distinguish between a strike out application based upon the unarguability of the claim as a matter of law and a strike out application based upon a lack of particulars. In this case, it is clearly not disputed that a claim for assault, misfeasance in public office, negligence etc. could be maintained against the defendants as a matter of law if the necessary facts were pleaded and proved. Accordingly, the defendants argue that the court need not exercise caution because there is a developing area of law such as in *Rush* where the court had to assess whether a duty of care in the circumstances of that case extended to police and therefore whether the case was not maintainable in law. The central basis for this challenge is that insufficient facts are pleaded to maintain the claim.

Vicarious liability

[206] In order to maintain a claim for vicarious liability, the plaintiffs must prove the case against the primary tortfeasor (i.e. the perpetrator) and thereafter demonstrate a relationship with the defendant which is sufficient to establish vicarious liability. The defendants submit that the pleadings fall at the first hurdle as they do not plead sufficient material facts to demonstrate the activities, involvement, and role of the individual perpetrators.

[207] The plaintiffs do not identify the actual perpetrators with sufficient facts to support their involvement or plead sufficient facts to support a claim for the imposition of vicarious liability.

[208] The difficulty faced by these plaintiffs is that they cannot have personal knowledge of the identity of state agents or what precise role any individual had in a terrorist incident unless the information is put in the public domain.

Are the pleadings capable of amendment?

[209] In *Three Rivers* the question was posed: "…whether there are reasonable grounds for thinking that evidence to support the allegations is or is capable of being made available…" That is at the crux of this case.

[210] If this case proceeds and the statement of claim is re-drafted after the completion of discovery and the deficiencies contained therein remained, there may perhaps be a more sound basis for the striking out of some or a large part of the allegations if at that stage they fell short of the requirements set by the court rules.

[211] As observed by this court in a recent commercial action *Norbev Ltd v CSI Hungary KFT* NIMaster 7, involving the disputed circumstances of service of a writ of summons:

> "The rules of court are a procedural framework which must be followed; however, they should not be used as a straight jacket as there is a need to do justice between the parties and each case will turn on its own facts. The court must also give effect to the overriding objective contained in Order 1 rule 1a of the Rules when the court exercises any power given to it by the Rules or interprets any rule."

The interests of justice therefore requires a balancing of the rights of both parties.

Burdensome nature of discovery

[212] In these cases the defendants pointed to the burdensome nature of the discovery obligations if this case should progress to that stage. I was told it would be nigh on impossible, expensive and would change the commercial dynamic of the case. While I recognise the defendants clarified their submissions, this is lawyer speak for forcing the defendants to settle. The plaintiff's response to that, in circumstances where they or their relatives were victims of a terrorist atrocity they assert was aided by state forces, is to have scant sympathy stating "so be it." I have no basis to consider these plaintiffs are seeking to use these proceedings for other purposes such as to identify informers or by asserting wide ranging and grave allegations, seeking to invoke a discovery process and use it as leverage which will force the defendants to compensate them.

[213] I am reminded of the comment in *Flynn*, which although a case which is distinguishable from this application as it involved an appeal in relation different issues, that while discovery may be a complicated process and there will be expense involved, the benefit of providing discovery to the plaintiffs in the present case outweighs the burden. In fact, the learned judge at first instance in *Flynn* talked of the resource argument being unattractive. I would concur that such arguments in the context of the events in question in this case are not appealing and do not amount to grounds to strike out the claim at an interlocutory stage. If, after the provision of discovery there remains no claim then that will become apparent.

[214] The plaintiffs claim they cannot get a fair trial in circumstances where the plaintiffs cannot access relevant material because the defendants claim a prohibition on its release. The defendants point to the difficulty in identifying the documents given the ambiguity in the pleadings. I consider on balance that there is sufficient information in the statement of claim to assist the defendants in a discovery exercise. There is also the credible suggestion that such an exercise has already commenced

and is ongoing in the context of another investigation, namely Operation Kenova. This has parallels with the *Flynn* case in which the Court of Appeal observed that the discovery exercise was not starting from scratch as considerable work had already been undertaken to assist with the Ballast report. The Court of Appeal concluded that this undermined the argument that the burden of discovery outweighed the benefit. In the present case, I consider that the burden of discovery is a valid consideration but in all the circumstances of this case it is not sufficient of itself to accede to the defendant's application to strike out the claim.

Do the defendants know the case they have to meet?

[215] The defendants claim that the pleadings lack "the particularity which a claim of this nature requires that enables the defendants to know and understand the case which they are required to meet." The case is grounded upon vicarious liability in relation to individuals who are not defendants. The defendants named in these proceedings assert they require the names of these individuals, the conduct for which they are liable and the relationship which provides the basis for the claim. The plaintiffs do name some individuals they claim were involved in the bombings.

[216] On one view this exercise could be seen as a classic fishing expedition seeking to piece together a claim on the basis of scant information, rumour, speculation, anecdote, journalistic investigations, TV programmes, books, newspaper articles and relying on the word of individuals with questionable and varying degrees of credibility.

[217] Alternatively, one could view the statement of claim as what the plaintiffs concede is admittedly not an elegant document but is essentially the best they can do. The plaintiff's senior counsel goes further, stating "the dogs in the street know what this case is about" and there is nothing wrong with the statement of claim. He points to the facts pleaded that are taken directly from an affidavit published by someone who can be called to give evidence, therefore, those "facts" are capable of being tested at a later point and also points to the letter from Colin Wallace.

[218] I consider that it stretches the bounds of credibility for the defendants to contend that they do not know the case they have to meet, that they cannot draft a defence and they do not know what discovery to provide as they cannot identify what is relevant or necessary for that purpose under the discovery rules. It may well be that, as they anticipate, the courts will be tied up on this issue for some time to come, grappling with legal issues pertaining to the release of such documents and this could include a closed material proceeding, however, I do not consider the burden of such exercises to be fatal to the further progress of this claim.

[219] At the heart of this case is an allegation that serving soldiers, policemen and informants were part of the Glenanne Gang which carried out these bombings (along with a huge string of other crimes). The plaintiffs have pieced together material in the public domain to set out the facts as far as possible that support such allegations, providing names of several solders or policemen who were in the Gang. When further material is made available through discovery, the plaintiffs will be required to amend and supplement the pleadings.

No reasonable cause of action

[220] In assessing whether there is no reasonable cause of action, this court cannot consider affidavit evidence such as those from Kevin Winters and John Weir, but rather the court must take the statement of claim as the height of the plaintiff's case when considering a strike out.

[221] The court, if acceding to such an application can either strike out the offending paragraphs, stay the proceedings or dismiss the claim.

[222] It is difficult at this interlocutory stage to determine if this case is doomed to fail. Without hearing evidence, assessing further relevant documentation, affidavits and the cross examining of witnesses as would be carried out by and before the trial judge, it is not possible to say at this stage whether this case will succeed or fail but ultimately I consider that there are triable issues, it is not unarguable and the lesson one draws from the authorities is that it is sufficient for the plaintiff to establish there is some point to be tried.

[223] It is not for the court, at this interlocutory stage, to determine whether this is a strong or weak case.

Prejudice, embarrass or delay the trial

[224] A claim is likely to prejudice, embarrass or delay a fair trial if it contains vague or baseless allegations which the defendants cannot plead to or if the allegations are irrelevant or unnecessary to plead the case.

[225] I consider that the statement of claim in this case, as redrafted, is the plaintiff's attempt to put their best foot forward at this stage, absent the additional material which may become available through discovery. I have already pointed to the justifiable explanation for the deficiency in the pleading at this point in the proceedings and I do not consider there are grounds for a strike out on this basis.

Abuse of the process of the court

[226] The High Court has inherent jurisdiction to strike out proceedings as an abuse of process, this does not offend Article 6 of the ECHR, as a right to a fair trial does not require a plenary trial where the plaintiff does not have a case to make. See *McAteer v Lismore* [2000] NI 471.

[227] I do not consider the plaintiff's statement of claim to be so frivolous that to allow the case to proceed would be an abuse of the process of the court. I do not agree with the defendant's assertion that the pleadings are an abuse of process as they will require a closed material proceeding simply to maintain a denial defence.

Three Rivers

[228] This case made clear there is a balance which must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other.

[229] In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 at 4–5 Saville LJ said:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it."

The above passage is apt in this case in circumstances where the plaintiffs contend the defendants know perfectly well that the plaintiffs allege the Glenane Gang killed their loved ones and caused life changing injuries in bombs set off in Dublin and Monaghan.

[230] Similar to the comments of Lord Millet in *Three Rivers*, I consider that these plaintiffs find themselves in a situation not of their making. They cannot be blamed for the volume and complexity of the facts that require investigation. They should be given the chance to present their case at trial so the merits can be assessed in light of the evidence.

Gravity of the allegations

[231] The gravity of the allegations was raised by defence counsel as a factor when considering the deficiency of the pleadings, in other words, the more serious the allegation the more detail and particularisation is required. On the other hand, the more serious the allegations, and one struggles to think of something more serious than alleged state collusion in the murder of innocent people, then the more latitude to be given to one party without the means or access to the documents to make the case they are seeking to make. They are not a bank, government body or organisation with limitless means or the power to access the documents that may prove the facts they allege in their statement of claim.

[232] Serious allegations require detailed particulars, but this case has a unique factual matrix and I consider the plaintiffs have as far as possible identified the central facts and allegations to support their claim, therefore, the lack of particulars is justifiable in all the circumstances.

Balancing the interests of justice

[233] The risk to individuals, not convicted by a court and whose names may be identified, the burdensome nature of discovery obligations and escalating costs as raised by the defendants are important considerations when carrying out the

balancing exercise of where the interests of justice lies. This has to be seen in context, in circumstances where the defendants seek to strike out the claim in the absence of discovery, the testing of the evidence, hearing from witnesses and where the cross examination of experts has not occurred, and the plaintiffs are left with no civil remedy such as they seek here.

[234] The plaintiffs are keen to ensure the tragic context of these cases is not overlooked. This is all the more important when the defendants make submissions regarding the cost implications, the difficulty of the discovery exercise and the onerous task of going through voluminous documentation.

[235] A pleading does not become oppressive because a party has pleaded evidence. The issue is not whether the defendants have identified breaches of the rules of pleading but whether they adversely affect the right of all parties to a fair hearing on the merits per *Breslin and others v McKenna and others*; Ruling No 4 [2008] NIQB 5 and *Lavery Ltd v Morton Newspapers Ltd* [2010] NIQB 61. The court must also have regard to the importance of the case, the financial position of each party and ensure the parties are on an equal footing. In this case, I consider the interests of justice lie firmly with the plaintiffs at this interlocutory stage where acceding to the defendants application would all but end their case.

Overriding objective

[236] Like any other rules of court, the requirement to plead "material facts" pursuant to Order 18, rule 7, and the recognition that a defendant may be unable to admit or deny facts, must be interpreted and applied in a manner which gives effect to the overriding objectives of Order 1, rule 1A, including dealing with the case expeditiously, fairly, in a way which is proportionate and "allocating to it an appropriate share of the court's resources."

[237] The plaintiffs do not have access to the information available to the defendants. This is their overarching point. They credibly assert this type of case is a far cry from the type of situation in a commercial action involving two corporations like *Three Rivers* where the parties each have access to considerable amounts of information and much greater equality of arms. In this case, the plaintiffs cannot gain access to key information that ironically the defendants require the plaintiffs to provide.

[238] The plaintiffs further credibly assert they cannot be criticised for pleading a vague case when they are not in possession of relevant material which is held by the defendants. While they contend it would be outrageous if the defendants were able to avoid facing up to this case by relying on a technical pleading point, the defendants assert that this is not a technical issue but merely the norms of civil procedure in an adversarial system. That said, the bottom line is it would mean striking out the claim which would leave no way for the plaintiffs to ever have the right to bring this case before a court and have it properly argued out.

Stay of proceedings

[239] The police review known as Operation Kenova expanded over recent years to include several other high-profile Troubles-linked investigations and reviews. These include Operation Denton, also known as the Barnard Review, which is examining dozens of murders carried out by the notorious Glenanne Gang said to have been responsible for over 100 deaths across mid-Ulster in the 1970's.

[240] The question arises as to whether it would be prudent to await the outcome of related investigations and in particular the report from Operation Denton to determine whether additional material is available to assist the parties and the court. It may assist in expanding upon what is currently a somewhat deficient statement of claim and also obviate the need for a prolonged and complex discovery exercise to commence now which may involve some element of duplication and would be a resource intensive process for the defendants.

[241] Whether the answers the plaintiffs seek are eventually forthcoming from other processes or investigations is not the focus of this decision and not a factor in the court's consideration of the merits of the defendant's application. I do not consider a stay of proceedings to be a suitable outcome for either party as the other investigations referred to may or may not report on the dates suggested and may or may not contain documents which assist the parties to this action. The court is required to deal with the application before it on its merits.

Reliance on inadmissible evidence

[242] The plaintiffs make reference to various sources such as books by journalists, a TV documentary and the Barron report. Taking the latter as one example, it is a statement of opinion and does not constitute legally enforceable findings for the purposes of a civil claim nor does it comprise facts relating to the bombing which the plaintiffs intend to prove. The report contains statements of belief which are impermissible pleadings. As stated previously, the statement of claim will require amendment and the plaintiffs will inevitably have to strip out sections of the statement of claim that rely on such material.

[243] I pause to note that one of the issues which impacted the scope of that Inquiry can be found in the statement by Judge Barron in appendix D to the report. He pointed to the reluctance to make documents available and refusal to supply information "on security grounds". This is what the plaintiffs contend similarly impeded their ability to particularise their claim against the defendants at this stage, a situation which may be rectified by the disclosure of relevant material. At Appendix D to the report, Mr Justice Barron in his statement to the Oireachtas Joint Committee, stated:

> "Correspondence with the Northern Ireland Office undoubtedly produced some useful information; but its value was reduced by the reluctance to make original documents available and the refusal to supply other information on security grounds. While the Inquiry fully understands the position taken by the British

> Government on these matters, it must be said that the scope of this report is limited as a result."

Assault and battery

[244] This tort could only be legally sustainable on the basis of vicarious liability. It therefore requires proof of the identity and role of the perpetrators and proof of the existence of a relationship between the individual and one or more defendant which is capable of sustaining vicarious liability. In the absence of any additional facts, this claim is entirely dependent upon the facts pleaded in the statement of claim. The difficulty is how can the plaintiffs be expected to identify all the perpetrators in the absence of further documentation in the possession of the defendants which may provide this information.

Misfeasance in public office

[245] The same difficulty arises with this aspect of the claim. No particulars are provided of any pre-bomb knowledge or information either about the activities of individuals who perpetrated the attack or of opportunities to take action to prevent their activities. No particulars are provided about the "knowledge" which either defendant is alleged to have held about any of the alleged perpetrators.

Conspiracy

[246] This requires particulars of among other things, the supply of vehicles, formulating plans, and providing weapons.

Negligence

[247] No particulars are provided about the individuals in question or their alleged role in the bombing or the information available to the defendants by which to detect the activities. No particulars are provided about the "handling" shortcomings, by which organisation, in relation to which individuals; the role which they allegedly played in the bombs or the action which might have been taken to prevent it. There are no particulars of the "positive actions" in question, the individuals to which it related or the knowledge which it is contended either defendant had at what time.

The court's determination

[248] It is worth restating that it is not for the court, at this interlocutory stage, to conduct a mini-trial assessing all the evidence in order to determine whether this is a strong or weak case.

[249] The court is firstly required to examine the pleadings under Order 18 rule 19(1)(a) to determine if there is a reasonable cause of action, a conclusion I determine in the plaintiff's favour.

[250] Secondly, in order to determine whether the pleadings in their current form would prejudice, embarrass or delay the trial pursuant to Order 18 rule 19 (1)(c), the court must further assess all the pleaded claim, affidavits and material advanced by

the plaintiff. I do not consider there are sufficient grounds to make such a determination in this case.

[251] Thirdly, the court must consider whether the pleadings constitute an abuse of the process of the court. I have no evidence to consider the plaintiffs are using these proceedings as a decoy for an alternative purpose such as to name informants or seeking a public inquiry. It is important to restate the parameters of this claim and that they are clear. It is a claim for damages and such actions are adversarial in nature and not an inquisitorial inquest or inquiry. The rules and procedure differ, and the court must have regard to balancing the rights of both parties to ensure the litigation progressing fairly, expeditiously and cost effectively with the interests of justice at its core. On balance, I do not consider this case is baseless or without merit or so frivolous that to allow it to proceed would be an abuse of the process of the court nor are any defects in the pleadings such as to reach such a conclusion.

[252] Finally, turning to Order 18 rules 7 and 12, the defendants seek a strike out for failure to comply with the Rules. The usual remedy to address deficient pleadings is not a strike out but for the court to order further particulars. This was attempted via the lengthy notice for particulars and replies thereto. The defendants essentially claim they take the case no further.

[253] The question for the court at this point in the proceedings is does the statement of claim in its current form, taking all the averments to be true and representing the height of the plaintiff's case, offend the Rules in such a way as to require the court to strike out the offending paragraphs, in this case essentially amounting to a strike out of the entire claim, on the basis it does not satisfy the provisions under Order 18 rules 7 and 12.

[254] I have considered all the circumstances of this case, the factual matrix and the information available to the court at this time, having regard to the definition of a pleading under Order 18 and giving effect to the overriding objective to do justice between the parties in interpreting any rule. The pleadings at this stage, while containing some clear deficiencies which will inevitably require further amendment as this case progresses and discovery is provided, do disclose a reasonable cause of action and raise questions fit to be decided by a judge. In line with the authorities, even a serious want of particularity in a pleading may not justify a striking out if the defect can be remedied and the defect is not the result of a blatant disregard of court orders. There is no evidence of such disregard in this case.

[255] The pleadings in civil actions are often fluid documents which evolve through the life of a claim, when discovery is provided, additional documentation or medical reports become available. The court and the Rules are both there to instil discipline and ensure procedural fairness having regard to many factors including the importance of the matters in dispute and the financial position of the parties. The court must bear in mind the need to allocate sufficient court resources, avoiding delay or unnecessary costs, adjudicate upon interlocutory disputes that may arise and ultimately ensure the claim reaches a point where it can be tried fully and fairly

before a judge. Many cases do not reach that far and are rightly struck out at an early stage on various grounds, including the grounds being sought here.

Conclusion

[256] On balance, I conclude this is not a case which is unarguable or uncontestably bad and I do not consider that the cause of action has no chance of success. It is only in exceptional cases where it is clear and obvious, that cases should be struck out. In the present action, I consider the pleadings are on balance at least capable of improvement once discovery has been completed and, weighing up the interests of justice between the parties, I consider this is a case in which the court should be slow to grant such a draconian remedy striking out the claim when the particulars disclose a cause of action and there are clearly issues which need to be decided by a judge.

[257] This judgment should not be viewed as indicative of any outcome either way. As stated in the authorities, if a court should refuse to strike out a claim, it betokens no forecast of ultimate success and even if a case may appear weak, it is not sufficient ground to strike it out. On balance, and for the reasons set out above, I refuse the defendant's application and determine that costs shall be costs in the cause.

The Human Rights claim

[258] The defendants' strike out application also sought to strike out of this aspect of the claim, but it was not addressed in their skeleton argument nor fully explored by the parties at hearing. Defence counsel stated in oral submissions that on the basis of the case of *Dalton* [2023] UKSC 36, the human rights claim should be struck out. After the hearing, I gave the parties the opportunity to make any written submissions they wished me to consider on the point.

Defence submissions

[259] At paragraph 34 of the statement of claim, the plaintiffs claim that there has been a failure to conduct an effective investigation into the bombings and an alleged breach of Article 2 European Convention on Human Rights ("ECHR") obligations.

[260] It is clear from both the statement of claim and the skeleton argument that the plaintiffs do not rely upon the "genuine connection" test in order to establish an Article 2 investigative obligation.

[261] It is not disputed that an Article 2 investigative duty could also arise under the HRA if the circumstances of the underlying deaths meet the threshold of the Convention values test. A plaintiff must therefore identify and clearly plead the grounds upon which it contends that the exception should apply.

[262] The plaintiffs' skeleton contends that the Dublin and Monaghan bombings amount to a crime against humanity. This plea is an essential feature of the claim and should therefore be set out clearly in the statement of claim, with the necessary particulars of the facts which support the existence of such a serious crime. These

particulars are essential as it is the component elements of this crime under international law which are necessary in order to be able to determine whether this atrocity is of a different magnitude and therefore distinguishable from other serious terrorist crimes and which are subject to the genuine connection test and to which an Article 2 investigative obligation would not otherwise apply. The defendants maintain that the facts pleaded in the statement of claim and the particulars given in paragraph 34 are insufficient to sustain either the claim that an investigative obligation arose or that it has been breached.

[263] In light of the need to demonstrate an exception to the normal temporal limits of Article 2, the plaintiff has an onus to provide all of the necessary particulars of the grounds relied upon to meet the Convention values test. It is not enough simply to assert that the Convention values test has been met. In this case, it requires both identifying the offence of crimes against humanity and the core facts relied upon in order to establish such an offence.

[264] The bombs all exploded in the Republic of Ireland. The Irish authorities are therefore the relevant investigatory authority. UK authorities have no jurisdiction to investigate criminal offences occurring in the Republic of Ireland. Insofar as the plaintiffs contend that criminal acts took place in Northern Ireland, for which UK investigatory authorities have jurisdiction, it is essential to identify the acts in question. There can be no breach of an investigative obligation unless there is clarity about the issue to be investigated. The pleading requirement for this claim therefore overlaps with the submissions previously made regarding the inadequacy of the pleadings. The plaintiffs have not set out the nature of the acts or events in Northern Ireland which could trigger an investigative obligation.

[265] It is submitted that the failings in the manner in which this claim has been pleaded are fatal. The claim is not saved by the arguments made in the skeleton argument, since it is not a pleading and, in any event, explain only how a Convention values claim might be possible. The skeleton does not identify the necessary facts to sustain the claim. The plaintiffs assert that the facts suggest that the UK attacked the civilian population of another state and that it did so "for political ends". Neither the skeleton nor the pleading set out those facts. In the circumstances, the claim under the HRA should be struck out.

Plaintiff submissions

[266] The Article 2 breach alleged in the statement of claim is essentially based upon the failure to properly investigate the Dublin and Monaghan bombings. That procedural failing is specifically referenced in the pleading as being actionable as a result of the Convention values test being met.

[267] The plaintiffs argue that as to whether the Convention values test is met, that can only be determined at the conclusion of the evidence in the trial and that the decision by the Supreme Court in *Dalton* in no way alters the application of the Convention values test.

[268] The Supreme Court in *Dalton,* at para 21, citing the case of *Janowiec* explained the basis of the Convention values test, namely, where the triggering event is "of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention", that will satisfy the genuine connection test and the temporal restriction that was clarified in *Dalton* is eliminated from consideration. Serious crimes under international law such as war crimes and crimes against humanity would satisfy the test, however, it is not limited to such crimes. Relevant factors in assessing whether this test is met will be the "heinous nature" and "gravity" of crimes causing death.

[269] The gravity and heinous nature of the unlawful acts causing death in the present case clearly satisfy the test:

(i) The facts suggest that one member of the EU and Council of Europe attacked the civilian population of another member state by arming and sending proxies to carry out a bomb attack during peacetime. These circumstances alone are capable of negating the very foundations of the Convention.

(ii) The evidence suggests that this was for political ends.

(iii) The attack was on a civilian population.

(iv) The deaths were caused by indiscriminate bomb attacks. The bombs were placed in locations where they were likely to cause a significant number of deaths.

(v) There were in fact large numbers of unarmed civilians killed indiscriminately, as well as many seriously injured.

[270] When considering the number of deceased and severely injured, it is notable that the number of deaths in the present case exceeds that in some prosecutions before the International Criminal Court. For example, the International Criminal Court ("the ICC") has sought to charge Bahr Idriss Abu Garda with the murder of 12 peacekeepers (*Prosecutor v Abu Garda*, Decision on the Prosecutor's Application under Article 8, Pre-Trial Chamber 1, ICC-02/05-02/09, 7 May 2009).

[271] Not only did that crime involve fewer victims than the present case, but the conflict in which those charges were brought included alleged crimes of genocide, and this was in circumstances where the ICC itself makes clear that due to its limited capacity it can prosecute only the most grave crimes. That latter factor must mean that the Convention values standard is significantly lower than what would be required to prosecute a case at the ICC.

[272] The conclusion that the acts in issue in the present case are equivalent to acts that would amount to war crimes and crimes against humanity also finds support from the definition of such attacks as found in the Rome Statute of the International Criminal Court.

[273] It is plainly arguable from the foregoing that the Convention values test can be satisfied in the present case. Whether the cause of action ultimately succeeds is dependent upon the evidence at trial. In those circumstances there is no basis to strike out the claim under Article 2.

Legal principles

Genuine connection test

[274] This is the test which was explained by the European Court of Human Rights ("ECtHR") in *Janowiec v Russia*, a case involving the Katyn massacre of 1940 in which Stalin ordered the murder of 21,000 prisoners of war and other Polish nationals detained after the Soviet invasion of Poland. The court held that states have an obligation to investigate international crimes and gross human rights violations as long as it is practically feasible to do so. The genuine connection is established if a significant proportion of the procedural steps required …"will have or ought to have been carried out after the critical date." A connection "could also be based on the need to ensure that the guarantees and underlying values of the Convention are protected in a real and effective manner." It has been applied in the UK by the Supreme Court in the context of a domestic claim under the Human Rights Act ("HRA") In *Re Finucane* [2019] UKSC 7; In *Re McQuillan* and In *Re Dalton*. A genuine connection could only ever be established where the death occurred within 12 years of the commencement of the HRA, ie after October 1988.

Convention values test

[275] The Supreme Court in *Dalton,* at para 21, citing *Janowiec,* explained the basis of the Convention values test:

> "In *Janowiec* the European Court also clarified the Convention values test. It accepted that there could be `extraordinary situations' which did not satisfy the genuine connection test, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection (para 149). It stated at paras 150-151:
>
> > `the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the

> definitions given to them in the relevant international instruments …The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order.'"

[276] The application of the Convention values test is therefore reserved for extreme cases and an exception to the normal temporal limits of Article 2. It is not simply a default for cases involving deaths occurring more than 10 (or possibly) 12 years prior to commencement of the Human Rights Act.

[277] In *McQuillan*, the Supreme Court analysed the Convention values test and at para 191 stated:

> "…it is clear from the Strasbourg Court's exposition of the Convention values test in *Janowiec* that it is intended to apply only to "extraordinary situations" which do not satisfy the genuine connection test (para 149). The required connection may be found to exist "if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention" (para 150). The examples which the court provides of such events - "serious crimes under international law, such as war crimes, genocide or crimes against humanity" - indicate that it had in mind the most extreme violations."

[278] The Supreme Court indicated in *McQuillan* [2021] UKSC 55, that the test would likely be satisfied in cases of torture by the state as referenced at para 336 of *Dalton.*

[279] The defendants provided a summary of the offence of a crime against humanity from the UN Office on Genocide Prevention. There are two key elements of such an offence which distinguish it from other terrorist atrocities which may be directed at a civilian population:

(i) There must be a course of conduct, involving the multiple commission of acts of murder or other acts enumerated in Article 7.

(ii) The course of conduct must be carried out in furtherance of a "state or organizational policy" to commit such an offence. The UN guidance makes clear that the existence of a state policy can be proven by way of inference from all of the circumstances of the case.

[280] The plaintiffs refer to the definition in the Rome Statute of the International Criminal Court:

> "Article 7
>
> Crimes against humanity
>
> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
>
> 2. For the purpose of paragraph 1:
>
> (a) `Attack directed against any civilian population' means a course of conduct involving

> the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack…"

[281] Article 8 defines war crimes, which are actionable when committed as "part of a plan or policy" and include 8(2)(a)(i) "Wilful killing", and 2(2)(b)(i) "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".

New or developing fields of law

[282] In *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that it raised matters of state policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C stated:

> "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the statement of claim."

[283] If, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered: *AC and BC v Board of Trustees Cabin Hill School* [2005] NIQB 45 [2005] 10 BNIL 132.

Consideration

[284] The bombings took place in 1974, long before 2 October 2000 which is when the HRA came into force in the UK, giving effect to the ECHR in domestic law. Article 2 of the Convention gives rise to a duty upon Convention states to investigate deaths. In *Re Dalton* the Supreme Court held there was a temporal limit to this, with a cut-off period applied for deaths occurring 10 years prior to the HRA, with exceptional circumstances for some cases between 10-12 years. Moreover, if the death occurred more than 12 years before 2 October 2000, no such duty arose and a court should strike out proceedings alleging a breach of this obligation unless the convention values test applies.

[285] The outer period for this was therefore set at 12 years before the HRA came into force unless the convention values test is met. In this case, the deaths occurred 26 years before the HRA came into effect and the bombings took place outside the UK.

[286] In this case, the plaintiffs do not seek to argue there is a genuine connection between the deaths and the critical date.

[287] The court must then consider whether there is a reasonable cause of action based on the convention values test or whether to advance such a case would be an abuse of process of the court or otherwise embarrass, prejudice or delay the trial of the action. The convention values test is described as an "extremely high hurdle" for someone seeking to rely on it.

[288] In *Dalton,* the Supreme Court also noted that the obligation was not limited to identifying and punishing perpetrators and states at para 194:

> "the civil proceedings in this case give additional scope for involvement of the families and could potentially lead to a detailed examination of facts by a judge and public judgment."

[289] The need for an effective investigation therefore goes well beyond facilitating a prosecution.

[290] In *Dalton*, the circumstances in which the Convention values test might be satisfied was described as extraordinary situations where the genuine connection test was not satisfied but where there was a need to ensure the real and effective protection of the underlying values of the Convention. The Supreme Court stated at para 336:

> "What is principally in mind are serious crimes under international law, such as war crimes, genocide or crimes against humanity."

[291] The Supreme Court indicated in *McQuillan* [2021] UKSC 55, that the test would likely be satisfied in cases of torture by the state as referenced in *Dalton.* Moreover, in the recent judicial review challenge to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, one of the cases, Gemma Gilvary, involved the applicant's brother who was murdered after being tortured in January 1981. The case fell outside the temporal limits set out in *Dalton*. The court found it difficult to conclude the circumstances met the Convention values test due to the lack of concrete evidence available to sustain a claim of state-sponsored torture, but stated:

> "This should not be understood as confirmation that torture does not fall within the range of serious crimes, contemplated in the jurisprudence, as capable of satisfying the Convention values test. Rather, in the court's view, the prevailing trend suggests that acts of torture sanctioned by the state would meet such a test."

[292] The application of the Convention values test is reserved for extreme cases and an exception to the normal temporal limits of Article 2.

[293] It is accepted by the defendants that an Article 2 investigative duty could arise under the HRA if the circumstances of the underlying deaths meet the threshold of the Convention values test. The issue that arises in this case is the defendant asserts the plaintiff must therefore identify and clearly plead the grounds upon which it contends that the exception should apply.

[294] The bomb attacks occurred in the Republic of Ireland meaning that the UK authorities have no jurisdiction to investigate criminal offences occurring in that jurisdiction. The plaintiffs contend that substantial components of the attack, namely, the planning, instigating, funding etc occurred in Northern Ireland but the statement of claim, in its current form, lacks the particularity required setting out the nature of the acts or events in Northern Ireland which could trigger an investigative obligation.

[295] The plaintiffs assert that this deficiency is due to lack of discovery as they cannot access the relevant documentation, such discovery they say rests in the possession of the defendants.

[296] This aspect of the plaintiff's claim suffers from the same difficulties they claim that arise in adequately pleading the other four torts. As with the other aspects of the plaintiffs claim, it is not for this court to conduct a mini-trial or arrive at conclusions on the merit of such a claim, but rather the court must determine whether in all the circumstances, this is a plain and obvious case for striking out. This includes consideration of factors such as whether there is at the very least an arguable case, whether it would be an injustice to strike out the plaintiff's claim denying them a hearing on the merits when they have not had the benefit of discovery and having the evidence tested at trial. Additional and equally important factors include whether by allowing the case to proceed, it would represent a greater injustice to the defendants given factors such as the current deficiencies in the pleadings, the cost of prolonged litigation when the claims have not been properly pleaded or have questionable merit and the consequent undoubted burdensome nature of the discovery obligations.

Conclusion

[297] The Article 2 breach alleged in the plaintiff's statement of claim is based upon the failure to properly investigate the Dublin and Monaghan bombings. That procedural failing is specifically referenced in the pleading as being actionable as a result of the Convention values test being met.

[298] I consider that the question of whether the Convention values test is met can only be determined after hearing all the evidence at trial. On the basis of the information currently available, that is at least capable of argument. As with the other parts of the plaintiffs' claim, I consider that on balance, the pleadings are at least capable of improvement once discovery has been provided and it would be

inappropriate to deploy a draconian strike out remedy in all the circumstances of this claim.

[299] In *Dalton*, the circumstances in which the Convention values test might be satisfied was described as extraordinary situations where the genuine connection test was not satisfied but where there was a need to ensure the real and effective protection of the underlying values of the Convention. Therefore, where the triggering event is "of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention", that will satisfy the test. While serious crimes under international law such as war crimes and crimes against humanity would satisfy the test, it is not limited to such crimes and can include acts of torture which are at least equivalent to, if not less serious than the circumstances giving rise to the present claim. Relevant factors in assessing whether this test is met will be the "heinous nature" and "gravity" of crimes causing death.

[300] The current action involves alleged acts of a heinous nature with the defendants allegedly intentionally directing bombing attacks against the civilian population. It is at least arguable that this is equivalent to acts that would meet the aforementioned definitions found in the Rome Statute of the International Criminal Court.

[301] It is therefore plainly arguable that the Convention values test can be satisfied in the present case. Whether the cause of action ultimately succeeds is dependent upon the evidence at trial. In those circumstances there is no basis to strike out the human rights claim under Article 2.

[302] I refuse the defendant's application pursuant to Order 18 rule 19 in relation to this aspect of the plaintiff's claim also.