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Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: **7/7/2011**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MARK CHRISTOPHER BRESLIN (BY HIMSELF AND ON BEHALF OF THE ESTATE OF GERALDINE BRESLIN)
CATHERINA ANNE GALLAGHER
MICHAEL JAMES GALLAGHER (BY HIMSELF AND ON BEHALF OF THE ESTATE OF ADRIAN GALLAGHER)
EDMUND WILLIAM GIBSON
STANLEY JAMES McCOMBE (BY HIMSELF AND ON BEHALF OF THE ESTATE OF ANNE McCOMBE)
MARION ELAINE RADFORD (BY HERSELF AND ON BEHALF OF THE ESTATE OF ALAN RADFORD)
PAUL WILLIAM RADFORD
COLIN DAVID JAMES WILSON
DENISE FRANCESCA WILSON
GARRY GODFREY CHARLES WILSON
GERALDINE ANN WILSON (BY HERSELF AND ON BEHALF OF THE ESTATE OF LORRAINE WILSON)
GODFREY DAVID WILSON (BY HIMSELF AND ON BEHALF OF THE ESTATE OF LORRAINE WILSON)

Respondents/Plaintiffs;

-and-

JOHN MICHAEL McKEVITT (SUED ON HIS OWN BEHALF AND/OR AS REPRESENTING THE REAL IRISH REPUBLICAN ARMY ("RIRA") AND/OR THE ARMY COUNCIL AND/OR LEADERS AND/OR MEMBERS OF RIRA)
LIAM CAMPBELL (SUED ON HIS OWN BEHALF AND/OR AS REPRESENTING RIRA AND/OR ARMY COUNCIL AND/OR LEADERS AND/OR MEMBERS OF RIRA)
MICHAEL COLM MURPHY
SEAMUS DALY

Appellants/Defendants.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

Introduction

[1] On 15 August 1998 at 3.05 pm a 500lb bomb planted in the boot of a car exploded in the centre of Omagh, County Tyrone. The bomb had been planted in the main shopping street of the town. As a result of the explosion 29 people and 2 unborn babies were killed and over 300 people were injured, many very seriously, and there was extensive damage to property in the town. The Omagh bomb was the worst single terrorist atrocity in the course of the years of violence which occurred in Northern Ireland from the late 1960s onwards. It occurred at a time when the main body of Republican terrorists, who had been protagonists in the years of violence, had decided to abandon the use of violence, as a means of achieving their political ends. The Omagh atrocity was undoubtedly perpetrated by dissident republicans who wanted to continue the campaign of terrorist violence to achieve their political aims notwithstanding the abandonment of the campaign by other republicans. The bombing was claimed by a body purporting to call itself Óglaigh na hÉireann, an organisation which claimed to be the Irish Republican Army, "the real Irish Republican Army" and which came to be commonly called "The Real IRA" ("the RIRA").

[2] No individual has been convicted of causing the explosion or the consequent deaths and injuries. Many of the families of those who suffered grievously as a result of the explosion considered that they should hold account in civil proceedings those whom they believed they could demonstrate were responsible for the event. Hence they instituted proceedings in tort to make good their claims that the parties identified were indeed responsible for the deaths and injuries which flowed from the explosion. The fact that the plaintiffs believe that the defendants were guilty of the crimes of murder and causing grievous bodily harm to the victims did not prevent them seeking to vindicate their civil law rights in connection with tort. This point was made clear by the House of Lords in Ashley v Chief Constable [2008] UKHL 25. As Lord Bingham stated:

> "It is not the business of the court to monitor the motives of the parties in bringing or resisting what is, on the face of it, a well recognised claim in tort."

Lord Scott stressed that:

> "Although the principal aim of an award of compensatory damages is to compensate the claimants for loss suffered, there is no reason why an award of compensatory damages should not also fulfil a vindicatory purpose."

The learned trial judge Morgan J ("the judge") rightly rejected the argument that the civil proceedings were in the circumstances an abuse of process.

[3] In his judgment in the proceedings delivered on 8 June 2009 following a difficult and protracted trial the judge concluded that the plaintiffs had established their claim for damages for trespass to the person against John Michael Henry McKevitt ("McKevitt"), Liam Campbell ("Campbell"), Michael Colm Murphy ("Murphy") and Seamus Daly ("Daly"). He also appointed Campbell to represent the Army Council of the Real Irish Republican Army. The plaintiff's claim against the first defendant Seamus McKenna was dismissed. In his judgment the judge assessed damages recoverable in respect of each of the plaintiffs and awarded aggravated damages.

[4] McKevitt, Campbell, Murphy and Daly have appealed against the judge's decision on a number of grounds to which detailed reference will be made below. The plaintiffs for their part have cross-appealed on the ground that the judge was wrong not to order exemplary damages and that the award of aggravated damages was insufficient. In addition the plaintiffs seek to affirm the decision of the trial judge by relying on evidence of convictions outside the United Kingdom of McKevitt, Murphy and Daly which the plaintiffs argue should be admissible as evidence that they committed the acts in respect of which the convictions occurred and that the contrary authority of Hollington v Hewthorn [1943] KB 587 should be treated as no longer good law. While the plaintiffs also appealed on the ground that the judge was wrong in law to confine himself to finding that the RIRA could only be sued under the provisions of Order 15 rule 12 in a representative action and not in its own right the plaintiffs did not pursue that ground of appeal and sought to stand over the judge's representation order against Campbell as representing the Army Council of the RIRA.

[5] McKevitt was represented by Mr O'Higgins SC and Mr Vaughan. Mr Brian Fee QC appeared with Mr Devine on behalf of the Campbell. Dermott Fee QC appeared with Ms McMahon on behalf of Murphy. Ms Higgins QC and Mr Stockman appeared for Daly. The plaintiffs, respondents to the appeal, were represented by Lord Brennan QC, Mr Lockhart QC and Mr McGleenan. The court is indebted to counsel for their helpful written and oral submissions.

The relevant appellate principles

[6] Lord Brennan reminded the court of its powers and functions relying among others on the authorities of this court in Northern Ireland Railways v Tweed [1982] NIJB, Murray v Royal County Down Golf Club [2005] NICA 2 and McClurg v Chief Constable [2009] NICA 37. He reminded the court of Lord Hoffman's dictum in Brogan v Medeva Plc [1996] 38 BMLR that

> "expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said la vérité est dans une nuance) of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation."

[7] In Smith New Courts Securities Limited v Citibank NA [1997] AC 259 at 274H Lord Steyn pointed out that:

> "Where there has been no misdirection on an issue of fact the presumption is that the conclusion on issues of fact is correct. The Court of Appeal will only reverse the trial judge on an issue of fact when it is convinced his view is wrong."

In the same vein Goddard LCJ in Lofthouse v Leicester Corporation (1948) 64 TLR 604 stated that:

> "The court ought not to interfere when the question is a pure question of fact and where the only matter for decision is whether the judge has come to a right conclusion on the facts unless it can be shown clearly that he did not take all the circumstances and evidence into account or that he has misapplied certain of the evidence or has drawn an inference which there is no evidence to support."

[8] In relation to the appellate court's approach to the judge's judgment and reasoning process it must be borne in mind, as Kerr LCJ pointed out in Stewart v Wright [2006] NICA that

> "It is not incumbent on a judge to rehearse every single issue that has been raised much less to record a finding in respect of each of them. Provided he deals with the substantial issues in the case and reaches, supportable factual conclusions on them and does not neglect to take account of matters that might affect those conclusions his findings on disputed facts cannot be disturbed."

[9] Thus a judge's judgment must be read in bonam partem. An appellant starts off with the burden of demonstrating that the judge's conclusions are legally unsustainable either on the basis that he misunderstood the law,

misdirected himself on relevant issues or reached conclusions which were evidentially unsustainable.

[10] The court must also bear in mind the powers that are set out in section 38(1)(e) of the Judicature (NI) Act 1978 which include the power to "draw any inference of fact which might have been drawn or give any judgment or make any order which might have been given or made by the original court and make such further or other order as the case may require".

The events on the day of the bomb

[11] In paragraphs [22] to [35] of his judgment the judge set out details of the sequence of events which occurred on 15 August 1998 in Omagh. The facts relating to that event can be summarised as follows:

(a) The car used for the planting of the bomb was a maroon Vauxhall Cavalier which had been stolen some time prior to 3.30 am on 13 August 1998 in Carrickmacross.

(b) On 15 August 1998 a male aged between 20 and 24 was seen driving the car in lower Market Street between 2.00 and 2.20. The car moved into the upper portion of Market Street. The car parked outside Kells shop at the lower end of Market Street approximately 365 yards from the courthouse. Another somewhat taller male was seen getting out of the car with the driver.

(c) At 2.30 pm on 15 August 1998 a phone call was made to Ulster Television newsroom. A programme assistant recorded the warning given in the phone message thus:

> "Bomb. Courthouse. Omagh. Main Street. 500lbs. Explosion 30 minutes."

The caller gave a code word Martha Pope, a recognised code word of the RIRA and said "Óglaigh na hÉireann". The message was immediately transmitted to the police in Belfast and the Omagh police were alerted four minutes later.

(d) A second call to the same newsroom was made two minutes later. Another warning was given, the caller saying:

> "Martha Pope. 15 minutes. Bomb, Omagh town."

(e) At about 2.34 a call was received by a Samaritans volunteer at Coleraine apparently diverted from the Samaritan Service in Omagh. The warning was that a bomb was going to go off in the centre of Omagh in 30 minutes and gave the code word Martha Pope. The volunteer asked for

clarification as to where the bomb would go off and was told Main Street about 200 yards from the courthouse. The evidence indicated that the warning was received at the communications office in Omagh at 2.38pm approximately 5 minutes after the first two warnings.

(f) The code word Martha Pope was recognised as the code word used earlier in a bomb attack in Banbridge. It was understood that the warning might refer to an actual as opposed to a hoax bomb.

(g) There is no Main Street as such in Omagh but Market Street is the main shopping thoroughfare in the town. Market Street leads into High Street and the Courthouse is located at the other or upper end of High Street.

(h) Police on the ground were told of the warning that the bomb was at the courthouse. A statement that it was allegedly 200 yards from the courthouse did not get through to the police on the ground.

(i) Police directed people away from the courthouse at High Street and set a cordon across the junction of High Street and Market Street at Scarffes Entry. Police directed members of the public out of the shops and into the entry and away from the main shopping area. This was about 300 yards away from the courthouse and thus unknown to the police in the vicinity of the bomb which was 375 yards from the courthouse. At or just before 3.00pm the police decided to move the cordon back towards the crossroads to some 440 yards from the courthouse. The bomb exploded at 3.05pm. In the result, as a consequence of the wrong information given in the warnings, the police were in fact directing people into the vicinity of the explosion. The fact that the warning received at Coleraine Samaritans was not transmitted to the police on the ground meant that they were operating without knowledge of the fact that the bomb was some distance from the courthouse and the judge concluded that if they had received that information they may well have placed the cordon beyond the bomb before the explosion thereby reducing the casualties and there may have been more focus in seeking to encourage members of the public into the side streets and entries away from the main shopping area.

(j) The bomb comprised 150-200 kgs of fertilisers, sugar and Semtex and was set off by a detonator activated by an electrical circuit including a timing device.

(k) A timer was an essential component of the explosive device. In this instance the timer was a Coupetan timer made in France. It was designed to provide a delay of up to two hours. The person arming the device would set the delay for the required period and at the end of the period an electric current flowed so as to initiate the detonation. The settings were not calibrated. A 360 degree turn was the maximum representing a period of two

hours. Thus the person setting the timer had to make a judgment as to how far to turn the timer. In setting the timer to a time chosen by that person there could have been an error of 3-5 minutes either way in the absence of precise calibration.

(l) Coupetan devices were used in a number of terrorist devices before and after Omagh. From 24 March 1998 to 15 August 1998 twelve separate explosive devices used such timers each with the same batch number. Other explosive devices using the timer were found also in the Republic of Ireland and in England. Subsequently from 25 February 2000 onwards the same device was used in explosive devices in Northern Ireland and on a device at Hammersmith Bridge and Acton/Ealing railway line. The similarity suggested a sharing of knowledge and source of components. The judge concluded that a number of the devices were prepared by the same person using similar components.

(m) The explosion from the bomb would have been substantial in terms of blast effect and thermal energy released within the range of 10-20 metres of the blast. To this must be added the much wider range of damage that could be caused by fragmentation, principally from the vehicle.

(n) On 17 August 1998 a person purporting to speak on behalf of Óglaigh na hÉireann claimed that a 45 minute warning had been given and it had been made clear that the bomb was 300-400 yards from the courthouse. The caller asserted that it had not been intended to cause loss of life and injury. On the following day a caller claiming to represent Óglaigh na hÉireann and giving the code word Martha Pope rang Ireland International, a news agency, and said that three 40 minute warnings had been given and that the location was 300 yards from the courthouse which the caller then corrected to 300 to 400 yards.

(o) On the evidence the judge reasonably concluded that the bomb was part of a terrorist campaign involving from time to time the use of explosive devices in locations in which large numbers of members of the public gathered. On 30 April 1998 a car bomb had been planted in Lisburn. It was successfully detected and defused. On 16 May 1998 a car bomb in Armagh was defused. On 13 July 1998 a car bomb was planted at Newry courthouse and was successfully defused. On 21 July 1998 a mortar attack at Monaghan Street, Newry had detonated but the device failed. On 1 August 1998 a fortnight before the Omagh bomb a large bomb exploded in Newry Street, Banbridge at about 4.32 pm.

[12] In paragraphs [34] and [35] of his judgment as he was clearly entitled to do in light of the evidence the judge drew certain conclusions and inferences from the events on 15 August 1998 when seen in the context of earlier terrorist outrages by the supporters of dissident terrorists:

(a) The firm intent of those involved in the planning, production, planting and detonation of the bomb was that it should explode causing massive damage to Omagh town centre.

(b) None of the warnings given identified the location of the device or details of the identity of the car. The failure to provide this information was an escalation of the bombing campaign as compared to the situation in Lisburn where such information was supplied.

(c) The provision of more particularised warnings in earlier dissident attacks demonstrated an appreciation of the grave risks posed to members of the public from such devices.

(d) The unparticularised nature of the warnings in Omagh showed that the bombers' primary objective was to ensure that the bomb exploded and that the safety of members of the public was at best an entirely minor consideration. The judge went further and concluded that those involved recognised the likelihood of serious death or injury from the detonation of the device but nonetheless decided to proceed to plant the bomb notwithstanding the risk.

Cause of action

[13] The plaintiffs in their writ claimed damages for trespass to the person (in this instance battery), intentional infliction of harm and conspiracy to injury. In his findings the judge held the appellants liable in trespass. He made no findings in relation to the other torts pleaded although he discussed at some length the ingredients of those separate torts. No cross-appeal was brought against his decision either that those torts were not made out or that it was unnecessary to make findings in relation to them. In the circumstances it is not necessary to consider further those torts.

[14] In paragraphs [8] to [12] of his judgment the judge considered some of the relevant authorities on the law of trespass to the person. These included Fowler v Lanning [1959] 1 QB in which Diplock J concluded that the tort of trespass may be committed intentionally or negligently, although in Letang v Cooper [1965] 1 QB 232 Lord Denning MR opined that when injury is not inflicted intentionally but negligently, the appropriate cause of action is in negligence and not in trespass. This dichotomy of opinion is one on which there is no final or conclusive decision in this jurisdiction. The appellants argued that, taking the plaintiffs' case at its height, if liability were established it could only be on the basis of negligently causing injuries and that such a case had been neither pleaded nor relied on by the plaintiffs. Lord Brennan rightly rejected as absurd the importation of a common law duty of care to terrorists in the conduct of a bombing campaign and he made clear

that the plaintiffs had not sought to found their case on mere negligence but rather made a case of intentional trespass to the person. It is clear from the judge's judgment particularly in paragraph [271] that in finding that the case of trespass had been made out against the appellants he was making a finding of intentional rather than negligent trespass.

[15] The tort of trespass may be committed by assault, battery or unlawful deprivation of liberty (this latter head of trespass being irrelevant in the present context). While it can be persuasively argued that the planting of the bomb and the giving of a short and unclear warning causing reasonable apprehension of imminent violence coupled with the capacity of carrying out the threatened explosion, constituted an assault in law, it is unnecessary to consider such an argument further since the plaintiffs' case was founded on the proposition that the appellants committed battery causing death and injury.

[16] A battery is committed when a defendant culpably touches another. Anything which amounts to a blow whether than inflicted by hand, weapon or missile (or it may be added by an explosion) is a battery. If a defendant plants a bomb designed to explode with the intention of injuring a person, common sense leads to conclusion that this would be as unlawful as hitting the injured person or throwing a stone or firing a bullet at him. Ms Higgins, however, called in aid a statement in Clerk and Lindsell 18th Edition paragraph 1305 which states that where the contact is only consequential on the act of the defendant, as where he lays a trap for the claimant or plants a bomb to detonate after an interval, there will be no battery. This passage was in any event ambiguous and may have been intended to convey the meaning that the mere laying of the trap or the planting of a bomb will not of itself constitute a battery. It did not deal with the question of what happens when the injured party falls into the trap or is injured by the bomb when it explodes. However in R v Clarence [1888] 22 QBD 23 at 45 Stephen J pointed out -

> "If a man laid a trap for another into which he fell after an interval the man who laid it would during the interval be guilty of an attempt to assault and of an actual assault as soon as the man fell in it."

The passage in Clerk and Lindsell relied on by Ms Higgins was wisely not repeated in the later edition.

[17] A deliberate planting of a bomb with intent to kill or injure someone clearly constitutes a battery. The question which arises in this case is whether a person who plants a bomb with the intention that it should explode and when it explodes it kills or injures another, is guilty of battery when he did

not intend that any person be killed or injured, but was reckless whether death or injury would ensure.

[18] Lord Brennan relied on Wilson v Pringle [1987] 1 QB 237, a case not referred to the judge, as clear authority that an intention to cause injury to another is not an essential element and that if a defendant intentionally does an unlawful act which involves the hostile touching of the injured party he is liable for the battery. In that case the defendant admitted that he had intentionally and unjustifiably touched the plaintiff. He argued that while he did intentionally touch the plaintiff he did not intend the consequential injury. In that case the plaintiff was injured by falling as a result of the defendant's admitted action of pulling him. In the instant case the appellants' argued that there was no evidence that they ever intentionally touched the plaintiffs at all even if in fact they were injured as a result of the explosion.

[19] Bearing in mind that whoever planted the bomb did in fact touch the plaintiffs when the bomb exploded the question is whether it can be said that the touching was intentional and culpable. While in paragraph [271] the judge rejected the plaintiffs' case that the persons who planted the bomb deliberately set out to kill and maim, he did conclude that the likelihood of injury and death occurring was plain in circumstances where a fully loaded car bomb was placed in the centre of a busy town on a Saturday afternoon. In effect the judge reached the unassailable conclusion that there had been recklessness on the part of those who planted the bomb. They did so in circumstances which clearly alerted them to the grave danger presented to those in the town and regardless of that danger they proceeded with their enterprise. There is no doubt that in the criminal law of assault (which includes what in civil law is battery) recklessness will be a sufficient state of mind to establish the requisite intention (see Blackstone Criminal Practice (2011) paragraph 2.10). There is no reason for a difference of approach in the civil law of trespass. Civil liability arises from a negligent infliction of injury (whether it be termed negligence or trespass) and where there is a clear intention to inflict injury. There can be no logical exclusion of civil liability for the reckless infliction of injury. The underlying principle giving rise to the law of trespass to the person is "the fundamental principle, plain and incontestable, [is] that every person's body is inviolate". (See Collins v Wilcox [1984] 1 WLR at 1177). Negligent and non-negligent infliction of injury is a civil wrong.

[20] Thus the trial judge applied the correct test in determining whether trespass had been committed by those who planted the bomb which was intended to and did explode causing injury and death to those affected. The question is whether the appellants can establish that the trial judge erred in reaching the conclusion that the evidence proved that the appellants individually or collectively were involved in the preparation, planting and

detonation of the bomb. The judge correctly concluded that those involved in assisting in those acts would be joint tortfeasors.

Standard of Proof

[21] The appellants sought to argue that the judge was wrong to conclude that the appropriate standard of proof was the civil standard of proof on a balance of probabilities. The judge accepted that there is a residual category of civil cases where it is appropriate to apply the criminal standard of proof beyond reasonable doubt. He concluded that the residual category was characterised by the fact that the state was usually the moving party, that there would normally be some material interference with freedom of movement and personal liberty, and that criminal sanctions would be prescribed for any breach of an order made.

[22] The judge in paragraphs [18]-[21] of his judgment carefully considered the authorities including Re H [1996] AC 563, B v Avon and Somerset Constabulary [2001] 1 WLR 340, Re B [2008] UKHL 35 and Re D [2008] UKHL. Re D, an appeal from this jurisdiction, contains a helpful statement of the law by Lord Carswell. In civil proceedings the seriousness of an allegation and the seriousness of the consequences for a defendant will be factors which underline the intrinsic unlikeliness of a party doing the disputed act. The court must apply good sense and exercise appropriate care before being satisfied of a matter which has to be established, but in civil proceedings the standard of proof remains proof on a balance of probabilities.

[23] Ms Higgins relied strongly on the approach of the House of Lords in R (McCann) v Manchester City Council [2002] 4 All ER 593 in support of her argument that in the circumstances of this case the criminal standard was the appropriate one. Although in that the case the House categorised as a civil matter the question whether an anti-social behaviour order (an ASBO)should be imposed on a defendant, it did conclude that magistrates had to apply the criminal standard of proof. The House stated that, although in principle the civil standard should apply, there were good reasons in fairness to apply the criminal standards when allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences. It followed that magistrates had to be sure that the defendant had acted in the manner as specified. In that case breach of an ASBO gave rise to a criminal offence with a maximum sentence of 5 years.

[24] The judge correctly analysed the authorities and was right to apply the civil standard. Although what was alleged by the plaintiffs were facts which, if established, showed, that the defendants had broken the criminal law that in itself did not mean that the case fell within that residual category of case in which, although the proceedings are civil, the criminal standard should in fairness be applied. In many civil actions evidence proving a tortious act may

also be evidence of a criminal act. However, that cannot of itself change the standard of proof. A tort claim is a claim for civil law remedies (normally damages) and does not cease to be such because the conduct giving rise to a tort is also criminal. In a case such as the present the findings of the court give rise to no criminal law sanctions and would not in themselves assist in a prosecution although evidence may or may not emerge in the course of the trial which may be relevant in a criminal law context. The proceedings remain, in effect, litigation between two private sets of individuals.

[25] The judge being correct to apply the civil standard of proof, the real question in this appeal is whether properly applying that standard he was in error concluding that the case against the individual appellants had been proved to the requisite standard, taking into account the seriousness of the allegations and the seriousness of the consequences to the appellant.

Analysis of the McKevitt Appeal

(i) *The Judge's Findings*

[26] The trial judge in his judgment set out the key pieces of evidence in relation to the appellant McKevitt. This included an extensive resumé of the content of hearsay evidence from the witness David Rupert and his account in relation to attendance at meetings and gatherings of dissident republicans particularly in February and October 2000. The evidence recorded by the judge provides details of the observation by Garda witnesses of the appellant in the company of Rupert. The appellant in his defence of the prosecution case against him for the crime of directing terrorism in proceedings in Dublin made the case that he had never met Rupert. The Garda witnesses also gave evidence of finding materials in McKevitt's house following a Garda search which were consistent with hearsay evidence from Rupert. They also gave evidence of a meeting between Rupert and "a sleeper" (Smith) in the United States. The judge further referred to evidence that witnesses E and AD who had been acting on intelligence received from Rupert in late 2000 set up a sting operation which implicated McKevitt in the importation of arms for dissident republican purposes. There were 19 telephone calls between January and March 2001 between security operatives and a man called Karl in connection with the operation. A Garda witness Sheridan gave oral evidence that in listening to the recording of the calls he recognised the voice of the person purporting to call himself Karl as that of McKevitt.

[27] At paragraph [266] of his judgment the judge concluded that McKevitt was responsible for authorising the provision of the material for the bomb. He held him liable in trespass on the basis that he intended that bomb should explode and foresaw the likely consequence of personal injury particularly having regard to the nature of the time allowed for clearance. The judge concluded that by virtue of his leadership role he was liable as aiding,

counselling and directing the commission of a tort. He considered that the failure of McKevitt to give evidence in answer to the case against him was inexplicable and made the case against him overwhelming.

(ii) *The Grounds of Appeal*

[28] Mr O'Higgins in his careful and painstaking submissions, both written and oral, argued that the evidence showed Rupert was a demonstrable confidence trickster and that the court should have ruled out his evidence as that of somebody who manipulated information at every turn. He subjected the judge's judgment to searching scrutiny. It is not necessary to refer to every point that he made in his submissions which are set out clearly in his skeleton argument and speaking notes. His points may be summarised thus. Rupert who initially indicated a willingness to give evidence by video link changed his mind. The court had no reasonable or acceptable evidence of his claim to ill health and Rupert was unable to give sound health or security reasons why he should not give evidence by video link. The FBI supplied no proper explanation. The judge had for no good reason rejected evidence from an individual in Massena in the United States who claimed to have seen Rupert fit and well shortly before. If a party seeks to adduce hearsay evidence he must explain why the witness is unable to attend. The judge had effectively wrongly reversed the onus to require the appellant to call the witness for cross examination. The absence of the ability to cross examine Rupert worked gross unfairness. The judge wrongly held it against the defendant McKevitt that he had not given evidence while accepting the hearsay evidence of a witness who declined to lay himself open to cross examination. At the heart of his able submissions Mr O'Higgins contended that in this case the judge was bound to carry out a searching audit of the issues raised about the credibility of Rupert and was bound to reach a conclusion and express it clearly in relation to each of the areas in which Rupert's credibility had been subjected to scrutiny and cross examination in the Dublin proceedings. These included the disputed evidence as to what had been said by Chief Superintendent Jennings, a member of the Garda Siochána, to whom Rupert attributed improper comments demonstrating a lack of interest in relation to terrorist bombings in Northern Ireland. Discovered documentation, counsel argued, revealed a totally improper attempt to manipulate and change Rupert's evidence to get round the real problem of Rupert's claims on that issue which impacted on his credibility as a witness. Counsel took the court through the transcript of Rupert's cross examination in the Dublin proceedings which, it was argued, inevitably led to the conclusion that Rupert was a venal, mendacious, criminal individual who was thoroughly dishonest. The judge had wrongly failed so to find; failed to reach clear conclusions against Rupert on those issues; was prepared to view Rupert in less unfavourable terms than he merited; and the judge should in fact have rejected his evidence. As a result the judge's assessment of the email evidence which purported to incriminate McKevitt was in error and he

improperly enhanced the weight to be attached to the email evidence which should, in fact, have been rejected as worthless or of such little worth that it was quite insufficient to form the basis of a case against McKevitt. It was further argued that the way in which the email evidence had been presented gave rise to real doubts as to whether the entirety of the email evidence was properly before the court since there had been editing and improper and inadequate discovery of relevant material. Mr Vaughan argued that the judge in ruling 8 was wrong to refuse access to MI5 records and erred in treating them as inadmissible under the Security Service Act 1989 which should be read down under the Human Rights Act 1998 so as to permit disclosure of potentially relevant material with the state having the onus of issuing a PII certificate to justify withholding the material. (We may interject to state that we consider that the judge was clearly correct in his analysis of the 1989 Act) Counsel contended that the Court should have taken into account, under Article 5 of the 1997 Order, the withholding of potentially relevant material. Although the judge had did all that he could under the Hague Convention to try and secure the attendance of Rupert and the disclosure of documents he should also have taken into account the prejudice suffered by the defendant by reason of the absence of potentially helpful material and the absence of Rupert.

The Civil Evidence (Northern Ireland) Order 1997

[29] Before considering the challenge to the judge's approach to the evidence in the light of the Civil Evidence (Northern Ireland) Order 1997 it should be borne in mind that no evidence can be properly weighed in a vacuum divorced from the totality of its evidential context. Apparently weak evidence may gain strength or indeed considerable strength when considered in the light of other evidence.

[30] The Order effected an important change in the law relating to evidence in civil law. It swept away the old and complex rules of hearsay and introduced a simplified regime, the central principle of which is that in civil law hearsay evidence is no longer inadmissible. The Order recognises the obvious, namely that hearsay evidence of its nature has frailties and weaknesses, may not be the best evidence and may not be probative in any relevant matter. The best evidence rule has in any event in effect disappeared. The Order, however, clearly recognises the evidential problems created by such evidence the central weakness of which is that the opposing party is deprived of the benefit of cross examination to test the correctness of the evidence and the court is deprived of seeing and hearing the witness to observe his demeanour and assess his veracity. The Order does this in Articles 4 to 6 by setting out procedures to enable a party to call, if possible, the witness whose hearsay evidence has been adduced by another party. The Order sets out factors to be taken into account when weighing the evidence. The court is empowered to adjourn proceedings for the purpose of enabling

the witness to be brought before it. Article 4(2) directs the court to consider whether the party concerned has been given a proper opportunity to investigate the credibility of the witness and to investigate his statement. Article 5 deals with the considerations relevant to the weighing of the hearsay evidence thus:-

> "(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.
>
> (3) Regard may also be had, in particular, to the following:
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had a motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[31] Upholding a party's case when it is dependent on hearsay evidence does not of itself mean that there has been an unfair outcome in relation to the parties or that reliance on hearsay evidence deprives a party of a fair trial.

In Welch v Stokes [2008] 1 WLR 1224 the Court of Appeal upheld a decision in which a finding of negligence was reached on the basis of uncorroborated hearsay evidence from an unidentified motorist who had been present at the scene of a riding accident. The court stressed that when a case depends entirely on hearsay evidence the court should be particularly careful before deciding that it could be given weight. Dyson LJ recognised that there may be said to be unfairness to the defendant in having to face hearsay evidence which he cannot challenge but on the other hand there would be unfairness to a claimant to place no weight on hearsay evidence where, without it, the plaintiff would inevitably fail. The decision as to what weight, if any, to give hearsay evidence involves an exercise of judgment. In Polanski v Condé Nast Publications Ltd [2005] Baroness Hale pointed out that it might be grossly unjust to the other party, even contrary to Article 6 of the Convention, to decide a claim principally on untested evidence of a party who had not been subjected to cross examination of any sort. However she went on to say that the principal safeguard of the opposing party is the weight to be given to the statement: "The court is to be trusted to give the statement such weight as it is worth in the circumstances."

The judge's conclusion in relation to weight

[32] In relation to his decision to give the hearsay evidence from Rupert including the email evidence considerable weight, the judge reached a number of conclusions which may be summarised as follows:

(a) The plaintiffs had taken every reasonable step to seek to ensure that Rupert was available to give evidence in the proceedings and attend for cross examination.

(b) The appellant had been given a proper opportunity to investigate Rupert's credibility having regard to what had transpired in the Dublin proceedings.

(c) In respect of the matters to which regard must be had under Article 5(3) –

a. It would not have been reasonable or practicable for the plaintiffs to have produced Rupert as a witness.

b. The statements which were prepared for the purpose of giving evidence in the Dublin proceedings were not prepared contemporaneously but the emails represented actual traffic between Rupert and his handlers. There was some email traffic which may not have

been included. In virtually all cases the emails were generated within hours of the end of lengthy meetings but caution had to be exercised in relation to isolated comments in response to queries raised by handlers where there may have been failures of recollection or misinterpretation.

c. Rupert's motivation for embarking on his activity was the prospect of financial reward. Rupert had been dishonest in his dealings with money and in representation of circumstances particularly where his financial interests and reputation were involved. Rupert was engaged under a financial contract with his minders in which his terms and conditions had improved as time went by. This was probably in part influenced by the assessment by his handlers of the quality of the material he was producing. Since Rupert had a financial interest in producing material that was likely to be considered significant, care had to be exercised in assessing the material.

d. The extraordinary level of detail which included identification by name of a significant number of people about whom it is highly unlikely that Rupert would previously have known was compelling evidence of an attempt to provide an accurate and comprehensive record of actual meetings. The judge made the point that the details from time to time recorded events which and activities of individuals in respect of whom it could be anticipated that the relevant intelligence agency would have other sources. (By this, no doubt, the judge meant that Rupert's knowledge of this likelihood made it less likely that he would provide false information conflicting with evidence potentially available to the security services from other sources, particularly because it would jeopardise his financial arrangements.)

e. The materials were generated for the purpose of enabling handlers to assess intelligence and there was no reason to think that the content had been manipulated in any particular way. He did not consider there was any evidence to suggest that

there was an attempt to prevent any proper evaluation of the weight of the email material.

f. The hearsay evidence of Rupert was decisive in the sense that without it the plaintiffs could not succeed against the appellant.

g. The appellants had a proper opportunity to investigate the credibility of Rupert. He had the advantage of the disclosures which had been made for the purposes of the criminal trial including the transcript of cross examinations. The substance of the statements from Rupert in the criminal proceedings repeated many of the matters in the emails. Taking account of the extensive cross examination as to the credibility of Rupert in the Dublin trial the fair trial rights of the appellant under Article 6 of the Convention would not be infringed if substantial weight could properly be given to the evidence properly assessed.

h. It was recognised that some material might be missing and there was the possibility of human error in collation.

i. The Garda evidence of observations of Rupert with McKevitt on 18 February 2000, 20 October 2000 and 23 October 2000 (see paragraphs [109]-[125] of the judgment) confirmed that Rupert and McKevitt were in close contact. A search of McKevitt's house on 29 March 2001 confirmed the presence of certain items (a map and computer hardware) that Rupert had referred to in earlier statements. Given their common interest in dissident republicanism the evidence indicated that matters related to that topic had been discussed.

j. The judge found evidence corroborating the contents of some of the emails.

    (i) In the case of an email of 16 February 2000 where Rupert indicated that he was introduced to a ranking volunteer who was to arrive in Chicago in the last weekend of

April, a photograph of his arrival was duly taken of that event.

(ii) In December 2000 in an operation with the agreement of the FBI Rupert met a "sleeper" in the US and obtained bomb making and other equipment from him. This person and his role had been identified on a number of occasions in emails. This evidence provided independent support for the credibility of the email evidence.

(iii) The evidence of Inspector Sheridan was strongly supportive of the hearsay statement made in the criminal proceedings by Rupert that the person identified as Karl in the tapes of conversations with undercover security personnel was the appellant. Those conversations demonstrated the appellant's involvement in relation to procurement of terrorist materials which was entirely in line with Rupert's email statements that McKevitt was involved. It provided support for Rupert's email statement that McKevitt had been engaged in earlier procurement for the Provisional IRA and was Quartermaster of the Provisional IRA before leaving them. It demonstrated that McKevitt was a committed terrorist and had a leadership role in relation to procurement. The entire operation was devised as the result of intelligence provided by Rupert.

[33] The proposition that the judge erred in refusing to rule as inadmissible, hearsay evidence from Rupert must be rejected. What the Order makes clear is that hearsay evidence is admissible evidence. It is thus, evidence which a plaintiff is entitled to adduce and which must be considered and weighed by the court. The admissibility of evidence does not mean that the evidence has any probative value or weight. A court may reject admissible evidence as of no weight or completely lacking in credibility. The arguments on behalf of McKevitt (and indeed those of the other appellants) which challenge the admissibility of Rupert's evidence are, in reality, arguments which go to the weight to be attributed to the evidence. In substance if not in form the appellants argue that no weight should have been attached to the Rupert evidence for, in the appellants' cases, he had been

shown to have no credibility as a witness and the judge should have rejected his evidence. As pointed out in Phipson on Evidence 17th edition at paragraph 7.17 -

> "Unlike admissibility, the weight of evidence cannot be determined by fixed rules since it depends on common sense, logic and experience."

Birch J in R v Madhub Chunder (1874) 21 WRL 13 put the matter neatly -

> "For weighing evidence and drawing inferences from it there can be no canon. Each case presents it own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited."

[34] The thrust of Mr O'Higgins argument was that the judge had failed to confront the points as to Rupert's credit which emerged from his cross examination in the trial in the Republic of Ireland trial. It was submitted these demonstrated his total unreliability, rendering it quite unsafe to rely on anything he might have said either in evidence or in the emails. However, the fact that a witness is demonstrated to be unreliable and, indeed, mendacious and dishonest on important occasions, is not of itself determinative of the question whether everything he says should be discounted as valueless and unreliable. As the judge made clear, Rupert's hearsay evidence had to be approached with care. Borrowing terminology from a different context, the evidence had to be subjected to anxious scrutiny. The judge was clearly alive to the financial motive to lie and exaggerate. He could not have failed to appreciate that Rupert had described himself as a "whore" and a "mercenary". He recognised the evidence from Rupert himself that he was guilty of dishonest behaviour in respect of his debts and bankruptcy. He fully appreciated that Rupert was perfectly prepared to hide money from his creditors in 1994 and to claim that that was acceptable behaviour. He appreciated that Rupert was prepared to deal with illegally obtained money, including drug money outside the US, on the basis that he believed that it was not illegal. His evidence certainly suggested a willingness to facilitate criminal activity. The judge accepted that those working with Rupert formed the view that he was dishonest on occasions. He accepted that Rupert used insolvency laws in a way that appeared to enable him to enjoy a very comfortable lifestyle and was prepared to expose those close to him to a significant financial risk. Rupert accepted that he had a reputation as a smuggler, drug dealer and general bad guy but the judge concluded that the evidence did not show that he was in fact a smuggler. The judge accepted that Rupert had admitted that he told police of his intention to take a minor female home and "keep her like a puppy". The evidence showed Rupert and his co-driver were handcuffed and taken to jail. But he

claimed that this had not amounted to arrest (which the judge was bound to have seen as non-sensical evidence). While the judge did not make adverse findings against the credibility of Rupert on all the issues as to credit raised in his cross-examination in Dublin, a fair reading of the judgment is that the judge was fully conscious of serious flaws in Rupert as a witness of truth on some issues. Mr O'Higgins criticised the judge to the point of suggesting intellectual laziness in failing to deal fully with each of the attacks on Rupert's credit and in not giving a detailed and reasoned decision on each head of attack. This criticism is unfair. Simply because counsel argued that a certain course should be taken in relation to the setting out of reasons in respect of a myriad of separate questions and issues, does not mean that the judge was bound to do so. In this instance what the judge did do was to set out extensively, but not exhaustively, the key evidence and areas in which issues arose and drew conclusions in relation to them when he considered it possible and fair to reach a definitive conclusion. Lord Brennan argued that the judge's approach to Rupert's evidence was structured, reasoned and balanced. We see no reason to disagree with that submission. In the ultimate assessment of the case against McKevitt the judge had to take into account the factors which weakened the cogency and credibility of Rupert's statements and the e-mail evidence and those factors which enhanced or strengthened it.

[35] In reaching his ultimate conclusion the judge took account of other evidence outwith the e-mails which he concluded gave weight to the contents of the e-mails. One of those matters related to what was called in the course of the argument, the Woolwich evidence to which it is necessary to turn.

[36] Lord Brennan argued that compelling and remarkable evidence was provided to the court which established that witnesses E and AD acting as intelligence agents had received from Rupert intelligence information in late 2000 which led to the setting up of a sting operation which involved a dissident republican conspiracy to import arms. Nineteen telephone calls occurred between January and March 2001 between Secret Service agents taking part in the sting and a man calling himself Karl. This man was directing the operation in Ireland and seeking to travel to Iraq for the purpose of collecting the weaponry. During the conversation Karl referred to the fact that he had previously done business of that type with that country. Rupert purported to identify Karl's voice as that the appellant McKevitt. Of evidential significance in the present context Garda Inspector Sheridan independently identified the voice as that of the appellant McKevitt. He was someone to whom Inspector Sheridan had spoken on 10-15 occasions and whom he had known for 29 years. Inspector Sheridan had a long conversation with McKevitt after a Republican commemoration in 2000. Inspector Sheridan also gave evidence about a passport application made in the name of Darling which included a photograph of the appellant McKevitt as the intended applicant.

[37] At paragraph [178] of the judgment the judge concluded that the most telling evidence in relation to the accuracy of the e-mail is that derived from the Woolwich material. He was clearly entitled to rely on the evidence which Inspector Sheridan gave. He deduced from that evidence that:

(a) McKevitt was actively involved in the procurement of terrorist material (and this was confirmatory of the procurement role of McKevitt to which the e-mails referred).

(b) The tapes referred to an earlier transaction with a foreign country which established McKevitt's engagement as far back as 1986 on behalf of the Provisional IRA (and this again confirmed material in the e-mails).

(c) It confirmed the e-mail evidence which showed McKevitt had revealed himself to be a Quartermaster of the Real IRA.

(d) It demonstrated a firm commitment to terrorism and a leadership role in relation to procurement.

(e) The sting operation was devised as a result of intelligence provided by Rupert.

All these were entirely reasonable and justifiable conclusions for the judge to reach on the evidence.

[38] In Ruling No. 12 the judge refused an application on behalf of the appellant to exclude the tape of Karl. He accepted that the disclosure of the material by the Security Services was governed by the Security Service Act 1989. He concluded that because the tape had been disclosed to the Metropolitan Police and Detective Superintendent Pearce during the criminal investigation there was no statutory restriction imposed on them to prevent the disclosure of the tape to the plaintiffs. Counsel argued that the police were subject to a binding undertaking that the material could only be used for criminal purposes and that the Act prohibited MI5 from permitting its use for non-criminal law purposes. The rights of a person holding a copy could in no way be greater than the rights of the person who owned the original.

[39] Section 2(2)(a) of the Security Services Act 1989 imposes a duty on the Director General to ensure arrangements which secure that no information is obtained by the Service except so far as is necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose for the purpose of preventing or detecting serious crime and for the purpose of any criminal proceedings.

[40] While accepting that the recording of the conversations with Karl was an interference with his private life and that its disclosure would constitute a

further interference the judge considered that release of the tapes would have involved careful consideration by the Metropolitan Police, of the balance between the public interest in disclosure and the private rights of the individual. He assumed that the Metropolitan Police had sought to strike a balance between the rights of the individual and the rights and freedoms of others (in this case the plaintiffs who were bringing civil proceedings).

[41] It is important to bear in mind that the courts at common law have disclaimed any general discretion in civil cases to exclude evidence on the ground of unfairness. There is no discretion to exclude evidence on the ground that it is unlawfully obtained. Thus for example in Lloyd v Mostyn 10 M and W 478 Parke B (with the concurrence of Lord Alinger, Gurney B and Ralph B) said:

> "Where an attorney is trusted confidentially with a document and communicates the contents of it or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen and a correct copy taken would it not be reasonable to admit it?"

There is no authority for the exclusion of evidence on the ground that its prejudicial effect outweighs its probative value (see Phipson on Evidence 17th Edition at paragraph 39.34).

[42] Thus, even if there were force in the appellant's argument that section 2(2) imposes a duty on the Director General to ensure arrangements to prevent the disclosure of evidence except for the purposes of any criminal proceedings, the evidence was before the court and forms probative material which cannot be excluded. In any event section 2(2)(a) provides that no information should be *obtained* by the Service except for the purpose of criminal proceedings. The material in this instance was properly obtained in the first place. It was disclosed in the course of the criminal proceedings in England and hence entered the public domain. In the absence of an express prohibition on its use for any purpose other than for those of criminal proceedings it is not unlawful for that evidence to be used in civil proceedings. While interference with the privacy of the phone conversation engaged Article 8 of the Convention, the interference was for the prevention of crime, was in accordance with law and was necessary in a democratic society. Once the material was properly used in connection with the criminal proceedings it is to be doubted whether Article 8 is further and separately engaged in relation to the question whether that material, so obtained, was or was not admissible in civil proceedings. If Article 8 was engaged, the balance between the interests of the plaintiffs in ensuring that relevant materials were put before the court and McKevitt's Article 8 rights in respect of the interference with the telephone calls, clearly comes down in favour of the

evidence being made available for use in the present proceedings. Once admitted it was material of considerable importance in the case. It confirmed relevant portions of e-mails implicating McKevitt in relation to procurement. It evidenced leadership activity in the dissident movement. It showed that Rupert was supplying high grade intelligence material which led to uncovering a serious criminal conspiracy evidencing a determination by dissident republicans to carry on an extreme violent campaign. The evidence thus, considerably enhances the value of the e-mail material. It is also of relevance in relation to the weight to be attached to the email evidence in so far as it implicated the other appellants.

[43] The circumstances relating to the unavailability of Rupert as a witness willing to give viva voce evidence were considered by the judge. Rupert's unwillingness to attend, and the lack of specificity in relation to the health and security considerations relied on to justify his absence, clearly went to weight. These matters did not, however, render the evidence inadmissible. The difficulties facing the plaintiffs, in securing the attendance of a US citizen engaged in a witness scheme operated by the FBI, were considerable. If a plaintiff abuses the Order in order to avoid calling available and compellable witnesses, the court may well be entitled to draw inferences adverse to that party and to conclude that no weight should be attached to the evidence of such a witness. The plaintiffs in the present case were not guilty of abuse of process, however. In this instance they were faced with a real and practical difficulty in securing the attendance of a reluctant witness only contactable through a reluctant FBI. The reluctance of the witness was not something that could be held against the plaintiffs as such, but it was a factor to be taken into account in considering the weight to be attached to that evidence. In paragraph [161] of the judgment the judge stated that he was satisfied that the plaintiffs had taken every reasonable step to seek to ensure that Rupert was available to give evidence and he also concluded that the appellant had taken every possible step to secure the attendance of Rupert for cross-examination. Under Article 5(3)(a) of the Order the court may have regard to whether it would be reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness. The judge addresses that issue in paragraph [161]. The matters to which the court may have regard under Article 5(3) are not exhaustive of the circumstances from which any interference can reasonably be drawn and Article 5(1) requires the court to have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. The lack of medical evidence in relation to Rupert from either Rupert or the FBI is of relevance in considering the weight of the hearsay evidence. There is nothing to suggest that the judge did not take the matter properly into consideration.

Previous Convictions

[44] Mr McKevitt was convicted of membership of the IRA and directing terrorism between August 1999 and October 2000. The judge ruled that he was bound by Hollington v Hewthorne [1943] KB 587 and accordingly held that the conviction could not be admitted as evidence that McKevitt had committed the acts which grounded the conviction. He considered however, that such a conviction could be admitted at common law as evidence of bad character, if probative and relevant. He considered that if evidence is adduced before the court that somebody has engaged in bomb planting activities, the surprise that the individual acted in that way is lessened somewhat if there is evidence that the same individual had been convicted of a recent offence related to terrorism. In the circumstances the fact of the conviction could have some modest bearing on circumstances where there was some other material contributing to the cogent evidence needed to establish the allegation on which the plaintiffs relied.

[45] The other appellants also raise an issue as to the admissibility and relevance of convictions by courts outside the United Kingdom. The plaintiffs also address the issue in the cross-appeal and they invite the court to regard Hollington v Hewthorne as wrongly decided. The plaintiffs seek to rely on evidence of previous convictions as admissible evidence that the appellants were guilty of the acts in question. It is convenient to deal with the question of previous convictions at this stage of the judgment in relation to both McKevitt and the other appellants.

[46] Counsel for the other appellants (Mr Dermot Fee QC making the most detailed submissions on this issue) contended that foreign convictions were inadmissible to prove the carrying out by the individual of activities in respect of which they were convicted. If the convictions cannot prove that the appellant committed the relevant offences then logically they could not be evidence of bad character. At their height they are evidence of a perception of bad character. They could not be relied on as evidence of propensity.

[47] Lord Brennan pointed out that Hollington v Hewthorne has been subject to trenchant criticism and was regarded as wrongly decided by Lord Diplock in Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 and 734. The common law rule was abolished in relation to foreign convictions by Section 99(a) of the Criminal Justice Act 2003 in respect of criminal proceedings. The rule was anomalous and inimical to the proper functioning of the European Union in combating terrorism. It originated at a time when interested parties and their spouses were considered not to be competent to testify in civil proceedings. He pressed this court to decline to follow Hollington v Hewthorne.

[48] The underlying reason in Hollington v Hewthorne [1943] 1KB 587 why evidence of a conviction of a party for careless driving in separate proceedings was irrelevant and thus inadmissible evidence in a subsequent civil action in negligence arising out of the same driving was succinctly stated by Goddard LCJ at 594:

> "In truth the conviction is only proof that another court considered the defendant was guilty of careless driving. . . . the court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it and what influenced the court in arriving at its decision . . ."

Although the rule was criticised by Lord Diplock in Hunter and Lord Hoffman in Arthur J S Hall v Simons [2002] 1 AC 615 at 702 the rule which applies to a wide range of verdicts remains in place, but is now subject to statutory exceptions in the Civil Evidence Act (Northern Ireland) 1971 (in relation to the use of UK convictions in civil proceedings) and the Criminal Justice Act 2003 (in relation to criminal proceedings). Lord Lowry in the Privy Council in Hui Chi Ming v R [1992] AC 34 clearly considered Hollington v Hewthorne as good authority, considering Goddard LCJ's observations as being "greatly in point". In Calyon v Michailaides and others [2009] UK PC 34 the Privy Council decided not to depart from the established principle.

[49] While this court is not strictly bound to follow a decision of the Court of Appeal in England and Wales it is the practice of this court to follow English Court of Appeal authority leaving it to the Supreme Court to correct the law if appropriate. (See for example the approach adopted by the Court of Appeal in Beaufort Developments v Gilbert Ash [1998] NI 144 where the Court of Appeal followed reluctantly the English Court of Appeal decision in Northern Regional Health Authority v Derek Crouch Construction which in due course was overruled by the House of Lords in the Beaufort case). The approach was stated by Holmes LJ in McCartan v Belfast Harbour Commissioner [1910] 2 IR 470 at 494:

> "It is true that although we are not technically bound by decisions of the court and the Court of Appeal in England we have been in the habit of adjudicating on questions as to which the law of the two countries is identical to follow them. We hold that uniformity of decisions is so desirable that it is better even when we think the matter doubtful to accept the authority of the English Court of Appeal and leave the error, if there be error, to be corrected by the tribunal whose judgment is final on both sides of the channel."

This approach was followed of this court in Re Northern Ireland Road Transport Board and Century Insurance Limited [1941] NI 77.

[50] The principle in Hollington v Hewthorn is a well established one. Statute law has recognised the principle and has made some but no universal alteration to it. While Lord Brennan was correct in drawing attention to the criticisms of the rule, the criticism has not been universal (see for example Lord Lowry in particular in the Chi Ming case). Phipson on Evidence at paragraph 43.79 accepts that the rule continues to be applicable subject to the statutory and common law exceptions. Any further change in the law must be brought about by the Legislature or by reconsideration of the principle by the Supreme Court.

[51] The rationale of the rule is such that it is difficult to see how a foreign conviction can in a civil action be admissible or relevant evidence in relation to bad character or propensity when it cannot be called in aid as evidence of the commission of the relevant offence. Its inadmissibility arises from the fact that it is considered to be opinion evidence. The conclusion that the defendant committed the offence is the opinion of the foreign court. Any inference of bad character or propensity inevitably derives from that opinion.

[52] Accordingly, insofar as the judge concluded that he could refer to the conviction evidence in relation to the appellant albeit to find some support for the plaintiff's case he was in error. In the circumstances of McKevitt's case, however, it does not affect the outcome. The judge referred to the evidence only insofar as it impacted on the question whether it affected the likelihood of the appellant being involved in an outrage like the Omagh bomb. This was clearly a reference to the point that while it is inherently unlikely that somebody would become involved in such a terrorist outrage, such unlikelihood is lessened when it is established that the defendant is a committed and active terrorist shown to be willing to participate in serious terrorist crime. That McKevitt was such a person emerges from the Woolwich evidence. The Dublin conviction thus adds no necessary additional material weight to the plaintiffs' case against McKevitt.

Inference from silence

[53] The judge considered that the failure of McKevitt to give evidence in answer to the case was inexplicable and made the case against him overwhelming. The judge referred to the proper approach to the silence of the party as being that set out by Lord Lowry in R v IRP ex parte T C Coombs & Co [1991] 2 AC 283:

> "In our legal system generally the silence of one party in face of the other party's evidence may convert that

> evidence into proof in relation to matters which are or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances a prima facie case may become a strong or even overwhelming case. But if the silent party's failure to give evidence or the necessary evidence can be credibly explained even if not entirely justified the effect of his silence in favour of the other party may be either reduced or nullified."

[54] The law in this area is usefully drawn together by Brooke LJ in Wisniewski v Central Manchester Health Authority [1998] EWCA Civ 596 cited with approval by the Court of Appeal in Benham Limited v Kythira Investments Limited [2003] EWCA 1794. What is clear is that the defendant must have a case to answer before any inference can be drawn. A plaintiff's case must be such that it has a real prospect of success. This is a different and lower test than the test of proof on a balance of probabilities. The possibility of drawing adverse inferences only arises where a defendant has material evidence to give on the issue in question. There will be cases where a defendant is simply not in a position to call any evidence (e.g. in proceedings against the estate of a deceased person the person's representatives may have no evidence to call and the deceased is obviously unavailable). In such a case the fact that no evidence is called cannot give rise to an adverse inference. The plaintiff must establish the case on a balance of probabilities without reliance on any added weight arising from any inference. In such a case a weak plaintiff's case based on a scintilla of evidence calling for an answer may very well fail because the silence of a party with knowledge of facts cannot be put in the scales. The present case is not one in which McKevitt can rely on such an argument. McKevitt clearly had access to material facts and declined to put any evidence before the court.

[55] McKevitt gave no explanation for his failure to call any evidence or go into the witness box. The judge clearly drew an adverse inference against him which he was fully entitled to do in the circumstances of what was a relatively strong prima facie case. The adverse influence adds considerable further weight to the case against McKevitt.

[56] In the result McKevitt has failed to establish that the judge erred in reaching the conclusion that McKevitt was one of the joint tortfeasors responsible for trespass to the person in relation to the victims of the explosion.

Analysis of the Campbell appeal

[57] The judge in paragraph [267] concluded that there was cogent evidence that Liam Campbell was a member of the army council of the RIRA at the time of the Omagh bomb and held an important leadership position at that time and subsequently. He considered that there was cogent evidence that he was using the 430 phone at the time of the Omagh bomb and two communications between phone 585 in Omagh and the 430 phone on the day of the bomb demonstrated his involvement in directing the operation and participating in it. Campbell who initially entered a defence to the claim subsequently instructed his solicitors to come off record. The judge considered his failure to answer the case made out against him was inexplicable. The judge concluded that the case against him was overwhelming. The evidence relied on by the judge against Campbell fell into the following categories, namely hearsay evidence from Rupert, telephone evidence in relation to the use of phone 430 and the appellant's convictions and associations.

The hearsay evidence

[58] Rupert's hearsay evidence was relied on by the plaintiffs to show that:

(a) Campbell was a senior member of RIRA during 1998 and up to his arrest in 2000;

(b) he was a member of the army council and number 2 in the RIRA;

(c) he was involved in relation to equipment and in relation to the execution of the operation; and

(d) he voted against the RIRA ceasefire announced in September 1998, shortly after the Omagh bomb.

Relevant emails included those of 8 November 1999, 11 November 1999 (containing information of McKevitt speaking of Campbell's keen commitment to the dissident movement), 17 February 2000 (which described Campbell as being in charge of the meeting and Campbell informing Rupert that he voted against the ceasefire), 23 June 2000 (when McKevitt indicated that Rupert should refer military issues to Campbell), 26 June 2000 (when McKevitt was in charge of the Army Council, but kept trying to give the floor to Campbell), 30 June 2000 (when there was detailed investigation of operations and equipment required including RIRA engineering personnel), 18 and 20 October 2000 (when McKevitt was now in charge following Campbell's arrest). There was in addition evidence provided by Inspector Sheridan that Rupert had been seen in Dundalk and at the Carrickdale Hotel in the company of Campbell.

[59] Hearsay evidence from the deceased witness Hughes obtained when interviewed by the police in June 1999 was to the effect that the phone 430 was used by Campbell although it was registered to another person. Hughes had the 430 number on his own phone against the name of Campbell. He also had a notebook with the number recorded against Campbell. Hughes said that he had been contacted by Campbell on the night of the Omagh bomb using the 430 phone between 9.12pm and 10.05pm.

[60] Warning calls in respect of the bomb were made from a public call box at McGeoughes Crossroads at 2.29pm to UTV and at 2.31pm to the Samaritans. A further warning call was made at 2.31 from a public call box at Loyes Crossroads to UTV. The two mobile phone cell sites in the vicinity of those public call boxes were Mulleyash Mountain and Clermont Carn. A call was made at 2.10pm from phone 585 in Omagh to 430 which was received using Clermont Carn. Phone 430 made a call to phone 971 using Mulleyash Mountain.

[61] The judge found at paragraph [185] that Campbell was convicted in the Republic of Ireland of membership of the IRA otherwise Óglaigh na hÉireann between 3 October 2000 and 29 July 2001. In the case of McKevitt the judge explained what effect he considered evidence of such a conviction would have and it can be assumed that he took into account the convictions in relation to Campbell in the same way.

[62] At paragraph [267] of the judgment the judge concluded that the case was made out against Campbell taking account of cogent evidence that he was a member of the Army Council of the RIRA at the time of the Omagh bomb and had a leadership role before and since the bomb and of the cogent evidence that the 430 phone was being used by him at the time of the Omagh bomb, the communication between it and phone 585 in Omagh demonstrating his involvement in directing the operation and participating in it. (It is to be noted that for present purposes in determining whether he was a joint tortfeasor in respect of trespass to the person, a finding that he was a participant in the enterprise would be sufficient to ground liability and a finding of directing was not a necessary prerequisite to establishing liability.) The judge considered that it was inexplicable that he should not have answered the case if he had an answer to it. It is not clear whether the judge meant thereby he was drawing an inference against Campbell from his failure to answer the case or whether the judge was satisfied absent any inference that a case had been made out against the appellant and simply not answered.

[63] Mr Brian Fee QC relied on a number of grounds to challenge the judge's finding. He adopted the arguments made on behalf of McKevitt and again argued that Rupert's evidence was wholly discredited. The judge's reliance on the fact that there was a previous criminal trial involving McKevitt

when Rupert was cross-examined meant that the court divested itself of its responsibility to subject the evidence of Rupert to proper scrutiny in the context of the case against Campbell. Even if in the McKevitt case the decision had been made to allow the plaintiffs to rely on Rupert's hearsay evidence it must clearly have been a finely balanced judgment and the context of McKevitt's case was different from that of Campbell. The judge had failed to carry out the same analysis of the hearsay evidence so far as it affected Campbell. The profound disadvantage Campbell laboured under was not remedied by McKevitt's ability to cross-examine Rupert in connection with the Dublin proceedings. A failure by the judge to grant access to MI5 records disadvantaged the appellants. Mr Fee stated that originally Campbell had demonstrated a desire to challenge the proceedings. He had instructed lawyers and filed a defence denying inter alia attendance at any of the meetings, being a member of the RIRA or engaging in any conspiracy and denied speaking to Hughes on 15 August 1998.

[64] Counsel referred to the Security Services' intensive questioning of Campbell; the praise lavished on Rupert by his handlers; and highlighted a reference to Liam Murphy, referred to in one of the emails, as being presumably a reference to Campbell thus suggesting the answer they wanted Campbell to provide. Mr Fee suggested the inference to be drawn was that Rupert was being induced to incriminate Campbell. He argued that it was not difficult to envisage that Rupert might supplement otherwise innocuous encounters to enhance his position. The emails did not reveal if Campbell had any role in Omagh or that he made any statements indicating any involvement. Since there had been editing of emails it was not fanciful to assert that any editing was conducted to strengthen Rupert's case.

[65] In relation to the telephone evidence counsel suggested that the court was wrong to make the evidential leap that Campbell's alleged use of a particular mobile connected him to the bomb and placed him in a position of control and command. The telephone evidence was an insufficient basis for inferring involvement. Hughes' evidence was hearsay evidence. The appellant was unable to challenge Hughes' account. Hughes' evidence had to be analysed with scepticism. He was at pains to distance himself from Omagh. He did not immediately recognise the number as linked to Campbell; he had to rely on the fact that it was by reference to his phone and notebook rather than specific memory that it was Campbell's number; he accepted he had used the number for six months prior to interview (the commencement of that 6 month period postdating the date of the Omagh bomb) and he allegedly rang the 430 phone on a number of occasions which had nothing to do with the Omagh bomb. Counsel argued that there was nothing in the use of the 430 phone during the day of the bomb which linked Campbell to it. The judge did not consider the possibility of innocent calls to 430.

[66] Mr Fee further argued that it was wrong of the judge to draw adverse inferences from the absence of Campbell from the proceedings. Campbell had lodged a defence to the case but then his assets were frozen in the Republic by the Criminal Assets Bureau and his Legal Aid was suspended on 14 February 2003 and revoked in June 2004. His solicitors came off record on 7 September 2004 in the absence of funding. Campbell was thus unrepresented in the trial and could not effectively have defended himself. He was thus in an impossible position and it was unfair to draw any inference against him to strengthen the plaintiff's case.

[67] Lord Brennan argued that Campbell's appeal was procedurally flawed. He could have applied under Order 35 rule 2 to set aside the judgment if he had a ground based, for example, on procedural unfairness or if he had material evidence which he had been unable to give. This he had not done and it ill-behoved him at this stage to appeal. The fact was that he deliberately took no part in the proceedings and obstructed service of documents. He was aware of the hearing and made no application to represent himself or show cause why the case should not proceed to trial. He presented no sworn affidavit setting out why he did not appear and why he took no part or interest in the proceedings. In the result it was open to the judge to try the case as he did in his absence, rather than strike out the defence and allow judgment to be entered against Campbell. It was equally open to the judge to conclude that inferences could be drawn against him when he presented no evidence to contradict the prima facie case made against him on the evidence.

[68] Lord Brennan resisted the argument that the email evidence should be treated as inadmissible or of no weight. The emails were not self-serving because Campbell had not said anything to directly incriminate himself in relation to the Omagh bomb. Since Rupert was an important US contact for the dissidents there was every reason why Campbell would explain his role and commitment and his attitude to the ceasefire. It was open to the judge to conclude that because of Campbell's admitted leadership role subsequent to Omagh, this gave rise to the likelihood of an earlier involvement in major actions planned and undertaken by RIRA such as the Omagh bomb. The emails were not made for litigation. They form a contemporaneous record of material building up piecemeal over time and these were sufficient to paint a cogent picture which the judge was entitled to rely on. Rupert's evident knowledge of and engagement with Campbell was corroborated by the evidence that he had been observed in the company of Campbell at a meeting of the extremist 32 Counties Sovereignty Organisation and at the Carrickdale Hotel.

[69] Counsel pointed out that Hughes' evidence was spontaneous evidence. It was straightforward hearsay evidence of a deceased witness with no issue of lack of credibility or honesty.

[70] Lord Brennan cited and relied on Re Edwards to support his argument that Campbell should have applied to the trial judge to set aside the judgment but Re Edwards on proper analysis does make clear that an aggrieved party is not prevented from appealing on the merits, notwithstanding the availability of the remedy under Order 35 rule 2. Accordingly, the failure of Campbell to apply to set aside the judgment against him under Order 35 rule 2 does not preclude him serving a Notice of Appeal. His remedies under Order 35, however, are of some relevance. If it were his case that he had evidence which in fairness he should have been permitted to call before the trial judge and did not do so because he was labouring under the difficulties of a lack of representation, that would indeed be the type of matter on which he could seek to rely in making an application under Order 35 rule 2. Mr Fee, however, had no instructions to suggest that Campbell wished to present such a case. From this it can be inferred that he is not making a case that he has been deprived of an opportunity to call rebuttal evidence to undermine the plaintiffs' case.

[71] Even apart from the inadmissible evidence of bad character arising from his conviction for terrorist offences there was a case against Campbell of some strength by the close of the plaintiffs' case, sufficient to give rise to a prima facie case which, when uncontradicted was sufficient to establish the case to the requisite standard of proof. The judge was entitled to reach the conclusion which he did on the Rupert evidence. His analysis of Rupert's evidence in the context of McKevitt's case, while not of itself determinative of the question whether it was reliable evidence against Campbell, was relevant. His analysis of Rupert's evidence in relation to McKevitt led him to give credence to evidence which in the circumstances required careful scrutiny. The judge was clearly aware of the relevant considerations in relation to determining the strength and weakness of Rupert's evidence from his analysis of the context of the McKevitt case. As in McKevitt's case the Rupert evidence could not be seen in a vacuum. There was some corroboration from the Garda observation of Rupert and Campbell together. The telephone evidence was itself evidence of some strength to connect Campbell to the 430 phone on the very day of the bomb and to a place it close to the phone boxes from which warning calls were made. In any circumstantial case strands of evidence, insufficient in themselves to prove a case, can give strength to each other so as to establish a case. Linking the pieces of evidence together the judge was justified in reaching the conclusion which he did. The fact that Campbell declined to give any evidence meant that he said nothing to contradict Hughes' assertion that he spoke to Campbell on the date of the bomb. Lack of contradiction by Campbell of the Hughes evidence and of Rupert's assertions about Campbell's leadership role in the dissident movement strengthens the evidence apart from the question whether an inference could be drawn which added weight to the plaintiff's case. In the

result it is to be concluded that the judge's finding against Campbell was justified and his appeal must be dismissed.

Representation Order

[72] The plaintiffs claimed relief against RIRA as an incorporated association. The judge in paragraph [83] concluded that the RIRA was an unincorporated association. He referred to Order 15 rule 12 which empowers the court to make a representation order against named individuals to represent all those in an unincorporated association. He recognised that the persons represented should have the same common interest in defending the proceedings. He declined to make a representation order against any individual to represent all members of the RIRA. Those who joined RIRA after the bomb would have a different defence to those who had had been members at the time. He also recognised as formidable the argument that because of the nature of the claim for damages in a personal action against wrongdoers, liability extended to the entire assets of the person represented for his individual wrongdoing, if it be established. In paragraph [270] of his judgment he readily concluded that those who were members of the army council of RIRA on 15 August 1998 bore responsibility for directing the attack as part of the campaign being waged at the time. He made an order that Campbell represent the members of the army council of the RIRA on 15 August 1998. The Order which, in fact, was made was that they represent the members of the Army Council without the time qualifying restriction on the class.

[73] The representation order procedure was originally a Chancery practice which was extended by rules of court to all divisions. The practice in the Court of Chancery was to require the presence of all parties interested in a matter or suit in order that a final end might be made of the controversy. When the parties were numerous "you could never come to justice" so the rule was relaxed and a representative suit was allowed. However Lord Lindley in Taff Vale Railway Company v Amalgamated Society of Railway Servants [1901] AC 424 at 443 stated that the principle on which the rule was based forbids its restriction to cases for which an exact precedent can be found in the reports. The critical words of Order 15 rule 12 are that the parties to be represented and the persons representing them, should have the same interest in the same proceedings. The rule is prima facie applicable to actions to establish a right of action against a fund rather than actions to enforce a personal liability. In Mercantile Marine Association v Toms [1916] 2 KB 243 the Court of Appeal in refusing to make the chairman, secretary and vice-chairman of an incorporated association representatives of the association in an action for libel in the association's magazine, expressed doubt whether the rule should ever be applied to actions for tort.

> "The action is for libel and the plaintiffs must prove who published it, either by themselves and their servants or agents, or have authorised the publication … The other members of the association if sued might say that however defamatory the words complained of might be they did not authorise their publication, that they were on the high seas and knew nothing about the matter. In my opinion the rule is not intended to apply to such a case as this."

Pickford LJ noted that no such representation order had ever been made in the past. That suggested doubt as to whether it ought to be made. No reason was given why the plaintiffs would be able to try their right more fairly or to get the remedy more certainly if the order was made. Similarly in Wood v McCarthy [1893] 1 QB 775 Wills J was of opinion that the procedure did not apply to tort claims (see also the judgments of Buckley LJ and Kennedy LJ in Walker v Sur [1914] 2 KB 930).

[74] In the present instance there are a number of reasons why the representation order made was inappropriate:

(a) There is no evidence that the class of persons which the order purported to bind was numerous. The claim as pleaded was a claim against the RIRA, the membership of which might well be numerous, but the judge rightly rejected the claim for judgment against that unincorporated entity, which was a fluctuating body of persons involved in a criminal conspiracy with individual members being parties to distinct separate criminal enterprises, albeit carried out under the umbrella of the RIRA.

(b) The individual members of the Army Council did not each have the same interest. In this tort claim the plaintiffs had to prove that individual persons were liable as tortfeasors for trespass to the person. While membership of the Army Council may be some evidence that a member thereof was a party to the tort (either being involved in the planning or execution of the enterprise) a member of the Army Council who did not participate in the relevant acts, being, for example, absent from a relevant meeting or unaware of the enterprise would have a defence to a claim in tort. Accordingly not all members of the Amy Council as at 15 August 1998 had the same interest for the purposes of Order 15 rule 12.

(c) Before the court may make a representation order it must authorise the named person to represent the relevant class. The court must be satisfied that he can properly represent the interests of the class to be

represented which is to be bound by any judgment. Campbell was not participating in the proceedings and was thus not representing his own interests much less those of others.

(d) There is nothing to suggest that the plaintiffs would be able, in the words of Pickford LJ, to "try their rights more fairly or get their remedy more certainly" if a representation order was made against Campbell or any of the other tortfeasors sued. Before another party could be held liable as a joint tortfeasor the plaintiffs would have to prove that the other party was a participant in the tort which is not of itself established simply by proof of membership of the Army Council, for the reasons already given.

[75] For these reasons the representation order must be set aside.

Analysis of the Murphy Appeal

[76] The judge held Murphy to be liable having regard to evidence contained in statements made by him during Garda interviews which the judge found showed that he had obtained phone 980 from Terence Morgan the day before the Omagh bomb. He was satisfied that that phone and Murphy's own phone 585 were used in connection with the Omagh bomb enterprise. He was satisfied that Murphy was at the time an active member of the Continuity IRA which was involved with the RIRA in connection with the Omagh bomb. The appellant was mentioned in a number of Rupert's emails which the judge considered to be significant and cogent evidence in relation to Murphy. In addition the judge relied on evidence of convictions of Murphy (one in 1972 of possession of a firearm with intent to endanger life; one in 1976 of membership of the IRA and possession of a firearm with intent to endanger life and convictions in respect of the three firearms offences arising from the purchase of machine guns in the United States.) The convictions were foreign convictions.

[77] In paragraph [246] the judge expressed himself as satisfied on the basis of "the above material" that there was clear evidence that Murphy obtained the Morgan phone 980 the day before the Omagh bomb. The reference to the "above material" must be a reference to what the judge set out in paragraphs [188] to [240].

[78] Mr Dermot Fee relied on a number of arguments in challenging the judge's findings against his client. Some of these grounds were common to grounds relied on by other appellants with which we have already dealt, namely the issues as to the cause of action, standard of proof and the use of foreign conviction evidence.

[79] In relation to the email evidence Mr Fee drew attention to the precise wording of the emails in question:-

(a) The actual text of the email of 27 February 1999 read –

> "Colin Murphy at MD's, I was trying to work on the computer and listen to MD go on at the same time but I hope I got all of this. I told him to stop me if I was asking something I shouldn't but to explain this deal to me. The paper was saying that CM was OnE they didn't really say he was directly involved in Omagh, what did they mean??? Etc MD told me that CM was C never was anything but, that he was basically the chief of the joint operations that were going on and still are. The jobs that were coming of on RIRA was claiming them but they were mostly joint ops, cease policy where no claim at the time. He said the men of the ground looked at him like they did DL, he said problem was DL wasn't doing his job and this guy was . . ." (sic)

The judge dealt with the email in the following terms:-

> "On 27 February Rupert recounts a conversation with a member of the Army Council of the Continuity IRA. That person informed Rupert that the fifth named defendant was a member of the Continuity IRA and was basically the chief of the joint operations that were going on with the Real IRA. The Real IRA were claiming responsibility but the policy of the Continuity IRA was to make no claim. The joint operations were claimed under Óglaigh Na HÉireann."

Counsel submitted that the court could not place any weight or reliance on that material in the absence of the writer of the email to explain exactly what it meant or was intended to mean. The source of the information was not established. It could not be shown that MD's comments were accurately reported. Nor could it be said whether MD was a member of the Army Council or what motive he may have had to make the comments. It was not clear whether MD knew the information first hand. Furthermore the plaintiffs had not relied on that email.

(b) The relevant extract from the email of 13 November 1999 was in the following terms –

> "CM showed up, that went great, he agree with me, which was what Galvin, his sister MMBS had hoped I would get him to do so he made me a hero to them again. I am to contact Galvin and get that show started. He talked for about 1 hour before I had to leave. A couple of things, for M I am sure you know he did 5 years inside in the US he spent 11 years in the US and was deported after he got out. The other thing, he started with CIRA when they first started up in 95, that was before the split with MM. At that time MM was supplying him with stuff to do jobs for CA, actually that is all the stuff CA was getting."

Counsel stressed that there was no evidence to confirm that CM referred to Colm Murphy and initials could refer to a number of persons whether their real identity or synonyms. Counsel argued that the judge's interpretation of the email at paragraph 242 of the judgment did not reflect the content of the email. In that paragraph the judge said –

> "Rupert and the third named defendant discussed setting up a meeting with fifth named defendant and Rupert reported on that meeting in an email dated 13 November 1999. He said that the fifth named defendant talked for an hour and agreed with the proposal Rupert put to him. The fifth named defendant said that he started with the Continuity IRA when they first started in 1995 before (sic) the third named defendant's split with the Provisional IRA. The third named defendant had earlier indicated that this split occurred in the period leading up to the multi party agreement in April 1998. The fifth named defendant indicated that even before then the third named defendant was supplying him with stuff to do jobs for the Continuity IRA. In fact he said that was the only material that the Continuity IRA was getting."

Counsel argued that there was no evidence of a proposal or if there was what it comprised or whether it was sinister. No source of information was given and the judge was wrong to interpret it as said by the fifth named defendant. Similarly the attribution of the other information could not be supported by the text in the email.

(c) The email of 20 February 2000 was relied on the plaintiffs. The relevant part read as follows -

> "The first meeting with CM was no great deal, he seems to be rather shy and is hard to talk to. He also is so fucking depressed he is hard to talk to. He didn't talk too much about things other than the fact that RO blew it, he had it in his grasp to make a very powerful organisation and would not deal. That CA was a disgrace and that all RSF were self serving. It is so bad that Michael McManus stopped to see him on way to New York just to say he had been by to see him when he got to NY. CM was furious over this. He said that MM is going to have to start the business soon or he is going to lose face with his men – they are ready and he can't hold them back . . ."

At paragraph 243 the judge stated –

> "On that occasion the fifth named defendant expressed his fury that the Continuity IRA had become a disgrace. He said the third named defendant was going to have to start the business soon or he was going to lose faith with his men who were ready."

Counsel argued that if this was the first meeting then it was entirely inconsistent with the contents of 13 November 1999. If this was the first meeting and if the emails were accurate then there were two different persons identified by the initials CM. One of them might be Colm Murphy or even this appellant though neither might be Colm Murphy and certainly not this appellant. In clear distinction to the case presented against McKevitt there was no evidence called to prove that Murphy was ever observed in the presence or company of Rupert. This was despite clear evidence of on going observations of Rupert and his acquaintenances referred to in paragraphs [109] to [125] of the judgment.

[80] It was argued that the email material was so unclear, inadequate and potentially contradictory that it would be inappropriate to place reliance on it. It could by no stretch of the imagination be described as significant and cogent as the judge described it. Counsel adopted the criticism of Rupert's evidence made by the other parties. This appellant had no opportunity to cross examine Rupert on any other occasion, unlike McKevitt. There was no observation of Murphy in the company of Rupert and no other corroborating material. The court ought to have approached its consideration of the evidence applying the common law procedure the importance of which was underlined in R v. Davis [2008] UKHL 36. In the circumstances no weight should have attached to the email.

[81] In relation to the phone evidence the judge found it proven that the Morgan phone 980 and the Murphy phone 585 were the mobiles phones used on the bomb run on 15 August 1998. Counsel stated that there was no specific issue in relation to the movement of those phones on the day of the bomb. He, however, did take serious issue with the judge's association of the use of the phones with Terence Morgan, a foreman/employee of Murphy. The phone was registered in name of Michael McDermott. The assertion that it was in the control of the appellant was based on alleged statements to that effect made by Morgan in interview with the RUC on 21-22 February 1999. That material was placed before the court as hearsay evidence. Morgan was required to attend for cross examination on 12 November 2008 and indicated that his account given to the RUC was wrong. The judge does not in his judgment place any reliance on Morgan's evidence. In paragraph [79] of the judgment the judge in the context of the case against the first defendant referred to an off-tape interview of Morgan with Detective Superintendent Houston in which Morgan stated that the first defendant was signed in at work on the morning of the Omagh bomb. The judge stated –

> "I will have more to say about the unreliability of Morgan's evidence."

The judge did not in fact return to the issue of Morgan's reliability. If the judge had intended to rely on Morgan's hearsay evidence he would have had to carry out a detailed assessment of the material, which he did not do.

[82] An important part of the judge's reasoning which led to his conclusion that the case against Murphy was proved, related to the content of police interview evidence relating to Murphy. The judge deals with the interviews in a protracted part of his judgment between paragraphs [188] and [240]. What appears clear is that Murphy was arrested on 21 February 1999 and was taken to Monaghan Garda Station, where he was interviewed between 21 February 1999 and 23 February 1999. He was charged with conspiracy to cause an explosion, namely the Omagh bomb, that charge being based on admissions allegedly made by him in the interviews together with evidence in respect of

the use of the 585 phone of which he was the registered owner. Murphy was ultimately acquitted of the charge. The interviews were conducted by three teams of Garda officers (Sergeant McGrath and Garda Hanley, Garda King and Garda Redie and Detective Garda Donnelly and Garda Fahy).

[83] Interview notes taken by Donnelly and Fahy between 3.45 and 5.45 on 22 February 1999 were tampered with by being rewritten to take out two lines in which Murphy allegedly said his wife was Sile Grew's sister (which was factually incorrect.) It was, thus, unlikely to have been said by Murphy. The change, or authors of the change, its timing and the reasons for it were not satisfactorily established and it called into question the integrity of the interviewing process, at the very least in relation to the interview between 3.45 and 5.45 pm. Neither Donnelly or Fahy gave evidence in the trial in this instance. In the course of the trial Mr Fee mounted a challenge to the reliability of the interview notes prepared by the Garda from lunchtime on 22 February 1999 onwards. While the judge recorded that there was no challenge to the interviews up to lunchtime Mr Fee pointed out that there was no acceptance of the accuracy of the records. He argued that the judge was wrong to place reliance on any of the interview material since the interference with the notes in respect of the 3.45 pm interview called into question the integrity of the entire process. The judge in paragraph [240] of the judgment said –

> "There is no issue taken in relation to the interviews up to lunchtime on 22 February 1999. Although Murphy has not given evidence in relation to the interviews there has been a challenge to the accuracy of the record thereafter. There is evidence of a rewriting of the notes in the afternoon of 22 February 1999 and an absence of documentation which is meant to be a safeguard for the person interviewed on that evening. In those circumstances I cannot give any significant weight to the content of the interviews after lunchtime on 22 February 1999."

It was argued that if the judge excluded the interviews after lunchtime there was no logical basis to admit the earlier interviews.

[84] Mr Fee went on to argue that in any event the only evidence which emerged from the interviews before lunch was that Murphy had a mobile phone 585, that he had never been in Omagh, that he worked with Morgan who contacted him on occasions, that he did not give his phone to anyone on 15 August, that he did not believe that he spoke to Morgan on 15 August and that he could not explain how the 585 phone came to be in Omagh.

[85] The first interview at which Murphy was claimed to have made concessions about having Morgan's phone was an interview involving

Detective Garda Hanley and Detective Sergeant McGrath which commenced at 1.45 pm on 22 February 1999 when it was put to him that he took possession of the phone 980 on Friday 14 August and did not return it until 17 August. He at first said he was saying nothing on the advice of his solicitors. Subsequently when asked had he given two mobile phones (585 and 980) to anyone else he allegedly admitted he had got the phone 980 on Friday evening but did not use it. When asked if he had passed it on he said "Now you have it. As I said I wasn't in Omagh". That interview was after lunchtime on 22 February and accordingly fell within the judge's decision not to give it any significant weight. Counsel accordingly argued that when the judge stated at paragraph [246] – "On the basis of the above material there is clear evidence that Murphy obtained the Morgan phone 980 the day before the Omagh bomb" he was clearly in error. He had not said that he accepted the hearsay evidence from Morgan (which conflicted with what he said in oral testimony) and the judge had decided that the alleged admission by Murphy in the post lunch interview on 22 February should not be given substantial weight. Counsel contended that the judge repeated his error at paragraph [265].

[86] Mr Fee argued that the judge was wrong to draw an inference against Murphy arising from a failure to give evidence or call witnesses. The appellant was facing a retrial in relation to the Omagh bomb charge. The appellant's approach to the criminal case was a challenge to the Garda evidence, an allegation of deliberate manipulation of the interview process and the attribution of admissions which had not been made. The giving of oral evidence in the civil case could potentially prejudice him in the criminal trial. The suggestion made by the judge that steps could be taken to protect his criminal law rights were misconceived, counsel argued. The court could not exclude the plaintiffs and members of the public. Restrictions of press coverage were open to challenge. The appellant's decision not to give evidence was credibly explained and no inference should have been drawn.

[87] In paragraph [70] of his skeleton argument Lord Brennan submitted that it would be helpful to match the judge's findings against Murphy to the submissions made by the plaintiffs in the closing submissions and he referred to paragraph 5.1 onwards of the closing submissions. In those submissions the plaintiffs had argued that the court should accept the evidence given by Morgan to the police which he later confirmed on oath at the criminal trial in Dublin, before later retracting it. The plaintiffs argued that Morgan's claimed inability to remember anything in court was plainly motivated by fear and the court should accept his original evidence. The court had the benefit of hearing the original tape of the interview of Morgan on 21/22 February 1999 and had the opportunity to observe the demeanour of Morgan in the witness box.

[88] While there may have been force in the plaintiff's submissions to the trial judge in respect of Morgan's evidence, the judge does not analyse his evidence in the light of the submissions made and he does not set out any

conclusions reached by him about the strength or weakness of the Morgan evidence. While he did state in paragraph [79] that he had more to say about the reliability of Morgan's evidence he did not in fact return to that issue and it is not possible to distil from the judgment the basis on which the judge concluded that there was clear evidence that the plaintiff obtained the Morgan phone 980. The material that preceded paragraph [246] where the judge so stated, does not provide the basis for the conclusion that there was such clear evidence. Lord Brennan recognised the judge had apparently omitted to deal with the Morgan material, an error which could have been picked up and addressed if the judge had circulated his draft judgment in advance of finalisation, a practice which counsel said was adopted in England in such cases.

[89] Since the judge appears to have laid some considerable weight on the appellant's possession of the 980 phone and not merely the 585 phone to justify his ultimate conclusion, the absence of a reasoned analysis of the Morgan evidence undermines the cogency of his ultimate conclusion.

[90] Lord Brennan argued that the appellant indisputably had ownership of the 585 phone and the absence of any evidence showing how he came to be allegedly out of possession of it when it was in use in Omagh was sufficient to give rise to a case to answer. He further argued that the email evidence on its own or in conjunction with the evidence relating to the 585 phone sustained the case. The appellant's failure to give or call evidence entitled this court to conclude that the case against the plaintiff against Murphy was proved to the requisite standard.

[91] Mr Fee's analysis of the emails does demonstrate that as evidence on their own against Murphy the emails have weaknesses. The paucity of the email evidence, the lack of consistency in the emails or at least ambiguity in relation to the reference to the "first meeting", the possibility of initials referring to someone other than Murphy and the fact that they refer on occasions to double hearsay considerably weakened the emails as evidence. The judge's conclusion that it was "cogent evidence" is not sustainable. In so describing it the judge was ascribing to it a greater weight than it merited. While it may have been of some weight and thus might weigh in the ultimate balance, to some extent the weaknesses and frailties of the email evidence was such that the evidence was considerably less cogent that the judge considered it to be.

[92] The plaintiff's reliance on the Garda interview notes to link the appellant to the Morgan phone at the relevant time was strongly relied on as part of the plaintiffs' case before the trial judge. However once the judge had dismissed as of little weight the record of interviews after lunch time on 22 February there was insufficient evidence recorded or analysed in the judgment to show that Murphy obtained the 980 phone before the Omagh bomb.

[93] Faced with a pending criminal trial which related to the Omagh bomb incident itself the effect of Murphy's decision not to give evidence gives rise to difficult questions as to what inferences if any should properly have been drawn against him from his evidence. In the event we do not consider it necessary to reach any final conclusion on this point since in our view a retrial of the claim against this appellant must be ordered. The criminal proceedings have now been concluded. Thus, in the event of a retrial different considerations will arise if the appellant again decides not to give or call evidence. A retrial of the claim against this appellant is necessary for the following reasons –

(a) As an appellate court we cannot determine the weight, if any, which should be given to Morgan's evidence. The judge has omitted to deal with this important plank of the plaintiffs' case against the appellant.

(b) We consider it inappropriate for this court to accept the plaintiff's invitation to rely solely on the 585 phone evidence and the email evidence as giving rise to a prima facie case which the appellant has failed to answer. The judge considered the issue of who was in control of the 980 phone at the relevant time to be of importance in his overall judgment in finding the case against Murphy proved.

(c) The judge's conclusion that the email evidence was cogent overstated the weight to be attached to the email material and its overall weight, bearing in mind its frailties when seen in the light of the rest of the evidence, requires to be reassessed in the light of all the evidence properly analysed. This requires reassessment in the light of all the evidence adduced at the retrial properly analysed.

(d) The judge erred in having regard to the foreign convictions for the reasons we have already given. The conviction evidence probably added little weight to the judge's conclusion particularly bearing in mind their vintage. The judge's erroneous reliance on them, would not in itself have called for a retrial. On a retrial however they would fall to be left out of account.

Analysis of the Daly Appeal

[94] The judge expressed his conclusions with regard to the plaintiffs' claim against Seamus Daly in the following terms at paragraph [269] of his judgment:

> "[269] In relation to the sixth named defendant I have indicated at paragraph [262] that the account given in the statements of Denis O'Connor on the afternoon of 23 February 1999 and that given in December 2001 should be given weight. I have further found at paragraph [263] that the evidence indicates that the 213 phone which is registered to the sixth named defendant was used by him on 29 April 1998 and 30 April 1998 in circumstances which at the very least are consistent with a scouting operation on 29 April 1998 and the movement of the bomb on the following day. This evidence is supportive of the evidence linking the sixth named defendant to the phone which was used on the bomb run. The sixth named defendant has chosen to provide no answer to the case against him. The matters with which this evidence is concerned are matters which are within the knowledge of the sixth named defendant and are matters about which he would be expected to give evidence. In my view his failure to give evidence in light of the material against him further supports the case against him and I am satisfied that there is cogent evidence that he is liable in trespass to the plaintiffs."

The evidence of Denis O'Connor

[95] Telephone records produced during the course of the trial indicated that a mobile phone registered to Denis O'Connor (identified as the 371 phone) received a call from another mobile phone (identified as the 585 phone) at 37 seconds past 3.30 pm on 15 August 1998 and that the call lasted 61 seconds. The plaintiffs' case was that the 585 phone was one of those used in the bomb run to Omagh and that it was highly probable that the person who made the call from the 585 phone was one of those involved in planting the bomb.

[96] On 22 February 1999 Detective Garda Sergeant Hunt and Detective Gardaí Lynch and Greenan of An Garda Síochána were directed to travel to Kilkenny and arrest Denis O'Connor on suspicion of having unlawful possession of explosives. After the arrest had been completed and during the course of the journey back to Carrickmacross Garda Station in the Garda vehicle, Denis O'Connor was cautioned. An interview was conducted commencing at 10.15 pm on 22 February 1999. No contemporaneous note of that interview was made, although evidence was given that a record was completed some time after midnight.

[97] During the course of the interview in the Garda car Denis O'Connor stated that he held a C2 tax clearance certificate ("the certificate") for a building company that he ran with his brother which entitled the holder to receive payment without deduction of tax. He confirmed that he would lend that certificate to other builders at a commission of 10% plus VAT. He would then meet the individual concerned and take the cheques to be cashed in banks at Blanchardstown, handing over the cash subject to deduction of his commission. He told the Gardaí that one of the individuals to whom he had lent the certificate was a man called Seamus Healy from Dundalk.

[98] The Gardaí further interviewed Mr O'Connor at 9.40 am on 23 February 1999 when he provided additional details of the circumstances under which he would permit others to use his certificate. During the course of this explanation Mr O'Connor again stated that Seamus Healy "who was an electrician working in the ladies' prisoner (sic) in Mountjoy" also benefited from a loan of the certificate. He described how Healy had put him in touch with an accountant named Boyle or Boyd who assisted in distributing copies of the certificate. When asked by the Gardaí officers if "Healy" could be "Seamus Daly" Mr O'Connor said that he could be. Mr O'Connor then gave an account of his movements on 15 August 1998 stating that he had been shooting pigeons with his uncle and afterwards he had visited a public house in Urlingford. He said that he was in the public house from about 2.30 until 8.00 pm and could not remember receiving any telephone calls. He specifically told the Gardaí that "during the time in the pub I did not have the phone with me in the pub because I do not make a habit of bringing the phone into pubs because nuisance calls come on the phone from mates of mine acting the fool". During that interview Mr O'Connor was presented with a number of photographs, including one of Seamus Daly whom he identified as being a man he had met at the Red Cow once and on three other occasions outside the Bank of Ireland at Blanchardstown. He said that he contacted Daly by ringing phone 213, the mobile phone that was registered to the sixth named defendant. He said that on some of the occasions when he had met this man at Blanchardstown the man had been accompanied by a good looking woman about 30 years old who was tall with long black hair.

[99] At 3.45 pm on the afternoon of 23 February 1999 Denis O'Connor made a further detailed statement to Gardaí dealing with his movements on Saturday 15 August 1998. In the body of that statement he repeated his account of shooting pigeons with his uncle and of his visit to the pub in Urlingford but on this occasion he said that he did have in his possession a mobile phone registered in his name which was switched on and in working order. Having done so, he continued:

> "I was having a conversation with Vincent and Evelyn when my mobile phone rang. I picked up the phone 086-2662371 and I answered it. The minute I

> picked it up I recognised the voice of Seamus Healy from Dundalk who works as a block layer in Dublin and he also has a contact in Dundalk for block laying."

He proceeded to describe the occasions upon which he had previously met Seamus Healy and the circumstances under which he became involved in the use of the certificate. He said that he had taken the phone outside the public house and that during the conversation Healy had asked him about his business with the accountant Boyle in Newry. According to Mr O'Connor, Healy was suspicious that "something funny was going on" and said that he was going to get in contact with Boyle. He said that the phone call had lasted some two minutes and that shortly after he had returned to the bar he saw a news flash referring to a massive car bomb in Omagh. His statement continued in the following terms:

> "I would like to state that the man I know to be Seamus Healy is the same man who made the phone call on my mobile phone number 086-2662371 on 15 August 1998 at about 3.30 pm, he is the man I pointed out to Detectives Enda Rice and Marty Flanagan in the album of 12 photographs which has just been shown to me. I now believe his name is Seamus Daly but I always knew him as Seamus Healy."

He again confirmed that the individual to whom he had referred was a block layer by trade, drove an old red Mercedes and had a good looking dark haired girlfriend with a Northern accent.

[100] The interview notes and statements recorded by the Gardaí officers from Mr O'Connor were originally adduced in evidence during a sitting of the court in Dublin on 27 May 2008 in accordance with the provisions of Council Regulation (EC) No. 1206/2001 ("the 2001 Regulation"). Article 10.2 of the 2001 Regulation provides that the requested court (in this case the court sitting in Dublin) must execute the request in accordance with the law of its member state. About one month after the admission of that evidence Ms Higgins, on behalf of Daly, objected to the admission of the O'Connor statements as being hearsay evidence and, therefore, not admissible as being contrary to the law of the Republic of Ireland. On 30 September 2008 District Judge Gibbons ruled that the evidence should be excluded from that transmitted to the requesting court in Northern Ireland in accordance with Regulation 2001. In so ruling the District Judge was careful to point out that he was not seeking to interfere with the trial taking place in Northern Ireland. The trial judge recognised the effect of that ruling during the hearing in Belfast on 15 October 2008 when he observed that:

> "Well, my understanding is that everything that I heard in relation to any discussion with Mr O'Connor, I just put a black line through."

[101] As a consequence of the ruling by District Judge Gibbons, on 15 October 2008 the plaintiffs applied to the judge sitting in Belfast to read into evidence under the provisions of the 1997 Order a statement made to Gardaí officers by Mr O'Connor. That statement was read into evidence by consent and with the leave of the judge. Leave was then given to counsel then representing Daly to call Mr O'Connor if he could be located. As with the efforts made by the plaintiffs, the inquiries made by the representatives of that defendant proved unproductive. The Gardaí indicated that, since O'Connor was a civilian, they were unable to assist in identifying his address. On 11 March 2009 counsel for Daly applied to the judge for leave to read into evidence two other statements made by Mr O'Connor to the Gardaí namely the record of the interview in transit at 10.15 pm on 22 February 1999 and the interview on the morning of 23 February 1999 at 9.40 am.

The sixth named defendant's grounds of appeal relating to the O'Connor statements

[102] Daly challenged the admission into evidence of the statements by the judge upon a number of grounds. Counsel criticised the judge for

(*i*) failing to recognise that it was for the plaintiffs to establish that it was not reasonable and/or practicable for them to call Denis O'Connor as a witness in accordance with Article 5(3)(*a*) of the 1997 Order;

(*ii*) failing to give any or adequate weight to the importance of observing adversarial procedure in the course of civil litigation involving serious allegations when deciding whether to admit important hearsay evidence;

(*iii*) failing to give any or adequate consideration to the manifest inconsistency and/or unreliability of hearsay statements;

(*iv*) when deciding whether to admit and/or determine the reliability of the hearsay statements of Denis O'Connor, failing to observe an approach consistent with that to which he adopted in relation to the evidence of Catherine McKenna; and

(*v*) failing to properly and effectively apply the relevant provisions of the 1997 Order.

Discussion

[103] The judge gave careful consideration to the admission of hearsay evidence in the course of delivering Ruling 9 when he was dealing with the admission of the Rupert evidence and he repeated a similar analysis with regard to the O'Connor evidence at paragraphs [256] to [260] of the judgment. He noted that there was no express exclusionary power in the 1997 Order and that the scheme of the legislation was to permit the introduction of hearsay evidence with a requirement that the court in civil proceedings should make an assessment of the appropriate weight to be given to such evidence. At the same time he accepted that he was required by Article 6 of the Convention to ensure that the proceedings as a whole were fair all the parties. He recognised the force in the submission that he would not have an opportunity to assess the demeanour of the witness and accepted that there was an obligation on the court to ensure that where the admission of the evidence would render the trial unfair the court should intervene in order to preserve the fair trial rights of the party affected. The judge having properly taken into account all the relevant circumstances, we cannot fault his approach in deciding to admit the O'Connor evidence.

[104] The judge dealt with the application of the relevant articles of the 1997 Order between paragraphs [253] and [260] of his judgment. He commenced by turning to the specific protections afforded by Article 5(3) of the 1997 Order and expressing the view that, if O'Connor had been available, it would have been reasonable and practicable for the plaintiffs to have called him as a witness. He accepted that the evidence was important and potentially controversial containing matters with which Daly was always likely to take issue. He recorded that the plaintiffs had produced evidence demonstrating the difficulty that they faced in tracing O'Connor and recorded that correspondence had been put before the court from Gardaí indicating that they were unable to assist in identifying the present whereabouts of the witness. In his view, it would have been practicable for the plaintiffs to instruct private investigators but they had not apparently considered such action worthwhile. However, in the absence of any known location for O'Connor, the judge considered that it was not practicable for him to be called as a witness by the plaintiffs. He also recorded that Daly had been given every reasonable opportunity to carry out an investigation of the whereabouts of O'Connor but had not sought an application to extend time in order to instruct a private investigator or to take any other step thought to be appropriate. It is to be noted that by letter dated 16 December 2008 the Chief State Solicitor's office in the Republic of Ireland offered to deliver any correspondence from Daly's solicitors to Mr O'Connor. The judge also took into account Article 5(2) of the 1997 Order in relation to the fact that no express notice of intention to introduce the hearsay statement of O'Connor had been provided by the plaintiffs but noted that they had furnished Daly with the statements of the Gardaí upon which they intended to rely and, in

the circumstances, he expressed himself satisfied that sufficient notice of the intention to introduce those statements had been given.

[105] The judge gave specific consideration to paragraphs (*b*) to (*f*) of Article 5(3) of the 1997 Order. He noted that the statements did not involve multiple hearsay but that the fact that they had not been made contemporaneously with the occurrence of the matters to which they related would inevitably bear upon the weight to be given to the evidence. Also relevant to the weight to be attributed to the statements was the fact that they recorded the maker's involvement in a tax fraud, an admission that would make him liable to prosecution. The judge expressed the view that such an admission would undoubtedly bear upon his credibility although he did not consider that it demonstrated a motive to conceal or misrepresent matters. There was no suggestion that O'Connor had been in any way personally involved in the Omagh atrocity and seeking to put the blame elsewhere and no evidence that the statement had been edited or made in collaboration with anyone else. The judge was not prepared to accept that there was any evidence to suggest that the Gardaí had manipulated or contributed to the substance of the statements. Taking into account the inability to identify the whereabouts of Mr O'Connor, the judge did not consider that the circumstances in which the evidence was adduced as hearsay were such as to suggest an attempt to prevent proper evaluation of the weight of the evidence.

[106] The sixth named defendant makes the case that the approach adopted by the judge to the hearsay evidence of Denis O'Connor should have been consistent with that which he had adopted to the evidence of Mrs McKenna, the estranged wife of the original first-named defendant. However, it seems to us that there were clear and significant differences between the evidence of Mrs McKenna and that of Denis O'Connor.

[107] While the plaintiffs relied upon hearsay evidence from Mrs McKenna in the form of her police interviews, the original first named defendant applied for and received leave to cross-examine Mrs McKenna and she attended for that purpose on 21 October 2008. Taking into account a combination of the police interviews of Mrs McKenna and her oral evidence the judge was able to conclude that she was an unsatisfactory witness whose oral evidence was of no assistance to the plaintiffs. In such circumstances he went on to consider whether he should give any weight to the interview statements. He concluded that it was clear that it would have been both reasonable and practicable for the plaintiffs to have produced Mrs McKenna as a witness and that the reason they had not done so was because they considered her to be an unreliable witness. The judge noted that if she had been called by the plaintiffs it would have been open to them to seek to have her declared a hostile witness. He considered the other relevant factors contained in Article 5(3) of the 1997 Order and then proceeded to look at the reliability of her police statements in the context of the circumstances in

which they had been made in accordance with Article 5(1). Having done so, he formed the opinion that the thrust of her evidence was that she could not actually remember any telephone call on the relevant day. The outcomes were different, doubtless because of the significant difference in circumstances, but we have not been persuaded that Daly has demonstrated any significant inconsistency in the approach adopted by the judge with regard to the application of the relevant provisions of the 1997 Order.

[108] At paragraph [257] of his judgment the judge accepted that the evidence of O'Connor linking Daly to the crucial phone call on 15 August 1998 was … "the only direct evidence upon which the plaintiffs rely in establishing that the sixth named defendant is liable to them". He then proceeded to give consideration to the cases of Al-Khawaja v UK [2009] 26 BHRC 249, ECHR and R v Horncastle [2009] 4 All ER 183 in which the European Court of Human Rights and the Court of Appeal in England and Wales, respectively, considered the question of how a court should approach the weight to be given to hearsay evidence where such evidence constituted the sole or decisive evidence in relation to a criminal charge. The judgment of the learned trial judge was delivered prior to the judgment of the Supreme Court in R v Horncastle [2010] 2 All ER 359 in which the Supreme Court declined to apply the Al-Khawaja decision and affirmed that of the Court of Appeal which had declined to follow the ECHR "sole or decisive" rule in favour of a statutory code intended to ensure that hearsay evidence was admitted only when it was fair to do so. Having examined the authorities, the judge bore in mind that these proceedings were not criminal but civil and at paragraph [260] he set out his conclusion in the following terms:

> "In a civil case the balance is different. Here the state is seeking to resolve competing claims by individuals who have no connection with the state. There is no question of punishment. The purpose of the proceedings is to uphold respect for the proper objectives of distributive justice. In relation to the specific issue with which this evidence is concerned the plaintiffs and their representatives were not a party to the phone call which the evidence indicates was made at approximately 3:30 p.m. on 15 August 1998. The plaintiffs' case, however, is that the sixth named defendant was a party to that phone call. He is, therefore, in a position to deal with the assertion that he was connected to the 585 phone or that the 585 phone was being used in the bomb run at the time the call was made. If, therefore, under the statute it is appropriate to give weight to this hearsay evidence taking into account all other relevant matters I do not consider in this case that there is any additional

> prohibition to the introduction of this evidence by virtue of the fact that it is the only direct evidence upon which the plaintiffs rely to establish a connection between the sixth named defendant and the bomb run."

[109] The learned trial judge then proceeded to examine the evidence of Mr O'Connor in detail noting, in particular, that:

(*i*) his involvement in the C2 tax evasion arrangement marked him out as a dishonest man whose evidence required to be examined carefully;

(*ii*) his reference to Seamus Healy had been spontaneous and not as a result of prompting on the part of the Gardaí;

(*iii*) it was common case that, during the course of the interview on the morning of 23 February 1999, it was the Gardaí who raised the possibility that Healy was Daly. In that context it is perhaps not without significance to note that at paragraph [213] of his judgment the judge had referred to Inspector Foley having relayed the information that Daly was believed to have made the phone call to O'Connor on 15 August 1998 when briefing the officers interviewing the fifth named defendant earlier on 23 February 1999;

(*iv*) the individual to whom he had been referring as being involved in the C2 tax evasion arrangement was clearly well known to O'Connor and, accordingly, his reaction to the photograph was one of recognition rather than identification;

(*v*) in the course of providing detail of the C2 tax evasion arrangement Mr O'Connor identified the telephone number that he used to keep in touch with Healy/Daly as the 213 number which was the mobile telephone registered to the sixth named defendant. Such prior contact was confirmed by the May 1999 records handed in to the court without formal proof on 30 September 2008; and

(*vi*) in respect of the inconsistency between the O'Connor statements the judge noted at paragraph [262] … "His (O'Connor's) initial position was that he did not have the phone and he maintained this until the afternoon of 23 February 1999. Between 23 February 1999 and December 2001 it is clear that he has maintained the account upon which the plaintiffs rely".

[110] Ultimately, the learned trial judge expressed himself to be satisfied that the account given in the statement of the afternoon of 23 February and that of December 2001 was one to which weight could be given although in

balancing that evidence it was necessary to take into account that O'Connor had admitted dishonesty and that the account was not given spontaneously and was preceded by a different account. The judge recognised that O'Connor's admitted involvement in fraud adversely impacted upon his credibility but he did not reach any final conclusion as to the reason for the inconsistency between his statements to the Gardaí. He characterised the reason given in his first statement for his omission to bring his phone with him to the public house as "bizarre" but simply recorded at paragraph [251] of the judgment that "There was no admissible evidence about the reasons for O'Connor's change of position."

[111] In dealing with the inconsistency between O'Connor's statements the judge recorded at paragraph [262] of the judgment:

> "Between 23 February 1999 and December 2001 it is clear that he has maintained the account upon which the plaintiffs rely."

If accurate, that would suggest that there was evidence before the court that two statements had been made upon different occasions confirming that O'Connor had firmly maintained the same account for almost three years. Unfortunately, that observation appears to have been based upon a misapprehension. It seems that, on 15 October 2008 in Belfast, Mr Lockhart QC may have read into evidence a statement made by O'Connor in December 2001 in the course of criminal proceedings in the Republic of Ireland against the fifth named defendant. That suggestion is apparently challenged by Ms Higgins who submits that he read the original statement made to the Gardaí on 23 February 1999. The contents of both documents are very similar. Whichever of these submissions is accurate it would appear that only one version was read into evidence before the judge on 15 October 2008 and, as a result of the earlier ruling in Dublin by District Judge Gibbons, only one version was properly in evidence.

[112] While the judge did give "some weight" to the pattern of movement of the 213 phone on 29 April 1998 in relation to the bomb in Lisburn as constituting evidence of "similar activities" it appears indisputable that without the evidence of the O'Connor statements the case against Daly would not have succeeded.

Other evidence

The Lisburn telephone records

[113] At paragraph [263] of the judgment the judge referred to telephone evidence demonstrating calls received by Daly's mobile phone, 213 on 29 April 1998 and telephone calls made and received by the same telephone on

30 April 1998, the latter being the date of the Lisburn bomb. He noted that at 7.22 pm on 29 April 1998 the 213 telephone had received a call from the landline of Sheila Grew using a Lisburn cell site. Between 7.58 and 8.30 am on the morning of 30 April 1998 the same phone made three calls in the Republic of Ireland, two to the original first named defendant and one to Sheila Grew. At 8.58 am 213 received a call from the defendant Murphy's wife's telephone using a cell site at Dromore and at 9.23 am the 213 phone made a call using a cell site at Linenhall Street, Lisburn. At 10.02 am the same telephone received a call using a Lisburn cell site and at 10.30 it received a call using a Loughbrickland cell site. By 11.57 am the 213 telephone was back in the Republic of Ireland. The learned trial concluded that:

> "The pattern of movement of the 213 phone is consistent with a scouting operation on 29 April 1998 and the movement of the bomb on 30 April 1998. The phone traffic with Sheila Grew supports the inference that the phone was not alone registered to Daly but possessed by him at the relevant time. I consider that this evidence constitutes evidence of similar activities to which some weight can properly be given."

At paragraph [269], when expressing his overall conclusion, the judge described the evidence relating to the movements of the 213 phone on 29 and 30 April 1998 as being at the very least consistent with a scouting operation and movement of the bomb on the following day. He considered that the evidence was supportive of the evidence linking Daly to the 585 mobile phone that was used on the bomb run to Omagh.

[114] It appears that, in the course of investigating the Omagh bomb, the police requested billing material from Vodafone, BT, Cellnet and Esat Eircell. The companies were asked to provide data with regard to mobile phones which had roamed in Northern Ireland between January and September 1998 and, in all, it seems that the data totalled somewhere in the region of five million calls. The data included cell site data and itemised telephone bills presented in either hard copy or electronic form. An attempt was made to throw an "electric net" over the Omagh and South Armagh/North Louth area with a view to picking up mobile communications that had taken place within those two areas between 2.00 o'clock and half past two on 15 August 1998. At the request of the PSNI investigation team Mr Green of Vodaphone interrogated his computer system and downloaded data relating to specified Eirecell and Digiphone mobiles roaming on the Vodaphone network during the period January to November 1998. He estimated that the data comprised about 600 megabytes. The records in respect of four roaming Eircell telephones within the Vodafone system in Northern Ireland on 15 August 1998 were researched, including the mobile phone 585. That trawl took approximately 2-3 months and the data produced identifying the calls made

to and from those phones was collected on a CD Rom and supplied to the police telephone research analyst Lisa Purnell who used it as the basis for her initial report LKP1. Vodaphone supplied both cell site enquiries and toll ticket analysis and Eircell provided billing information in order to permit tracking the movements of the mobiles on both sides of the border. During the hearing on the 15 April 2008 Mr Green from Vodafone explained that the original prime records consisted of toll ticket analysis relating to the costing records in respect of the relevant telephones while the expression "cell site analysis" tended to be used by the police. Vodafone could provide the cell, a sub-set of the full switch record, but that would be some forty fields in length most of which was irrelevant to police needs. Accordingly, Vodafone provided a simple analysis involving the person making the call, the person receiving the call, dates, time, duration etc. with an extended record being provided on request.

[115] Further requests and inquiries were generated as the investigation progressed and the initial four mobile phones under investigation were increased to thirteen and, eventually, to twenty seven. The information relating to the incoming/outgoing calls and the movements of the 213 telephone on 29 and 30 April was added and, ultimately, the data used to produce a document compiled by Lisa Purnell which came to be known as LKP5. The task of such an analyst is to examine a volume of material, which may be substantial, for the purpose of determining its meaning and significant features and then to present it in a user-friendly format. Her work appears to have consisted of a series of reports with charts referring to communication data to which her own notes and comments were appended suggesting further lines of enquiry. These documents ranged from LKP1 to LKP5. LKP1 was a four paged report compiled by Ms Purnell in November 1998 after she had examined the toll ticket analysis TRS1 obtained from the telephone companies. That material, supplemented by additional data resulting from her further directions and inquiries, was analysed by Ms Purnell utilising computer software over a period of some two years ultimately producing the document LKP5, the majority of her work being done between 1998 and 1999. Mr Samuel Telford, one of the most experienced police telephone analysts in Northern Ireland, assisted Ms Purnell by providing some analytic support and he explained the development and significance of the final document including the technique by which the original data was transferred into the LKP5 format. LKP5, which was put into evidence in its redacted form, was the final version of the report based on the analysis carried out by their department. Mr Telford explained the computer software used in the course of the analysis and confirmed that LKP5 covered Omagh, Banbridge and Lisburn. He also produced maps based upon the telephone data illustrating the movement of the relevant telephones in relation to the incidents at Omagh, Banbridge and Lisburn. Mr Telford dealt specifically with the calls made and received by and the movement of the 213 phone registered to the sixth named defendant

on the day before and the day of the Lisburn bomb during the course of giving evidence on the 15 April 2008.

[116] Ms Purnell was not available to give evidence in person at the hearing, possibly because of ill health, and leave was sought for Mr Telford, to read LKP5 into evidence in accordance with the provisions of the 1997 Order. Some of the defendants objected to such a course of action on the basis that LKP5 included significant numbers of comments, inference and observations by the analyst as opposed to analysis of hard data. The judge suggested that LKP5 might be edited to exclude inferences and/or comment and contain only primary facts. Lord Brennan on behalf of the plaintiffs agreed to edit the document and to seek the views of the defendants' representatives in relation to the proposed editing. However, he also made clear that he wished to refer to and rely on the contents of the document LKP5 which covered not only Omagh but four other incidents in relation to the sequence and location of relevant telephone calls.

[117] Thus, it would appear that LKP5, completed in 2003, represented a composite series of reports developing from the original four page report LKP1 and based upon a careful computerised analysis by an experienced telephone research analyst of an enormous quantity of raw data supplied by the relevant telephone companies. The composite document was built up to take account of further requests and inquiries raised by Lisa Purnell and, thereafter, by other telephone research analysts. Such requests and the consequent further researches inevitably contained comments, suggestions and other relevant notes as to how and in respect of whom the research should continue. However, LKP5 was redacted with the consent of the defendants before being read into evidence.

[118] The expert called on behalf of the plaintiffs, Mr Uglow and his opposite number retained by the defendants, Mr Brown, agreed that LKP5 in itself could not be treated as a reliable source of telephone data evidence and that, so far as it goes, cannot be gainsaid. The identity of the cell used to initiate a connection is recorded whenever a call is made to or from a mobile phone and that information is stored with the user's billing history in a format known as the Call Detail Records ("CDRs"). Some network providers also add details of the cell in use when the call ends. However, such information is only held by the network providers for a limited period of time. Mr Green gave evidence that, at the material time, it was only retained by Vodaphone for six to twelve months. Mr Brown confirmed in his original report that neither he nor Mr Uglow had sight of any original CDRs when preparing their respective reports in 2008. Mr Uglow pointed out that LKP5 was a police analyst's interpretation of the data containing commentary and confirmed that he had not read the document in detail, his task being to look at the call data records that had been provided. In the course of his report Mr Brown referred to LKP5 as "… the resultant output of the Analysts Notebook

software by human interaction with the input of data files" which was an accurate, although limited, description. He noted some small errors or omissions involving inaccuracies relating to times and cell sites, one of which was that the document included a call incoming to the 585 phone at 12.50pm on the 15 August which he was unable to find in the call data. However, bearing in mind those observations, we are satisfied that the evidence established that LKP5 was derived from a vast amount of original data produced by the relevant telephone companies. The nature and provenance of that data was described in detail in evidence, although it may well be that a significant proportion of that data was no longer available for examination by the experts. However, the authenticity of that original material was described by those by whom it was supplied and we see no reason for rejection of the manner in which the evidence relating to the movements of the relevant mobiles, including LKP5, was considered and analysed by the judge between paragraphs [36] and [67] of his judgment. In any event, it appears to have been common case that, whoever possessed it at the material time, mobile 585 was used in the course of the Omagh bomb and the reports of both experts confirmed that a call was made from that mobile to O'Connor's mobile 371 at 3.30pm on the day of the explosion. Indeed, it seems that Mr Brown indicated that he was happy with the available source data in respect of the 585 calls after the experts' meeting. The only criticism eventually raised by Mr Brown was that to describe that call as originating off Eirecell's Castleblayney site was imprecise since there were at least two serving cells in Castleblayney.

[119] Ms Higgins submitted that no evidence had been called by the plaintiffs as to why the maker of LKP5, Ms Purnell, was not called and that, in such circumstances, the report should not have been admitted in evidence in accordance with the provisions of the 1997 Order. However, the question of the attendance of Ms Purnell was clearly raised by the defendants before the judge on 14 April 2008 but was not pursued. On that date, Lord Brennan made it quite clear that Ms Purnell was not available to give evidence, that the plaintiffs were compelled to rely upon a Civil Evidence Order notice and that her report would be read into evidence by Mr Telford. LKP5 was subsequently redacted with the consent of the defendants and, accordingly, we see no reason why it should not have been admitted in evidence as a hearsay document. It is quite clear from his remarks on 29 October 2008 that the judge considered that LKP5 had been read into evidence by Mr Telford and he proceeded to discuss the report with the defendants' expert, Mr Brown.

Discussion

[120] The evidence produced by the plaintiffs against Daly may be summarised as follows:

The O'Connor statement

(a) This was hearsay and the evidence could not be subjected to cross-examination although the sixth defendant was given leave to introduce inconsistent hearsay statements.

(b) No clear reason was established for his unavailability to give evidence other than the inability of the parties to establish his whereabouts.

(c) O'Connor was a self- confessed dishonest individual.

(d) He did spontaneously refer to knowing Healy, whom he later identified as Daly, and contacting him on the mobile registered to Daly in relation to the C2 scam. Therefore he would have recognised his voice.

(e) The statements of O'Connor that were admitted in evidence were inconsistent in a number of respects, most significantly with regard to whether he had his mobile phone in his possession on the day of the Omagh bomb. No clear reason for such inconsistency was ever established. Those inconsistencies would have been an obvious area to explore in cross examination. In the absence of such cross examination, with no obvious reason for the change, it is difficult to discern the basis upon which the judge came to a decision as to which version he should attribute weight. The judge gave no reasons for his conclusion that the later hearsay statements should be accepted.

(f) The judge clearly placed weight upon the consistency between the statement made on the 23 February 1999 and December 2001 but one or other of those statements, possibly the former, was not admissible in evidence.

The Lisburn telephone evidence.

(a) The judge considered that the pattern of movement of the 213 telephone was consistent with a scouting operation on the 29 and the movement of the Lisburn bomb on the 30 April. In his view that evidence constituted evidence of similar activities to which some weight could properly be given.

(b) It would seem that the evidence consistent with "scouting activity" on the 29 April was a single call from Sheila Grew's landline received by the 213 phone using a Lisburn cell site. There was no evidence that there was any scouting activity on the part of the sixth named defendant or any of the other defendants on the evening before the Omagh bomb. The judge did not provide any further detail as to the basis for his conclusion that the single call from Sheila Grew was

evidence of scouting activity. On the day of the explosion in Omagh the activities of the terrorists seem to have involved the scout car and the delivery vehicle travelling in a fairly co-ordinated fashion to and from their destination. We note that at paragraph [54] of his judgment the judge recorded that "Mr Brown agreed that the call at 1357 from 585 to 980 and the call at 1409 from 980 to 585 were consistent with the scout car entering Omagh and calling to the bomb car then entering Omagh and calling to the scout car." The experts do not appear to have given any equivalent evidence in respect of the Lisburn telephone evidence.

(c) The two incidents appear to have involved the use of different mobile phones. The judge does not seem to have asked himself why the sixth named defendant would have used the mobile phone registered to himself and, therefore easily traceable to him, in the course of both scouting for and assisting in the delivery of the Lisburn bomb but a completely different mobile, one that was officially registered to and, therefore, easily traceable to Murphy, on the day of the Omagh explosion. It does not appear that any attempt was made to research the records for any calls that might have been made by or to mobile 213 on the day of the Omagh explosion on 15 August 1998.

[121] The judge considered that the evidence of O'Connor linking Daly to the 585 telephone call was the only direct evidence of Daly's liability to the plaintiffs. He did not place any weight upon the alleged connection between the 076 phone and the sixth named defendant.

The conviction

[122] In paragraph [264] of the judgment, under the heading "*Other evidence,*" the judge also referred to the conviction of that defendant when he pleaded guilty on 2 March 2004 to membership of Óglaigh na hÉireann on 20 November 2000, some two years after the Omagh explosion. However, he did not refer again to that conviction when summarising his conclusions in relation to the sixth named defendant at paragraph [269]. In such circumstances it is difficult to reach a firm conclusion as to whether he gave any and, if so, how much weight to that conviction in assessing the evidence against the sixth named defendant. In the context of his approach to the convictions relied upon by the plaintiffs in respect of the other defendants inclusion of the reference under such a heading would suggest that he did give it some weight, particularly in the absence of any clear statement that, in the case of Daly it was not relevant. In his closing on behalf of the plaintiffs, when dealing with the liability of Daly, Lord Brennan relied upon the combination of the O'Connor statement, the Lisburn telephone evidence and the conviction. On the basis that he did give some weight to that conviction

the judge would have been acting in breach of the rule in Hollington v Hewthorn for the reasons set out earlier in this judgment.

[123] The judge also took into account Daly's failure to give evidence. In order to do so he had to be satisfied that the plaintiffs had made out a sufficient case of liability calling for an answer. We have set out earlier in this judgment the relevant legal principles that arise in that context.

[124] In her speaking notes in reply on behalf of Daly Ms Higgins took issue with the applicability of the "scintilla of evidence" test in the circumstances of this case. She maintained that such a test was only relevant in a case in which the plaintiffs were alleging negligent trespass or negligence and that in the case of intentional torts it was not possible to have a "scintilla of intention or apply a scintilla of force." In Benham the plaintiffs were able to rely upon a significant amount of circumstantial evidence and no issue of witness credibility arose. Again in Wisniewski there was no question as to the credibility of any of the plaintiff's witnesses and the plaintiff made the case that the relevant authority had been negligent either through the omission of the midwife sister failing to inform the resident house officer about the condition of a patient or the failure of the house officer to attend. As we have noted earlier the plaintiffs must show that their case has a real prospect of success before any possibility of drawing an adverse inference from a defendant's silence arises.

[125] We have carefully reviewed the conclusion reached by the judge with regard to the liability of Daly in the context of the observations set out above. No question arises of his having enjoyed the advantage of assessing the demeanour of witnesses when giving evidence. Essentially this court is in as good a position as the judge to review the relevant evidence and to draw any relevant inferences. In our view, bearing in mind that the only direct evidence against Daly was the inconsistent and hearsay statement of O'Connor, the amount of weight given to the other matters clearly assumed considerable importance. The judge appears to have taken into account a statement that should have been excluded and he also seems to have erroneously given some weight to inadmissible evidence of a conviction. In the case of the sixth named defendant, in the absence of substantial independent confirmation such as the Woolwich evidence in the case of McKevitt, it is not possible to conclude that the conviction did not add material weight to the judge's determination The judge has given no reasoned basis for his conclusion that the later hearsay evidence should be preferred to the earlier hearsay statements.

[126] Order 59 rules 11 (1) and (2) of the Rules of the Supreme Court (Northern Ireland) 1980 provide:

> "11. – (1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below.
>
> (2) The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned."

[127] In Stewart v Wright [2006] NICA 25 this court approved the following passage from the 1999 Supreme Court Practice as being in accord with principle and common sense:

> "…… where the trial was by judge alone … if, notwithstanding that the judge misdirected himself, his decision of the case was the right one, a new trial will not be ordered."

After giving the matter close and anxious consideration we are not persuaded that the learned trial judge would inevitably have reached the same conclusion as to the liability of the sixth named defendant if the misdirections referred to above had not occurred. Accordingly the appeal will be allowed and we shall hear counsel on the question of a re-trial.

Exemplary and aggravated damages

[128] In their notice of cross-appeal the plaintiffs claim that the judge erred in his rejection of their claim for exemplary damages and in his approach to the assessment of aggravated damages. It is thus necessary to consider those issues.

[129] At paragraph [271] of his judgment the judge referred to Ruling No. 9 in which he had confirmed that it was not open to him to make an award of exemplary damages in this case. He then went on to make the following observations:

> "It is clear to me, however, from the reports that I have read and the evidence of those plaintiffs who appeared in court that the senseless and

> indiscriminate nature of this appalling outrage has deeply affected each of them."

[130] The primary concern of Ruling No. 9 was whether these proceedings were civil or criminal in nature and, as one of the arguments they put forward in support of the latter classification, the defendants had referred to the fact that the plaintiffs were seeking aggravated and exemplary damages. In particular, the defendants submitted that exemplary damages were not compensatory and that the claim for such damages represented a punitive element in the case. The judge referred to the categories of case in which the award of exemplary damages was recognised as possible in Rookes v Barnard [1964] AC 1129. He noted that the first category was that of "oppressive, arbitrary or unconstitutional action by the servants of the Government" and observed that none of the defendants in this case was a public authority and none of them exercised public power. The judge then proceeded to consider the second category of case recognised in Rookes v Barnard, namely, conduct calculated to result in profit. He noted that a substantial aspect of that limb was the objective of redistributing to the plaintiff the gains or benefits which a defendant made or hoped to make. The judge concluded that the authorities did not support a submission that exemplary damages in principle give rise to the imposition of a penalty on a private defendant.

The plaintiffs' submissions

[131] While the plaintiffs recognised the authority of Rookes v Barnard for limiting the potential to claim exemplary damages to the categories of case specified therein, they emphasised the lack of any relevant comparable authority to the present proceedings noting that the type of terrorist conduct alleged and civil action arising from it was unknown in English law at the time of Rookes v Barnard. They relied upon the rulings of the House of Lords and Court of Appeal of England and Wales in Broome v Cassell [1972] AC 1027 and Thompson v The Commissioner of Police of the Metropolis [1997] 2 All ER 762 together with the decision of the House of Lords in Kuddus v Chief Constable of Leicestershire [2001] 3 All ER 193. In particular the plaintiffs referred to the observations of Lord Diplock in Broome v Cassell at page 1127 when he said:

> "The common law would not have survived in any of those countries which had adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society – to discard those which have outlived their usefulness, to develop new rules to meet new situations."

The plaintiffs also relied upon the reform recommended by the Law Commission Report on Aggravated, Exemplary and Restitutionary Damages (1997 No. 247). They noted that the Government had responded to that report by indicating that it would defer further legislation together with the comment:

> "It may be that some further judicial development of the law in this area might help clarify the issues."

[132] The defendants submit that the circumstances in which a court may contemplate an award of exemplary damages are now so clearly fixed that they should only be altered and/or extended by Parliament or the Supreme Court.

The Law Commission Report

[133] The Law Commission Report (1997 No. 427) expressed the view that there were gaps in the law intended to prevent and deter serious wrongful behaviour and that:

> "….. the availability of exemplary damages under English law is, at present, artificially restricted."

The plaintiffs primarily relied upon the following sub-paragraphs contained in the Commission's conclusion at page 184:

> "15. Exemplary damages should be retained. Exemplary damages may only be awarded where in committing a wrong, or in conduct subsequent to the wrong, the defendant deliberately and recklessly disregarded the plaintiff's rights, and the narrower 'categories' test of *Rooks v Barnard* should be rejected.
>
> 19. The cause of action test should be abandoned and punitive damages be awardable for any tort or equitable wrong provided the award would be within the policy objectives of 18.
>
> 20. Such damages should only be awarded where the judge confirms that other remedies which are available to the court would be inadequate alone to punish the defendant for his conduct (the 'if, but only if' test). For these purposes the court may regard deterring the defendant or others from similar conduct as an object for punishment.

> 22. The relevant considerations of an award are that the award should not exceed the minimum needed to punish the defendant for his conduct, and must be proportionate to the gravity of his wrongdoing. For these purposes the court may have regard to deterring the defendant and others from similar conduct as an object of punishment.
>
> 23. The relevant factors include the thinking of the defendant, and the nature and extent of the rights infringed and any other relevant consideration.
>
> 32. If the court intends to award punitive damages to two or more plaintiffs in the same proceedings the aggregate amount awarded must be such that, while it may properly take account of the fact that the defendant has deliberately and outrageously disregarded the rights of more than one person, it does not punish the defendant excessively for his conduct."

Kuddus v Chief Constable of Leicestershire

[134] In this case a householder had reported a theft from his home to the police. Some time later a police constable forged the householder's signature on a document withdrawing the complaint and the householder sued the Chief Constable for misfeasance in a public office. The majority of their Lordships appeared to believe that the time had come for a review of exemplary damages, that the "cause of action" test artificially restricted the law and that the proper development of the common law required that such a test should be removed. Lord Slynn referred to the restrictive analysis in Rookes v Barnard and to the more recent recommendations of the Law Commission that the availability of punitive damages should be extended for most torts and he expressed the view that the Rookes v Barnard categories might fall to be reconsidered as decisions emerged on particular facts. At paragraph 26 he said:

> "In Lord Devlin's speech in Rookes v Barnard [1964] AC 1129 it seems to me that it is the features of the behaviour rather than the cause of action which must be looked at in order to decide whether the facts fall into the first category. In Broome v Cassell and Company Limited [1972] AC 1027 Lord Diplock was also recognising that the task of the judge was to

> decide whether the facts brought the case into one of the categories."

While other members of the majority agreed that the "cause of action" test was wrong, it seems clear that their Lordships were inhibited from embarking upon a wider and more fundamental review of the principles underlying an award of exemplary damages by the absence of any detailed submissions on behalf of the parties. At paragraphs [63] to [68] Lord Nicholls, perhaps the greatest enthusiast for reform, concluded that:

> "… In view of the limited scope of the submissions made by the parties on this appeal, this is not the occasion for attempting to state comprehensive conclusions on these matters."

Discussion

[135] Taking their cue from the report of the Law Commission and the decision in Kuddus the essence of the plaintiffs' submissions is that the categories/cause of action classification for the award of exemplary damages should now be superseded by focus on the nature of the relevant tortious behaviour, particularly in the context of widespread and evermore brutal terrorist campaigns. In the instant case the plaintiff's identified the following significant factors:

(*i*) The tortious conduct was the carrying out of terrorist acts that led to death, serious injury and destruction.

(*ii*) The Omagh incident was a continuation of other similar terrorist conduct.

(*iii*) Thereafter the conduct resumed in 2000.

(*iv*) The Omagh outrage, and earlier and later incidents, involved a deliberate disregard for the safety of ordinary people and a flagrant rejection of civilised and legal order and of the human rights of people who might be killed or injured by this conduct. The plaintiffs draw attention to the strong words of condemnation employed by the learned trial judge at paragraph [271] of his judgment.

[136] It is important to bear in mind that in the course of his speech in Rookes v Barnard Lord Devlin referred to the idea of exemplary damages as being "peculiar to English law" and noted that it was necessary to consider whether the House should remove such an "anomaly" from the law of England. Ultimately, he advised that exemplary damages should be retained but that they should be restricted to certain categories of case in which they

served a useful purpose. However, he also conceded that there was "… powerful, but not compelling, authority for allowing them a wider range." It seems to be fairly clear that, since the decision in Rookes v Barnard there has been a body of opinion in favour of extending the ambit of exemplary damages as illustrated by the Law Commission Report and some of the views expressed by their Lordships in Kuddus.

[137] In Watkins v Secretary of State for the Home Department [2006] 2 AC 395 the House of Lords concluded that it would not be right to develop the law of tort to award exemplary damages solely for the purpose of punishment in cases where there was no material damage that would attract a compensatory award. While that was a case involving very different factual circumstances from the present appeal insofar as the claimant, a serving prisoner, had not established any loss or damage resulting from the tort of misfeasance in a public office, it is perhaps not without significance to note that their Lordships, in general, considered that the policy of the law was not to encourage exemplary damages. In the course of delivering his judgment Lord Carswell accepted that it might theoretically be possible to abolish the distinction between actions in tort in which it was not necessary to prove special or material damage and those in which such proof was essential recognising that "the common law is capable of accommodating changes necessary to allow it to adapt to modern needs …" However, he also noted that such a development would be a departure from the prevailing trend in other common law jurisdictions. He concluded by saying:

> "Finally, it would be likely to open the door to claims for exemplary damages in a broader class of cases than those in which they may now be awarded. Notwithstanding the fact that the House has ruled in Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 AC 122 that exemplary damages may in principle be awarded in cases of misfeasance in public office, I should myself prefer to confine the award of such damages very closely indeed."

[138] In our consideration of this aspect of the appeal we have also had regard to the speeches recently delivered in the Supreme Court in Lumba (Congo) v Secretary of State for the Home Department [2011] UKSC 12. In that case the claimants alleged that they were being detained in accordance with policies that had not been published and had been deliberately suppressed by the Secretary of State. The judgments of their Lordships focussed upon the principle of vindicatory damages for violation of constitutional rights and whether that principle should be extended further. Lord Dyson specifically referred to the *obiter* suggestion raised by Lord Scott in Ashley v Chief Constable of Sussex Police [2008] AC 962 that such damages

might be awarded for the tort of battery or trespass to the person by the police resulting in the death of the victim. Lord Dyson was clearly concerned about the difficulty of rationally containing any such extension and, at paragraph [101] of his judgment he observed:

> "I see no justification for letting such an unruly horse loose on our law. In my view the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved, (ii) where appropriate, a declaration in suitable terms and (iii) again, where appropriate, an award of exemplary damages."

Lord Dyson reviewed the principles set out above relating to the basis for awarding exemplary damages and, having done so, did not consider that the case was one in which it was appropriate to make such an award. The remainder of their Lordships were in agreement with those views.

[139] It is not difficult to have considerable sympathy for the plaintiffs' submission that the court should have the power to award exemplary damages in a case such as the present. The function of exemplary damages is punitive rather than compensatory and the terrorist atrocity such as the Omagh explosion might seem to be the archetypical case for damages to serve such a purpose. However, upon reflection, given the anomalous nature of the remedy and its longstanding restriction to very limited types of case by the highest judicial authority, we do not consider that it would be appropriate for this court to embark upon the radical extension sought by the plaintiffs.

[140] Without such an extension, the plaintiffs are driven to submit that their claims come within the second category of cases recognised in Rookes v Barnard as being capable of attracting an award of exemplary damages, namely, cases arising from conduct calculated to result in profit. The learned trial judge does not appear to have ruled specifically upon the question of whether the plaintiffs' claims fell into the second Rookes v Barnard category. It is not entirely clear that he was asked to do so. The plaintiffs' submission is that one of the persistent features of terrorist campaigns in this jurisdiction has been the use of "spectacular" acts of atrocity as a means of attracting funding, recruits and support and that, in such circumstances, the claims "falls squarely" within the second category. We are not persuaded by that submission. The second category has traditionally been reserved for those cases in which an evidential foundation has been laid to establish that activities of the defendant were commercially motivated for profit or, to use the words of Lord Devlin in Rookes and Barnard at page 1227:

> "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing would probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity."

Examples include deliberate publication by a newspaper knowing that a statement had no solid foundation but calculating that it could thereby produce more profit than likely damages as in Broome v Cassell or the deliberate eviction of a tenant so that a landlord might achieve a higher rent than that awarded by the Rent Tribunal as in Drane v Evangelou [1978] 1 WLR 455. As the learned trial judge observed at paragraph [16] of Ruling No. 9:

> "A substantial aspect of this limb is, therefore, the objective of redistributing to the plaintiff the gains or benefits which the defendant made or hoped to make. So understood the issue is demonstrably one of redistributive justice rather than the imposition of a penalty."

In the circumstances we do not consider that the evidence called on behalf of the plaintiffs has established the basis for a claim for exemplary damages falling within the second Rookes v Barnard category.

Aggravated Damages

[141] The judge succinctly and eloquently set out his approach to the issue of aggravated damages in paragraph [271] of his judgment in the following terms:

> "It is clear to me, however, from the reports that I have read and the evidence of those plaintiffs who appeared in court that the senseless and indiscriminate nature of this appalling outrage has deeply affected each of them. It is unsurprising that the plaintiffs should be of the view that it was the specific intention of those who caused the detonation of this bomb that there should be massive death and injury. Although not satisfied that there was any such intention, I recognise that the likelihood of injury or death occurring was plain in circumstances where a fully loaded car bomb was placed in the centre of a busy market town on a Saturday afternoon. It is of significance that a warning of only 35 minutes and that there was no identification of the vehicle as it

> happened, for instance, in Lisburn. I also accept that the conflicting nature of the warnings has contributed to the sense of distress felt by the victims. In those circumstances I consider that this is an appropriate case in which to make an award of aggravated damages to include damages for injury to feelings as a result of the manner of the commission of this outrage."

[142] The judge then proceeded to assess the damages due to each individual plaintiff in respect of loss of dependency, physical and psychiatric injury and, in each case, he added to the overall figure a sum of £30,000 to represent aggravated damages.

The plaintiffs' submissions

[143] The plaintiffs submit that, in simple terms, the awards of damages made by the judge under the heading of "aggravated damages" were "demonstrably inadequate". They argue that the level of damages awarded under this heading was wholly inconsistent with the trial judge's remarks at paragraph [271]. The plaintiffs refer to the case of Thompson v The Commissioner of the Police for the Metropolis [1997] 2 All ER 762 which was a case involving allegations of wrongful arrest, false imprisonment and assault, in which Lord Woolf MR, delivering the judgment of the Court of Appeal, observed at page 775:

> "(10) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest."

[144] The plaintiffs submit that aggravated damages are particularly appropriate in this case to reflect the intentional and deliberate circumstances in which injury and death occurred but they contend that, having regard to the unprecedented circumstances of the plaintiffs' claims, existing legal categories, such as those defined in Thompson, may be strained in any attempt to quantify loss.

[145] Counsel on behalf of the respondent Murphy maintain that the level of aggravated damages awarded by the judge fell within the correct range.

However, those representing the respondent Daly argue that the basis for aggravated damages is compensation for injury to feelings, distress, indignity rather than punishment relying upon the decisions in Gerald v Metropolitan Police Commissioner (1998) (Times 26 June EWCA), McConnell v PANI [1997] NI 244 and Valentine Civil Proceedings paragraph 14.52. They further argue that, in any event, the plaintiffs have failed to establish an evidential basis for aggravated damages and that no award should be made.

Discussion

[146] At paragraph [14] of Ruling No. 9 the learned trial judge said of aggravated damages that:

> "In my view such damages are awarded in respect of injury to feelings flowing from consequences such as the indignity, mental suffering, disgrace and humiliation that may be caused by the matters of which complaint is made. Since the assessment of such damages is entirely dependent upon the finding as to injury to feelings I consider that such damages must necessarily be compensatory."

In the course of giving judgment in Thompson Lord Woolf set out a number of suggested directions for a jury on the issue of damages the second of which was as follows:

> "(2) As the law stands at present compensatory damages are of two types.
>
> (*a*) ordinary damages which we would suggest should be described as basic, and
>
> (*b*) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages."

Lord Woolf also said that it should be strongly emphasised to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory and not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.

[147] Recently, there has been some indication by the Court of Appeal in England and Wales that, in cases of assault, it is in general inappropriate to award aggravated damages on top of, and in addition to, damages for injured feelings. In Richardson v Howey [2005] P.I.Q.R. Q3 CA 48 Thomas LJ delivering the judgment of the court reviewed several authorities and, having done so, said at paragraph 23:

> "It is and must be accepted that at least in cases of assault and similar torts, it is inappropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack. It is also now clearly accepted that aggravated damages are in essence compensatory in cases of assault. Therefore we consider that a court should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack, as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded. It is, we consider, no longer appropriate to characterise the award of damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case."

[148] Richardson was subsequently followed at first instance in Fuk Wan Hau v Jim (2007) EWHC 3358 QB. However, we are inclined to agree with the comments of the learned authors of McGregor on Damages 18th Edition with regard to the former decision. At paragraph 37-006 the learned authors say:

> "It is difficult to follow the progress of the Court of Appeal's reasoning here. The classification of damages given for injured feelings as compensatory and the classification of aggravated damages as compensatory does not mean that the one is not independent of the other and that the one should be subsumed within the other. If the scale or the horror of the assault increases the injury to the claimant's feelings, the damage is aggravated, and hence the damages are aggravated, and the courts have recognised this in their awards."

It could scarcely be argued that, in the circumstances of this case, that the scale or the horror of the assault did not aggravate the injury to the plaintiffs' feelings.

[149] In the first instance case of AT and others v Dulghieru [2009] EWHC 225 (QB) Treacy J was careful to distinguish the element of damages awarded for psychiatric harm from aggravated damages awarded for injury to feelings, humiliation, loss of pride and dignity and feelings of anger or resentment arising from the defendants' actions in order to avoid double recovery in accordance with the approach taken by Moore-Bick LJ in Rowlands v Chief Constable of Merseyside [2007] 1 WLR 1065. In a series of claims brought by Moldovan women for compensation in respect of an unlawful conspiracy to traffic them into the U.K. where they were then falsely imprisoned and subjected to appalling and prolonged sexual abuse Treacy J made awards of £30,000 and £35000 in respect of aggravated damages.

[150] The learned trial judge carefully and conscientiously considered the issue of damages, including that of aggravated damage. Having done so, he was entitled to conclude as he must have done that it would be invidious to distinguish between individuals in terms of an award under that heading. After careful consideration, we are not persuaded that there is any basis for interfering with the quantum of the awards made by the learned trial judge either generally or in order to distinguish between individual plaintiffs.

Disposal of the appeals and cross appeals

[149] For the reasons given we dismiss the appeal brought by McKevitt. We dismiss Campbell's appeal save to the extent of setting aside the representation order. We allow the appeals of Murphy and Daly. We dismiss the plaintiffs' cross appeal in relation to exemplary and aggravated damages. We shall hear submissions on the question of costs and retrial.