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

Delivered: **4-4-2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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MARGARET ROSEANNA GORDON

Plaintiff:

-and-

McKILLENS (BALLYMENA) LIMITED

Defendant:

_____

STEPHENS J

Introduction

[1] The plaintiff, Margaret Roseanna Gordon, brings this action seeking compensation from the defendant, McKillens (Ballymena) Limited, for the injuries that she sustained in an accident that occurred in the defendant's shoe shop in Ballymena on 22 October 2008. On 14 October 2011, just prior to the expiry of the three year limitation period, a writ of summons was issued but "due to an error in her solicitor's office that writ of summons expired on 14 October 2012 without having been served." On 29 April 2013, some 1 year and 6 months after the expiry of the limitation period, the plaintiff then issued a second writ of summons. On 8 January 2015 the defendant applied for orders pursuant to Order 33, Rules 3 and 6 of the Rules of the Court of Judicature (Northern Ireland) 1980 that the issue of limitation is dealt with as a preliminary issue and for an order that the action be dismissed. Master Bell decided not to exercise his discretion under Article 50 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order") to allow the action to proceed and he dismissed the action. The plaintiff appeals to this court against that decision.

[2] Mr McCollum QC and Mr O'Hare appeared on behalf of the plaintiff though neither counsel was instructed at the initial stages of either the first or second writ of

summons. Mr Gerald Simpson QC and Mr Michael Maxwell appeared on behalf of the defendant.

Procedure

[3] This case raises questions as to the procedure to be adopted to obtain a determination of issues under Article 50 of the 1989 Order and to whom the application should be made.

[4] The starting point is the observations of Lord Denning in *Firman v Ellis* [1978] QB 886 in relation to the provisions of section 2D of the Limitation Act 1939, as inserted by section 1 of the Limitation Act 1975. That was the parallel provision in England and Wales to section 9D of the Statute of Limitations (Northern Ireland) 1958 as inserted by the Limitation (Northern Ireland) Order 1976. Lord Denning stated

> "A question also arose about the procedure under s 2D. To whom is the application to be made? 'The court' means 'the court in which the action has been brought': see 2D(2). Some people have thought that 'the court' there means the court which tries the case. But it is not so limited. I think it means a judge of the High Court or of the county court, as the case may be. It includes a judge in chambers, or a judge hearing an application as a preliminary issue. *I do not think it includes a master in the High Court*, or a registrar in the county court. It should be dealt with separately from any application to renew it." (emphasis added).

So in 1978 the practice was that the application in the High Court was made to a judge but, due to a lack of jurisdiction, not to the Master.

[5] The Master was given jurisdiction when Order 32 of the Rules of the Court of Judicature (Northern Ireland) 1980 was amended by the introduction of Rule 12A with effect from 1 September 1982. The effect of Rule 12A was to empower the court, which by Order 1 Rule 3(2) includes any Master, to exercise jurisdiction under section 9D of the Statute of Limitations (Northern Ireland) 1958 that section 9A or 9B of that Act should not apply to an action, see 32/9A/2 of the Supreme Court Practice 1999. So as from 1 September 1982 the Master had jurisdiction in relation to applications under those provisions of the Statute of Limitations (Northern Ireland) 1958.

[6] The next procedural question is as to how the application should be made. This was considered by Lord Lowry LCJ in *Rodgers v Gallagher Limited* [1982] NI 316 at 320 and by Higgins J in *Moane v Reilly* [1984] NI 269. Lord Lowry stated that the effect of Order 32 Rule 12A was to allow the question at issue to be decided on a summons instead of being treated as a preliminary issue under Order 33 Rule 3. Higgins J at page 274 G of the decision in *Moane* followed the decision in *Rodgers* but also stated

that there are special cases relating to section 9D of the Statute of Limitations (Northern Ireland) 1958 which cannot be dealt with satisfactorily in an interlocutory application so that the court considers ordering the trial of a preliminary issue. So the position in 1984 was that an application could be made to the Master under Order 32 Rule 12A by summons and affidavit but there could be special cases which required consideration as to whether it was appropriate to order the trial of a preliminary issue.

[7] That procedure of applying by summons and affidavit with the potential in the alternative of consideration of the trial of a preliminary issue is the procedure set out in the 1999 edition of the Supreme Court Practice which states at paragraph 33/4/11 that:

> "The practice has become fairly settled that this question should be dealt with at the pre-trial stage of the action, when the Court can properly be placed in the position of "having regard to all the circumstances of the case" either *on the hearing of a separate summons seeking an order of the Court to make or refuse such a direction* or on the hearing of an allied or parallel summons, such as to dismiss the action for want of prosecution or to reconstitute the action by adding or substituting a new party as plaintiff or defendant or a new cause of action or on the hearing of a summons for the renewal of a writ for service. *But nevertheless, special circumstances may arise when the Court cannot, on the hearing of an interlocutory application, properly have regard to all the circumstances of the case,* and would require the matter to be further or more closely investigated, such as by hearing oral evidence of the parties or other witnesses, their cross-examination, the service of documents and so forth. *In such special circumstances, it may be proper or even necessary for the Court to order the trial of a preliminary issue as to whether the Court should or should not give a direction under s.33(3) of the Limitation Act 1980 to override any relevant time limits laid down by that Act*." (my emphasis)

So it can be seen that the application can be by way of a summons, for instance under Order 32 Rule 12A and if the Court cannot, on the hearing of the summons, properly have regard to all the circumstances of the case that consideration should be given to a preliminary issue.

[8] Two points should be made about preliminary issues.

(a) The first is that if the court is giving consideration to ordering a preliminary issue then great care and discretion should be exercised particularly so as to avoid the duplication of such a preliminary trial and the trial of the action itself, with the consequent increase in cost, delay and effort. It may well happen that what appears attractive as the trial of such a preliminary issue will not differ much from the plenary trial itself,

especially as the Court has to have regard "to all the circumstances of the case."

(b) The second is that in the High Court the trial of the preliminary issue, which is a part of the trial, should be by a judge.

[9] The position has been complicated as Order 32, Rule 12A has not been amended to refer to Article 50 of the 1989 Order but rather it still refers to the Statute of Limitations (Northern Ireland) 1958 which has been repealed. The question arises as to whether this means that the Master has no jurisdiction to deal with the issues under Article 50 in accordance with the observations of Lord Denning in *Firman v Ellis* or whether Order 32 Rule 12A can be read down as referring to the 1989 Order.

[10] Section 29(1) of the Interpretation (Northern Ireland) Act 1954 ("the 1954 Act") provides that

> "Where an *enactment* repeals or revokes and re-enacts, with or without modification, any statutory provision, *a reference in any other statutory provision or in any statutory instrument or statutory document* to the provision so repealed or revoked shall without prejudice to the operation of sub-sections (2) and (3) be construed as a reference to the provision as re-enacted." (my emphasis)

The 1989 Order which is an enactment (see *McAfee v Gilliland* [1979] NI 97) repealed and re-enacted the statutory provisions in the Statute of Limitations (Northern Ireland) 1958 and accordingly the question arises as to whether the references in Order 32 Rule 12A of the Rules of the Court of Judicature (Northern Ireland) 1980 to the Statute of Limitations (Northern Ireland) 1958 should be construed as a reference to the 1989 Order. I do not consider it necessary to decide whether the Rules are a statutory instrument or a statutory document as the answer may depend on whether the Rules are a statutory provision. Section 1(f) of the 1954 Act contains a wide definition of a statutory provision in the following terms:

> "'statutory provision' means any provision of a statute or instrument made under a statute (by whatsoever Parliament or Assembly passed or by whomsoever made) for the time being in force in Northern Ireland."

The Court of Appeal considered that there was a statutory provision in *Fitzpatrick's Application (No.3)* [2008] NICA 53. The Rules of the Court of Judicature (Northern Ireland) 1980 are made under section 55A of the Judicature (Northern Ireland) Act 1978 and I consider that they fall within the definition of a statutory provision being an instrument (see section 1(c) of the 1954 Act) made under a statute. Accordingly under section 29(1) of the 1954 Act the reference in Order 32 Rule 12A to the repealed Statute of Limitations (Northern Ireland) 1958 shall be construed as a reference to the 1989 Order. The outcome is that despite the failure to amend Order

32 Rule 12A the Master has jurisdiction to hear and determine a summons dealing with the issues under Article 50.

[11] It is obvious, as was suggested by Valentine in "Civil Proceedings: The Supreme Court" that Order 32 Rule 12A should be amended and that it should be amended in the manner indicated by him so that it would be as follows:-

> "Application for a direction under the Limitation (Northern Ireland) Order 1989
>
> 12A. The jurisdiction to direct, under Article 50 of the Limitation (Northern Ireland) Order 1989, that Articles 7, 8 or 9 of that Order should not apply to an action or to any specified cause of action to which the action relates shall be exercisable by the Court."

The procedure that was followed in this case

[12] The defendant did not apply by a summons relying on Order 32 Rule 12A but rather applied by summons for an order pursuant to Order 33, Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 providing that the issue of limitation be dealt with as a preliminary issue and for an order pursuant to Order 33 Rule 6 that the action be dismissed. It is likely that before the Master, as before this court, the parties agreed that it was appropriate for the issue of limitation to be heard by way of a preliminary issue. However I consider that this was not a considered position but was rather a general indication that the parties were content that the matter is dealt with on summons and affidavit prior to the trial of the action. That likelihood is confirmed by the fact that there is no order of the Master that the issue should be dealt with by way of a preliminary issue. As I have indicated on the basis that this is the properly analysed position of the parties then there should have been a summons under Order 32 Rule 12A. The court has power under Order 20 Rule 8 to amend of its own motion the defendant's summons so that it seeks an order pursuant to Order 32 Rule 12A refusing a direction that the provisions of Article 7 of the 1989 Order are not to apply to the action. I make that amendment.

[13] As can be seen the court is proceeding on the basis that the defendant's summons includes an application under Order 32 Rule 12A. If I consider that special circumstances arise so that the Court cannot, on the hearing of the summons under Order 32 Rule 12A, properly have regard to all the circumstances of the case then I will invite submissions as to whether there should be further affidavit evidence or a preliminary issue or whether the matter should proceed to trial.

[14] At the time that the application was heard by the Master there was no affidavit evidence on behalf of the plaintiff. The appeal was adjourned to facilitate the plaintiff's solicitor filing a replying affidavit. At the start of the appeal hearing I was informed that neither party wished to call any oral evidence and that both parties wished to proceed on the basis of affidavit evidence alone. If this means that

this court is not able to have regard to all the circumstances of the case then again I will give consideration to whether there should be further affidavit evidence or the trial of a preliminary issue or as to whether the matter should proceed to trial.

Factual background

[15] The plaintiff, now 72, then 64, was employed as a kitchen assistant by the Northern Ireland Housing Executive. She alleges that on 22 October 2008 she was shopping in the defendant's premises in Church Street, Ballymena, and as she was bending to look at a pair of boots she struck her head on the edge of a glass shelf. She alleges that the defendant was negligent in failing to highlight the presence of a glass shelf and failed by the "use of lighting or placing shoes on it to make the shelf clearly visible." She also alleges that the shelf was at "such a height that it was likely to come into contact with the plaintiff's head." The plaintiff has given a history to Dr Morrow, Consultant Neurologist, that she had no loss of consciousness and was not knocked down but she felt dazed. That she went back to work and drove home but does not really recall that day. She stated that at home that evening her son found her staggering around and looking a little vacant. She was taken to Antrim Area Hospital where she was admitted for six days for investigations.

[16] The plaintiff's accident was witnessed by Davina Holmes, a shop assistant employed by the defendant. On the evidence presently available it is not clear as to whether Ms Holmes did actually see the plaintiff before and as she struck her head but now cannot remember the details, whether she was only a witness in the more limited sense that the accident was reported to her so that she was able to recount what the plaintiff told her at the time or whether she cannot remember what it was that she witnessed.

[17] No entry was made by or on behalf of the defendant in the accident book.

[18] No written statement was taken by the defendant or on its behalf from Ms Holmes at the time of the plaintiff's accident or during the subsequent investigation by the Environmental Health Officers of Ballymena Borough Council. There is no present evidence that she gave any oral statement except to identify the shelf upon which the plaintiff struck her head.

[19] On 22 October 2008 Elsie Logan, an Environmental Health Officer of Ballymena Borough Council received a complaint from the plaintiff alleging that she had bumped her brow on a glass display shelf in the front ladies shoe display area of the defendant's shop.

[20] On 24 October 2008 a visit was made to the defendant's shop by Ms Logan but due to the absence of the sales assistant, Ms Holmes, it was not possible to establish the glass display shelf about which the plaintiff was complaining. On 28 October 2008 there was a further visit to the defendant's shop by Ms Logan and at that visit the defendant's manager, Mr Jimmy Dunlop, stated that he had spoken to

Ms Holmes, and was able to indicate "the glass shelf" that the plaintiff had bumped her brow on. The shelving was inspected by Ms Logan who concluded that no safety issues were identified with the glass display shelving and Mr Dunlop was advised of this.

[21] On 14 November 2008 a further visit to the defendant's shop was made by Ms Logan together with another Environmental Health Officer, Karen Bruce. They inspected the shelving, took photographs and agreed that there was no safety issue with the shelving. On completion of those investigations the plaintiff was advised that no further action was deemed necessary by the Environmental Health Office in relation to her complaint.

[22] Two documents from the Environmental Health Office have been produced the contents of which I have sought to summarise in paragraphs [19] to [21]. The first is a typed document with handwritten details dated 28 October 2008. It states "No problem/issue identified with display shelves where customer bumped her head." The second is a typed document recording in relatively summary form the dates of the visits by the Environmental Health Officers, the conversations with Mr Jimmy Dunlop, the inspections which were carried out, and the conclusions reached. In addition there are four photographs of the glass shelves with shoes placed on each of the four shelves. There is no record of the Environmental Health Officers measuring the shelves and there is no record of which particular shelf was identified by Mr Dunlop as the one upon which Ms Holmes stated that the plaintiff had bumped her head. The Environmental Health Office has no record of what posture the plaintiff was adopting, the reason why she was bending down, the distance involved when she straightened up, the force with which she hit the shelf or whether there was any cut to or mark on her skin. On the present evidence and as the Environmental Health Officers were dependent on Ms Holmes to identify the shelf I infer that the plaintiff did not tell them as to which shelf was the particular shelf upon which she bumped her head. During the course of the hearing of this appeal Mr McCollum was unable to identify the particular shelf involved.

[23] There is no evidence from the plaintiff as to what she did over the two year period between November 2008 when the investigations by the Environmental Health Office came to an end and 29 November 2010 when she consulted her solicitors.

[24] On 29 November 2010 the plaintiff's solicitor took instructions from the plaintiff and also took a statement from an unnamed witness who apparently was with the plaintiff at the time of the accident. The plaintiff's instructions and the contents of the witness statement have not been disclosed so that they were not in evidence for the purposes of this appeal. There is no record of any witness being identified by the plaintiff to the Environmental Health Office in October/November 2008. The issues at trial will include whether the accident was in fact witnessed by this unnamed individual and that in turn could involve an analysis as to whether the

witness was identified to the Environmental Health Officers but not recorded by them.

[25] On 2 December 2010 the plaintiff's solicitors sent a letter of claim to the defendant. That letter did not comply with the *Pre-Action Protocol for Personal Injury Litigation* dated 1 April 2008 in that it did not contain a clear summary of the facts upon which the claim was based merely asserting that an accident occurred on or about 23 October 2008 (which was the wrong date) and that the accident was caused by the defendant's negligence and breach of statutory duty. The letter of claim was also deficient in a number of other respects including that it did not give any indication of the nature of any injuries suffered by the plaintiff.

[26] The letter of claim was received Mr McKillen, the Chief Executive Officer of the defendant, who replied on 6 December 2010 confirming that there was no accident book entry relating to the plaintiff's accident. On the present evidence I infer that he had then forgotten about or was never aware of the investigation which had been carried out over two years earlier by the Environmental Health Officers.

[27] On 18 January 2011 the plaintiff's solicitors informed the defendant's insurers that the plaintiff had sustained a head injury and had been off work ever since due to the injuries that she has sustained.

[28] On 28 February 2011 the defendant's insurers wrote to the plaintiff's solicitors stating amongst other matters that they had spoken to Ms Holmes but she has no recollection of the plaintiff reporting an accident.

[29] The plaintiff's solicitor states that after taking the plaintiff's initial instructions on 29 November 2010 he attempted to arrange a medico legal appointment for the plaintiff with Dr Watt or some other consultant neurologist, but without success. Eventually an appointment was made for the plaintiff to be seen by Dr Watt on 16 May 2011. The report of that examination is dated 13 October 2011. Accordingly it took nearly one year between the date of the request for an appointment and the date of receipt of the expert's report. In his report Dr Watt concluded on the balance of probabilities that the problems the plaintiff had developed on 22 October 2008 were due to a mild brain stem stroke which has left her with a tendency to partial seizures and that the most likely cause of the stroke was a vertebral artery dissection associated with the injury when she stood up and banged the front of her head on a glass shelf. That conclusion is disputed by Dr Morrow the expert retained on behalf of the defendant.

[30] On 14 October 2011 the first writ of summons was issued but not served by the plaintiff's solicitors. Instructions were sent to counsel to draft a statement of claim but given the lack of detail in Dr Watt's report as to prognosis and the symptoms from which the plaintiff was presently suffering counsel advised that he required further information from Dr Watt before proceeding to draft a statement of claim. No further report was received from Dr Watt. The validity of the first writ

expired on 14 October 2012. The failure to serve the first writ, once appreciated, led to the second writ being issued on 29 April 2013 and served on 1 May 2013. The statement of claim was drafted despite the lack of any further report from Dr Watt and was served on 19 September 2013. The defence, pleading limitation amongst other matters, was served on 21 October 2013 and the plaintiff's reply was served on 19 November 2013. The action was only set down by the plaintiff's solicitor after a further period of some 14 months.

Legal principles

[31] In an action for damages which consist of, or include, damages for personal injury to the plaintiff arising from negligence or breach of duty the period of limitation is three years. The period runs from the later of the dates on which the cause of action accrues and the date of knowledge of the person injured. It is common case that the plaintiff's cause of action accrued on 22 October 2008. The plaintiff did not seek to contend that she had any later date of knowledge and accordingly the limitation period expired three years later on 22 October 2011. Article 50 of the 1989 Order gives the court a discretion to allow a plaintiff to proceed with an action for personal injuries notwithstanding that the time limited by Article 7 of the Order has expired, if it appears to the court that it would be *equitable* to do so having regard to the degree to which Article 7 prejudiced the plaintiff and the degree to which any decision under Article 50 would prejudice the defendant. In essence Article 50 requires the court to engage in a balancing exercise, weighing the prejudice to the plaintiff if the time limit is not extended against the prejudice to the defendant if it is extended. Article 50(4) requires a number of particular factors to be taken into account relevant to the balancing exercising required by Article 50(1). In that respect Article 50(4) is supplementary to Article 50(1). However Article 50(4) also states clearly that the court must have regard not only to those particular factors when performing the balancing exercise but also to *all the circumstances of the case*.

[32] The delay which is referred to in Article 50(4)(a) is the delay after the expiry of the limitation period. However the period of time which elapsed between the accrual of the plaintiff's cause of action or more significantly the date of the plaintiff's knowledge on the one hand and the expiry of the limitation period on the other is a part of "the circumstances of the case" within the meaning of Article 50(4) so that the court can take into account prejudice caused to the defendant by the plaintiff's delay over the entire period since her accident. In *Donovan v Gwentoys Ltd* [1990] 1 W.L.R. 472 Lord Oliver said that "… in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant." Accordingly the defendant can rely upon the earlier delays, in order to show for instance that it had already faced massive difficulties in defending the action and that therefore any additional problems caused by the plaintiff's further delay after the expiry of the limitation period were a serious matter. However earlier delay is not one of the primary factors to which the court is to have regard

because the primary factors are those set out in Article 50(4)(a)-(f), see *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717.

[33] In this case one of the issues is to decide upon the effect that should be given to the fact that there were previous proceedings in that the plaintiff issued the first writ of summons which due to an oversight on the part of her solicitor was not served prior to the expiry of its validity. In *Walkley v Precision Forgings* [1979] 1 WLR 606 the House of Lords held that the previous proceedings could have been pursued to judgment, with the result that the real cause of the plaintiff's problem was the failure to prosecute the first action rather than the expiry of the limitation period. In *Horton v Sadler* [2007] 1 AC 307 the House of Lords departed from *Walkley* holding instead that the discretion under the equivalent provision to Article 50 must remain unfettered and that the decision in *Walkley* was unsound because it ignored the fact that in cases where there have been previous proceedings but the limitation period has now expired, the plaintiff is effected by Article 7 in that that article will cause his second action to fail unless the limitation period is disapplied. However the reasoning in *Horton* still means that the existence of the previous action is a matter to be taken into account in exercising discretion under Article 50 as the court must take those previous proceedings into account as one of the circumstances of the case.

[34] The existence of an alternative remedy in negligence against the plaintiff's solicitor for failing to prosecute the previous proceedings is not determinative in that the discretion under Article 50 is unfettered so that there is always jurisdiction to disapply the limitation period, see *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296. However the existence of the alternative remedy is a matter to be taken into account and can be a weighty consideration see *Remsden v Lee* [1992] 2 All ER 204 and *Hartley v Birmingham CC* [1992] 1 WLR 968.

[35] The overall question is one of equity, namely whether it would be "equitable" to disapply the limitation provisions having regard to the balance of potential prejudice weighed with regard to all the circumstances of the case including those specifically mentioned in Article 50(4), see *Various Claimants v Bryn Alyn Community (Holdings) Ltd (In Liquidation) and Royal and Sun Alliance plc* [2003] EWCA Civ 85; [2003] 1 F.C.R. 385. The onus of showing that in the particular circumstances of any case it would be equitable to make an exception lies on the plaintiff, see *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296 at 303C.

[36] Further consideration was given to the exercise of that overall question in *Cain v Francis* [2008] EWCA Civ 1451; [2009] QB 754. In that case Smith L.J. stated:

> "It seems to me that in the exercise of the discretion the basic question to be asked is whether it is fair and just in all the circumstances to expect the Defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important not so much for itself as to the effect it has had. To what extent has the Defendant been disadvantaged in

> his investigation of the claim and/or the assembly of evidence in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus there may be some unfairness to the Defendant due to the delay in issue, but the delay may have arisen for so excusable a reason that, looking at the matter in the round, on balance it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the Defendant and partly because of the reasons for the delay or its length are not good ones."

So the length of delay is not as important as the effect it has had. The reasons for delay may be excusable or they may be bad.

Consideration of the particular factors in Article 50(4)

[37] I have given preliminary consideration to each of the particular facts set out in Article 50(4) together with the other circumstances of this case but I consider that I cannot, on the hearing of an interlocutory summons, properly have regard to the particular circumstance in Article 50(4)(b) and to all the circumstances of the case. I do not consider it appropriate to set out my preliminary views in relation to the other particular circumstances except to say in relation to Article 50(4)(a) that there has been a delay of one year and six months and no good reason has been given for that delay.

[38] The particular factor in Article 50(4)(b) is the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7. There is no suggestion that the delay has caused any lack of cogency in relation to the assessment of damages. The suggested lack of cogency is confined to the issue of liability and the impact of delay on the memory of the witnesses. Again I do not consider it appropriate to set out my preliminary views as to the lack of memory of individual witnesses but rather to highlight various matters that require either further affidavit evidence or alternatively oral evidence at the trial of a preliminary issue or at trial when addressing the lack of cogency in relation to the issue of liability including addressing the questions as to whether the glass shelves or the particular glass shelf upon which the plaintiff is alleged to have struck her head presented a danger and whether the plaintiff struck her head in the way that she has suggested.

[39] The most fundamental point is that Mr Simpson, on behalf of the defendant, was not in a position to state whether the glass shelves are still present in the shop and accordingly as to whether the defendants have been prejudiced in that the premises have been altered so that they are no longer able to measure or photograph the shelves. The cogency of the evidence at trial depends on a number of factors including a consideration of the physical layout of the premises so that the parties

can still address one of the essential liability questions, namely whether the glass shelves or the particular glass shelf presented a danger. The defendant's shop is open to the public and both parties have available to them the photographs which were taken on 14 November 2008 by the Environmental Health Officers. It would be a simple task for either the plaintiff or for the defendant to have inspected the premises to determine whether they remain exactly as shown in the 2008 photographs. If the premises have not been altered then presumably the shelves can be inspected and measured by a consulting engineer who can give evidence as to whether they present a danger to members of the public if the shelves have shoes on them or even if they do not. Furthermore general evidence could be given by the defendant as to whether there have been any accidents or complaints in relation to the shelves over the years since 2008.

[40] There are further issues in relation to the cogency of the defendant's evidence. For instance in relation to Ms Holmes it is stated in the defendant's solicitor's affidavit sworn on 7 January 2015 that he has been informed by her that "she has no *useful* recollection of the alleged incident" (my emphasis). I note that on 28 February 2011 and within the limitation period the defendant's insurers stated that Ms Holmes "has no recollection of your client *reporting an accident*" (my emphasis). The qualification that Ms Holmes has no useful evidence as opposed to no evidence or no recollection is one to which definition should be brought. The defendant's application should condescend to particulars bringing definition to what she can or cannot remember. Also definition should be brought as to whether she did actually see the plaintiff before and as she struck her head but now cannot remember the details, whether she was only a witness in the more limited sense that the accident was reported to her so that she was able to recount what the plaintiff told her at the time or whether she cannot remember what it was that she witnessed.

[41] Mr Dunlop, the manager of the shop did not witness the accident but rather it is envisaged that he could have given general evidence as to the length of time that the glass shelves were in the shop, whether there had been any other accidents or complaints in relation to them, what the general state of the lighting was like in the area of the shelves and the normal practice as to whether shoes were at all times kept on the shelves. He could also have given evidence as to the investigations carried out by the Environmental Health Officers. In contrast to the statement that Ms Holmes has no useful recollection the defendant's solicitors have not stated whether Mr Dunlop has any recollection of the glass shelves, of the investigation or of the other general issues. Again further definition should be brought to the state of his recollection with appropriate particularity.

[42] Documentation has been provided by the Environmental Health Officers but no definition has been brought as to whether they have any recollection of their inspections or of any of the circumstances ancillary to their inspections.

[43] The suggestion is that the plaintiff and her unidentified witness will now have considerable difficulties in recollecting events with any degree of accuracy including

for instance identifying the precise shelf involved in the accident, what posture the plaintiff was adopting, the reason why she was bending down, the distance involved when she straightened up, the force with which she hit the shelf or whether there was any cut to or mark on her skin. Again no definition has been brought to the state of their recollection.

Conclusion

[44] The Court cannot, on the hearing of an interlocutory summons, properly have regard to the particular circumstance in Article 50(4)(b) and to all the circumstances of the case. I will hear Counsel in relation to whether I should permit further affidavit evidence, order the trial of a preliminary issue or leave the limitation issue to be determined at trial.