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

Delivered: **08/06/09**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS

PLAINTIFFS;

-AND-

SEAMUS MCKENNA AND OTHERS

DEFENDANTS.

MORGAN J

The Claim

[1] The 12 plaintiffs in this action claim damages including aggravated and exemplary damages for personal injuries sustained by them as a result of the explosion of a bomb in Omagh town centre on 15 August 1998. In addition there are three further claims for damages under the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 as a result of the death of members of their families in the explosion. The plaintiffs also include a claim for an injunction to restrain the defendants in respect of their future conduct.

[2] The defendants are five named individuals and an unincorporated association identified as The Real Irish Republican Army. Two of the defendants are sued on their own behalf and/or as representing that organisation. It is alleged against the defendants that they were in various ways responsible for the planning, production, planting and detonation of the bomb at Omagh.

[3] The plaintiffs are represented by Lord Brennan QC, Mr Lockhart QC and Mr McGleenan, the first named defendant is represented by Mr Brian Fee QC and Mr Connolly, the second named defendant did not appear, the third named defendant is represented by Mr O'Higgins SC and Mr Vaughan, the fourth named defendant entered an appearance but his solicitors

subsequently came off record and he has taken no further part and the fifth and sixth named defendants were represented by Mr Dermot Fee QC, Ms Higgins QC and Ms McMahon. I am grateful to all counsel for their careful oral and written submissions and for their assistance in the course of the trial. I also want to record my thanks to District Judge Conal Gibbons who presided during the taking of evidence under Council Regulation (EC) No 1206/2001 in Dublin for his courtesy and skill in conducting those proceedings.

[4] Prior to the commencement of the trial the fifth and sixth named defendants submitted that the pursuit of this action by the plaintiffs constituted an abuse of process. That submission was based in part on the fact that the public funding arrangements for this action might well mean that the plaintiffs had no real prospect of obtaining a financial benefit and that the collateral purpose behind these proceedings was to identify the defendants as those responsible for the bomb despite the fact that no criminal proceedings are contemplated. In Ruling No 5, delivered on January 2008, I rejected that submission. I mention it briefly now because it was raised again on behalf of the sixth named defendant in final submissions and because in April 2008 the House of Lords handed down its decision in Ashley v Chief Constable [2008] UKHL 25. That was a case in which an unarmed naked man had been shot dead by a police officer in a planned raid on his flat. The police officer was subsequently prosecuted for murder and acquitted. The father and son of the deceased instituted proceedings relying on assault, battery and negligence. The Chief Constable admitted responsibility in negligence and agreed to pay damages including aggravated damages. The Chief Constable applied to strike out the claims in assault and battery as an abuse of process. It was common case that there was no difference in the amount of damages that would be recovered by the plaintiffs in pursuing the assault and battery claims in light of the admissions made by the Chief Constable.

[5] The majority of the House upheld the decision of the Court of Appeal that the action should be allowed to proceed to judgment. Lord Bingham recognised the autonomy of the individual litigant at paragraph 4.

> "4 As to the second issue, the claimants have an arguable claim for battery of the deceased which cannot be struck out as disclosing no cause of action, which has not been the subject of previous adjudication and which can in principle succeed consistently with the acquittal of Police Constable Sherwood at the criminal trial and without throwing doubt on his innocence. Success in establishing this claim will bring the claimants no additional compensation and may expose them to financial risk. But it is ordinarily for the claimant, properly advised

> of the litigation risk, to decide what claim, being arguable and legally unobjectionable, he wishes to pursue, and case management, legitimately used to ensure that the court's process is efficiently and justly used, gives no warrant to extinguish the autonomy of the individual litigant. The claimants' reasons for wishing to pursue their claim in battery are readily understandable, as are the chief constable's reasons for wishing to resist it, but it is not the business of the court to monitor the motives of the parties in bringing and resisting what is, on the face of it, a well recognised claim in tort."

Lord Scott specifically recognised that proceedings had a vindicatory purpose at paragraph 22.

> "22 The claim forms issued by the Ashleys simply seek damages for the torts giving rise to the deceased Mr Ashley's death. These torts include, of course, the assault and battery tort. The only legitimate purpose for which Fatal Accident Act damages can be claimed and awarded for this tort is, in my opinion, compensatory. The damages are awarded for a loss of dependency. But the purposes for which damages could have been awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindicatory purpose. In Chester v Afshar [2005] 1 AC 134 , para 87 Lord Hope of Craighead remarked that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a hollow one, stripped of all practical force and devoid of all content". So, too, would the right. How is the deceased Mr Ashley's right not to be subjected to a violent and deadly attack to be vindicated if the claim for assault and battery, a claim that the chief constable has steadfastly and consistently disputed, is not allowed to proceed? Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages can could

> ever fulfil a vindicatory purpose in a case of alleged assault where liability for the *976 assault were denied and a trial of that issue never took place. "

In this case there is no admission of responsibility of any kind by any of the defendants and those against whom these proceedings have been launched are persons whom the plaintiffs claim were involved in the planning, production, planting and detonation of the bomb. No criminal proceedings are contemplated. It is clear from the speeches of the dissenting members of the Committee in Ashley that the admissions made by the Chief Constable leading to the entry of judgment for the plaintiffs in negligence were critical to their reasoning. Neither of them would have contemplated staying proceedings in the circumstances of this case. In my view Ashley strongly supports the view that the abuse of process claim in this case is without foundation.

[6] I also consider that Ashley is helpful in identifying the nature of these proceedings. In Ruling No 9 I dealt with an application by the third, fifth and sixth named defendants contending that these proceedings constituted the determination of a criminal charge for the purpose of article 6 of the ECHR. Lord Carswell recognised at paragraph 79 of Ashley that there is a difference between a civil claim in tort and a charge of a criminal offence based on the same set of facts since the content of the criminal offence and the tort may not be identical, the defences may vary and the standard proof will differ. He might have added that there may be different procedural rules in relation to the admission of evidence. Lord Rodger and Lord Neuberger both referred with approval to the distinction drawn by the European Court at paragraph 41 of Y v Norway (2005) 41 EHRR 87.

> "In the view of the Court, the fact that an act which may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence could not, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being "charged with a criminal offence". Nor could the fact that evidence from the criminal trial is used to determine civil law consequences of the act warrant such characterisation. Otherwise, as rightly pointed out by the Government, Article 6 § 2 would give a criminal acquittal the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to court under Article 6 § 1 of the

> Convention. This again could give an acquitted perpetrator, who would be deemed responsible according the civil burden of proof, the undue advantage of avoiding any responsibility for his or her actions. Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude establishing civil liability in relation to the same facts."

That was a case in which the applicant had been convicted of sexual assault and homicide. In linked civil proceedings he was ordered to pay compensation to the victim's parents. On appeal he was acquitted of the criminal charges but the compensation order was upheld. He succeeded in the European Court in a claim that the judgment in the civil proceedings breached the presumption of innocence protected by article 6(2) of the ECHR on the relatively narrow ground that in determining the compensation claim the court concluded that it was clearly probable that he had committed the criminal offences alleged against him. In this case there is no criminal charge at issue and it is not for the court to determine whether any criminal offence has been committed. The role of the court in this case is to establish whether the plaintiffs have discharged the burden of demonstrating that the defendants were responsible for causing harm to the plaintiffs in the manner alleged and, if so, to determine what, if any, damages are payable in respect of the harm proved.

The Causes of Action

[7] The plaintiffs have chosen to maintain the case against the defendants on the basis of three causes of action. The first is trespass to the person which in this case amounts to battery, the second is the intentional infliction of harm and the third is conspiracy to injure. I will examine each of these in turn to establish what the plaintiffs are required to prove in each case.

[8] Many of the 19th century cases in which actions in trespass to the person were maintained arose out of shooting accidents. One such case was Stanley v Powell [1891] 1 QB 86. In that case the defendant fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff. Denman J approved the review of the case law carried out by Bramwell B in Holmes v Mather LR 10 Ex 261.

> "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible

> enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

Although the plaintiff in that action failed because he could not establish negligence it is clear that negligence would have been sufficient. This decision was considered by the English Court of Appeal in National Coal Board v Evans [1951] 2 KB 861 and approved. The necessary elements to establish this tort were considered subsequently by Diplock J in Fowler v Lanning [1959] 1 QB 426. He summarised the relevant law at 439.

> "(1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.
> (2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.
> (3) If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (i.e., injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful - of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For Blackburn J., in the passage I have quoted from Fletcher v. Rylands was in truth doing no more than stating the converse of the principle referred to by Lord Macmillan in Read v. J. Lyons & Co. Ltd., that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.
> (4) The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass or in

> negligence. This has been unquestioned law in highway cases ever since Holmes v. Mather, and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence."

[9] The elements of this tort were next considered by the English Court of Appeal in Letang v Cooper [1965] 1 QB 232. That was a case in which the defendant drove over the legs of the plaintiff who was sunbathing at the time. The case was pleaded in both negligence and trespass and the issue concerned the appropriate limitation period. Strictly speaking all of the remarks were obiter since each of the judges held that limitation period was the same no matter which cause of action was relied upon. Lord Denning referred to the judgment of Diplock J in Fowler v Lanning and indicated that he fully agreed with it. He went on, however, to say that when the injury is not inflicted intentionally but negligently the only cause of action was negligence and not trespass. Diplock LJ dealt with this at 243F.

> " If A., by failing to exercise reasonable care, inflicts direct personal injuries upon B., it is permissible today to describe this factual situation indifferently, either as a cause of action in negligence or as a cause of action in trespass, and the action brought to obtain a remedy for this factual situation as an action for negligence or an action for trespass to the person - though I agree with Lord Denning M.R. that today "negligence" is the expression to be preferred. But no procedural consequences flow from the choice of description by the pleader: see Fowler v. Lanning. They are simply alternative ways of describing the same factual situation."

[10] Unsurprisingly in light of those comments textbook writers note that cases of unintentional negligent infliction of direct harm are now pursued in negligence. A recent example is the case of Bici v Ministry of Defence [2004] EWHC 786. That was a case in which two men who were passengers in a car in Kosovo claimed damages in trespass and negligence as a result of the discharge of shots by British soldiers which injured one of them and caused nervous shock to the other. The trial judge found that the shots were aimed at a third person in the car who was killed and that there was no intention to injure either of the claimants. He rejected a submission that the soldiers were reckless in that they deliberately fired to disable the car in circumstances where they must have been aware of the likelihood that there were passengers in the car but gave no thought for their safety. Having rejected

that submission the trial judge found that the defendants were guilty of negligence as the use of force was unreasonable in the circumstances. It is clear, therefore, that the trial judge proceeded on the basis that the mental element for trespass was actual intention to injure or subjective foresight of the real risk of injury.

[11 That approach accords with the development of the criminal law of assault. R v Venna [1976] 1 QB 421, approved in R v Ireland [1997] 4 All ER 225, makes it plain that in order to establish a criminal assault it is necessary to prove either that the offender intended to directly inflict harm or that he actually foresaw that the risk of inflicting harm was likely but decided to take that risk. It is clear that this mental element would be sufficient to establish a civil trespass but Fowler v Lanning remains authority for the proposition that a civil trespass may be committed negligently.

[12] In each case, however, it is necessary to demonstrate that the infliction of harm is direct. Striking a blow by hand, weapon or missile constitutes the direct infliction of harm. Laying a trap such as a hole in the ground into which the plaintiff may fall may not be direct. The fifth and sixth named defendants rely on the passage at 13 - 05 of the 18th edition of Clerk and Lindsell on Torts which states that there will be no battery where the defendant plants a bomb to detonate after an interval to support the submission that there is no direct infliction of harm in this case. The example referred to in the 18th edition is not repeated in the 19th edition. I consider that there is a difference in kind between the creation of a hole which might cause a trap for a person and the detonation of a bomb which will directly impact upon those in its vicinity. Impact caused by the detonation of the bomb is in my view direct injury and a delay in detonation makes no difference as long as the mental element required for the tort is established in either case.

[13] The tort of intentional infliction of harm is based on Wilkinson v Downton [1897] 2 QB 57. The defendant attended at the home of the plaintiff and by way of practical joke falsely represented to her that her husband had met with a serious accident whereby both his legs were broken. The plaintiff became seriously ill as a result of developing nervous shock. Wright J. set out the basis upon which she could recover.

> "The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no

> malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

It is clear that the defendant did not intend to commit an act harmful to the plaintiff but the court felt able to impute an intention to the defendant on the basis that it was difficult to imagine such a statement failing to produce grave effects. The decision was considered by the Court of Appeal in Janvier v Sweeney [1919] 2 KB 316 and followed. Bankes LJ said that the case had been approved in other cases and did not create any new rule of law except in relation to remoteness.

[14] This tort has been further considered in two important cases. The first in time is Wong v Parkside Health NHS Trust and Another [2001] EWCA Civ 1721. The plaintiff was employed by an NHS trust. She worked in the same office as the second defendant who was rude and unfriendly, criticised her, locked her out of the office and interfered with her desk and personal effects. The second defendant was involved in setting off the plaintiff's car alarm and frightening her by throwing an object against her office window. At paragraph 12 of the judgment the court set out the ingredients for this tort.

> "12. For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour."

[15] Wilkinson v Downton was considered by the House of Lords in Wainwright v Home Office [2003] UKHL 53. Lord Hoffmann noted that this tort had been developed to deal with the difficulty arising from the decision of the Privy Council in Victorian Railway Commissioners v Coultas (1888) 13 App Cas 222 that nervous shock was too remote a consequence of a negligent act. That decision was not followed by the Divisional Court in Dulieu v White [1901] 2 KB 669. Accordingly the reason for inventing the Wilkinson v Downton tort no longer applied. Lord Hoffmann accepted, however, that this tort had not "disappeared beneath the surface of the law of negligence". At paragraph 44 he considered that the concept of imputed intention sailed as close to negligence as the learned judge felt he could go in light of the Victorian Railway Commissioners decision. At paragraph 45 he considered

that imputed intention would not do if damages for distress were to be recoverable. He considered that for such damages to be recoverable the defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not. Although the test in Wong was neither approved nor disapproved in Wainwright I consider that it represents the appropriate test to apply to determine whether this tort has been committed.

[16] From this review of the authorities I consider that one can derive the following propositions.

> (a) Where personal injury is inflicted directly or indirectly an intention to cause that harm or proceeding in the knowledge that personal injury was the likely consequence will be sufficient to establish a trespass or intentional infliction of harm.
> (b) Where the personal injury is inflicted indirectly the tort of intentional infliction of harm may be established where it is obvious that personal injury will result even though the defendant may not actually foresee it.
> (c) Fowler v Lanning remains authority for the proposition that trespass may be inflicted negligently.

[17] The tort of conspiracy to injure has been the subject of sharply contrasting submissions. The defendants contend that although there is an economic tort of conspiracy to injure there is no such tort in respect of the infliction of personal injury. In any event the defendants contend that the mental element required for the economic tort is a specific intention to injure a particular plaintiff and that no such intention can be established in this case. I do not intend to explore this further except to note that one has to draw the distinction between liability under the tort of conspiracy to injure and liability in respect of concerted action. Where an act is done in pursuance of a concerted enterprise which is tortious it is the joint tort of those involved (see Brooke v Bool [1928] 2 KB 578). All persons in trespass who aid or counsel, direct, or join, are joint trespassers (see Petrie v Lamont (1842) Car & Marsh 93).

The Standard of Proof

[18] Subsequent to the commencement of this action the House of Lords delivered 2 important judgments relating to the standard of proof in civil cases. Before turning to those judgments I want to look at three earlier relatively recent judgments from the House of Lords on this issue. The first is Re H [1996] AC 563. That was a case in which there were allegations of sexual abuse by the mother's partner. He was charged with rape but subsequently acquitted. The question then arose as to the standard of proof appropriate in care proceedings where the issue was whether the court was satisfied that the

child was suffering or was likely to suffer significant harm. The majority concluded that the court had to be satisfied on the balance of probabilities of any facts upon which the likelihood of suffering significant harm was based. In a celebrated passage Lord Nicholls set out the approach to the standard.

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, *this does not mean that where a serious allegation is in issue the standard of proof required is higher*. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

I have italicised a portion of this quotation because of the significance subsequently attached to it by Lord Hoffmann and Baroness Hale.

[19] The issue was next considered by the House of Lords in B v Avon and Somerset Constabulary [2001] 1 WLR 340. That was a case in which the context was an application for a sex offender order. The order prohibited activities in relation to contact with children, including work, and there were severe sanctions for its breach. At paragraph 30 of his opinion Lord Bingham said that the civil standard of proof did not invariably mean a bare balance of

probability and did not mean so in that case. At paragraph 31 he expressed the view that the civil standard of proof in that case for all practical purposes was indistinguishable from the criminal standard. The notion of a heightened civil standard was given express recognition in Re McCann [2002] UKHL 39. That case was concerned with the imposition of Antisocial Behaviour Orders. The House held that the proceedings were civil but that given the seriousness of the matters involved the court should be satisfied to the criminal standard of proof that the defendant had acted in an antisocial manner before making such an order. At paragraph 37 of the judgment Lord Steyn expressly referred to a heightened civil standard which he drew from the speech of Lord Nicholls in Re H.

[20] Re B (Children) [2008] UKHL 35 was a care case in which the Guardian and local authority sought to revisit Re H in light of the remarks about the heightened civil standard. The House rejected this invitation and asserted that there is only one civil standard, namely the balance of probabilities. Both Lord Hoffmann and Baroness Hale approved the passage from re H set out above but emphasised that it expressly contradicted the proposition that the more serious the allegation the higher standard of proof required. Lord Hoffmann left open the possibility that there were a group of civil cases where it was appropriate to specifically apply a criminal standard. On the same day the house give judgment in re D [2008] UKHL 33. That was a case from this jurisdiction in which the Life Sentence Review Commissioners applied the balance of probability standard in relation to allegations of buggery, indecent assault and gross indecency made against a life sentence prisoner as a result of which the Board concluded that the applicant's conduct was indicative of a significant risk of his committing serious harm and that he should not be released. That decision was overturned by the Court of Appeal which found that a flexible approach to the civil standard of proof required more cogent evidence than would be conventionally required. In the House the leading speech was delivered by Lord Carswell. He approved earlier comments by Lord Hoffmann in Secretary Of State for the Home Department v Rehman [2003] 1 AC 153 that the balance of probabilities was the only civil standard of proof. He then approved and explained a passage from Richards LJ in R{N) v Mental Health Review Tribunal (Northern Region)[2006] QB 468.

> "27 Richards LJ expressed the proposition neatly in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468 , para 62 where he said:
>
> > 'Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application* . In particular, the more serious the allegation or the more serious the consequences if the allegation is proved,

> the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.

28. It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the

> application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established. "

[21] I am satisfied that I should apply the balance of probability standard set out in re H as explained in Re B (Children) and Re D. If there is a residual category of civil cases where it is appropriate to apply a criminal standard this is not one of them. The cases referred to by Lord Hoffmann in Re B(Children) are characterised by the fact that the proceedings are usually taken by or on behalf of the State, they normally involve some material interference with freedom of movement or other personal liberty and criminal sanctions are prescribed for any breach of the orders that may be made. None of these features are present in this case and I do not consider that the seriousness of the allegation alone is a reason for departing from the civil standard.

Events on the Day of the Bomb

[22] The courthouse stands at the top of a hill in the centre of Omagh. In front of the courthouse to the east lies High Street which is the principal shopping location. After approximately 250 yards this thoroughfare becomes Market Street which continues to the Drumragh crossroads approximately 425 yards from the courthouse. Market Street continues beyond the crossroads into that portion sometimes called Lower Market Street. At either side of the upper end of Market Street and High Street there are a number of alleyways and entries which give access to car parks and other amenities.

[23] The car used in the bomb was a maroon Vauxhall Cavalier. It was parked by its owner outside a house at Carrickmacross at 11 p.m. on 12 August 1998 and by 3.30 a.m. on 13 August 1998 it had been stolen. The theft was immediately reported to gardai.

[24] It appears that a number of people saw the bomb car prior to the explosion on 15 August 1998. The proprietor of premises at Lower Market Street and his son drove onto Lower Market Street at approximately 2 20 p.m. that afternoon. The son is particularly confident about the time. The father saw a maroon coloured saloon car drive slowly in front of him as he tried to get on to the street and noticed that the driver was a male aged between 20 to 24 with short dirty fair hair. As they proceeded towards Drumragh crossroads the maroon saloon which the son noted was a cavalier was making its way directly in front of them into the upper portion of Market Street . Another lady was parked in her car outside Kells shop waiting for her mother. She noticed a maroon coloured car which he thinks was a cavalier pull in front of her. She thinks that time was about 2 p.m. She observed the

two men who got out of the car for approximately 3 to 4 continuous seconds. She noticed they were both very neat in appearance and looked like soldiers. They were a short distance from her and the passenger made eye contact with her and grinned at her. He was in his mid-twenties, 6 foot tall and of slim build with dark hair which was neatly cut. The driver was in his mid-twenties, of slightly heavier build and about 5'9" tall. He had fair coloured hair which was also neatly cut. Another man was making his way from one set of premises to another at approximately 2 20 p.m. he noticed a man in his mid-twenties standing beside a fairly clean looking maroon coloured car parked outside Kells shop closing the door of the car. He had short dirty fair hair, was of light medium or stocky build and was 5'8" to 5'10" tall. Another lady who was crossing the road at Market Street sometime around 2.15 p.m. recollects being waved across the road by the driver of a red Vauxhall Cavalier which was indicating an intention to park outside Kells shop. She noted that there were two men in the car but could not describe either of them. There is no real doubt that each of these sightings is a reference to the bomb car although the timings may not be absolutely accurate.

[25] At approximately 2.30 pm a production assistant at the UTV newsroom received the first warning of the explosion. She recorded the warning as:

> "Bomb courthouse Omagh, Main Street. 500lbs explosion, 30 minutes. Martha Pope. IRA Oglanahan"

She immediately transmitted this message to police in Belfast and it was received by police communications at Omagh approximately 4 minutes later. A second call was made to the same newsroom two minutes later and another warning given.

> "Martha Pope 15 minutes, bomb Omagh Town."

This warning appears to have been received by police communications at Omagh at approximately the same time as the first warning. At about the same time a call was received by a Samaritans volunteer at Coleraine. It appears that the call had been diverted from the Samaritans service at Omagh. The warning advised that a bomb was going to go off in the centre of Omagh in 30 minutes and gave the code word "Marta 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 indicates that this warning was received at the communications office at Omagh approximately 5 minutes after the first two warnings, at 2:38 p.m.

[26] Police at Omagh quickly realised that this might well be a real attack rather than a hoax as they were advised that the code word "Martha Pope" had been used in the Banbridge bomb explosion two weeks earlier. The first warning to the UTV newsroom located the bomb at the courthouse and Main

Street. There is no Main Street in Omagh. It appears that police on the ground were advised that the target of the attack was the courthouse and it does not appear that the third warning that the bomb was 200 yards from the courthouse which was given to the Samaritans in Coleraine was transmitted to or received by police responding to the bomb. Mobile patrols were at the scene within minutes of the first warnings being transmitted. Police set about directing people away from the courthouse at High Street and set a cordon across the junction of High Street and Market Street at Scarfe's Entry. Other police directed members of the public out of shops and into the entries away from the main shopping area. Although the cordon was nearly 300 yards away from the courthouse it appears that some time at or just before 3 p.m. police considered that it would be safer to move the cordon back towards the crossroads, a distance of approximately 440 yards from the courthouse. At about this time one officer was informed that there might be a lady in a flat above commercial premises in High Street. He kicked the door to gain access to the premises as police started to move the cordon down Market Street when the bomb exploded shortly after 3 p.m. The bomb exploded approximately 35 minutes after the first warning call was made.

[27] In fact the bomb car was positioned approximately 375 yards from the courthouse and the police officers guiding the cordon back towards the cross roads were in fact walking directly towards it. The explosion caused horrendous carnage. 29 people and 2 unborn children were killed. Hundreds of people were injured. A substantial part of the commercial centre of Omagh was destroyed. Structural damage occurred over an area of 125 m and blast damage occurred over an area of 500 m. One of the issues explored at the trial was the effect of the failure to transmit to police on the ground the warning to the Samaritans in Coleraine that the bomb was 200 yards from the courthouse. Sgt McCracken indicated that if the warning had been transmitted he would have anticipated that a cordon would have been established at Scarfe's entry and that the cordon would then have been moved back to the crossroads. I accept that if this plan had been initiated as soon as police had become established on the ground the cordon may well have been moved beyond the bomb car before the explosion thereby reducing the risk of casualties. I also accept that if the Coleraine warning had been transmitted to police on the ground there may have been more focus on seeking to encourage members of public onto the side streets and entries away from the main shopping area.

[28] Denis McAuley was a Senior Scientific Officer in the Forensic Science Agency of Northern Ireland at the time of the explosion. He directed the forensic investigation. As a result he was able to conclude that the charge was approximately 150/200 kg mostly made up of fertiliser and sugar. There were some traces of explosives found as Semtex H. The explosives would largely have filled the boot of the cavalier. The main charge was boosted by a booster charge connected to a detonator activated by an electrical circuit. The Timer Power Unit was probably located in the passenger compartment of the

bomb vehicle and connected by a cable to the boot and the lead wires of the detonator. A careful analysis of the recovered elements of the Timer Power Unit enabled Mr McAuley to conclude that this was a configuration known to him and described by him as a Mark 19.

[29] The timer was an essential element of the bomb. The timer in this bomb was a Coupatan and was part of a batch made at the factory in a particular week in 1997. The batch number was 99710 where the first nine represented the place of manufacture, France, 97 represented the year of manufacture and 10 represented the week of manufacture. The timer was designed to provide a delay of up to two hours. The person arming the device simply set the delay for the required period and at the end of the period electric current flowed so as to initiate the detonator. Although the timer was activated by turning the timer knob the settings were not graduated so the person arming the device had to make a judgment knowing that a 360° turn represented two hours. Mr McAuley accepted that this judgment might be 3/4/5 minutes out.

[30] On 9 January 1997 the manufacturer of these timer units received an order for 480 timers from a company called Electro-Techniks of Dundalk. All of the timers supplied had the same batch number as that used in the Omagh bomb. It has not been possible to trace any company called Electro-Techniks in Dundalk nor the individual apparently responsible for the payment which was apparently made through a bank in Dundalk. Coupatan timers from this batch have, however, been used in a number of devices both before and after the Omagh bomb. In the period from 24 March 1998 to 15 August 1998 there were 12 separate explosive devices where Coupatan timers with the same batch number were used. Timers from the same batch were also used in two car bombs which were detected in the Republic of Ireland on 21 March 1998 and 2 April 1998. Another device with the same batch number was discovered in England on 10 July 1998. Use of these timers in Northern Ireland commenced again on 25 February 2000 and between then and 24 November 2002 there were nine incidents when Coupatan timers from this batch were used in explosive devices. The same Coupatan batch number was noted on devices at Hammersmith Bridge London on 1 June 2000 and Acton/Ealing railway on 19 July 2000. Mr McAuley also noted that in the Northern Ireland incidents there were many similarities in the components used, how and in what configurations they were mounted on lunch boxes within which they were contained, the modifications to the lunch boxes, how the components were wired together, the sequence of the components in the circuit and the configuration of the wiring colours used. Although it was likely that a number of the devices were prepared by the same person and it was possible that all of the devices were prepared by one person it was not probable that the same person prepared all of the devices although the similarities suggested some sharing of knowledge and source of components.

[31] Mr McAuley explained that within a street such as Market Street the blast effect would have been substantial. Within 10/20 m of the blast the effect would have been to compress the chest cavity causing severe damage to the lung structure and internal organs. As a result of pressure people could be thrown against walls. Within the same distance individuals would also have been exposed to thermal effects caused by temperatures in excess of 1000°C leading to severe burns. Outside the 10/20 m area and there would still be a risk of injury from blast or thermal effects but this would drop off relatively rapidly as compared to the risks from fragmentation. The risk of fragmentation arose mainly from the vehicle itself. Fragments of the booster tube were recovered up to 180 m from the vehicle. The furthest piece of vehicle fragment was recovered some 300 m away from the bomb. Mr McAuley indicated that because of the long history of bomb explosions in Northern Ireland up to 1998 these effects were well known.

[32] On 17 August 1998 a person rang the news desk at RTE giving a statement from Oglaigh na hEireann in which it was asserted that three 45 minute warnings were given and that it was made clear that the bomb was three to four hundred yards from the courthouse. The caller asserted that it was not their intention to cause loss of life and injuries. On the following day a caller rang Ireland International, a newsagency. The caller said that three 40 minute warnings were given and the location was 300 yards (then the caller said 300 to 400 yards) from the courthouse on the Main Street. The caller gave the cold word Martha Pope and claimed to represent Oglaigh na hEireann.

[33] In light of the above material it is clear that this bomb was part of a campaign of terror involving from time to time the use of explosive devices in locations to which large numbers of members of public resorted. On 30 April 1998 a car bomb had been detected and successfully defused in Lisburn. On 16 May 1998 a car bomb had ben defused at Armagh. On 13 July 1998 there was a car bomb at Newry courthouse. On 21 July 1998 a mortar attack at Monaghan Street Newry had detonated but the device failed. On 1 August 1998 a massive car bomb had detonated at Banbridge as a result of which one person was injured.

[34] It is clear that it was the firm intent of those involved in the planning, production, planting and detonation of this bomb that it should explode causing massive damage to Omagh town centre. The first warning call referred to the bomb being at the courthouse, the second to the bomb being in Omagh town centre and the third to a location 200 yards from the courthouse at Main Street. None of these warnings in fact identified the location of the bomb car. If it had been intended that the bomb car be detected so as to assist the evacuation of members of the public it would have been possible to identify the vehicle registration number and the make, model and colour of the car. Such a warning was given in relation to the Lisburn bomb which was defused. The provision of the warnings by those involved in this bombing

clearly demonstrates that they appreciated the grave risks to which they were exposing members of the public. The provision of general warnings only shows that the bombers' primary objective was to ensure that the bomb exploded without detection and the safety of those members of the public in Omagh town centre was at best a secondary consideration. In this case the task of those clearing the area was made even worse because the warnings were conflicting and misleading.

[35] Because of the reference to the courthouse in the first warning significant police resources were deployed to that area to assist in the evacuation of nearby premises. The evidence before me suggests that there may have been as few as five police officers in the High Street/Market Street area at the time of the explosion. I have already indicated that if the terms of the third warning had been received by police officers on the ground that may have reduced the risk of casualties because a different plan of evacuation may have occurred. I consider, however, that it was plain to any of those involved in the planning, production, planting and detonation of this bomb that there was a likelihood that the detonation of the bomb would kill or injure some of those in its vicinity because of blast or thermal damage or fragmentation. The explosion occurred 35 minutes after the first warning was received. Because of the general nature of the warnings a wide area around Omagh town centre would have to be cleared on a busy Saturday afternoon. This included commercial premises and any residential premises above some of the shops. The general nature of the warning is to be contrasted with the specific warning identifying the make and model of car in the Lisburn attack on 30 April 1998. That warning was also longer and enabled the bomb to be defused. The shortening of warnings had started with the Banbridge bomb on 1 August 1998 and that bomb had resulted in the injury of 1 person. The period necessary for evacuation certainly exceeded 35 minutes. One constable was still checking on a flat above a shop when the bomb went off. The uncertainty over the effect of general warnings which I find were specifically designed to prevent detection of the location of the bomb car before the explosion was bound to increase the area that needed to be cleared and the time necessary to do it. I am satisfied, therefore, that those involved in the planning, production, planting and detonation of the bomb recognised the likelihood of serious injury or death from its detonation but decided to take that risk.

The Telephone Evidence

[36] Shortly after the bomb it was established that the warning calls had been made from 2 telephone boxes in South Armagh close to the border. Police considered it likely that communication with those who made the warning calls was effected by mobile phone. Police then focused on mobile phone traffic between 2 p.m. and 2:30 p.m. in the Omagh and south Armagh areas. Details of subscribers were established as a result of which in October 1998

police asked Vodafone to check their systems in respect of 13 telephones operating on cell sites in Northern Ireland during the period 12/15 August 1998. The results of that analysis were made available on 11 November 1998 in a printed document referred to as TRS1 in these proceedings. Further requests for information were made to Vodafone and BT Cellnet in the United Kingdom and Eircell in the Republic of Ireland. Analysis of this material was conducted by Lisa Purnell on behalf of the police but she did not give evidence in this trial.

[37] Raymond Green was a fraud and investigation manager employed by Vodafone from 1995 to 2004. He explained that Call Detail Records are the basis upon which billing records are prepared. Billing records are 99.997% accurate. Any errors are those of omission. He explained that the police requested data and Vodafone provided it in accordance with the Data Protection Act. He explained that TRS1 was a document prepared from a Toll Ticket Enquiry. The Toll Ticket is a printout of the original computer file and the inquiry related to all outgoing calls or calls received. The Vodafone system did not record incoming calls and in order to carry out the search it was necessary to search all the dialled numbers in order to identify calls received by these phones. The process was lengthy and required considerable resources. TRS1 was an Excel file prepared from the source data. This was only one of a number of such exercises carried out in the course of the investigation of this bomb and in February 1999 Vodafone were asked to carry out checks on 27 numbers between January and October 1998. In light of the importance of these documents to the company every effort is made to ensure their completeness and accuracy and Mr Green stated that there was no reason to doubt that the records produced were accurate.

[38] Mr Green recognised the importance of original evidence. Before RIPA 2000 Vodafone usually retained the original electronic materials for six to 12 months. In 1998 the procedures were embryonic and the magnetic disc or tape on which the data was stored was not retained and is not now available. Procedures have now evolved to ensure that such data is retained so that it can be checked as original source material.

[39] Expert evidence in relation to the phone material was provided by Mr Uglow and Mr Brown. Peter Uglow has been trained to MSc standard in forensic computing and has an expertise in the analysis and extraction of data from computers and mobile phones. He has supervised more than 250 cell site analysis reports which he has produced for both prosecution and defence, has made 60 appearances as a witness and is a registered expert witness. Peter Brown is a registered forensic practitioner. He worked for Vodafone from 1986 until 2004. He was Operations Executive in 1999/2000 and was responsible for the millennium transition. From 2002 he was Head of Service Quality and Assurance. Thereafter he has given evidence as an expert witness

in more than 80 cases. I accept the expertise of both witnesses in the areas in which they have given evidence.

[40] The mobile phone network operates by enabling mobile handsets and sim cards within them to communicate with masts known as cell sites or base stations using digital technology. Each network operator has a number of cell sites acting as transmitters and receivers which are usually placed on higher vantage points or in buildings. Each geographical area served is called a cell. The area served can be affected by the height of the mast, the number of antennas and their orientation, the output power of each of the masts and the geographical locality. The phone scans the signals it can see seeking the best quality signal it can find.

[41] When the phone is in its idle state it is the necessary for the mobile phone network to identify the mast through which communication can be made so as to direct incoming traffic to that mast. The mobile phone provider knows which cell is connected and can identify it if a call has been made. If the mobile phone moves it may transfer from one mast to another. In order to ensure that they provide good quality signal mobile phone companies measure signals on the ground. Using computer data the network will produce predictive maps to deal with coverage.

[42] When the mobile is in the idle state the mast location through which the phone can access the network is held in the location register. That location is not stored by the network if the phone does not make or receive a call. When a call is made the billing record includes the time, date and duration so as to identify the cost incurred. That is stored as part of the Call Detail Records which include additional network material including the cell used. The cell site location may have a number of transmitters or receivers pointed in different directions.

[43] There is a limit to the number of simultaneous calls that can be handled by a cell. In rural areas there are not as many masts because there is less phone traffic. In urban areas greater capacity is required. In urban areas typical coverage is 2 to 3 miles whereas in rural areas it is more likely to be 10 miles or more. Cell site coverage can range up to 35.2 km but the distance that will be covered depends on a number of factors. Where there are a number of masts networks may reduce this maximum to give concentrated coverage in a local area.

[44] This technology is used in many countries as a result of which people can travel with their phones into the telephone systems of other countries. The networks have roaming agreements so that charges are passed to the right company. In 1998 these systems operated in United Kingdom and the Republic of Ireland. In the Republic of Ireland the relevant companies were

Vodafone Ireland and Eircell. In Northern Ireland the relevant companies were Vodafone UK and BT Cellnet.

[45] As a result of the earlier phone investigations to which I have referred a cell site analysis was conducted in respect of four phones, 076, 585, 980 and 430. I will refer only to the last 3 digits when identifying each phone. There was no dispute that the 585 phone was registered to Colm Murphy, the fifth named defendant, the 980 phone to Michael McDermott the father in law of Terence Morgan who in fact used the phone and was employed by Colm Murphy as a foreman on his building site in Dublin and the 430 phone to Oliver Traynor. 585 and 980 were Eircell contract phones capable of roaming in Northern Ireland. 430 was a BT Cellnet phone with a similar facility. The plaintiffs contend that 076 can be attributed to Seamus Daly, the sixth named defendant. This is a matter of substantial dispute to which I shall return. 076 was a pay as you go phone and in 1998 was not capable of roaming in Northern Ireland. The analysis specifically looked at 15 August 1998 and in particular at the Dundalk and Omagh areas. Toll Ticket Analysis was the name given to the billing system in the early days. Call data from Vodafone Ireland for a number of telephones including cell site data were examined as were coverage maps. Mr Uglow assessed the documentation that he had received which was similar to other material used by him and was happy that the information provided to him was adequate to support the conclusions which he reached.

[46] This was the principal point of dispute between Mr Uglow and Mr Brown. Mr Brown contended that in the absence of the electronic records one could not be confident that the material did not contain errors or omissions. He noted that TRS1 had been compiled on excel and that there had been some intervention by way of human action or computer programme to produce that version. He accepted that there were no procedures in relation to the maintenance of such records in place in 1998 as far as he was aware. He accepted that his previous experience was entirely in relation to criminal cases since 2005 and he was approaching this case in exactly the same manner as he would any such case. He accepted that in his previous employment as head of service quality and assurance he had measured network performance including billing and that the court should treat Vodafone as a competent and well organised company. He did not take issue with Mr Green's evidence about the reliability of the billing system. He was able to trace all of the calls upon which Mr Uglow relied to the documents provided but in the absence of the original source data he was not prepared as an expert to accept any printed alternative. He agreed that a phone log trial carried out in Omagh by Mr Southall in May 1999 included a test of coverage of the cell site at Bridge Street Omagh and he did not dispute the finding that coverage did not exceed 5 kms on any of the roads in the area. Mr Brown also had access to floppy discs produced by Vodafone containing information on the outcome of a search requested by police in relation to Eire roamers between January and

October 1998 and floppy discs relating to another enquiry about the receipt of calls by Eire roamers. He eventually satisfied himself that the calls with which he was concerned were in this material although it was common case that these materials were not in standard form from the network and were described as something of a mish-mash.

[47] Mr Uglow produced a chart of 20 calls. This was supposed to represent all of the calls made by these phones during a period commencing just before 11 a.m. and finishing just after 8 p.m. on 15 August 1998. The information provided by each network is slightly different. Eircell and Vodafone Ireland only provide call records of outgoing calls and do not store the identification cells of incoming calls. Vodafone UK when roaming identifies the location of cells handling incoming calls. The information includes the direction of the antennae where relevant and appropriate. When a text message is received it would also be included. The checking or reading of the text is not recorded.

[48] The cell site used for the call at 10:58 a.m. by 076 is the Clermont Carn which is located North East of Dundalk. The call at 12:41 p.m. from 585 to 980 was made using a cell site at Castleblaney to the north-west of Dundalk. This indicates that 585 was in the area north-west of Dundalk and that 980 was in the Republic of Ireland as no incoming cell site was identified.

[49] The call at 13:13 p.m. from 585 to 980 was made using a cell site at Emyvale in the Republic of Ireland. This indicates that 980 was in the Republic of Ireland and that 585 had travelled between 12:41 p.m. and 13:13 p.m. in a north-north westerly direction. The call at 13:29 p.m. from 585 to 980 was made using the Aughnacloy cell site and was received using the same cell site. This indicates that both phones had roamed onto Vodafone UK and that both were in Northern Ireland.

[50] The call at 1357 from 585 to 980 was made using sector 2 Bridge Street in the centre of Omagh and received using sector 1 of Pigeon Top which is located on Mount Pollnaght 5 miles west of Omagh. The call made at 1409 from 980 to 585 was made using sector 3 of Bridge Street Omagh and received using sector 1 of Pigeon Top. The call made at 1410 from 585 to 430 was made at sector 1 of Pigeon Top while 430 was on the digital network using the cell site at Clermont Carn to the north-east of Dundalk. At 1414 980 phoned 259 using sector 1 of Pigeon Top to the west of Omagh. At 1419 980 phoned 585 and both were using sector 1 of Pigeon Top. Based on this information between 1357 and 1419 all calls by 585 and 980 were handled either by sector 1 at Pigeon Top or by sectors 2 and 3 antennae at the cell site at Omagh Technical College.

[51] There is a diagrammatic representation of the approximate coverage angle of sector 1 at Pigeon Top which shows that it faces towards Omagh and covers a wide area to both the North and South of the town. Mr Uglow

estimated that the range to the east might be 20 miles or thereabouts. There is a map available showing the coverage of the cell site at Bridge Street Omagh. Such maps are produced using complicated algorithms and are checked with radio equipment. They are not necessarily totally accurate but they are a prediction of coverage. The calls between 585 and 980 using Bridge St sectors 2 or 3 indicate that the phones would have been in an area within 2 to 3 miles from the centre of Omagh. This was confirmed by Mr Southall in May 1999.

[52] Warning calls were made from a public call box at McGeough's crossroads at 1429 to UTV and 1431 to the Samaritans. A further warning call was made from a public call box at Loyes crossroads at 1431 to UTV. The two cell sites in the vicinity of those public call boxes are Mulleyash Mt and Clermont Carn. The call made at 1410 from 585 to 430 was received using Clermont Carn. 430 made a call to 971 at 1437 using Mulleyash Mountain. At 1438 585 using Cranlome Hill made a call to 430 which again used Mulleyash Mt. This is consistent with the phone 430 being in the vicinity of the public call boxes when the warnings were given.

[53] At 1513 585 phoned 980 using the Cavanagarvan cell site in the Republic of Ireland. There is no cell site for the receipt of the call by 980 which suggests that it also was in the Republic of Ireland at that stage. At 1530 585 phoned 371 using the Castleblaney cell site. At 1541 980 makes a call from the Clontibret cell site to a landline, 0801693861105. The duration of that call is one minute 55 seconds. The remaining calls are all made in the Republic of Ireland.

[54] Pigeon Top provides a wide coverage and using it alone it is not possible to narrow down where the phones were but coupled with the use of cell sites in Omagh it allows one to determine that the phones using those cell sites were nearer to the centre of Omagh than Pigeon Top. If both phones were in Bridge Street it is not possible to say whether or not Pigeon Top might have been involved. Given the phone traffic between 585 and 980 it seems unlikely that they were together. 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 and the bomb car then entering Omagh and calling to the scout car.

[55] Mr Uglow agreed that an expert should go back as far as possible to source data but the data available depended on the format produced by the network. The practices in the networks today differed from the way in which information was obtained and stored in 1998. Today there are stringent processes imposed upon networks requiring them to maintain and provide an electronic copy of their data. This is a read-only copy so as to prevent any possibility of interference. That was not in place in 1998. Mr Uglow was unable to say whether the original electronic data was still held by the networks when the RUC first requested it in late 1998 or early 1999. The

original source data is magnetic tapes and the information on these tapes is generally brought forward onto a screen and printed off to produce paper information. Quite often backup tapes were also magnetic tapes. It is possible that the information requested by the police was held electronically by the networks but the networks at that time did not keep all material because of the enormous amount of data involved.

[56] The documents seen by Mr Uglow were commensurate with being taken off the telephone system because of their format. Mr Uglow did not ask for source data but worked on the material provided. It was not unusual to find than a computer printout was not in date order. It depended on the way in which the query was formulated and the criteria for the search. The items might be in order of type as incoming or outgoing calls or could be obtained from different switches. Mr Uglow indicated that it was his understanding after the joint experts meeting that Mr Brown was happy with the paper copies as source data in relation to three of the phones, 076, 585 and 980. Both wanted further work in respect of 430 particularly in relation to the identification of cells used by that phone. In his evidence Mr Uglow said that he had subsequently obtained that information in a statement from Ms O'Donovan.

[57] Mr Uglow relied on TRS1. Mr Uglow did not pick up certain errors in TRS1 which were picked up by Mr Brown. The only one relevant to the calls with which his evidence was concerned was the call from 980 at 1414. The cell site is described as 6145 whereas one would have expected it to be 61451. This document was manually created using Excel and was probably some form of human error. The last digit indicated the direction of the antenna at the relevant site.

[58] The base station gets the identity of the mobile phone in order to bill it. The base station identifies the serial number of the phone and the serial number of the sim card within the phone. It was technically possible to copy a sim card but very rare. Each field of storage is protected by a pin number. Mr Uglow accepted that alterations can be made but said that although it might be easy to change an entry in an address book it would be much more difficult to change the technical parameters of the sim card.

[59] The serial numbers of the phones can be changed and there are internet sites with unissued numbers. The telephone number, however, is associated with the sim card. Mr Uglow accepted that there can be duplicate calls on bills where the same call was stored in different parts of the network. He further accepted that sometimes the timings within the network are different because they are set against the atomic clock. He agreed that there was no fixed boundary to the coverage of any call except that it must be in the area where coverage was provided.

[60] Mr Uglow agreed that there were additional calls identified by Mr Brown. The call analysis in relation to 076 only goes to 1504 and did not include later calls. There is a call from 585 to 04243088 at 1723. There is an analysis of that number in the papers but there are no records of mobile numbers and that explains why this call was not identified. The records include calls from 585 to 00353 numbers on 1 August 1998 which suggests that the 585 phone was in Northern Ireland on that date. The incoming calls at 1409 and 1419 are listed among the outgoing calls. This is an example of inconsistency in the way in which networks provide material. It was suggested to Mr Uglow that there was an inconsistency between the seven calls apparently made in the billing list provided for 585 at page 659 of the papers and the 11 references at page 661. He pointed out that the omissions appeared to be roaming calls which suggests that one was not comparing like with like. Mr Uglow accepted that there was a possibility of error when retrieving material from the Vodafone system which produced the Toll Ticket Enquiry.

[61] I have already referred at paragraph 37 above to the fact that TRS1 represented the first inquiry made to Vodafone. Thereafter there were further inquiries in relation to incoming and outgoing calls involving some 27 phones in all and covering a period from January to October 1998. The information from these inquiries was available on floppy disks to which Mr Brown had access. Mr Uglow did not rely on them in preparing his report. Because these discs were not source materials Mr Brown was not confident that they were accurate records for the reasons set out above. Mr Green was unable to indicate who precisely had prepared these materials but indicated that it had been done under his direction. Mr Uglow agreed with Mr Brown that these materials came in non-standard formats and that it was unclear what inquiries were actually made to generate the material contained on the discs. There was, therefore, a clear risk that relevant calls might have been missed. In relation to these calls there was no evidence of the extent of cell site coverage so at best the indication of a location could be no better than a general indication.

[62] The materials provided by the phone companies were subsequently analysed using a computer programme to assist in the visualisation of large quantities of information. Mr Uglow did not rely on this analysis as it clearly consisted of material in addition to phone information. The analyst did not give evidence to explain how the analysis was conducted. The calls referred to in the analysis are contained within the material provided by the phone companies to the police in the course of the investigation. Mr Green described this material as being as close to the prime record as one could get.

[63] TRS1 is in my view a hearsay document. It was prepared by a member of Mr Green's staff who interrogated the mobile phone network in order to

obtain material and then transferred that material onto an Excel file. I have already referred to some form of human error in the preparation of the document at paragraph 57 above. The floppy disks containing the information in relation to the period from January to October 1998 were again prepared by Mr Green's staff who carried out the interrogation and transferred the material onto the floppy disk from some other source, possibly the original source material. Although the original computer printout might not have been hearsay I consider that the floppy disks are hearsay. In any event I consider it appropriate to examine the considerations relevant to the weighing of hearsay evidence in article 5 of the Civil Evidence (Northern Ireland) Order 1997 in assessing the reliability of the material contained in TRS1 and the floppy disks. I am satisfied that it is not now possible to identify those who prepared these documents and that the makers of the documents accordingly are not available to give evidence.

[64] Article 5 of the 1997 Order identifies the considerations relevant to the weighing of hearsay evidence.

> "5. - (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.
>
> (3) Regard may also be had, in particular, to the following-
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
> (c) whether the evidence involves multiple hearsay;

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

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

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[65] The material contained in TRS1 and the floppy disks put forward are a copy of information retained on machines which the phone companies maintain inter alia for the purpose of ensuring that their billing records are accurate and comprehensive. The possibility of human error has to be recognised and indeed one example of it was discovered in relation to one of the entries but it is common case that there is a high level of competence within Vodafone. The question on notice does not arise in this case since the maker of a copy is not now available although I am satisfied that Mr Brown was given every possible accommodation to ensure that he could be as fully informed as possible in order to present his expert opinion. Looking at the matters set out in article 5(3) it would not have been reasonable or practicable for the plaintiff to have produced the maker of the original statements since they can no longer be traced. The original statement in this case is the information contained within the computer systems of Vodafone and was contemporaneously made. It is possible that there was multiple hearsay in the production of the copies. There was no motive to conceal or misrepresent matters and the only editing of the information was designed to make it relevant and manageable. There are in my view no circumstances to suggest any attempt to prevent proper evaluation of the weight of this evidence.

[66] I am grateful to both Mr Uglow and Mr Brown for the careful and measured way in which they presented their evidence. The first issue which I am considering is the reliability of the individual entries asserting that a particular phone called another identified phone each of which was using cell sites for a duration of a particular number of seconds. The second issue is the extent to which I can be confident that the record before me of individual calls is comprehensive so as to exclude any possibility of being misled in particular by the absence of other calls. On the first issue although I cannot exclude the possibility of human error I consider that I can have a high level of confidence that the individual entries have generally been accurately transcribed or downloaded having regard to the high level of competence within Vodafone as a whole. On the second issue I draw a distinction between TRS1 and the floppy disk material. I am satisfied that there is a clear indication that the terms of interrogation of the phones examined within TRS1 was to establish

all incoming and outgoing calls for the relevant period. I am, therefore, satisfied to a high standard that the material is comprehensive for the period covered. I am unable to take the same view about the floppy disks. It is clear from the format in which this material was subsequently provided that the terms of interrogation were unclear and I cannot exclude the possibility that there are other calls which have not been disclosed as a result of the particular form of interrogation. The level of confidence that the material is comprehensive is, therefore, diminished. I accept, however, that the existence of individual calls to and from certain phones using identified masts is evidence that calls were made to or from those phones using those masts at the time identified and that I can be confident of that fact to a high level. In reaching that conclusion I am not in any way criticising the evidence of Mr Brown but it seems to me that the level of confidence to which he aspired was something akin to certainty.

[67] The purpose of the police investigation of the telephone system was to seek to identify the use of mobile phones in the transmission of the bomb into Omagh and the use of them to facilitate the making of the warning calls. The 585 and 980 phones were the mobile phone numbers which were thrown up for investigation as a result of that extensive and time consuming exercise. The records show the 585 phone travelling and making calls from Castleblaney at 12:41, Emyvale at 13:13, Aughnacloy at 13:29 and Omagh at 13:57. All of those calls were made to the 980 phone which was in the Republic of Ireland for the first 2 calls but in the vicinity of Aughnacloy for the third call and the vicinity of Omagh for the fourth call. 980 then used the Bridge Street cell at 14:09 to phone 585 which received by using Pigeon Top. This shows a clear direction of travel for the 585 phone from Castleblaney, the general vicinity in which the bomb car was stolen, to Omagh. The 980 phone is regularly in contact with 585 and the evidence suggests it is travelling in the same direction at the same time. The timings of the calls are consistent with the delivery of the bomb to the centre of Omagh after 2 pm. This broadly accords with the evidence of the witnesses who claim to have seen the maroon vehicle. The 585 phone makes a call to the 430 phone at 14:10. That phone receives the call by use of a cell site in the vicinity of the phone box from which the first warning call is made. 585 makes 2 further calls to 430 at 14:37 and a minute later when that phone is using a cell site in the vicinity of the other phone box from which warning calls were made. Both 585 and 980 return to the Republic of Ireland by 15:13 that day. I consider that the movements of these phones from the Republic of Ireland and back, the connection between them, the times of travel, the location from which they came having regard to the theft of the bomb car and the connection with the 430 phone in the vicinity of the call boxes from which the warning calls were made lead to an irresistible inference that 585 and 980 were the mobile phones which were used in the bomb run on 15 August 1998. There is no suggestion that the phone material has identified any other phones which could have played such a role.

The Evidence in Relation to Particular Defendants

[68] I now want to look at some of the evidence in relation to particular defendants. In conducting this exercise I do not intend to set out all of the relevant evidence in relation to each defendant but will focus on some of the material which in my view is of significant assistance in coming to a conclusion as to whether the plaintiffs have made out their allegation that any of these defendants were in breach of any obligations owed by them under the law of tort.

Evidence in relation to the first named defendant

[69] The case against the first named defendant depends entirely upon a connection which the plaintiffs seek to establish between the first named defendant and the 980 phone. The plaintiffs contend that the 980 phone was one of those used by the bombers on the bomb run. The telephone evidence, which I have discussed above, suggests that at 1541 that phone phoned the landline of the home of the first named defendant's estranged wife in Silverbridge. The plaintiffs contend that the call was made by the first named defendant and that this establishes his connection to the bomb run. The evidence upon which the plaintiffs rely is the hearsay evidence of Mrs McKenna.

[70] On 2 March 1999 Catherine McKenna was arrested by RUC officers at her home at Silverbridge. She was taken by helicopter to Bessbrook and was then transferred by car to Strand Road RUC station. Her first interview commenced at 2214 on 2 March 1999 and she had a total of 17 interviews before she was released on 5 March 1999. This was her first time in police custody. It was made clear to her that she had been arrested in connection with very serious offences. She had never been in trouble with the police before. She said she was separated for four or five years from the first named defendant and described him as an alcoholic. She said that she had no recollection of any phone call on the day of the bomb. She was advised that she would be detained for at least 48 hours and thereafter the police could apply for extensions to keep her for up to seven days. She was advised that time in a cell would concentrate her mind. She said that it could have been her husband who rang but she could not remember. She said that he generally only rang when he was drunk. She was told that it was not acceptable for her to say that she did not remember. She was asked to sign the interview notes but was shaking so much that she was unable to do so.

[71] Her first interview on 3 March 1999 commenced at 0957. She said that she had not slept. Her daughter Jacqueline who was heavily pregnant lived with her and it was suggested to her that it might be necessary to bring her in since Mrs McKenna was unsure as to whether she took the phone call. She

said that if it was from a mobile it was more than likely from the first named defendant but she could not remember it. She was told that police knew that the first named defendant was definitely involved in the incident. During the interviews that morning it was noted that Mrs McKenna was visibly shaking and anxious and the interviewing officer said to her that he did not think that she could afford to sit there for a number of days due to the state she was in. During an interview commencing at 1654 on 3 March 1999 Mrs McKenna said that although she could not remember the call it must have been her husband. During an interview commencing in 1923 it was put to her that if she could not remember taking the call it had to be either Gary, her 8 year old son, or her 25-year-old pregnant daughter. The interviewer indicated that it would be for the bosses or powers that be to decide whether each or both of them should be arrested. She continued to maintain throughout that evening that she could not remember the call but said that if he had called the conversation would have been about the children.

[72] On the morning of 4 March 1999 the first interview commenced at 0947. After caution Mrs McKenna was asked if they were going to get the truth is morning. She replied:

> "My husband made the call, I remember, I just (inaudible) think about it last night. He made the call that day and it was me took the call…. yeah, yeah, because I remember it now, ahm I remember just what he'd normally say, ah well Annie what's the crack, that's normally what he'd say to me when he'd ring, what are you at and I remember saying where are you and he said he was in Dundalk. That's I, I would normally say when he'd ring where are you and he said I'm in Dundalk because he said ahm to me was I heading out that night…"

Mrs McKenna said that the first named defendant had indicated that he might go down to Donnelly's pub for a pint that evening. She said she did not know why he rang. When asked why she had not mentioned this before she said she spent last night trying to study her brain as to when he had rung her and it just came. When pressed about the conversation she said that "would have been the full conversation". She said that she took the call because her young son was outside playing and she didn't think her daughter was in the living room. She was asked if she remembered if it was a sunny day or a sunny afternoon. She could not remember. She said that he said the sort of things he would normally say. When pressed further about why she had taken so long to remember this she said it had been awful lying in a cell without sleeping. In an interview commencing at 1229 on 4 March 1999 she said she could think no more. Later that afternoon she denied that she had failed to give a true account of the conversation on the phone. It was then put to her

that she was covering up for someone else but she denied that. There were various other possible callers in relation to that call that were put to her by police. She had no recollection about any other phone call she had on the day of the Omagh bomb.

[73] On the evening of 4 March 1999 police received information which suggested that Mrs McKenna might have been away during the weekend of 15 August 1998. When this was suggested to her she said that she was away sometime in August but could not think of the date. She then said that she was so sure that it was the first named defendant who phoned her but she thought now that she was away for that weekend. When she was away her daughter Jackie and her boyfriend Martin Bradley were in the house. She was asked to tell the truth about what happened and she said she did not know what happened. It was put to her that she wasn't in the house and she said that she went away. She was asked how she heard about the Omagh bomb and said that she'd say she and her boyfriend Peter were in a pub but she didn't know. She then agreed that she had told lies about being in the house when she was in fact in Mayo.

[74] In her first interview on 5 March 2009 starting at 0932 she was asked why she should say the first named defendant rang her when she was in fact in Mayo. She said that she just lay thinking and the police had said about him and that would be the normal conversation he would say to her. At the next interviews starting at 1145 she said that she was away on holidays but that she had indicated that the first named defendant had called her because it was being said to her that the call was made from a mobile phone and she thought it must have been him who rang. She agreed that she should not have made up the story about the first named defendant ringing her. Later she said she had just decided to say it was her who took the call and it was the first named defendant who rang because she couldn't think straight.

[75] By the afternoon of 5 March 1999 it had been established that Mrs McKenna had gone on holiday at the end of August and was apparently at home on 15 August 1998. She was asked about this and agreed that she was confused. She was then asked in light of that that if she agreed that the first named defendant had made the telephone call. She said she could not remember. She said she had had a drink in her that day and her memory was bad. She was asked if she had just said that the first named defendant had phoned to keep police happy and he said the whole pressure was on her and she just thought of something to say. She agreed that it was possible that somebody else took the call. She said if the first named defendant had rung she thought she would have remembered that even with drink on her. Later she agreed that she must have a drink problem and said that she might not have remembered the call with drink on her that Saturday afternoon. She said that she had no recollection of such a call.

[76] The first named defendant applied for leave to cross-examine Mrs McKenna and she attended on 21 October 2008. She said that she had no suspicion that the first named defendant was involved with the Omagh bomb until she was interviewed on 2 March 1999. She said that she was arrested out of the blue by security forces who arrived in number, dragged her out of her house, took her in a helicopter to Bessbrook and then drove her to Strand Road police station. She said that she was tortured for four days, told her children were going to be arrested and that she would not see her grandchildren. She had never experienced anything like this. She was frightened and upset. She said that she did not eat for four days, did not sleep at all during the four days in custody and cried the whole time. She could not remember anything about signing notes and she said she had to get a tablet every day to settle herself. She said the police put pressure on her to give the answers they wanted. She said that she had no recollection of any phone call on the day of the Omagh bomb. She said she was terrified all the time that she was being interviewed. She had nothing to do with the Real IRA or any terrorist organisation. She separated from the first named defendant in 1993. He had a drink problem. She agreed that because police suggested to her that she was in the West of Ireland she said she was there. She said that in 1998 the first named defendant was in his 40s and 5′7′′ or 5′8′′ tall. She said that she had attended at a Garda Station some days before her arrest where she had been asked questions about this phone call. In re-examination a portion of the tape containing her account that the first named defendant had made the phone call was played over to her but she did not remember saying any of that. She did not remember volunteering that it was the first named defendant on the morning of 4 March 1999.

[77] Mrs McKenna was an unsatisfactory witness because she appeared to remember very little by way of detail but it is difficult to know whether that is an indication of her of being evasive or a reflection of the fact that she is a lady with lifestyle issues which require medication. Her oral evidence was of no assistance to the plaintiffs and the question, therefore, arises as to what if any weight I should give to the statements upon which the plaintiffs rely. Having regard to the particular matters in article 5(3) of the 1997 Order it is clear that it would have been both reasonable and practicable for the plaintiffs to have produced Mrs McKenna as a witness. The reason they did not do so is, I am satisfied, because they considered her an unreliable witness. If she had been so called by the plaintiffs I consider that it would have been open to them to seek to have her declared hostile in relation to whether she gave the account that she gave on the morning of 4 March 1999. Clearly in this case the original statement was not made contemporaneously with the existence of the matters stated. The evidence did not involve multiple hearsay. I do not consider that the plaintiffs concealed or misrepresented matters in that at all times Mrs McKenna was presented as a witness who had given differing accounts. The statement was not an edited account and there is no suggestion of an attempt to prevent proper evaluation of weight.

[78] Pursuant to article 5 (1) of the 1997 Order I take into account that the statements made at interview by her were made in circumstances where it was being suggested to her that she was involved in some way in an extremely serious offence. She is on any view a very nervous woman. Her hands were shaking at the end of the first interview so much that she could not sign the notes. Her accounts have varied significantly. At first she said she did not remember any call. She then said that she did remember the call from the first named defendant but when pressed on this she gave an account of the call which tended to suggest that she was referring to what he would normally say. It was then suggested to her that she was actually away when the call was made and she adopted this suggestion. The plaintiffs attributed this change of approach to a meeting with her solicitor but in fact it is clear that she maintained the account she had given before the meeting with her solicitor after that meeting. Finally when it was demonstrated that she was not in fact away at the time of the Omagh bomb she reverted to the position that she simply could not remember whether the call had been made or not. In my view there is no basis upon which one could give any weight to the account given by this lady on the morning of 4 March 1999 taking into account all the circumstances. She had been pressed the previous evening in relation to whether the phone call had come from the first named defendant. That evening it had been indicated to her that it might be necessary to arrest her eight-year-old son and pregnant daughter. She was clearly having enormous difficulty in coping with the circumstances in which she found herself. She had indicated from an early stage that if the call was from a mobile phone it probably was the first named defendant but the thrust of her evidence is that she cannot actually remember any call on that day.

[79] There were two other pieces of evidence adduced in respect of the first named defendant. The first was the off tape interview of Terence Morgan with Det Chief Supt Houston that the first named defendant was not signed in at work on the morning of the Omagh bomb. I will have more to say about the reliability of Morgan's evidence but in light of the fact that there were no notes of that interview and that another police officer who was present at that interview had no recollection of the content upon which the plaintiffs rely I could not place weight on that statement. I also note that the first named defendant was convicted at the Special Criminal Court in September 2004 of unlawfully and maliciously having in his possession an explosive substance with intent by means thereof to endanger life or cause serious injury to property.

Evidence in relation to the Real IRA

[80] Evidence in relation to the emergence of the second named defendant was given by detective Chief Inspector Duff. In 1997 a fracture occurred within the provisional IRA. A small group emerged as a separate entity

known as the Real IRA and referring to itself as Oglaigh na hEireann. During the early part of its existence this group deployed small groups of armed men in the south Armagh area manning vehicle checkpoints and introducing themselves to occupants as the IRA, the real IRA. On 9 March 1998 the Irish Independent newspaper printed an article entitled "Dissident Provos Declare New War" as a result of contact by a dissident republican group using a recognised codeword claiming that it was the "Real IRA". This indicated that the organisation had formally set up IRA structures including the establishment of a caretaker army executive. As a result of this and other reports the media ascribed to this organisation the nomenclature "The Real IRA".

[81] In relation to the conduct of terrorist attacks the Real IRA have utilised a number of recognised codewords to reinforce the authenticity of their warnings. In particular the Martha Pope codeword was used on 30 April 1998 in relation to the car bomb at Market Square Lisburn which was defused. That codeword was also used in relation to a car bomb at Newry Road Armagh which was defused on 16 May 1998, a bomb at Newry Street Banbridge on 1 August 1998 and the Omagh bomb on 15 August 1998. In the case of the last three incidents the claim of responsibility was made by Oglaigh na hEireann. It is of some significance that after the defusing of the car bombs on 30 April 1998 and 16 May 1998 the period of time between the receipt of the warning and the explosion of the Banbridge bomb was reduced to 30 minutes and the period in the case of Omagh was 35 minutes. This is evidence of a deliberate policy to reduce the amount of time available to police to attempt to prevent the explosion and its consequences. After the Omagh bomb this organisation resumed its campaign of terror with an explosion at the railway line at Newry on 30 June 2000 and with numerous other terrorist attacks in Northern Ireland and Great Britain.

[82] By virtue of the Northern Ireland (Sentences) (Specified Organisations) Order 1998 the Real IRA and Oglaigh na hEireann were made specified organisations for the purposes of the Northern Ireland (Sentences) Act 1998. I have already referred to the numerous bomb attacks carried out using Coupaton timers of a particular manufacture and styles of bomb preparation displaying the sharing of knowledge at the very least in relation to the preparation of bombs. The connection between this organisation which uses recognised codewords and styles itself Oglaigh na hEireann and the continuation of a campaign of terrorist bombing over a prolonged period leaves me satisfied to a very high degree that the Real IRA were responsible for the Omagh bomb in that the directing minds of that organisation were committed to the carrying out of the terrorist campaign in every respect and were part of a concerted enterprise to that end.

[83] The real issue in connection with this defendant is whether as a matter of law it is possible to maintain an action against it. In legal terms the Real

IRA is an unincorporated association. Such an association cannot be made a defendant in its own right to action (see London Association for the Protection of Trade v Greenlands Ltd. [1916] 2 AC 15). Order 15 Rule 12of the Rules of the Supreme Court (Northern Ireland) 1980 provides that where numerous persons have the same interest in any proceedings the proceedings may be begun and continued against any one or more of them as representing all. At any stage of the proceedings the court may on the application of the plaintiffs appoint one or more of the defendants as representing all of those sued. The issue is whether this Rule provides a mechanism whereby the plaintiffs are entitled to maintain this action against the Real IRA.

[84] In order to fall within the Rule it is necessary to demonstrate that the persons represented should have the same common interest in defending the proceedings in question. This was discussed in Roche v Sherrington and others (1982) 1 WLR 599 by Slade J. That was a case in which the first named defendant was sued as the representative of Opus Dei and the case against him was dismissed on the basis that different members of the organisation would have had different defences depending upon whether they were members of the organisation on the date the relevant payments were made. In this case the point is similarly made that those who joined the Real IRA after the Omagh bomb would have a different defence to those who had been members at the time. In addition to that it is necessary to recognise that the nature of a claim for damages is a personal action against the wrongdoer and liability, if established, is not, therefore, limited to the common fund but extends to the entire assets of the person represented for his individual wrongdoing. That may bear upon the issue of whether there is a common interest in defending the claim.

[85] These are formidable arguments. If correct they would inhibit the plaintiffs from securing any judgment against the organisation's common funds which the plaintiffs could not attribute to individual defendants against whom liability had been established. The issue was considered recently in Oxford University v Webb and others[2006] EWHC 2490 (QB) by Irwin J. This was one of those cases arising from the protests in relation to the construction of a research laboratory on behalf of the University. The learned judge reviewed a number of apparently conflicting outcomes and was faced with something of the same arguments in relation to the representation of the ALF. He allowed the representative action to continue and founded himself on 2 critical features. The first is the equivalent of Order 15 Rule 12(3) which provides that a judgment or order given in proceedings under this rule shall be binding on all the persons represented whom the plaintiffs sue but enforcement against any person not a party to the proceedings requires the leave of the court. The second feature is the provision within the Rules asserting that the overriding objective of the Rules is to deal with the case justly. In those circumstances the law in relation to representative proceedings should not prevent the plaintiffs from recovering against the members of this

organisation who have consistently and relentlessly pursued the terrorist campaign identified in the evidence before me.

[86] Support for this approach is also found in John v Rees [1970] Ch 345. That was a case in which there was a dispute over the expulsion of a labour MP from the parliamentary party which led to a very lively constituency meeting. The chairman of the meeting purported to adjourn the meeting but others remained and passed various resolutions purporting to disaffiliate. The chairman then instituted proceedings on his own behalf and on behalf of the other members of the constituency party other than the defendants seeking orders that those decisions were of no effect. The court allowed the representative action to proceed on the basis that all members needed to have a determination of the issue even though all may not have had the same view as to the outcome. The guiding principle was set out by Megarry J.

> "The rule as to representative actions is an old Chancery rule which the Rules of the Supreme Court later made statutory. The present provision is Ord. 15, r. 12 . The classic statement is that made by Lord Macnaghten in Bedford (Duke of) v. Ellis [1901] A.C. 1 . He said there, at p. 8:
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> > 'The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the court required the presence of all parties interested in the matter in suit, in order **370* that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." From the time the rule as to representative suits was first established, he said, at p. 10, "... it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such

judgments as those delivered by Lord Eldon in Adair v. New River Co., 11 Ves. 429 , in 1805, and in Cockburn v. Thompson, 16 Ves.Jun. 321 , in 1809, without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire. 'The strict rule,' he said [ibid. 325], 'was that all persons materially interested in the subject of the suit, however numerous, ought to be parties ... but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application.' 'It was better,' he added [ibid. 329], to go as far as possible towards justice than to deny it altogether. He laid out of consideration the case of persons suing on behalf of themselves and all others, 'for in a sense,' he said, 'they are before the court.' As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. I do not think, my Lords, that we have advanced much beyond that in the last hundred years, and I do not think that it is necessary to go further, at any rate for the purposes of this suit."

This seems to me to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice."

I am satisfied, therefore, that in considering any representation order my objective should be to ensure that all parties that can be fairly dealt with before the court should have the issue of liability determined in respect of them.

Evidence in relation to the third named defendant

The statements of David Rupert

[87] By far the greatest volume of material upon which the plaintiffs rely is the hearsay evidence of David Rupert. I have already dealt with the admissibility of this evidence in Ruling No 9 and have given the plaintiffs permission to adduce it. David Rupert made an affidavit on 24 June 2004 in which he referred to various statements and e-mails generated by him and indicated at paragraph 10 his wish to give evidence in these proceedings. At paragraph 9 he indicated that due to the grave security considerations affecting his giving evidence he must rely on the US Federal Bureau of Investigation for advice on the most appropriate way for him to give evidence to meet security considerations. On 29 September 2006 I made an order that he could give evidence by video link in relation to the third and fourth named defendants and on 23 November 2006 I made a further order that he may give video link evidence against the fifth named defendant. In spring 2007 the plaintiff's solicitor contacted the FBI to secure the attendance of Mr Rupert as a witness. He was advised that Mr Rupert would not be available due to his current health and increased concerns for his security at that time. No further explanation for his inability to attend was provided despite repeated requests. It is clear that there are security concerns in relation to Mr Rupert and PSNI have assessed the risk to him as severe if he were to come to this jurisdiction to give evidence. The third named defendant made an application under the Hague Convention in order to make Mr Rupert available for cross-examination but this application was not successful.

[88] Rupert has previously given evidence against the third named defendant. In 2003 the third named defendant stood trial on a charge of directing terrorism between August 1999 and October 2000 before the Special Criminal Court in Dublin. Rupert give evidence over 14 days during 11 of which he was cross-examined by counsel on behalf of the third named defendant. His evidence was based on three statements made by him between January 2001 and March 2001. In preparation for that trial the prosecuting authorities sought disclosure from the FBI and British Security Service for both of whom Rupert had been employed as an agent. The disclosure consisted of approximately 2300 pieces of e-mail traffic and 4 ring binders of documents. It does not appear that the cross-examination of Rupert focused on any alleged inaccuracy in relation to the detail of the allegation that meetings between Rupert and the third named defendant occurred. The third named defendant's case at trial was that he had never met Rupert and consequently had not discussed with him any of the matters alleged although the plaintiffs point out that the evidence is that Rupert is a distinctively large man standing some 6′7′′ in height. The cross-examination was, therefore, directed towards seeking to demonstrate that Rupert was not a credible witness. Rupert did not rely on the e-mail documentation in his direct evidence and he was not cross-examined in relation to it.

[89] The evidence upon which the plaintiffs rely is contained in the three statements made between January and March 2001, a further statement

dealing with certain aspects of the e-mails, 2 statements dated 21 February 2002 made in connection with the proposed trial of R v McDonald and others at Woolwich Crown Court, the e-mails and certain small extracts from the transcript of evidence in the Special Criminal Court in 2003.

[90] The first statement was taken by Det Supt O'Sullivan of AGS. Although the statement was dated 12 January 2001 it was in fact taken over three days. In that statement Rupert described his previous work record between 1972 and 1992 by which stage he said he had built up a business owning 39 lorries and over 100 trailers. He said at that time he also owned two restaurants, three bars and a clothing store in upstate New York. His business went into receivership that year because of a road traffic accident which generated multiple lawsuits. In spring 1992 he visited Ireland for the first time and was introduced to a number of republicans in Bundoran and Sligo. He visited on a number of occasions over the next two years. In his original statement he said that he was approached by Patrick Edward Buckley of the FBI in summer 1994. He said that Buckley showed him 2 photographs of him taken with two different republicans. Buckley said that he was inquiring about his association with them. Rupert says in a statement that he then identified the two individuals and Buckley suggested they were both terrorists. He invited Rupert to co-operate with the FBI. Rupert returned to Ireland in September 1994 and on his return to the United States in autumn 1994 he agreed to provide information in return for payment of his expenses. In a subsequent statement dated 1 March 2001 Rupert varied his account in relation to the photographs. He said that he intended to say that Buckley told him that he had photographs of Rupert with the two Republicans. Mr O'Higgins points out that this is inconsistent with that portion of the first statement in which he says that he identified each of the individuals in the photographs. Although of itself not of great importance Mr O'Higgins points to this as evidence that Rupert in acknowledging any inaccuracy will try to cover it with a lie to minimise its importance. The photographs referred to in the first statement have never been discovered.

[91] Rupert travelled back and forth to Ireland during 1995 and 1996 and at his suggestion on 31 July 1996 he took over a public house known as The Drowes Bar in Leitrim on the basis of an agreement with Buckley that the FBI would help with any expenses associated with it in return for the information that Rupert could provide. Although he was working for the FBI Rupert was introduced in or about this time to Supt Dermot Jennings of AGS. Rupert says that he was asked to put aside 12 empty beer barrels by one of the republicans and he passed the serial numbers of these barrels on to Mr Jennings. The bar business was not successful and Rupert says that he returned to the United States in October 1996. In 1997 he made a number of visits to Ireland and in June of that year he agreed with Buckley that he would also work for the British Security Service. He agreed financial terms in September 1997 and made arrangements to stop off in London to meet his

contact on the way to and from Ireland. It was also agreed that both the FBI and the BSS would get a copy of any encrypted e-mail following his visits to Ireland in addition to the e-mails sent while there.

[92] Over the next two years Rupert said that he was in contact with various republicans associated with Republican Sinn Fein and the Continuity IRA. In August 1999 he states that he was invited to a meeting which he was told arose out of elements of the Provisional IRA, INLA, Continuity IRA and Real IRA now coming together and calling themselves Oglaigh na h-Eireann/IRA. On 29 August 1999 he says that he met with his contacts and travelled to the Four Seasons Hotel, Monaghan where he met the third named defendant for the first time. The third named defendant told him at this meeting about the new grouping and said that it had absorbed 98% of the Continuity IRA. He said the new grouping was to have a 12 member executive and a seven-member army council of which no more than two could be political members. The third named defendant told Rupert that he was very hands on in terms of procurement but was neither chief of staff or on the army council because he did not want the group to become known as his organisation. He referred to the establishment of a cell charged with computer hacking and electronics development as he saw cyber terrorism as the way forward rather than car bombs. The third named defendant indicated that Omagh was a joint operation with Continuity Army. He said that they had been training and equipping CA's people, giving them cars to put the bombs in and in some cases driving the boys to the jobs. They built the bomb but Continuity IRA picked the target and placed the bomb. They were both supposed to fix responsibility but in the end Continuity IRA took the position of condemning it even though it was 80% CA. Having regard to the earlier evidence of the warnings and claims in respect of the Omagh bomb it is clear that these passages describe the involvement of the Real IRA in the bombing and the direct involvement of the third named defendant in procurement and training. The third named defendant was also reported as admitting that "we took responsibility for it", meaning the bomb at Omagh. The third named defendant asked Rupert to use his influence to bring Republican Sinn Fein on board as the political front for this new military grouping in order to secure financial support from the United States. At this stage Republican Sinn Fein was in competition with the 32 County Sovereignty Movement for funding. The third named defendant stated that the 32 County Sovereignty Movement was not a political party.

[93] The detail of these events was set out in several e-mails between Rupert and his handlers during 30 August 1999. Within those e-mails there was a description of some of those involved and attribution of roles and statements to a number of individuals. The e-mail report of the conversations was detailed as was the report of the rather circuitous journey leading up to the meeting.

[94] Rupert left Ireland on 31 August 1999 but returned on 4 November 1999. Rupert discussed his plans for this visit in an e-mail dated 19 October 1999. The third named defendant points out that he anticipates arriving in London on 5 November 1999 but says in the body of the e-mail that his first meeting with the third named defendant is to take place on 8 September. The reference to September is clearly an error. He says later in his e-mails that his next meeting with the third named defendant took place on 7 November 1999 when he was picked up from the Fairways Hotel by the third named defendant's son and taken to their home. He claims that the third named defendant told him that he was the main person responsible for the Libyan arms deal back in 1986. When the third named defendant left the Provisional IRA he took with him all of the engineering and procurement capabilities. He also took with him all the arms dumps and returned that portion to the Provisional IRA that he did not want. The third named defendant claimed that he had full control over all the arms dumps held by the Provisional IRA and that the leadership did not know where the dumps were. The third named defendant said that he was the quartermaster for the Provisional IRA. He was attempting to unify all the dissident groups behind Oglaigh na h-Eireann and when he had achieved that he wanted to appoint a liaison person to the army council, an American based republican to report back to the American fundraising leaders. He spoke about targeting preferences and specifically indicated that in November 1999 he instructed a member of the army council not to proceed with a particular attack.

[95] This meeting was one of a number of meetings between the third named defendant and Rupert before Rupert returned to the United States on 22 November 1999. The third named defendant referred to a joint arms deal with the Continuity IRA from Eastern Europe in May 1998. It is clear from the context of this and other discussions that he was approached as the person responsible for procurement within the Real IRA. The third named defendant described the Real IRA ceasefire as purely a tactical manoeuvre designed to reduce the pressure on the paramilitaries after Omagh. He said that this allowed the group to reorganise and regroup prior to organising another military campaign. The third named defendant said that he wanted Oglaigh na h-Eireann's first hit to overshadow Omagh. At one of these meetings Rupert said that he was made the temporary liaison officer for the army council in the United States at the third named defendant's request. He also says that the third named defendant told him that the chain of command for reporting purposes was first to him, second to Liam Campbell whom Rupert says in his e-mails that he met during this series of meetings and third to the third named defendant's wife. It was during this series of meetings that Rupert also says in his e-mails that he met Colm Murphy, the fifth named defendant, for the first time. On 19 November 1999 Rupert said that he had a meeting at a housing estate on the west side of Dundalk where he was introduced to two members of the engineering staff by the third named defendant who ran the meeting. Various remote detonating techniques were

discussed as was the need for specific materials about which Rupert agreed to make enquiries. He says that he then provided some of these items having been cleared by the FBI and BSS to do so. The e-mails suggest that this meeting in fact took place on 13 November 1999 when there was a discussion about various items that were needed. At a meeting on 19 November 1999 the e-mails suggest that Rupert and the third named defendant discussed the need for the items identified in the meeting of 13 November 1999.

[96] Rupert returned to Ireland at the beginning of February 2000 and said in the statement that he brought with him $9,900 which he gave to the third named defendant in person. He also said that during this trip he had four meetings with the third named defendant. The first was in his house, the second was in Greenore, the third was with the engineers in a housing estate in Dundalk and the fourth was in the Carrickdale Hotel. He also had a meeting with Liam Campbell and Noel Abernathy in Dundalk.

[97] Rupert says that in the first meeting they discussed recruitment and a strategy of taking the war to the heartland of London. He says that the third named defendant told him that he was going to arrange a ranking volunteer to go to the United States to reinforce the chain of command and let everyone know that Rupert was the army's representative in the United States. Rupert says in his statement that the second meeting he had with the third named defendant at Greenore was his first meeting with the army council. In fact there is observation evidence of the third named defendant at his home during this meeting. Rupert's e-mails indicate that there was a meeting at the third named defendant's home on 16 February 2000 when Rupert worked on a computer in the house and that Rupert was then taken to a meeting of the army council which the third named defendant did not attend. Although in his statement Rupert states that the third named defendant handed over a large sum of money to the person in charge of finance and discussed a gun-running operation in Florida it is clear that these events did not occur at that meeting. The e-mails suggest that the discussion about the gun running operation occurred earlier in the day at the third named defendant's home. In his evidence in Dublin Rupert indicated that the e-mail account was more likely to be accurate. Rupert alleges that the fourth named defendant, Liam Campbell, was present at the army council meeting and in his e-mails says that the fourth named defendant was in charge of the army council meeting but that within the meeting it was indicated that the third named defendant and his wife were the high-profile leaders and very much in charge.

[98] Rupert says that the next meeting with the third named defendant took place in the Carrickdale Hotel. He says that the third named defendant indicated that there was a need for 2 particular types of pistol which were wanted urgently for a high security operation. He said that the third named defendant provided him with bogus receipts to provide to those in the United States who provided money for the families of prisoners. He directed Rupert

to make contact with a "sleeper" and to arrange to work with him to create a procurement network in the United States. Rupert says that the fourth meeting with the third named defendant included the same bomb engineers as before and the different electronics engineer. There was a discussion about long-delayed timing mechanisms for explosive devices. The third named defendant said that they had purchased a lot of weapons in Eastern Europe and still had to pay for them. He then gave Rupert a list of items that were needed including infrared detection devices, bug sweeping gear, laptops, detonators, cords, mercury switches, black powder and firearms.

[99] The next meeting referred to by Rupert was with the fourth named defendant, Noel Abernathy and another man unknown to Rupert. Rupert said that the sole purpose of the meeting was to introduce him to the ranking volunteer who was going to the United States at Easter to answer any questions people might have concerning operations. He says in a statement that he had a brief introduction to Abernathy and left the meeting. In his e-mails he says that he was not told Abernathy's name but described him and indicated that he was to arrive on 22 April 2000 at Chicago. Rupert was to meet him and Abernathy was to follow him out of the airport. The FBI photographed Abernathy's arrival and Rupert identified Abernathy in a photograph of himself and Abernathy at Chicago airport on 22 April 2000. Rupert described in his statement how he had taken Abernathy to various meetings and also describe meeting the "sleeper".

[100] Rupert says that he returned to Ireland on 19 June 2000. He described a meeting with the third named defendant where he says that the third named defendant discussed how the Hammersmith bombing which occurred on 1 June 2000 was carried out. He also said that the bomb at Meigh Bridge on 30 June 2000 on the railway line was carried out to monitor the reaction of the security forces in how they deal with the situation. The e-mails suggest that these discussions occurred in two separate conversations on 22 June 2000 and 30 June 2000. Rupert also says that he attended a meeting of the army council on the Greenore Road on 26 June 2000 at the direction of the third named defendant. The fourth named defendant was also present. Rupert says that there was discussion about the need for money, detonators, cord and ammunition and that the third named defendant directed the fourth named defendant to provide Rupert with an accommodation address for the "sleeper". Rupert had a further meeting with the two electronic technical people and the fourth named defendant after the army council meeting. Rupert returned to the United States on 4 July 2000.

[101] Rupert returned to Ireland on 17 October 2000. He said that he gave the third named defendant $6,300 and a new computer power unit for the third named defendant's wife which had been requested by the third named defendant. They discussed the Stewartstown car bomb which had occurred on 9 July 2000. The third named defendant said that it started out as a

planned attack on a troop movement but when the troops did not show up the volunteers decided to take it into town and let it go. They discussed attacks on the transport infrastructure in England and hoax bombs. He identified aspects of the political system in Northern Ireland as a target. The third named defendant stressed the need for funding and said that he was looking for some kind of state sponsorship. The third named defendant directed Rupert to move the "sleeper" and explained that he had had to take personal charge of an investigation into a killing of a young man in Belfast in light of the arrest of the fourth named defendant. The third named defendant described how he had threatened a volunteer that he would be shot unless he told the truth. Rupert arranged to pass on computer software which was subsequently collected. The third named defendant said that he had tried to make contacts for state sponsorship at a conference recently but nothing had come out of it.

[102] Rupert described how he spent an afternoon at the third named defendant's house installing the computer power unit for the third named defendant's wife. While there he noticed a pocket guide for hotels in Yugoslavia and a detailed roadmap for Belle de Terre in France. The third named defendant's wife told him that she was using a lacie external hard drive for sensitive material. The third named defendant instructed Rupert to set up a dump in the United States to move all the procurements to it and to make sure that the dump had no way of coming back to him. He instructed Rupert to obtain whatever procurements the "sleeper" had and put them in the dump. He explained that the fourth named defendant was to be replaced if he was not released by the following Friday in accordance with the rules of the army. The third named defendant explained that he had to take a more hands-on approach to the day-to-day operations of the army and was now having to give orders directly to people with whom the fourth named defendant dealt on his directions. Rupert returned to Chicago on 27 October 2000. All the matters discussed in this trip were set out in enormous detail in e-mails covering the period of the trip.

[103] On 20 December 2000 Rupert met the "sleeper" who supplied him with a shoulder bag full of various bomb-making equipment and other items contained in the procurement list authorised by the third named defendant. The meeting occurred with the full knowledge and consent of the FBI who recorded all of the activity in the room. On 11 January 2001 Rupert accompanied detective Inspector O'Sullivan to Dundalk where he pointed out the home of the third named defendant and his wife. He also showed detective Inspector O'Sullivan the house in which the meetings of the army council took place. He gave detailed descriptions by name and appearance of many people whom he met in connection with his work as an agent and described any role attributed to them in terms of terrorist activity.

[104] Duncan Campbell is an expert on electronics, computers and telecommunications. He was provided with 2293 pages of material which has been referred to as the e-mail material. He noted that the page numbers of the bottom of pages ran from 1 to 2184 and that there were in addition separately alphabetically lettered pages. He noted that there were separate manuscript numbers and markings at the top of many of the pages within the first 200 pages of the bundle which was the portion upon which he focused. He concluded that the appearance and form of the documents indicated that these were not e-mails but rather were printouts from encrypted files probably attached to e-mails. He concluded that the material was consistent with a system where Rupert and/or his handlers prepared messages to send to each other using a simple text programme. The message files were then encrypted using PC Crypto, creating an encrypted version of each file. The files were attached to e-mails and transmitted. On receipt of the e-mails the files would be received as encrypted attached files. PC Crypto was used to decrypt the encrypted files recovering them to plain text. The recipient manually added a header to the file and then printed it.

[105] There is no real dispute that this was the system used. There are statements and affidavits within the papers from Rupert, the FBI and BSS confirming that the documents comprised in the 2293 pages represented the product of e-mail traffic between Rupert and his handlers. In particular there are statements from Paul and Peter of the security services who state how they were in contact with Rupert over a period from May 1998 until November 2000 during which they say Rupert sent them detailed e-mails in relation to his activities in Ireland. The general content of those emails is recorded in their statements and accords both with the content of the email material on which the plaintiffs rely and the general terms of the statements made by Rupert in the criminal case. Mr Campbell noted that he has not been provided with any evidence or a document identifying who has produced these documents, how they were created, communicated, processed, printed and stored. Normally this information relating to the chain of evidence is an issue relating to reliability and accuracy of the documentary evidence.

[106] Mr Campbell also noted that there had been a process of pagination in relation to these documents. It is apparently standard practice in US legal, medical and business activity to give a series of documents sequential numbers stamped on the bottom right-hand side known as Bates numbering. Mr Campbell noted that in the format of the documents provided to him each message from Rupert was Bates numbered serially but messages and instructions from his handlers were inserted as extra pages with Bates letter A. Manuscript numbers were also applied to the early documents and it appears that the number was given to each document rather than a page. Mr Campbell notes that some documents were not present. He points to a part of an e-mail at Bates 81 whose first manuscript numbered page is not present. There are a small number of other such examples within the first 200 pages.

He also established a total of 20 manuscript documents which were not present within the selection of 200 Bates numbered pages. This suggests that there are other documents which were part of the manuscript series which have not been disclosed.

[107] Mr Campbell indicated that he was not in a position to comment on material beyond the first 200 pages although he had generally considered that material. The first 200 pages dealt with the period from November 1997 to April 1998. After 600 pages there appeared to be a formal change to include more header type information relating to times and dates. The material relating to the third named defendant began after page 1100. There were a number of redactions. Mr Campbell was referred to a series of e-mails relating to the third named defendant's wife and accepted that these had the appearance of authenticity. He indicated that the documents were not sequential and identified a number of occasions when earlier material appeared after later material.

[108] It is clear from Mr Campbell's evidence that the use of encryption has required some manual input in relation to some of this material and therefore there is the risk of some human error within the documents. Secondly it is apparent that in relation to the initial documents within the first 200 pages there appear to be other documents which have not been included in the material. The FBI in particular has made plain that the documents produced by it were for the purpose of assisting the defence or providing information that might undermine the prosecution so documents failing that test may not have been included. In assessing the weight to be given to this material it will be necessary to bear in mind that the original source documents are no longer available for checking, that there has been some human intervention in the production of the documents and that the court has not been in a position to scrutinise directly the FBI claim that all relevant material has been produced. I take into account that there was a disclosure hearing in relation to this material at the criminal trial where witnesses were available for cross-examination. I also note that the third named defendant discharged his counsel at the end of the cross-examination of Rupert in the criminal trial because of late disclosure.

Observations of David Rupert

[109] Det Sgt Finbar Healy is a Garda officer who has been involved in surveillance duties for approximately 25 years. At 6:30 p.m. on 18 February 2000 he was tasked to take up observation duties in respect of 83 Oakland Park Dundalk. Oakland Park is a street of terraced houses in a cul-de-sac with a lane at its end leading to the back of some of the houses. At 7 p.m. he saw a car driven by Stephen McKevitt, the son of Michael McKevitt, stop outside 83 Oakland Park. David Rupert, the only passenger, got out of the car and entered the house. Stephen McKevitt then drove off. At 7:30 p.m. a van

driven by Alan Browne drove into the cul-de-sac. Det Sgt Healy was advised of the approach of the vehicle and walked from the lane at the end of the cul-de-sac from which he had been observing. He walked towards the subject house as the van pulled up outside it. Michael McKevitt got out of the van and entered the house just as Det Sgt Healy was walking past it. The detective sergeant had a view of Mr McKevitt for a number of seconds. He said that he knew Michael McKevitt, Stephen McKevitt, David Rupert and Alan Browne at the time of these observations.

[110] At 8:55 p.m. that evening the detective sergeant says that he saw three people come out of the house. These were Michael McKevitt, David Rupert and another male who was unidentified. From his vantage point at the cul-de-sac some 50 to 60 yards away he saw that David Rupert and Michael McKevitt were engaged in a conversation near the front door in the garden of the house. The third male appeared to be standing to one side. A blue Ford Fiesta arrived in the cul-de-sac at 9pm and David Rupert left in it with the unknown male. Det Sgt Healy made a statement on 29 March 2001 identifying Gareth Mulley as the driver of that vehicle. In a duty report filed in February 2000 Det Sgt Healy recorded that he believed the driver to be Gareth Mulley. In cross-examination Det Sgt Healy said that he vaguely knew Gareth Mulley at the time of the duty report but knew him well by the time he made his statement. Det Sgt Healy said that he made his statement of 29 March 2001 on his own and could not say why the 2 colleagues with whom he was working that night both made statements stating that Mr Mulley was the driver rather than that he was believed to be the driver.

[111] Det Sgt Healy decided to follow the fiesta in his car which was parked outside the cul-de-sac. He ran up the laneway in order to reach his car. The fiesta drove to Wolfe Tone Terrace less than a mile away. It drove up broadside to the car of Stephen McKevitt. Det Sgt Healy decided to return to Oakland Park. He parked his vehicle outside the cul-de-sac and ran down the lane so as to have a view of the cul-de-sac. He says that a short number of minutes later Mr McKevitt's son, Stephen, came back to Oakland Park, collected his father and left with him.

[112] On 20 October 2000 Det Sgt Healy said he was on duty with Det Garda Frank McGrath in Dundalk. At 1:05 p.m. he saw David Rupert in the Fairways Hotel on his own. At 1:22 p.m. he saw him walk to the car park and get into the front passenger seat of a green Volkswagen Passat driven by Stephen McKevitt. The vehicle then travelled down the back roads to Blackrock and drove to 45A Beech Park the home of Michael McKevitt. Stephen McKevitt and David Rupert then got out of the vehicle and went into 45A Beech Park.

[113] In cross-examination Det Sgt Healy said that he had read the three statements that he had supplied for the criminal case against McKevitt and

also the list of questions prepared for this hearing before giving his evidence. He said that he remembered the events to a fair degree but that he relied on the statement for the timings. He made a report on the night of 18 February 2000 but his first statement was not made until after McKevitt had been arrested. He knew that the purpose of that statement was to put McKevitt and Rupert in a meeting together. He said that although it was practice in Northern Ireland and Great Britain to have a logkeeper for surveillance it was not the practice in the Republic of Ireland and he had never used one in 25 years of surveillance experience. He said that his practice was to dictate events and type them up on his personal organiser in his car as he got the chance. He would then download his report to his computer in the office. He said that he no longer had the dictaphone, personal organiser or computer. There was no system of keeping tapes and his personal computer had long gone as a result of technology changes. He said there was no photograph or video of the events because it had been too dark and he did not think that a photograph in those circumstances would be useful. He said that this was an intelligence gathering exercise which turned into a court case. He said that he had visited this location on the 2 days preceding the observation and subsequently attended with the mapper to show his position for the purpose of the criminal case.

[114] He said that the first thing of interest he noted that night was a man leaving the house at 6:55 p.m. He said that he had not included this in his statement as he had been asked to make a statement about observations of David Rupert and Michael McKevitt. He had asked his two other colleagues working on that evening to make statements about any observations of David Rupert or Michael McKevitt. It was put to him that it would have been unusual for McKevitt to stand outside this house for five minutes with Mr Rupert if as he was suggesting this was a clandestine meeting. Det Sgt Healy agreed that it was unusual but suggested that on reflection Rupert may have lured McKevitt out to the door. Det Sgt Healy could not recall that if there was a hedge outside 83 Oakland Park and was unable to describe any piece of clothing worn by McKevitt. It was put to him that there was a wall at the bottom of the cul-de-sac which would have blocked the view. He agreed that when he visited the scene with the mapper there was a wall at the bottom of the cul-de-sac but he said that the base block was old and the blocks above were new. He was fairly confident that there was only one block of the wall in place at the time of his observations and that it had subsequently been rebuilt. He agreed that he had not noted the time of departure of McKevitt from 83 Oakland Park. He said that he forgot to do so. He agreed that he had been on surveillance duty on the evening of 17 February 2000. He said that 6 p.m. Stephen McKevitt was observed driving on his own towards Blackrock. At 6:18 p.m. he was noted returning to Blackrock on his own. At 7:55 p.m. that evening Michael McKevitt was observed in the front room of his house at 45A Beech Road Blackrock. This is of some relevance as this was the alleged date of the army council meeting at Greenore which Rupert said in his

statement that the third named defendant had attended although his e-mails suggested that the third named defendant had not in fact attended.

[115] Det Garda Fergal O'Brien was also on surveillance duty at Oakland Park on the evening of 18 February 2000. He attended a briefing earlier that day. He recollected that Det Sgt Healy, Det Sgt Seamus Lynch and possibly Det Garda Lockley were also present. He took up duty at 6 p.m. He was in a van which he parked at the end of the cul-de-sac. He placed himself in the rear of the van so that he could not be seen. 83 Oakland Park was the second last house in the cul-de-sac and he was positioned so that he was approximately 30 yards away. At 7 p.m. he noted that David Rupert arrived in a vehicle driven by Stephen McKevitt. Rupert got out of the vehicle and went into 83 Oakland Park which was the house outside which the vehicle stopped. Rupert was identified to Det Garda O'Brien by Det Sgt Healy. Rupert stood out as a big man, both tall and broad. At 7:30 p.m. Michael McKevitt arrived in a vehicle driven by Alan Browne. Det Garda O'Brien knew Michael McKevitt. He saw the vehicle in which McKevitt was travelling stop outside 83 Oakland Park and McKevitt got out of the vehicle and into the house. At 8:55 p.m. he saw McKevitt and Rupert come out of the house and stand in the garden in conversation. A third male also came out of the house at the same time but stood somewhat apart and did not appear to take part in the conversation. At 9 p.m. a Ford Fiesta drove into the cul-de-sac and parked outside number 83 Oakland Park. Rupert and the unidentified male got into the car and drove off. McKevit went back into the house. Some minutes later Det Garda O'Brien saw McKevitt leave in a car driven by Stephen McKevitt which had also driven into the cul-de-sac and parked outside the house.

[116] In cross-examination Det Garda O'Brien said that he had no notes relating to the surveillance but had referred to his statement before giving evidence. The statement would assist his recollection of events but he would rely on it for times and registration numbers of vehicles. He made a statement in the early part of 2001 but could not recollect the date. There was no date of the statement but he knew that it was made after McKevitt had been arrested. As far as he could recall Det Sgt Healy had asked him to make the statement. He said that he made no notes or records of his observations on the evening but relayed messages to Det Sgt Healy who would have noted his observations. Det Garda O'Brien did not have a pen or paper. Det Sgt Healy was the member in charge of the operation and it was his job to take notes of the surveillance. Det Garda O'Brien had been involved in the surveillance unit since 1997 or 1998. He had used a camera in connection with a surveillance operation subsequently but did not have a camera on the night in question and could not recall any discussion at any stage about a camera. He said that Det Sgt Healy had told him which house was number 83 Oakland Park but he could not remember how he described it. The house was the second house from the end on the left-hand side travelling down the

cul-de-sac. He agreed that he had no notes, photographs or tapes from a dictaphone to corroborate his presence on the night in question.

[117] He said that he had seen a man leave the house at 6:55pm but had not referred to this in his statement. He said that he had been asked to make a statement in relation to David Rupert and Michael McKevitt and sightings of them. He said that he had subsequently been asked to make a statement referring to two men who had gone into the house at 7:05 p.m. Neither were David Rupert or Michael McKevitt. He was asked why he referred to Gareth Mulley as the driver of the fiesta when the duty report indicated that the driver was believed to be Gareth Mulley. He said that he had subsequently got to know Gareth Mulley between that sighting and the making of his statement. He did not know who the driver was on the night of the observation. He said there would be reports subsequent to February 2000 of surveillance operations in which he was involved in which Gareth Mulley was observed.

[118] He said that there was a breeze block wall at the end house in the cul-de-sac but that at the time of the observation it was completely broken. He thought it had been broken right to the very bottom of the wall. He attended the scene in 2003 with a photographer and noted that the wall had been newly built up. He could see a new build of three or four blocks onto the old wall. He could not say whether he would have been able to see number 83 Oakland Park if the wall had been in place. He said that he would still have seen some of it over the wall. He could not recall a hedge at number 83. He said that he had a full view of number 83. He said that he could not say how long he had been able to observe David Rupert when he was entering the house. He had been able to see him with Michael McKevitt for five minutes in the garden before he left. Michael McKevitt left some minutes after David Rupert left. It might have been five or six minutes later. He agreed that he had not recorded any time for Michael McKevitt's departure in his statement. He could not say why this time had not been logged. He agreed that he had no independent recollection of the times recorded in the duty report but was confident that Det Sgt Healy had recorded them accurately. He could not recall what clothing Michael McKevitt was wearing at this stage. He could not recall whether Michael McKevitt was wearing a baseball cap. He agreed that the duty report referred to the clothing of other individuals but made no reference to the clothing of Michael McKevitt.

[119] Det Sgt Seamus Lynch was also part of the surveillance unit on 18 February 2000. He had been briefed that Michael McKevitt whom he knew and David Rupert, an American, were both likely to attend a meeting of the Real IRA that evening. He was positioned at the entrance to the cul-de-sac. At 7 p.m. he noted David Rupert going into the cul-de-sac in a vehicle driven by Stephen McKevitt whom he knew. He saw the car stopped in the vicinity of 83 Oakland Park and saw Rupert getting out of the car but could not see

where he went from his position. At 7:30 p.m. he saw Michael McKevitt at the cul-de-sac in a van driven by Alan Browne. He had known Alan Browne for 8 to 10 years. He next saw David Rupert shortly after 9 p.m. when he was leaving the cul-de-sac as a passenger in a blue Fiesta. That car had to stop at the top of the cul-de-sac for a passing car. He could see that there was another passenger it in the back of the car who was leaning forward at that time. He also saw Michael McKevitt leaving Oakland Park shortly after 9 p.m. in his son's car.

[120] In cross-examination he agreed that he had no notes relating to the evening. It was the responsibility of the team leader Det Sgt Healy to make records with his dictaphone. He thought that in addition to those mentioned by Det Garda O'Brien Det Garda Kearns might also have been present for the briefing. That night Det Garda Kearns was covering the back of the house and Det Garda Lockley was somewhere in the area. He said that he had looked at the statement to refresh his memory and that his statement was made in early 2001. He agreed that there was no date on the statement and that this was contrary to his training. He knew at that time that Michael McKevitt had been arrested on serious charges. He could not explain why that was no date on the copy of the statement in court. He had not spoken to his colleagues before making his statement. He believed Det Sgt Healy had contacted him about the need for a statement by telephone. Det Sgt Healy advised him that the statement was to deal with any observations of Michael McKevitt or David Rupert or both on the night in question. He had not known Gareth Mulley on the night of the observation but had subsequently become aware of his identity. He remembered seeing Gareth Mulley shortly after this observation but could not recall if he had reported the sighting.

[121] He said that he had moved around on foot at the entrance to the cul-de-sac. He had parked his car at Cedar Wood just off the cul-de-sac. He had moved between the car, a shop and around the general area. He could not see Oakland Park from where his car was parked. Part of his role was as a spotter of cars entering the cul-de-sac. He left the area sometime after 9 p.m., possibly 15 minutes later. He agreed that cars had their lights on coming into Oakland Park. He said that the car in which David Rupert was leaving Oakland Park had to stop before it turned onto the road thereby affording him a longer view but agreed that he had not referred to this in his statement. He could not recall what any of the individuals referred to were wearing that night. He was not in a position to see the garden from his position at the end of the cul-de-sac. He could not recollect any discussion about following David Rupert although it was possible that Det Sgt Healy did so. He agreed that if Det Sgt Healy left there was no one to record any observations but said that he and Det Garda O'Brien would have informed Det Sgt Healy shortly thereafter. He said that he had refreshed his memory from the report of Det Sgt Healy when he made his statement. He would have seen it in the offices

of his unit shortly after it was made but could not recall if anyone was with him when he saw it.

[122] Det Garda Frank McGrath was on duty with Det Sgt Healy on 20 October 2000 in the vicinity of Dundalk. At 1:22 p.m. he saw a green Volkswagen Passat drive out of the Fairways Hotel. The driver of the vehicle was Stephen McKevitt and David Rupert was the passenger. Det Sgt Healy had identified David Rupert to Det Garda McGrath. He followed the vehicle as it drove to Blackrock and pulled into Beech Park. It stopped outside 45A, the home of Michael McKevitt, and David Rupert and Stephen McKevitt entered the house.

[123] On the evening of 23 October 2000 Det Sgt Noel McGuigan was contacted by Supt Kelly and asked to check the Ballymascanlon Hotel to see if Michael McKevitt and his wife were in the company of any other persons. Det Sgt McGuigan was quite close to the hotel and drove there on his own arriving a couple of minutes later. He parked his car and made his way to the hotel entrance. As he did so he saw Michael McKevitt, David Rupert and their wives emerging from the hotel into the car park. Although he did not know David Rupert at the time of the observation he subsequently came to know him. He had the party under observation for 8 to 12 seconds and they walked by each other. As he approached the entrance to the hotel they were walking out.

[124] He said that he had no notes of the observation. He had a dictaphone from which he made a duty report. He made his statement from the duty report. The dictaphone tape had been reused. He expected that there were some records to confirm that he was on duty in the general area of Dundalk. He was in charge of a surveillance team in the Dundalk area that evening. He could not remember the names of those on the team that evening. He said that the various teams that he led consisted of different persons at different times. There was no one with him when he was contacted by Supt Kelly and he believed that he was the nearest person to the hotel. He agreed that it was usual to have support when engaged in surveillance work. He said that when he arrived at the hotel he discovered that there had been a power outage and the normal car park lighting was not on. There was some emergency lighting. He passed within 4 to 5 feet of David Rupert and Michael McKevitt as he approached the front door of the hotel. Supt Kelly had told him that the McKevitts were believed to be meeting a couple from the United States. Subsequently Supt Kelly showed him a photograph in early 2001 shortly after McKevitt was arrested from which he was able to identify David Rupert. David Rupert was a strikingly big man standing 6′6′′ or 6′7′′. Supt Kelly showed him the photograph in order to confirm that he was the person that he had seen with Michael McKevitt that night. He agreed that he had not stared at Rupert and McKevitt. After Rupert and McKevitt left the hotel he contacted Supt Kelly and described Rupert. He had not asked for camera

footage from the hotel and in any event because of the power situation only an infrared camera would have given images. He did not consider it worth while at the time getting any video footage and was not involved in any investigation at that time. His statement was dated 8 May 2001, some months after the arrest of Michael McKevitt. He denied that his account was either mistaken or untruthful.

[125] Each of the Garda officers was carefully tested as to what he saw and the circumstances of his opportunity to identify Rupert or the third named defendant. At the relevant time each was on surveillance duty so that this is not a case of a passing observation. I find no reason to doubt the accuracy of the Garda officers. I am entirely satisfied that I can rely on this evidence to establish first that Rupert and the third named defendant both attended at 83 Oakland Park Dundalk on the evening of 18 February 2000 and that they engaged in a conversation in the street at the front of that house for approximately 5 minutes shortly before 9pm. That is supported by the fact that Rupert took Det Supt O'Sullivan to 83 Oakland Park on 11 January 2001 and identified it as the place in which he met the third named defendant. Secondly I am entirely satisfied that this evidence establishes that Rupert arrived at the home of the third named defendant on the afternoon of 20 October 2000 and that he was driven there by the third named defendant's son. There is some further support for that from the fact that Rupert took Det Supt O'Sulivan to that address on the evening of 11 January 2001 and identified it as the home of the third named defendant. On a search of those premises on 29 March 2001 a map of Yugoslavia referred to by Rupert in the statement which he had made earlier was recovered and the computer hardware described by him which he had installed was also identified. Thirdly, I am satisfied that Rupert, the third named defendant and their wives were socialising together at the Ballymascanlon Hotel on the evening of 23 October 2000. All of this material demonstrates that Rupert and the third named defendant were well known to each other. Rupert is a strikingly big man with a distinctive appearance as a result of this. The suggestion by the third named defendant that he could not remember meeting Rupert which he made at interview after arrest is plainly false as is the case put at his criminal trial that he never met Rupert.

The Woolwich evidence and the conviction of the third named defendant

[126] Witness E is employed by the Security Service and in 2000 had responsibility for the day-to-day conduct of agent operations against Irish terrorist targets outside Northern Ireland. In late 2000 he received intelligence from Rupert that the leadership of the Real IRA were seeking state sponsorship for their activities and were looking to establish contact with foreign governments likely to be sympathetic to their cause. The disruption and prevention of this was given the highest priority by the Security Service.

An operation was set up to make contact with the Real IRA purporting to be a state friendly to their cause.

[127] Initial contact between the role players and the Real IRA was by fax. This was followed by telephone contact at which a meeting was arranged with a representative of the Real IRA and a Security Service agent. The agent posed as a Lebanese journalist and messenger on behalf of the Iraqi intelligence service. That meeting took place in Dublin on 11 January 2001. Thereafter between 19 January 2001 and 28 March 2001 there were a series of phone calls between Security Service agents and members of the Real IRA identifying themselves as Karl and John. Even after the arrest of the third named defendant on 29 March 2001 the operation continued and eventually resulted in the detection of three persons in Slovakia in July 2001. They were extradited and subsequently pleaded guilty to charges of conspiracy with others including the third named defendant to import weapons.

[128] The telephone calls between Karl and the Security Service agents were taped. It is clear that Karl was directing the operation in Ireland and seeking to make arrangements to travel to Iraq for the purpose of collecting the weaponry. At an early stage in these conversations Karl refers to the fact that he had done business of this type before with that country. A compilation of the tapes was played over to Rupert and he made a statement stating that Karl's voice was that of the third named defendant for the criminal trial against the conspirators which was due to take place at Woolwich Crown Court. Evidence in relation to this tape was also given by Inspector Sheridan of AGS. He said that he had known the third named defendant for 29 years. He had spoken to him 10 or 15 times. These conversations had occurred when stopping him in cars or carrying out searches of his home. He had also had a long conversation of 8 to 10 minutes with him after a republican commemoration in 2000. A compilation of the voice of Karl was played over to him and he indicated that in his opinion that was the voice of the third named defendant. He agreed that he had not spoken to the third named defendant since 2000 and that some of the conversation he had with him were short particularly when stopping him at checkpoints. He agreed that there was nothing that distinctive about his voice. He agreed that he could not exclude the possibility that someone from the Louth area might speak similarly. In cross examination he accepted the possibility that he was wrong but stated that he had no doubt his own mind that this was the voice of the third named defendant. Although not directly material to this particular incident detective Inspector Sheridan also gave evidence about a passport application in the name of Richard Nevill Darling. He confirmed that the photograph on the application was that of the third named defendant.

[129] These matters are relied on by the plaintiffs as evidence that firstly the Security Service were receiving and acting on intelligence received from Rupert and secondly that the third named defendant was actively concerning

himself with the procurement of money and materials from a foreign state. The plaintiffs contend that it is of significance that Rupert's e-mail material states that the third named defendant said that he was directly involved in the procurement process and that he was also seeking some form of state sponsorship.

[130] The plaintiffs also seek to rely upon the fact that at the Special Criminal Court in Dublin in October 2003 the third named defendant was convicted of membership of the IRA and directing terrorism between August 1999 and October 2000. I have already indicated in Ruling No 13 that I consider myself bound as a result of the decision of the Court of Appeal in R v McIntyre (6 February 1979) to follow the case of Hollington v Hewthorn [1943] KB 587 and accordingly the conviction cannot in my view be admitted as evidence that the third named defendant has committed the acts on which the conviction was based. Although this rule has been reversed in relation to convictions in the United Kingdom by section 7 of the Civil Evidence Act (Northern Ireland) 1971 it continues to apply to foreign convictions. It is perhaps somewhat anomalous that under the bad character provisions relating to criminal evidence foreign convictions can now be admitted as evidence of propensity (see R v Kordasinski [2007] 1 Cr App R 17). The rule has been criticised notably by Lord Diplock in Hunter v Chief Constable of the West Midlands [1982] AC 529 where he expressed the view that the case was generally considered to have been wrongly decided. All the authorities were subsequently carefully reviewed by Mance LJ in Secretary Of State for Trade and Industry v Bairstow [2003] EWCA Civ 321 and the position remains in England and Wales that Hollington v Hewthorn is good law.

[131] In Ruling No 13 I indicated that such a conviction can be admitted at common law as evidence of bad character if probative and relevant. I referred to the cases of R v Murray [1995] RTR 239 and R v Krachner [1995] Crim LR 819. I consider that this proposition is also supported by the approach of Lord Phillips in O'Brien v Chief Constable [2005] UKHL 26. The issue in this case is whether any of the defendants inflicted harm on the plaintiffs by their alleged actions in connection with the planning, production, planting and detonation of the bomb. If evidence is adduced before the court that someone has engaged in such activity the surprise that the individual acted in that way is lessened somewhat if there is evidence that the same individual has been convicted of a recent offence related to terrorism. The label that one may give to the admission of the conviction is propensity but its effect is as set out in the previous sentence and its weight is limited. The weight will be affected by how far removed in time from the index events the subject matter of the conviction was. In this case the period relating to the conviction began approximately 1 year after the detonation of this bomb. The fact of the conviction could in my view have some modest bearing in circumstances where there was other material contributing to the cogent evidence needed to establish the allegations upon which the plaintiffs rely.

[132] The plaintiffs relied on Hunter v Chief Constable of West Midlands[1982] AC 529 to support the proposition that it would be an abuse of process for the third named defendant to defend this case in a way which called into question the validity of his conviction. In order to deal with that submission it is necessary to recognise the differences between the issue dealt with by the Special Criminal Court in Dublin in 2003 and that before this court. The Special Criminal Court was concerned with the activities of the defendant in the period between August 1999 and October 2000. This court is concerned with allegations relating to a period up to and including 15 August 1998. The principal volume of material introduced by the plaintiffs in this case is the extensive e-mail material. That material played no part in the criminal case. In essence the plaintiffs are contending that it is an abuse of process for the third named defendant to contend that the statements and e-mails of Rupert are not credible in this action. The courts have long protected an attack on a determined action by way of res judicata and an attempt to re-litigate an issue by way of issue estoppel. Neither of these arises in this case. At best this seems to be an attempt to establish a fact estoppel, i.e. that Rupert is credible. The law is very slow to do so (see Thoday v Thoday [1964] P 181) and I do not consider that I should do so in this case.

The Character of David Rupert

[133] The third named defendant mounted an attack on the character of Rupert based in substantial part on answers he gave during cross-examination during the criminal trial against the third named defendant in Dublin. Rupert was asked in the course of the Dublin trial about his reasons for engaging in intelligence gathering and he said that one of those reasons was because of his moral teachings. When pressed on this he said he was raised in a Protestant Christian household in rural northern New York and a particular moral teaching he referred to was that you should not kill people. He did not make any reference to the need for honesty until this was specifically put to him at which stage he agreed that this also came into it.

[134] Rupert accepted in his evidence that on one occasion within the e-mails he indicated that he was prepared to perjure himself. It appears that in November 1999 the IRS were pursuing Rupert for outstanding taxes. Rupert had already discussed this with the FBI. He received a registered letter from the IRS and expressed his concern in the e-mail that if there was an investigation it would turn up his intelligence gathering activities. In the e-mail he said that it would be open to him to file an offer as a result of which the IRS would not bother him any more. In order to do that he would have to provide a financial statement in person. In that context he said that if he wound up having to perjure himself that was fine with him. Mr O'Higgins pointed to the fact that he tried to pass this off as a quip when the matter was put to him in cross examination and contends that this is evidence of the fact

that Rupert will seek to manipulate the evidence to present himself in the best light. The reference to perjury appears to have arisen in the context of retaining his undercover status during any tax investigation. There is no evidence that he did perjure himself in connection with his tax affairs.

[135] In the course of his evidence Rupert described himself as a whore. He suggested that it was a bit of a slur towards somebody who works and gets paid for it. He described it as a minor slur. He also described himself as a mercenary. He suggested that in the United States that simply meant that he worked and was getting paid for the job. He said that he was aware from his handlers that there was an improper connotation to the term in Europe but did not know what it was. He was then pressed further on the meaning of the word mercenary and suggested that it carried some connotation of either military or intelligence. He agreed that he had never heard anybody else in America use the term mercenary in that context. The third named defendant relies on this as an indicator that Rupert was being encouraged by his handlers to minimise material tending to discredit him.

[136] In 1972 Rupert said that he got a job through his father-in-law selling pensions and insurance with North Western Mutual Life Insurance Company. He explained that he was entitled to draw against commissions but if the sale subsequently went bad money was owed by the agent to the company. He accepted that when he left the job there was money owing to the company. He accepted that he got a loan of $2000 from his father-in-law's boss. When asked if he paid it back he said that he was not there long enough to return the money. He then accepted that he simply did not pay him back. He filed for bankruptcy in 1974 and says that he included this debt so that he no longer had any legal obligation to pay it. When pressed as to whether it would have been honest to repay the money after the bankruptcy when he was able to do so he suggested that non-payment would be far short of murder. This appears to be a reference to an earlier statement in which he said that as a result of business law class he equated business as separate from the moral teaching of not to kill.

[137] In 1974 Rupert applied for bankruptcy. He was also charged in the same year with passing 2 bad cheques. He agreed that he was arrested in relation to the cheques but the charges were dismissed. He was unclear as to the circumstances in which this happened. The third named defendant points to the fact that 1974 was the year in which Rupert was approached by the FBI for the first time to assist in undercover work not connected with Ireland. A bankruptcy order was eventually made in 1977.

[138] Rupert again filed for bankruptcy in 1984. He said that this was as a result of catastrophic business circumstances. He explained that he and his wife were selling a house in Massena New York for $40,000. There was a mortgage of $30,000 on the property held by Massena Savings and Loan

Association. A discharge of the mortgage was sent in escrow to the purchaser's solicitor and she in error paid the money to Rupert rather than the bank. That left the bank without security. They immediately called in their loan but Rupert was unable to pay he says because he had reinvested the money. He said that the bank's attorney obtained summary judgment against him and seized his property as a result of which he filed for bankruptcy. Rupert claimed that the judge who heard the case had recently been the partner of the bank's lawyer and that he had conspired with the bank to provide the bank with the relief which they sought. Rupert claimed that the vice president of the bank who was pursuing the case had been at college with him and held a grudge against him. He accused the estate agent dealing with the transaction of behaving improperly since, he said, the purchaser was her brother. He contended that he had not behaved improperly because the bank still retained an entitlement to sue him on the outstanding loan which he had not paid. The bank had taken the chance of losing their security by sending the discharge to the purchaser's solicitor. In a deposition filed on behalf of the bank the vice president accused Rupert of fraud. Rupert said that he had no recollection of that accusation and had never seen the deposition before. This dispute apparently became a matter of some controversy in Massena and the Massena Observer of 8 January 2005 carried an apparent quote from Rupert saying that he inadvertently ended up with all the money from the sale and that he never disagreed with the fact that he owed the money, he was just jerking them around. Rupert could not remember making any such comments.

[139] Rupert could not remember according to his evidence whether the purchaser's attorney sued him. He said in evidence that this was the first occasion on which he had heard of that. He had been in Florida with his wife after this dispute arose and stayed there for approximately 1 year. His wife was under pressure from his father-in-law who was a vice president of the bank. He said that his business produced a good enough cash flow at that time to pay his bills. He said that although he could not remember the purchaser's attorney suing him he did remember the estate agent suing because they did not receive a commission. He could not remember being sued for defamation by the attorney. He agreed that he never paid the money back to the bank. Although in his evidence he had maintained that the judge was biased against him he had no recollection of discussing this with the attorney who represented him in the case.

[140] In cross-examination an order of the Supreme Court of New York relating to this matter was put to him showing that Rupert was represented by his attorney and that the judge who dealt with the case was not in fact the partner of the bank's attorney. Rupert said that he had believed for 20 years that that had been the case. He was then taken through some of the details of his bankruptcy application in 1985. He agreed that the application recorded a claim by the estate agent for fees and defamation. The form also included a

claim by the purchaser's attorney in relation to the $30,000 loan. There was also a debt of $10,000 to his second wife's father and commercial loans of more than $200,000. The bankruptcy application claimed that there had been a business theft problem. He agreed that he diverted funds from a business account into another account so that the bank could not find it. He said that he did not believe that his conduct was criminal and was never arrested for it. He described it as a civil offence. He agreed that many of the loans had been taken out in 1984, the year in which his bankruptcy occurred, but said that these were in connection with this ongoing business. He said that although he had been to the Cayman Islands several times he did not have an account there. The plaintiffs point to the elaborate story in relation to the judge which appears to be totally without foundation as evidence of the ability of Rupert to invent explanations to exculpate himself from wrongdoing. I accept that this demonstrates that Rupert was perfectly prepared to hide money from his creditors in 1984 and he has thereafter maintained that such conduct represents an acceptable business practice. This is evidence of dishonesty in relation to financial matters. I also accept that this material demonstrates that Rupert has been prepared to advance a claim of blame towards others on the basis of no or no substantial evidence where this might put him in a better light. Rupert's initial account in his statement about catastrophic business circumstances appears to have been incomplete by omitting the business debts which had been accumulated. All of this demonstrates a capacity to misrepresent the position especially where any issue of Rupert's financial reputation or interest is concerned.

[141] In 1985 Rupert claimed that he came up with the idea of an offshore gambling operation which would be facilitated by high-speed taxis back and forth to the boats. He claims that his friend introduced him to Diego Silver who claimed that he had previously been connected to General Pinochet and General Noriega. As a result of the latter connection he felt that he could bring the Bank of Panama into the operation. They had a meeting at an attorney's office. Rupert contacted a trucking friend in Syracuse to obtain an introduction to somebody who knew something about gambling. This friend introduced him to Guy Skelski who was also from Syracuse New York and came to visit Rupert and Silver in Florida. Rupert agreed that he might have described Skelski as a mob lieutenant but said that he did not know if that was correct. He agreed that such a description suggested a connection with the Mafia. He said that he and Silver had one meeting with this man at a restaurant. Rupert agreed that in his discussions there was reference to black money, being money which had been earned illegally or on which tax had not been paid. Rupert agreed that the original idea was to have a Bank of Panama on board to deal with black money on the basis that it was not illegal to operate in that way outside the jurisdiction of the United States. He accepted that black money included drug money but contended that if people wanted to use this facility for illegal purposes that would have been their option. In fact it is clear that none of the participants in these discussions had any

financial backing. Mr Silver claimed that he was protected by a colonel who was the former head of the Geneva Quick Response Team although this individual was never seen by Rupert. I accept that it is difficult to know how serious this project was. Rupert's evidence to the court in Dublin certainly suggests that he was prepared to facilitate criminal activity involving organised crime as long as there was some suitable financial reward for him.

[142] In 1992 Rupert applied for receivership in respect of his trucking company. In a statement prepared for the trial he said that this was due to the fact that one of his trucks was involved in a traffic accident involving multiple fatalities as a result of which there were lawsuits against the company in the region of $50 million. When cross-examined about this he said that the accident was the straw that broke the camel's back. He agreed that the accident occurred in 27 December 1992 but that the bankruptcy papers had been signed on 14 December 1992. He accepted that the business was already in trouble although he claimed that filing for bankruptcy was simply a device to hang on to his equipment long enough to gain refinancing for TAI his trucking company. He rejected a suggestion that the statement prepared by him had been misleading.

[143] In the period leading up to the bankruptcy most of the company's business was done with a company called B&W Cartage. The arrangement was that TAI could use trucks and trailers owned or leased by Cartage and avail of a credit system for payment of drivers and fuel. TAI then reimbursed Cartage. From the summer of 1991 Rupert engaged in a process of sharing ownership of the company with his ex-wife and various employees working within the company. During 1992, according to one of the employees, Rupert started building up the liabilities to Cartage as a result of which they issued proceedings in October 1992 alleging fraudulent misrepresentation. Cartage eventually processed a claim for $655,000 in the bankruptcy. As a result of all of this the FBI became involved in a wire fraud investigation about which Rupert did not apparently know until 2001. Rupert was not apparently interviewed about the wire fraud nor were any proceedings instituted in relation to it. It was alleged to the investigators that Rupert had forged a signature on a cheque and had issued several cheques to traders which had bounced. The total debts as a result of this bankruptcy were in or about $2.5 million. Despite this Rupert was subsequently able to drive around in a Rolls-Royce owned by another company but available to him. Those working with him formed the view that he was a dishonest person. Although it was noted that he made occasional trips to the Cayman Islands apparently on vacation there was no evidence that he held any accounts in that location. The third named defendant also points to the fact that in January 1999 Rupert suggested a cover story to his handlers in an e-mail that he had been in business in New York, that he stole all the money out of the company, hid it and bankrupted the company. In the e-mail he refers to the fact that he was accused of this by attorneys at the time and that he had been told that there had been an FBI

investigation into it. That might suggest that he knew about the FBI involvement rather earlier than he said. The third named defendant suggested that the cover story was in fact a true account of what Rupert had done. I do not accept that the evidence leads to an inference that Rupert had siphoned large amount of money off which he kept in the Cayman Islands but I do accept that this material supports the view that Rupert used the insolvency laws in a way which appeared to enable him to enjoy a very comfortable lifestyle while in business and a relatively comfortable lifestyle even after insolvency and that the probabilities are that some money was hidden from the creditors in this instance also. This episode also suggests that he was prepared to expose those close to him to significant financial risks which they probably did not appreciate at the time.

[144] Rupert was cross-examined about the form of insolvency in 1992. He said that a chapter 11 bankruptcy allowed a corporation to take time to breathe and take stock while rearranging their debts whereas a chapter 7 was final. Although he had suggested that the purpose of the bankruptcy was to allow time to take stock it appears that he filed a chapter 7 bankruptcy on 14 December 1992 apparently because he could not afford the $30,000 retainer for a law firm to file a Chapter 11. As a result of this bankruptcy Rupert owed the IRS $35,000 in withholding taxes. This debt was not extinguished by the receivership. The IRS applied penalties to it and at one stage it had reached a total of $750,000. Rupert says that he had an interview with an IRS agent after he moved to Chicago in 1993. He said that the options were to pay in full, offer a little payment which the government might accept or avoid the issue for 10 years at which point they claim would be dismissed because of the statute of limitations. Rupert said that he decided to go for the third option. He agreed that he attempted to keep his money out of the way of the revenue. He explained that he established a corporation in his wife's name and dealt in cash sums. That was the position he was in when in the summer of 1994 Mr Buckley of the FBI approached him. He says that Buckley did not advise him that he was at that time under investigation for wire fraud. This conduct is further evidence of Rupert's propensity to hide money from his creditors.

[145] The liability of Rupert for taxes was a subject of persistent cross-examination in the criminal trial. Rupert declined to make available his personal tax records and indicated that he had no recollection of the amount of tax he paid during the 1990s. He said that he dealt with the problem in relation to withholding taxes and the penalty in 2002 and that prior to that he had relied on cash and money in accounts held in his wife's name. The tax demand was settled for $25,000. He accepted that the FBI were involved in the settlement in that they put him in touch with the appropriate division of the IRS but claimed that he had not received any other benefit. He agreed that in a contract he made with the FBI in 2000 the FBI agreed to approach the appropriate officials to explore a resolution of Rupert's tax issues. Rupert received approximately £190,000 in salary and expenses between 1997 and

2002 from the British Security Service and approximately $1.25 million in salary and expenses from 1994 until 2002 from the FBI. Rupert also agreed that he requested $2 million after taxes to compensate him for security and the damage that agreeing to testify was going to cost him and his wife. He eventually reached an agreement under a co-operating witness contract which pays him $12,000 per month by way of salary and a further $7,000 per month by way of expenses. Part of that contract provides him with criminal immunity.

[146] Rupert accepted that his reputation in Massena was as a smuggler, drug dealer and bad guy. He said that this assumption arose from the fact that he was in the trucking business and his trucks travelled back and forth across the border. Although he denied any previous criminal or smuggling background a note made by a British Security Service handler stated that Rupert related much about his earlier criminal and smuggling background. In a clarifying statement the handler said that this related to his contacts with others who had been engaged in smuggling. Another note referred to an admission by Rupert that he had been involved in smuggling before he was recruited. Rupert denied this. He was referred to statements by State police officers which described him as a lifelong criminal and the suspicion that he has been using trucks for thefts, smuggling and the illegal importation of aliens, drugs, weapons and explosives. Rupert made counter allegations against the police officers which they have vigorously denied. Trooper Hamill maintains the Rupert used the Indian reservations as a means of effecting smuggling. Clearly the local police are of the view that Rupert was engaged in this activity but he has no convictions and there is no evidence to establish his involvement other than the opinion of local police which is apparently based on intelligence assessments the details of which have not been provided. It does appear that he has left a trail of bad debt behind him as evidenced by the statements of those who have come in contact with him and that some of those who have been involved with him view his conduct as fraudulent. I am not satisfied on the evidence that Rupert was a smuggler but for the reasons set out above I consider that his hiding of money in connection with his bankruptcies is evidence of dishonesty.

[147] Although Rupert said that he had only been arrested on two occasions in relation to bad cheques his attention was drawn to an incident in 1976 in relation to the transportation of minors across state lines. Rupert and his co-driver were making deliveries between Florida and California. They picked up two girls who were hitchhiking. It appears that both were underage. One moved on to another truck reasonably quickly but the second with whom his co-driver was apparently having a relationship stayed with them for approximately 1 week before police became involved when the truck broke down. Both Rupert and his co-driver were handcuffed, put in the back seat of the police car and taken to jail. Rupert was then released. He claimed that these activities did not constitute an arrest. He agreed that he could have told

police that it was his co-driver's intention to take the girl home and keep her like a little puppy or something. The third named defendant points to this as an attempt by Rupert to dissemble in face of the clearest evidence that he was in fact arrested in relation to this incident.

[148] Rupert's activities were disclosed to the AGS in 1996. Rupert met Det Supt Jennings who was then head of Crime and Security on two occasions that year. In June 1996 or thereabouts he met Jennings in the back of a van in a car park. Rupert asked Jennings about finances. Rupert says Jennings offered him mileage for the trip. At that time Rupert did not have a contract with the FBI and was anxious to ensure that he was paid for his continuing work. He says that as a result of this conversation with Jennings and the indication that he was not going to be paid by the AGS he decided to go back to the FBI. It appears that at or about this time that he indicated an intention to publish a book about his activities if a contract could not be agreed. Rupert had a second meeting with Jennings in a bar at an airport in Dublin with Mr Buckley of the FBI. In an e-mail after the meeting in the back of the van Rupert reported that Jennings expressed indifference to terrorist activity in Northern Ireland and said that he only cared about what happened in the Republic of Ireland. In cross-examination about this Rupert said that on reflection Jennings was really talking about his jurisdictional responsibilities. The third named defendant contends that this answer is a prepared answer designed to avoid difficulties that might otherwise arise in relation to Rupert's credibility. I accept that Rupert was disappointed about his failure to secure a financial arrangement with Jennings in the meeting in the van and that his email account reflected his impression at that time about the interest of Jennings in wider terrorist activity. I do not consider that the impression made upon Rupert in this single meeting is significant.

[149] It was sometime after these meetings before Rupert was recruited by the British Security Service in 1997. A heavily redacted communiqué between the Security Service and Washington dated 14 June 1999 has been disclosed in relation to a conversation between a member of the Security Service and Jennings. In that communiqué it is recorded that Jennings considered that Rupert had an overblown sense of his own importance and the value of his information. He also referred to a fuss over payments made or not made by Jennings and the note specifically records that Jennings used the word "lies" in relation to this. In July 1999 Jennings had meetings with the FBI and the British Security Service. A note of those meeting suggests that Jennings described Rupert as a "bullshitter" and that he was dismissive of his value.

[150] The British Security Service also disclosed a further note dated 8 February 2001 relating to a conversation between a member of the Security Service and Jennings. The note records the member of the Security Service reading an extract from an e-mail sent by Rupert in 1998 which alleged Jennings expressing indifference to terrorism in Northern Ireland and only

being interested in illegal activity in the Republic of Ireland. The note records Jennings saying that the statement was untrue. It was pointed out that if the defence got hold of it and Jennings denied the report's veracity that would make Rupert an trustworthy source. The note records that Jennings urged that the report be removed. The note then continued by suggesting a way of dealing with this issue. It recommended suggesting to Jennings an approach based on the fact that the agent may have misunderstood or misinterpreted what was said and on that basis that Jennings might on reflection have remembered the conversation.

[151] Jennings made a statement about some of these matters on 11 June 2002. In that statement he says that the term "bullshitter" was not an accurate reflection of his exchanges on the topic of Rupert. He was waiting to be convinced about Rupert's value. He was agreeable to Rupert's continued activity in the Republic of Ireland and intelligence gathering as long as he was kept fully informed. He stated that he had a number of conversations with representatives of the British Security Service on security matters and did recall a number of conversations in relation to e-mails sent by Rupert but would not have suggested to the British Security Service member that he should remove a document from the collection. He suggested the conversation may have been misinterpreted by the Security Services member. Assistant Commissioner Jennings as he then was attended for cross-examination in Dublin on 16 October 2008. He said that there was no AGS assessment of Rupert as he was not an agent of an ROI authority. Mr Jennings had no notes of meetings either with Rupert or with other agencies. He said that there was no requirement for him to maintain notes in relation to Rupert because Rupert was not an agent. He said that he had expressed his disappointment that he had not been told that Rupert was operating within the ROI and said that he waited to be convinced about his value. He denied that he had branded Rupert a liar. He said that there had been no arrangement for payment of Rupert and the Rupert had not looked for money in the van meeting. He said that there was no unpleasantness at the meeting although Rupert described it as an abortion of a meeting in his e-mail. He had no recollection of any discussion about Rupert being an untrustworthy source and did not urge that an e-mail should be removed. He did not recall any conversation about the credibility of Rupert. He had no recollection of describing Rupert as a "bullshitter" and said that this was terminology that he would not have used.

[152] In relation to the meeting in the van in 1996 nothing much turns on this. Rupert says that he did not pursue Jennings for finance and Jennings says that Rupert did not ask for money. Very little seems to have been achieved at the meeting. Jennings at that stage did not place any value on Rupert. When he was approached in 1999 by the British Security Service and told that Rupert was operating ROI Jennings says that he was disappointed that he had not been told about this earlier. He has no record of the meetings

and conversations which took place in June and July 1999. I am satisfied that he has given an account of those meetings to the best this recollection. The notes maintained by the British Security Service suggest that Jennings gave the impression that he was more dismissive of Rupert as a source than he now recollects. The note also suggests that Jennings was irritated by the fact that Rupert had threatened to publish a book about his time as an agent if he was no longer to be paid. Jennings says that he did not brand Rupert a liar but it seems that he created the impression at that time that he considered Rupert untruthful. Jennings has, however, been clear in his evidence that any such impression is inaccurate.

[153] The note of 8 February 2001 gives rise to greater conflict. Jennings says that he has no recollection of any discussion about Rupert being an untrustworthy source and he denies that he urged that any e-mail should be removed. He also says that he does not recall any conversation about the credibility of Rupert. All of this contradicts elements of the note prepared by the member of the Security Service. There is no doubt that the original call made by the Security Service to Jennings was for the purpose of alerting him to certain "trickinesses" in the paperwork. Jennings was unavailable when the call was initially made and rang back. The conversation seems, therefore, to have been an impromptu event where Jennings at least was unlikely to have had any relevant paperwork in front of him and the member of the Security Service may or may not have had the material. Of necessity the conversation could only have been general. If there was any discussion about redaction or exclusion the circumstances do not suggest that it could have related to specific redactions or exclusions as Jennings did not have the paperwork. What the materials do suggest is a willingness on the part of this Security Service member to both identify possible difficulties in relation to credibility and suggest responses by which these might be overcome. That, in my view, is reprehensible but in looking at its importance as a whole I take into account the fact that this unredacted document was made available on disclosure. The relevance of this disclosure is that it argues against the existence of any systemic attempt to prevent disclosure that might be of assistance to the defence or embarrassing to the prosecution authorities. I also bear in mind that the document itself recognises that the burden of proper disclosure is a matter for the authorities in the Republic of Ireland and there is evidence of considerable steps having been taken by those authorities to obtain disclosure from outside that jurisdiction. I do not consider, therefore, that this material supports the view that the British Security Service prevented proper disclosure nor do I consider that the evidence suggests that there was any encouragement by Mr Jennings to the prevention of disclosure. I consider it likely that Mr Jennings has an imperfect recollection of a conversation which had taken place a year before his statement and more than 7 years before his evidence in this trial. At most the note suggests that there was a spontaneous unconsidered reaction which was never thereafter adopted by Jennings. I note

that Mr Jennings made himself available for cross-examination not just in this trial but also in the criminal trial which took place in Dublin in 2003.

Further e-mail material

[154] The third named defendant also relies on a number of passages appearing in the e-mails. In an e-mail dated 17 December 1997 Rupert describes how he left the trucking business because of stress. The third named defendant says that there is no mention of bankruptcy or the road traffic case. Looking at the context, however, this appears to be the description of a cover story which Rupert was spinning to those with whom he was in contact and he describes this as a "smoke and mirrors approach". I do not attach significance to this.

[155] There are number of references to difficulty with accents. In August 1998 Rupert refers to the accent being heavy and his wife having trouble understanding. At that stage he was in or about the West of Ireland. There was also reference to having difficulty with a heavy local accent from Derry. There is one further reference to difficulty with an accent in August 1999 when Rupert refers to the fact that a particular individual has as much difficulty with Rupert's accent as Rupert has with his. There is a further reference in November 1998 to not understanding the SAS motto which was apparently recounted by another individual from Derry. There is no reference of any sort to Rupert having difficulty in understanding the third named defendant within the e-mails.

[156] There is a reference in an e-mail in March 1999 to a conversation with someone who said that the third named defendant was not the real leader of the 32 County Sovereignty Movement. It is clear from the context that this person was not a member of that organisation and there is no identification of any other person who allegedly was the leader.

[157] There are numerous references in the e-mails to complaints about finance and attempts to secure a suitable financial arrangement. It is beyond doubt that Rupert's involvement in this enterprise was significantly influenced by the financial reward that he obtained for it. It is also clear that he had considerable reservations about working with the gardai and in part this seems to be based upon his conversations with Jennings back in 1996. In October 1999 Rupert also specifically refers in the e-mails to the fact that there is an annual or two yearly bonus which he describes as being put into a savings account to be used like a retirement. There is no material to indicate that the bonus was other than a length of service bonus and specifically no material to suggest that it was related in any way to output. The payments actually made to Rupert by the FBI and British Security Service have been disclosed and Rupert was cross-examined on these issues within the criminal trial.

[158] In his record of the meeting on 29 August 1999 which was his first meeting with the third named defendant according to the e-mails Rupert identifies a man called Shane McGarrigal as the person appearing to be the number two man with responsibility for training. In his statement he refers to this person as Shane McGrane. It is submitted on behalf of the third named defendant that one would have expected Rupert to correctly identify the details of the name. In fact the e-mails suggest that the name was given to him by another individual and it is entirely possible, therefore, that he was given the wrong name.

[159] In an e-mail on 19 November 1999 Rupert gave an account of the third named defendant referring to a man called Liam Murphy. In reply his handler asked him did he in fact mean Liam Campbell, the fourth named defendant. Rupert corrected himself in reply saying that the stress must be getting to him. He also described the fourth named defendant as the CO of South Armagh and the second in command. The third named defendant contends that this is an indicator of manipulation. I do not accept that submission. This appears to me to be an indication of authenticity. At this stage the evidence suggests that there was no intention that any of this material should be used in any criminal prosecution or civil trial. This was an intelligence gathering exercise. The third named defendant has suggested the possibility that there may have been some interference with the content of these e-mails but this exchange in my view supports the proposition that the content represents the actual exchanges between Rupert and his handlers.

The application of the Civil Evidence (NI) Order 1997

[160] The material set out at paragraph 87 to 159 above bears on 2 questions. The first is whether the e-mail material represents a fair and accurate account of the actual traffic that passed between Rupert and his handlers and the second is whether the statements and e-mails represent a fair and accurate account of the exchanges between Rupert and the third named defendant. Both of those questions require consideration of the Civil Evidence (Northern Ireland) Order 1997. Article 3 of the 1997 Order provides that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. Hearsay means a statement made otherwise than by a person by giving oral evidence in the proceedings which is tendered as evidence of the matters stated and includes hearsay of whatever degree. The rule against exclusion of hearsay evidence is then balanced by safeguards in relation to it which are set out in articles 4 to 6 of the 1997 Order.

[161] Article 4 (1) of the 1997 Order provides that where a person adduces hearsay evidence of a statement made by a person and does not call that person as a witness any other party to the proceedings may with the leave of the court call that person as a witness and cross examine him on the

statement. Where leave is given by article 4(2) the court may adjourn the proceedings for the purpose of enabling the witness to be brought before the court or giving the party concerned a proper opportunity to investigate the statement of the credibility of the witness. As I have already indicated in paragraph 87 it was originally proposed that Rupert should give his evidence by video link in light of the threat to his security if he were to come to this jurisdiction. Rupert's affidavit of 24 June 2004 indicated that he wished to give evidence in these proceedings. In spring 2007 the FBI advised the plaintiffs' solicitor that because of issues relating to his health and increased concerns for his security he would not be available. Rupert has been in a co-operating witness programme and the input from the FBI makes it plain that they continue to be involved with him. The third named defendant introduced a statement from one person who claimed that he saw Rupert living openly in Massena recently but if that were right I would have expected considerably more evidence about it since Rupert as a result of his previous activities would have been very well-known in that area. I am satisfied that the plaintiffs have taken every reasonable step to seek to ensure that Rupert was available to give evidence in these proceedings.

[162] In light of the stance taken by the FBI the third named defendant then applied to me to institute a request under the Hague Convention for permission to call Rupert as a witness for the purpose of cross-examination. This request was transmitted to the relevant authorities in the United States. The reply indicated that the request could not be processed because it was necessary for the applicant to identify the address at which the relevant person resided. Since Rupert was in a witness co-operation programme no such address was known to any of the parties in this litigation. The United States authorities indicated that as a matter of law it was not open to them to conduct an inquiry for the purpose of establishing the address and the application consequently failed. I am satisfied, therefore, that the third named defendant has taken every possible step to secure the attendance of Rupert as a witness for cross-examination. Despite the considerable effort made by both the plaintiffs and the third named defendant Rupert has not given oral evidence in these proceedings.

[163] 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. In this case the third named defendant has had made available to him in the criminal trial disclosure of material by both the FBI and the British Security Service as well as that provided by the gardai and that material has been available to him in this trial. The evidence given in the criminal trial indicated that the test applied by both the FBI and the British Security Service was that disclosure should be made of documents which might undermine the prosecution case or assist the defence. Some of this material was used to cross examine Rupert during the criminal trial and the transcript of that trial has also been available to the third named defendant. The third named

defendant was concerned, however, that there was other documentation which might be helpful to him which had not been disclosed. In particular Mr O'Higgins made reference to any assessment of Rupert as an intelligence source which might cast doubt upon his credibility. The third named defendant pursued an application under the Hague Convention for disclosure of documents in relation to Rupert. The request was described by the United States authorities as presenting extremely sensitive legal issues for the FBI. In a response dated 5 March 2009 it was indicated that no documents can legally be produced in answer to the request. The third named defendant points to the fact the Rupert has not waived his privacy rights as a result of which each request must be refused as a matter of law in the United States. That refusal has to be seen, however, in the context of an individual in respect of whom the United States authorities have indicated that there remains a significant threat to his life. An analysis of the reasons for the refusal of disclosure also reveals that the reasons in each case also include reference to a refusal to disclose because of the confidential nature of the source and the documentation asserts that this ground affords the most comprehensive basis for refusing disclosure under the FOIA regime. The third named defendant has been aware since 2004 that the plaintiffs would rely upon Rupert and his present solicitors have been on record since 2007. After the conclusion of the hearing I was advised that the third named defendant is pursuing a separate proceeding in the United States in relation to disclosure. The respondent to that application apparently has 60 days in which to reply. I have not been given any indication as to how long it may take for the determination of those proceedings. I do not consider that I need to wait further. I am satisfied that the court has provided a proper opportunity to the third named defendant to investigate Rupert's credibility.

[164] Article 5 of the 1997 Order deals with considerations relevant to the weighing of hearsay evidence. Article 5 (1) provides that 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. Article 5 (2) requires the court to have regard in particular to whether the party by whom the hearsay evidence is adduced gave notice. I am satisfied that sufficient notice has been given in this case. Article 5 (3) set on a number of particular matters to which the court may have regard.

> "(3) Regard may also be had, in particular, to the following-
> (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
> (c) whether the evidence involves multiple hearsay;
> (d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[165] I want to look at the particular matters first. For the reasons I have given I consider that it would not have been reasonable or practicable for the plaintiffs to have produced Rupert as a witness. The next issue concerns whether the original statements were made contemporaneously with the occurrence or existence of the matters stated. Certainly the statements which were prepared for the purpose of giving evidence were not prepared contemporaneously. In relation to the e-mails this question raises the issue of whether the evidence is such that I should accept that the e-mails represent traffic that actually occurred between Rupert and his handlers. I have set out in paragraphs 83 to 87 the reservations on this issue by Mr Campbell who was the expert on electronics, computers and telecommunications called by the third named defendant. I accept that Mr Campbell has not been provided with the level of original documentation that he would normally expect in a case where he is asked to authenticate the e-mail traffic. I consider, however, that there is considerable evidence to indicate that the e-mails do represent such traffic. I have referred at paragraph 105 to the statements from Paul and Peter of the British Security Service which in my view are considerable evidence of authentication. The e-mails were provided by the FBI as part of its contribution to disclosure. The examination by Mr Campbell is consistent with the transmission of this material as encrypted attached files as indicated in paragraph 104 above. I accept that there has been some manual input in relation to some of this material and that the possibility of human error cannot be excluded. I also recognise the possibility that some e-mail traffic has not been included. I consider, however, that I can be satisfied to a very high standard of probability that the exchanges set out in the 2293 pages of e-mails represent actual traffic that occurred between Rupert and his handlers.

[166] It is clear that the e-mails were not made contemporaneously with the conversations to which they refer. In virtually all cases that are material to this case it appears that the e-mails were generated within hours of the end of lengthy meetings. Thereafter queries were occasionally raised by the handlers which might not have received a reply until the following day. Such delays inevitably give rise to the possibility of human error and it is necessary to be cautious, therefore, about any isolated comments since these might be consequent upon failure of recollection or misinterpretation. The next question concerns multiple hearsay. There is some material where Rupert records others as referring to the third named defendant, particularly in relation to his leadership role. Clearly it is necessary to be careful in relation to that material but it does not seem to me that this material conflicts in any way with the overall thrust of the material relating to direct contact with the

third named defendant other than in relation to the suggestion that the third named defendant was not the real leader. I have referred to this above in paragraph 156 but do not consider it significant.

[167] The next question is whether any person involved had any motive to conceal or misrepresent matters. In my review of the material adduced by the third named defendant in relation to Rupert I indicated that Rupert's motivation for embarking on this activity was the prospect of financial reward and I further indicated that there was evidence that Rupert had been dishonest in hiding money and misrepresented circumstances particularly where his financial interest or reputation was involved. Rupert was engaged under a financial contract in which his terms and conditions had improved as time went by and it seems fair to conclude that this was in part influenced by the assessment by his handlers of the quality of the material that he was producing. Rupert had, therefore, an interest in producing material that was likely to be considered significant. Accordingly in assessing the material that he did produce it is necessary to exercise care. What is striking, however, about the e-mail material is the extremely high level of detail in relation to the encounters not alone with the third named defendant but with many others. These details from time to time record events and activities of individuals in respect of which one would anticipate that the relevant intelligence agencies would have other sources. The level of detail includes identification by name of a significant number of people about whom it is highly unlikely that Rupert could have previously known. The extraordinary level of detail and the reference to these individuals is compelling evidence that these accounts represent an attempt to provide an accurate and comprehensive record of actual meetings.

[168] The next issue concerns whether the e-mails were edited or made in collaboration with another or for a particular purpose. Mr Campbell has pointed out that there was some human intervention in relation to the process of turning the encrypted material into text. I have recognised the possibility of some human error in relation to that although having regard to the body of material with which I am dealing that appears to be a very small risk. These materials were generated for the purpose of enabling the handlers to assess intelligence and I do not consider that there is any case for thinking that the content has been manipulated in any particular way. Mr Campbell did not carry out an analysis of the material specifically relevant to the third named defendant but I cannot exclude the possibility that some such material has not been included. I do not consider, however, that the issues raised by the third named defendant in relation to the management of this material raise any evidence of a risk that the material was being manipulated by the receiving agency to establish a case against the third named defendant. I do not consider that there is any evidence to suggest that there was an attempt to prevent any proper evaluation of the weight of the e-mail material.

[169] I now come back to the general duty in article 5 (1) of the 1997 Order to have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. The third named defendant points out that in this case the e-mail material together with the statements constitutes the potentially decisive evidence upon which the plaintiffs rely against him. I accept that without this evidence the plaintiffs could not succeed against the third named defendant. Although the third named defendant has drawn my attention to the important decision of the House of Lords in R v Davis [2008] UKHL 36 where the House asserted the importance of the adversarial nature of proceedings at common law in this case the hearsay evidence is admissible under the 1997 Order. I consider that I should approach the general discretion under article 5 (1) of the 1997 Order by considering in this instance how the weight of the evidence is affected by the court's obligation to ensure that the parties have a fair trial which complies with the procedural requirements of article 6 of the ECHR.

[170] The issue of how the court should approach the weight to be given to hearsay evidence where it constitutes the sole or decisive evidence has been considered in the criminal context recently in the European decision of Al-Khawaja and Tahery v UK (20 January 2009) and in the subsequent decision of the English Court of Appeal in R v Horncastle [2009] EWCA Crim 964. Both turned on the proper approach to the procedural protections provided by article 6 of the ECHR.

" ARTICLE 6 RIGHT TO A FAIR TRIAL

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
…

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In Al-Khawaja the European Court concluded that in a criminal case where the hearsay evidence constituted the sole or decisive evidence a conviction based upon such hearsay offended the protections contained in article 6(3)(d) other than in exceptional circumstances. The Court of Appeal in R v Horncastle carefully considered this decision and the authorities from the European Court which preceded it. The Court of Appeal concluded that the statement in Al-Khawaja was not supported by the earlier authorities in the European Court and that the test of whether admission of hearsay evidence offended article 6(3)(d) should be determined by examining the reliability of the evidence in the particular circumstances.

[171] This, of course, is not a criminal case and the minimum rights set out in article 6 (3) are, therefore, not expressly engaged. The entitlement to a fair hearing, however, will often involve consideration of many of the issues identified as minimum rights within article 6 (3) and in my view in this case it is necessary to examine whether the admission of this evidence and the giving of weight to it would render the hearing unfair. The minimum rights set out in article 6 (3) are in the nature of protections afforded to the individual against the State in circumstances where the state is seeking to exercise its retributive power of punishment against the individual. The minimum rights are, therefore, designed to establish a balance between the state and the individual which must, of course, recognise the substantial investigative powers available to the state and the extent of resource also available to it. The nature of the balance must also recognise the potentially significant consequences for the individual in terms of possible loss of freedom or deprivation of property.

[172] 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 any conversations between Rupert and the third named defendant. The plaintiffs' case, however, is that the third named defendant was a party to those conversations. He is, therefore, in a position to deal directly with the assertion that he was engaged in the conversations recounted by Rupert in the e-mail correspondence. It is clear, however, that the requirement for a fair hearing requires observance of the principle of equality of arms and the principle that proceedings as a whole should be adversarial. In litigation involving opposing private interests this requires that each party must be afforded a reasonable opportunity to present his case -- including his evidence -- under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent. Each party must also be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (see Dombo Beheer

v The Netherlands (1993) 18 EHRR 213 at paragraph 33 and Buchberger v Austria (2003) 37 EHRR 13 at paragraph 50).

[173] In this case the material upon which the plaintiffs rely has long been known to all of the parties. I have already indicated that I consider that the defendants have had a proper opportunity to investigate the credibility of Rupert. The defendants have had the advantage of the disclosure of which was made within the criminal trial. That material has been used in accordance with article 6 of the 1997 Order to introduce evidence which could have been put to him in cross-examination if he had attended as a witness but which could not have been adduced by the defendants if he had given evidence because of the collateral evidence rule. The defendants have had available to them the transcript of the extensive cross-examination of Rupert by experienced defence counsel which was directed to the question of his credibility. That is the factual issue which the third and fifth named defendants contest at this trial. Although the e-mails were not relied upon by the prosecution or defence in the criminal trial they were available to the third named defendant at all times and it is clear that the substance of the statements repeats in summary form many of the matters referred to in the e-mails. I accept that there is some disadvantage to the third named defendant in that I am not in a position to assess the demeanour of Rupert as a witness. It is important to note, however, that the jurisprudence of the European Court recognises that the testing of the witness might occur before the trial and it does not appear, therefore, that this disadvantage is perceived to be substantial according to the Court's case law. I also accept that there may be matters which Mr O'Higgins in cross-examination might pursue with Rupert. The third named defendant suggests that Rupert might have been cross-examined as to whether his e-mails really did connect the Real IRA with the Omagh bomb. He makes the point that the e-mails never asserted that the third named defendant was in the Real IRA. The organisation in respect of which the third named defendant was convicted was Oglaigh na hEireann, not the Real IRA. All of these points it seems to me are in any event the subject of submission on behalf of the third named defendant. It is asserted that there would have been further cross-examination about Rupert's tax affairs but given the extensive cross-examination to which I had been referred it is difficult to see how the third named defendant is substantially disadvantaged by the lack of the opportunity to reopen that material. There are circumstances in which the reliance on evidence where there was an inability to require a witness to attend for cross-examination could constitute a breach of article 6 (1) of the ECHR but in light of the extensive previous cross-examination of this witness as to his credibility by experienced counsel on behalf of the third named defendant and the extent of disclosure of material in relation to the credibility of this witness by agencies in the United Kingdom, the United States and the Republic of Ireland I consider that I can give substantial weight to this evidence without offending the third named defendant's fair trial rights under article 6 of the ECHR.

[174] I have already indicated that there is in my view substantial evidence proving that the e-mail documentation represents the actual exchange of materials between Rupert and his handlers although I accept firstly that some material be missing and secondly that there is the possibility of human error having regard to the limited interaction necessary to deal with the encryption of these materials. I now move on to consider to what extent I can give weight to this material as an accurate record of events and conversations. I start by recognising that there is evidence of dishonesty in relation to financial matters relating to Rupert and that the fact that Rupert was being paid for his services should properly cause me to exercise caution in relation to the acceptance of the accuracy of this material.

[175] I start off by noting that there is overwhelming evidence that the Rupert account in relation to attendance at meetings and gatherings is accurate. I have set out in some detail the evidence dealing with the observations of 18 February 2000, 20 October 2000 and 23 October 2000. There were numerous other pieces of evidence given in relation to Rupert's attendance at meetings and commemorations connected with dissident Republicans. On a number of these occasions the third named defendant was also present. I am confident, therefore, that the e-mails represent a reliable record of Rupert's activities and that the evidence demonstrates that Rupert was an active participant in events organised by dissident republicanism as indeed was the third named defendant. This is important because it establishes their common interest.

[176] The statements also help to copper-fasten the observation evidence in relation to Rupert attending the third named defendant's home. Specifically the statements refer to a particular travel book and a piece of computer equipment both of which were discovered in the third named defendant's home when it was searched. There is no doubt, therefore, that Rupert was a visitor to the third named defendant's home. That is further evidence of the strength of the relationship between them which supports the observation evidence of then talking together. Given their common interest in dissident republicanism the evidence is indicative of the fact that matters relating to that would have been discussed between them.

[177] It is submitted on behalf of the third named defendant, however, that evidence in relation to the fact that meetings occurred cannot corroborate Rupert's evidence about what was actually discussed. There are, however, a number of instances which in my view assist in coming to a view about the accuracy of the content of the conversations recorded in the e-mails. The first relates to an e-mail dated 16 February 2000 where Rupert indicated that he was introduced to a ranking volunteer who was to arrive at Chicago on the last weekend of April. Rupert described what the arrangement for meeting him was and a photograph of his arrival was duly taken by the FBI. A second

example relates to the operation in December 2000 where with the agreement of the FBI Rupert met the "sleeper" and obtained bomb-making and other equipment from him. Rupert had identified this person and his role on a number of occasions through the e-mails and this operation was in my view supportive of the accuracy of his account about this man. Although not of direct relevance to the third named defendant Rupert had also in an earlier e-mail referred to the change of policy in relation to the duration of bomb warnings.

[178] I consider, however, that the most telling evidence in relation to the accuracy of the content of e-mails is that derived from the Woolwich material. I consider that the evidence of Inspector Sheridan is 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 Service personnel is the third named defendant. These conversations demonstrate firstly the third named defendant's active involvement in relation to procurement of terrorist materials. Rupert e-mails had specifically recorded the third named defendant asserting that he was hands on in relation to procurement. Secondly the reference in the tapes by the third named defendant to an earlier transaction with the foreign country concerned supports the account given by the third named defendant to Rupert that he had been engaged in procurement as far back as 1986 on behalf of the provisional IRA. Thirdly this material also supports the assertion that the third named defendant was a quartermaster in the provisional IRA before leaving them as stated by Rupert in his e-mails. Fourthly it demonstrates that the third named defendant was a committed terrorist and is indicative of the fact that he had a leadership role in relation to procurement. All of this is both consistent with and indicative of the accuracy of the statement in Rupert e-mails that the third named defendant had defected as the quartermaster of the provisional IRA and had specific responsibilities in relation to procurement for the Real IRA. Fifthly this entire operation was devised as a result of the intelligence provided by Rupert that the third named defendant was trying to organise state sponsorship for his terrorist activities. In light of the evidence in relation to the nomenclature used by the Real IRA I have no doubt that the reference to Oglaigh na hEireann as the organisation to which the third named defendant was committed was in fact a reference to the Real IRA.

[179] I am satisfied, therefore, that I should give considerable weight to the content of the e-mail traffic. I consider that the only reasonable inference to draw from the description by the third named defendant of his departure from the provisional IRA taking with him as quartermaster such material as he felt might be useful is that he held and has always held a significant leadership role within the Real IRA which is reflected by the fact that he was certainly its leader in August 1999. In his leadership role he was undoubtedly responsible for encouraging the campaign of bombing in 1998 which

culminated in the Omagh bomb and the availability of the materials to prepare that bomb could only have occurred with his support and approval.

Evidence in relation to the fourth named defendant

[180] Rupert records his first meeting with the fourth named defendant in an e-mail dated 8 November 1999. The meeting was attended by the third named defendant and the fourth named defendant was introduced as a member of the Army Council. The meeting continued for a period of 4 hours. Most of the e-mail was taken up with comments from the third named defendant but towards the end Rupert records the fourth named defendant saying that they expected to have lots of opportunity to take on new members defecting from the provisional IRA but only wanted men who they felt had something to offer.

[181] Rupert's next record of meeting the fourth named defendant was on 17 February 2000 when Rupert attended a meeting of the Army Council. He said that the fourth named defendant was in charge. This was a meeting in respect of which there was a difference between the e-mail and Rupert's statement as to whether the third named defendant had attended. Rupert records that those present alluded to the third named defendant is being a high-profile leader and very much in charge. In the course of this discussion Rupert refers to the fact that the Real IRA ceasefire after Omagh was mentioned. The fourth named defendant said that he voted against the ceasefire. He said that the army council had been changed during the summer of 1999 and that he had been re-elected.

[182] Rupert met the fourth named defendant again on 23 June 2000 in the company of the third named defendant. They discussed preparations for a meeting of the Army Council and the third named defendant indicated that Rupert would be dealing with the fourth named defendant as the third named defendant would be away.

[183] Rupert records a further meeting of the Army Council on 26 June 2000 which was attended by both the third named defendant and fourth named defendant. He describes how the third named defendant was in charge but kept trying to give the floor to the fourth named defendant.

[184] In an e-mail dated 30 June 2000 Rupert refers to an operation where a bomb was placed on a railway line. The third named defendant stated that this operation was carried out to watch the response of the security forces but the fourth named defendant spoke about the operation and appeared to have been directly in charge of the job. Later in that long e-mail Rupert referred to a meeting with the fourth named defendant and 2 people concerned with computers. He described how the fourth named defendant was in charge of operations within the organisation.

[185] By October 2000 the fourth named defendant had been arrested and was being held in custody. The third named defendant informed Rupert that in those circumstances he was in charge is now that the fourth named defendant had gone. There is also independent evidence from Inspector Sheridan that Rupert and the fourth named defendant were in each others company at Dundalk in November 1999 and at the Carrickdale Hotel in June 2000. The fourth named defendant was subsequently convicted in the Republic of Ireland of membership of the IRA, otherwise Oglaigh na hEireann on 3 October 2000 and 29 July 2001.

[186] There was also relevant phone evidence in relation to the fourth named defendant. I have already found that the 585 phone was one of the phones used on the bomb run. That phone received a call from the 980 phone on at 14:09 on 15 August 1998. At 14:10 the 585 phone rang the 430 phone which was using a cell site in the vicinity of the telephone box from which the first warning call was made. The 585 phone again called the 430 phone at 14:38. Daniel Hughes who is now deceased was interviewed by police in June 1999. He was asked about the 430 phone. Although it is registered to a person for whom the fourth named defendant used to work Hughes said that it was in fact used by the fourth named defendant. He explained that he had the number in his own phone under the name "Liam C". He also had a notebook with the number recorded against the fourth named defendant's name. Hughes also stated that he had contacted the fourth named defendant on the night of the bomb using the 430 phone.

[187] I have already dealt with the weight to be given to the Rupert material in considering the position of the third named defendant. I am satisfied on the basis of this material that there is cogent evidence that the fourth named defendant was a member of the Army Council of the Real IRA at the time of the Omagh bomb. I am further satisfied that he held an important leadership position in the Real IRA both at that time and subsequently. I am satisfied that there is cogent evidence that the 430 phone was being used by the fourth named defendant at the time of the Omagh bomb and that the two communications between the 585 phone and the 430 phone on the day of the bomb demonstrate the fourth named defendant’s involvement in directing the operation and participating in it.

Evidence in relation to the Fifth named defendant

The interviews of the fifth named defendant

[188] Colm Murphy was arrested at home on the morning of 21 February 1999. He was taken to Monaghan Garda Station where he was interviewed between 21 February 1999 and the evening of 23 February 1999. He was then charged with conspiring to cause an explosion. The charge related to the

Omagh bomb. The charge was based on admissions allegedly made by him together with evidence in relation to the use of this phone 585. There were three teams of interviewers who participated in the interviews of Murphy. I heard from two of them, detective Sergeant McGrath and Det Garda Hanley and Det Garda King and Det Garda Reidy. The third interviewing team was Det Garda Donnelly and Det Garda Fahy. It is common case that this team interviewed Murphy between 3:45 p.m. and 5:45 p.m. on the afternoon of 22 February 1999. Three pages of notes were taken in relation to that interview. The notes were subject to ESDA examination and evidence on this was given by Mr Hughes, a forensic document examiner. This evidence demonstrates that the third page of the interview notes was rewritten to exclude two lines of the interview with Murphy where he allegedly confirmed that his wife was Sile Grew's sister. It is common case that this information is wrong and the fifth named defendant submits that the interview notes were changed because it would have become apparent that this information was inaccurate and the interview would thereby become subject to question. Donnelly and Fahy were charged as a result of this but the case against them collapsed apparently as a result of continuity issues. Neither of them gave evidence at this trial. There was considerable evidence about the conduct of the interviews and Mr Dermot Fee QC on behalf of the fifth named defendant mounted a challenge to the reliability of the interview notes prepared by the gardai from lunchtime on 22 February 1999 until Murphy was charged. I consider it appropriate to set out in some detail the evidence in relation to the interviews.

[189] Murphy was interviewed on six occasions by detective Garda Hanley and detective Sergeant McGrath between 21 and 23 February 1999. The first interview started shortly after 3:30 p.m. on 21 February 1999. Murphy was cautioned and advised that the interviewers were investigating the unlawful possession of explosive substances at Dundalk between 13 and 15 August 1998. He said that he did not know anything about it. He later told his interviewers that he was never in Omagh in his life and was not there on the day of the bomb. He agreed that he had owned a mobile telephone for four years and that the number was 0872425585 (the 585 phone). This had also been established at the time of his arrest and there is no issue about it. He denied that he gave the telephone to anybody else but said that someone such as a family member or worker might have used it while he was there. He denied that he would loan it to anyone for a day or a few hours. Det Garda Hanley said that Murphy agreed that the notes of the interview were right but refused to sign them. The interview ended at 5:20 p.m.. There was no challenge to this interview.

[190] The second interview conducted by detective Garda Hanley and detective Sergeant McGrath started at 10:30 a.m. on 22 February 1999. According to the gardai when cautioned he said that he wanted to talk to his solicitor before explaining anything further. He again denied that he was in

Omagh prior to the bomb going off. He said that the only time he was in Tyrone was 30 years ago when he was in Dungannon. When asked how his mobile phone could be linked with Aughnacloy, Bridge Street Omagh and Mount Pullaght Omagh he said that he wanted to talk to his solicitor first. At 11:03 a.m. the interview was interrupted so that he could receive a visit from his solicitor. The interview recommenced at 11:37 a.m.. It was put to him that his mobile telephone was in Omagh and he replied that he was taking his solicitor's advice and saying no more. According to the gardai he agreed that the interview notes were correct but did not sign them. The interview finished at 12:25 p.m.. There was no challenge to this interview

[191] The third interview involving Det Garda Hanley and Det Sergeant McGrath commenced at 1:45 p.m. on 22 February 1999. After caution Murphy explained that he had been advised by his solicitor that he was not to answer any questions. It was put to him that his mobile telephone was used in Omagh on 15 August 1998 and that he had already said he had his mobile telephone with him on that day. He denied that he had been in Omagh ever and certainly not on 15 August 1998. He explained that he was in his pub in Dundalk on that day. It was put to him that the gardai had reason to believe that he also took possession of Terence Morgan's mobile phone 0872443980 on Friday evening 14 August 1998 and that he did not return it until Monday 17 August 1998. He said that he was saying nothing on the advice of his solicitor. When asked if he knew Denis O'Connor Murphy did not reply. When asked if he knew Seamus Daly Murphy said that he did know him but did not reply when asked how well he knew him. The gardai highlighted various calls made from various locations from his mobile phone on 15 August 1998 and in particular a call to 0862662371, the phone of Denis O'Connor at 3:30 p.m. on 15 August 1998. Murphy denied making the call but said that he thought Mr O'Connor had worked for him once. He repeated that he did not ring him and that he was in his pub on 15 August 1998. He was asked had he given 2 mobile phones, his own and Terry Morgan's, to somebody else on Saturday 15 August 1998. He said "look, what can I say, I could finish out at the border with a hole in my head". When asked what he knew of Terence Morgan's mobile phone he said that he got that off him on Friday evening but that he did not use it. When asked if he had passed it on to somebody else he replied "now you have it, as I said I wasn't in Omagh". According to the gardai the notes were read over to him and he agreed that they were fine but refused to sign them. The interview ended at 3:45 p.m..

[192] The fourth interview conducted by these gardai commenced at 10:45 p.m. on 22 February 1999. After caution Murphy said that he did not have any more to say about the matter now. He said that he did not have his mobile phone on 15 August 1998 and that he gave it to a fellow who was doing a job, he was not too sure what it was, it was moving some gear away. He said that he had got Terence Morgan's mobile telephone on the Friday and given it to the fellow who wanted it to cover moving some gear. He said that

the fellow had the 2 mobile phones over the weekend. They were returned to him either on Sunday or Monday. He could see that the fellow returning the phones was in a bad way but he did not discuss what had happened. Murphy said that the mobile telephones were returned to him in the pub. He agreed that his mobile phone had been used in Banbridge around the time the bomb went off on 1 August 1998. The interview finished at 11:52 p.m.

[193] The fifth interview involving these gardai commenced at 12:45 p.m. on 23 February 1999. According to the gardai after caution Murphy was asked if he had told Terence Morgan what he was going to use the phones for. Murphy said that Morgan had no involvement. It was put to him the gardai were satisfied from their inquiries that Seamus Daly had use of his telephone on 15 August 1998 and Murphy replied that he was the person he gave them to saying that the gardai knew that all along. Murphy denied that he had given Seamus Daly his mobile phone for the bomb in Banbridge on 1 August 1998. It was put to him that he gave the mobile telephoned to Seamus Daly in order to move gear so he knew it was going to be used in some criminal act. Murphy said that he did but didn't think he would use it for another phone call. Murphy then continued by saying that he knew his mobile telephone would be used for moving bombs and that he knew these fellows were involved in moving bombs to Northern Ireland to bomb targets. He said that his phone had been taken by Joe Fee around 1 August 1998. The gardai say that the notes of the interview were read over to him and Mr Murphy agreed that they were correct but did not sign them. The interview ended at 2 p.m.

[194] The last interview conducted by these gardai commenced at 7:25 p.m. on 23 February 1999. Mr Murphy said that he had given the gardai all of the information available to him and said that this was a sign that he took responsibility for his actions but that other people had caused the disaster. The interview terminated at 8:05 p.m. The gardai say that the notes were read over to him and he agreed with their content but refused to sign them. Det Garda Hanley confirmed that Murphy's bar in Dundalk was the Emerald Bar. Det Garda Hanley confirmed that his statement for the Book of Evidence was produced by him from his handwritten statement. He said that his handwritten statement was not dated or timed.

[195] In cross-examination D/G Hanley said that he had with him his manuscript written statement, copies of the interview notes made by him and D/G McGrath and 2 typed copies of his statement of evidence including a copy of the statement used in the Colm Murphy Book of Evidence. He agreed that he had made a statement in respect of the trial of Garda Donnelly and Garda Fahy for perjury. He had 30 years experience as a Garda officer at the time of the interview in 1999. He had been involved in other high profile cases. His recollection of events was not as clear as he would like it to be and in respect of some matters was poor. He had not been involved in this matter for a number of years. He had been interviewed in respect of a disciplinary

investigation involving Donnelly and Fahy which was noted but not tape-recorded. He did not know about the outcome of the disciplinary proceedings although he understood that Fahy was still a Garda officer and Donnelly had retired.

[196] Det Garda Hanley agreed that this was a serious investigation which needed to be carried out carefully and properly. There were initially three teams of interviewers for Murphy, detectives King and Reidy, Donnelly and Fahy and McGrath and Hanley. Detective Inspector Foley was the coordinator. Det Garda Hanley did not accept that there was intense pressure within the force to get a result. He agreed that a considerable number of persons were arrested at the same time but he said that the approach to interview was no different from other investigations. None of the interviews were tape-recorded. He understood that at that time there was a pilot scheme for recording interviews but Monaghan was not one of the stations participating in that. He accepted that notes made by gardai could not reflect the totality of what took place at interview. Every question and answer or conversation is not recorded. He accepted that there was always a chance of inaccuracy and in some cases there could be deliberate alteration of notes. He agreed that detectives Donnelly and Fahy had been acquitted because of continuity issues in relation to the evidence. Everyone knew there was a difficulty about their interview notes because they had been altered. Det Garda Hanley agreed that notes could be subtly altered to change the flavour of the interview but he said that the notes had been read over to Mr Murphy to give him an opportunity to comment in the interviews he conducted.

[197] Det Garda Hanley agreed that coordination of information between teams of interviewers is important but at times is not done. The recommended practice is that there should be communication with the officer in charge. Although he asserted that it might be beneficial in some circumstances not to impart the information to the other interviewing team he was unable to provide an example of such a circumstance. He accepted that in the Ward case in which he was involved in 1998 the court did not accept that interviewing officers were not telling each other what occurred and said that this was either complete incompetence or untrue. He agreed that in Ward he had been criticised for grievous psychological pressure on a girlfriend who was questioned before she went in to speak to Ward. He also agreed that he had been criticised in Gilligan for not making notes in respect of two witnesses who were interviewed in the course of the investigation although not in custody.

[198] Prior to the arrests on 21 February 1999 teams had been selected to interview various prisoners. He believed he had interviewed two suspects. He had been given a briefing document with a lot of detail. This contained the phone contacts including location and time together with the text of warnings about the bomb in Omagh. He did not recollect any specific

briefing about the role of various suspects. The briefing indicated that Murphy's phone travelled with the bomb to Omagh and his suspicion was that Murphy travelled with it. During the interviews there was an informal exchange of information between the interviewers and all of the interview notes were handed into the incident room. He had a recollection of at least one more formal meeting with detective Inspector Foley together with other interviewers on the evening of 22 February 1999. He had no notes of that meeting. He said that his interview notes were written during the interview and not altered after the interview. The accepted practice was to hand them over immediately to the incident room. They were then typed up for anyone who needed them.

[199] He agreed that notes used to question a suspect or to seek his comment should be kept. He said that he interviewed Murphy about the presence of his phone in Banbridge on 1 August 1998 during an interview commencing at 10:45 p.m. on 22 February 1999. He had a printout of phone contacts and a document dealing with the location of the phone in Banbridge. He was not aware what that document was. He could not recall the form of the document. It was put to him that no formal documents about cell site location were given to police until 24 February 1999, the day after Murphy was released. He said that although he was updated by the previous interviewers he was not given advice by detective Inspector Foley or others as to how he should conduct the interviews.

[200] Detectives Reidy and King dropped out early because they were transferred to other duties. They conducted their last interview between 8 a.m. and 10 am on 22 February 1999. Thereafter the remainder of the interviews were carried out by Hanley and McGrath as one team and Donnelly and Fahy as the other. The phone traffic was highlighted in the briefing document but there was no instruction to concentrate on that issue. The fact that Murphy admitted ownership of the phone was a major part of the investigation. Murphy had been involved in the republican movement over a number of years and had been arrested and interviewed on various occasions. He was no stranger to interviews of this kind. It was not unusual for him to deny allegations put to him or not answer questions. It was put as Murphy's case that he made no incriminating admissions during his interviews. Det Garda Hanley denied categorically that he had added matters into the notes in order to render him liable.

[201] Det Garda Hanley agreed that in the first interviews on 21 February 1999 the suspicion was that Murphy had travelled from Castleblaney to Omagh with the bomb. At interview he was asked about his mobile number and stated that he had never been in Omagh. He gave a detailed account about his activities on the day of the bomb giving the names of a number of people with whom he worked. Mr Hanley's first interview commenced at 3:30 p.m. on 21 February 1999 and he agreed that on at least one occasion he

had not properly timed the notes in relation to the start and end of the interview. During that interview Murphy repeated that he had gone quad biking on the mountain in the morning, had returned to the Emerald Bar in the afternoon and had never been in Omagh. He did not give any explanation for the phone calls connected to his phone that afternoon or the locations connected to the phone. He did not remember any of the calls.

[202] Det Garda Hanley agreed that the thrust of the interviews of the first day was that Murphy had not been in Omagh. In those circumstances he would have expected detective Inspector Foley to put in place investigations in relation to this account. He did not accept that the case against Murphy was falling apart because it appeared that Murphy had not in fact been in Omagh. Murphy had accepted that the mobile was his. The kernel of the case was the phone, the fact that there was no explanation for the phone traffic and the need to investigate. He did not accept that on the second day a decision was made to try to involve Murphy in another way.

[203] The first interview on 22 February 1999 was conducted by detectives King and Reidy. Murphy made it plain to Gardai that he did not intend to answer any questions and wanted to see a solicitor. Detectives Hanley and McGrath conducted the next interview at 10:35 a.m. in which Murphy maintained the same approach. His solicitor arrived at 11:03 a.m. and the interview recommenced at 11:37 a.m. and continued until 12:30 p.m. during which time Murphy declined to answer further questions about his alleged involvement in Omagh.

[204] It was put to Hanley that after lunch on 22 February 1999 a decision was made to concoct evidence against Murphy because it was clear that there was no prospect of admissions since Murphy would not answer further questions about Omagh. Det Garda Hanley denied this and said that he had no recollection of any meeting during lunchtime on 22 February 1999. He denied that a decision was made after lunch on 22 February 1999 not to read out interview notes at the end of each interview. It was put to him that phrases such as "get rid of the gear" and "I am happy to do 20 years" were Garda phrases inserted into the interview notes and not spoken by Murphy. Det Garda Hanley denied this.

[205] The first interview after lunch on 22 February 1999 was conducted by detectives Hanley and McGrath from 1:50 p.m. to 3:44 p.m.. It had been arranged that Donnelly and Fahy would continue on for a further two hours until 5:45 p.m.. This was in accordance with normal practice. Det Garda Hanley says that Murphy was asked to explain how his mobile telephone was in the north of the day of the bomb and he said "you can work that out yourselves". It was put that Murphy did not say this. Det Garda Hanley rejected a suggestion that this was put into the interview notes to create authenticity. Det Garda Hanley says that he put to Murphy that he had

reason to believe that Murphy also took possession Terence Morgan's mobile 980 on 14 August 1998 but did not return it until Monday 17 August 1998. Det Garda Hanley was unable to say where that information had come from. He had no recollection of any notes in relation to it. He thought it was possible that he had memorised the number from the briefing document. The interview notes record that Murphy agreed that he knew Seamus Daly and where he was from. It was put that Murphy did not discuss any knowledge of Daly.

[206] Det Garda Hanley believed that the briefing document referred to Denis O'Connor but only contained information about his phone contact and his name. He stated that he was unaware of the fact that O'Connor was believed to be part of a C2 tax fraud and stated that he had no knowledge of such a fraud prior to it being mentioned at interview by Murphy. It was put to him that the background of O'Connor's involvement in tax fraud had been made known to him at the first briefing the day before Murphy was arrested. He denied that. It was further put to him that Murphy denied that any conversation about O'Connor took place. Det Garda Hanley denied that also and further denied that the answer "now you have it", the reference to 20 years and to finishing out at the border with a hole in his head were made up.

[207] It was put to the witness that the questions in respect of Terence Morgan's phone did not take place. When asked why questions about when the phone was given and who gave it were not asked the witness explained that Murphy was quite apprehensive. He agreed that with hindsight he could have asked different questions to follow-up.

[208] At the end of this interview there was an immediate handover to Donnelly and Fahy. Det Garda Hanley remembered that Det Sgt McGrath went to the door when it was knocked and had some conversation after which the notes were read over and they left. He had no recollection of discussing the admission by Murphy that he had received Morgan's phone on Friday and returned it on Monday with detective Inspector Foley. He had not concocted anything in the interviews but was shocked that 2 colleagues had altered their notes. He agreed that a page of the notes had been rewritten but he had no knowledge as to how that had happened. He agreed that the original page had referred to Sile Grew being the in-law of Colm Murphy. That was wrong. It was put to him that at some stage the inaccuracy was spotted as a result of which it was rectified by rewriting the notes. It was put to him that this inaccurate information had been included in the notes in order to give them authenticity but had been excluded when it was realised that was wrong. He had no recollection of ever reading a note about Sile Grew being the sister-in-law of Murphy. He said that he probably would not have realised that the information was wrong. He had no knowledge of the change made to the interview notes. He said that he had known Donnelly from a previous investigation. He agreed that in light of the alterations of the

notes there were no notes to confirm what actually had taken place during the next two hours of interview with Donnelly and Fahy. Det Garda Hanley said that when the pressure was off Murphy about his involvement in Omagh he changed his approach and provided some information.

[209] At 8:50 p.m. on 22 February 1999 Murphy was taken to the District Court to extend the custody period for a further 24 hours. Det Garda Hanley imagined that detective Inspector Foley brought the Supt going to court up to date about the state of the interviews. It was put to him that the reasons given for the extension of custody were that Murphy's answers were not truthful, that there was a need to check documents and a need to check alibi movements. Det Garda Hanley said that he believed that Murphy had been untruthful in some of his answers. He had no knowledge of the procedure for applying for an extension but did not believe that a breakthrough was a ground for obtaining such an extension. He agreed that if there were admissions by Murphy that he had moved "gear" then it would be necessary to follow-up those admissions to obtain more detail.

[210] Det Garda Hanley did not accept that he had included alleged implicatory remarks in order to provide a cloak of authenticity. It was put to him that he did this because he knew that Murphy had a background of dealing with interrogation and was experienced in police interviews. Det Garda Hanley said that the difference in this case was that he accepted that his mobile had been used in connection with the bomb. He accepted that on occasions persons whom he had interviewed argued in court that they had not in fact made the admissions alleged by him. He pointed out that many others had pleaded guilty. He said that his memory for events was poor on peripheral matters.

[211] Detectives Hanley and McGrath carried out the final interview of Murphy on 22 February 1999 starting at 10:45 p.m.. Det Garda Hanley said that during that interview he had a document with a telephone number on top containing a list of times, other phone numbers and subscribers names some typed and some in handwriting. He also had a location document which showed the location of the Murphy phone making contact with the other phones. He did not know where this document now was and accepted that such a document must be and should be retained as an essential part of the evidence where it is put to a suspect in the course of questioning. He believed it was attached to the list of phone calls but not stapled. He agreed that it was not specifically noted in the memorandum of interview and should have been. It was put to him that there was no such document at that time but he said that there was information in a previous interview about the Banbridge phones. It was put to him that the formal cell site analysis did not arrive at Monaghan Garda Station until the 24 February 1999 when Murphy had been released. He agreed that the prompt for the answer "yeah, it was up there all right" in relation to the 585 phone being in Banbridge on 1 August was the

document. His recollection is that both documents were produced at the same time. He agreed that there was no reference to location in the memorandum of interview, the formal document was not available until 24 February 1999 and that the document had gone missing. He denied that he was telling lies about this. He said that the document was prepared by someone else. He believed after the interview on the night of 22 February 1999 he went into the office of detective Inspector Foley and gave him the memorandum of interview and documents. He explained that this was around midnight. He had no memory of discussing this document with Foley. He did not believe that he would have gone through the document although he would have explained how the interview developed. He thought the document might be a graph with handwriting on it. He could not say what happened to it. He could not say whether there was another copy of the document. He imagined that it was based on informal information which had arrived in Monaghan. He did not know whether Foley would also have been provided with a copy of such important information. He said that Foley was well aware that Colm Murphy's mobile was in Banbridge on the day of the bomb. He imagined that there had been extensive searches to try to obtain the document or a copy of it. He agreed that the first time it was mentioned was when he volunteered it at the criminal trial. It was not challenged that there had been a discussion about the use of phones in Banbridge on the day of the bomb during this interview.

[212] Det Garda Hanley had no recollection of any meeting on the morning of 23 February 1999 about the investigation but he expected that Donnelly and Fahy became aware of the content of the earlier interviews. He did not know why the the first interview that morning did not commence until 10 a.m.. During that interview Murphy told Donnelly and Fahy that he did not know how his phone got to Banbridge on 1 August 1998 and that he did not give it to anyone. This differed from his previous account that someone else had it which he gave to Hanley and McGrath the previous evening. Det Garda Hanley could not say why Donnelly and Fahy had not put to Murphy that he had made an admission the previous night that someone else had his phone.

[213] Detectives Hanley and McGrath conducted a further interview between 12:45 p.m. and 2 p.m. on 23 February 1999. Although Denis O'Connor did not positively identify Seamus Daly as the person from whom he received a telephone call at 3:30 p.m. on 15 August 1998 until 1:30 p.m. on 23 February 1999 Det Garda Hanley said that they had been told prior to the interview that Daly had use of the phone on that day. He believed that detective Inspector Foley had given them the information about Daly. According to Det Garda Hanley Murphy was distancing himself from the phone for most of the interviews but was relieved when it was accepted that he was not in Omagh on 15 August 1998. It was put to him that the admission that he knew that the phones would be used for moving bombs was a Garda concoction. Det Garda Hanley accepted that on the previous day

he had made an admission that the phones were to be used for moving gear, rifles, but that this later admission implicated him in the Omagh bomb. He could not say what his state of mind was at that time. In the course of the interview he was shown a list of subscribers to whom telephone calls were made. The notes record reference to Kevin McShane who had a concrete block place in Drogheda. It was put to Det Garda Hanley that McShane actually had a concrete block lorry but lived north of Dundalk. The subscriber list identified McShane's address as Drogheda and that was what Murphy said. Det Garda Hanley accepted that this was a breakthrough because it was the first admission by Murphy that he knew what the phones were going to be used for. He did not know why the next interview was delayed until 4:15 p.m. The last interview conducted by detectives Hanley and McGrath was between 7:30 p.m. to 10 p.m. It was put to him that Murphy did not make the comments about cooperating but Hanley said that he certainly did.

[214] In an additional statement made for the Special Criminal Court Det Garda Hanley stated that he had received a printout of subscribers from Det Garda Costello. The statement was made before he gave evidence and the investigating team would not have been aware of the additional document relating to location. He accepted that in the original memoranda of interview there were instances of changes of ink and different paper being used. He said that he had a folder with different types of paper and that he had a range of pens. In re-examination he said that he gave Murphy a list of the subscribers and that he pointed to 2 subscribers beside whom ticks were placed and the word blocks was written beside McShane. Murphy made no complaint. He said that Det Garda Costello had specific responsibility for telephone traffic and had given him the list of subscribers and the locations shortly before the interview at 10:45 p.m. on 22 February 1999.

[215] Det Garda King interviewed Colm Murphy with Det Garda Reidy on three occasions. The first interview commenced at 1:30 p.m. on 21 February 1999. He was asked to give an account of his movements in the days prior to the bomb and on the day of the bomb itself. He stated that he was in the Emerald Bar on the day of the bomb and described various business activities in the days prior to the bomb. The gardai say that he agreed that the notes were accurate but declined to sign them. The interview ended at 3:30 p.m.

[216] The second interview conducted by these gardai began at 6:45 p.m. 21 February 1999. After caution it is alleged that Mr Murphy denied that he gave his mobile phone to anybody than day. He said that he was not in Omagh on 15 August 1998 and did not receive or transmit calls on his mobile phone to Terence Morgan or Oliver Treanor on that day. Phone records showing calls from his mobile to 0872443980, a phone used by Terence Morgan, were put to him. In particular his attention was drawn to calls from his mobile to 980 at 1241 via Castleblaney mast. He denied that he was in or

near Castleblaney on that day or time. He agreed it would be unusual for him to phone Terence Morgan on four occasions in the space of one hour 15 minutes on a Saturday. It was to put to him that between 1241 and 1337 on 15 August 1998 4 calls were made on his mobile as it travelled north from Castleblaney to Omagh. He could not explain these calls or 2 calls at 1410 and 1438 on the same day activated by masts in County Tyrone. He denied that he had lent his mobile phone to anybody on 15 August 1998. The gardai say that the notes where read over to him and he agreed that they were correct but did not sign them. There was no challenge to these notes. The last interview conducted by these gardai was at 8 a.m. on 22 February 1999. Mr Murphy refused to answer any questions until he first spoke to his solicitor.

[217] In cross-examination Det Garda King agreed that this was a coordinated procedure in respect of an important investigation. A large number of people had been arrested for interview. Prior to the interviews he had been informed about some telephone communications and was aware that phones registered to Murphy and Morgan had been in contact. They became prime suspects. This was evidence that Murphy might have been in Omagh with the phone. Before the interviews briefing documents indicated contacts with the Murphy phone. There was co-ordination throughout the interview process and information exchanged between the interviewers. When the interview was completed the regulations required that the notes should the timed, dated & signed by the interviewers and taken to the incident room and given to Garda Whelan. If there was an immediate transfer of interviewer information would be given verbally. Although Det Garda Reidy photocopied the notes using the photocopier in the corner Det Garda King had no recollection of doing so. On occasions photocopies would be available going into a fresh interview if typed notes were not ready. They were generally prepared after a couple of hours. It was a requirement of proper practice to hand in the interview notes immediately after the interview and the originals were not handed out again. Det Garda King was aware that Donnelly and Fahy had made a reference to Sile Grew in their handwritten notes which it had been confirmed was altered.

[218] Det Garda King had never interviewed Murphy before. He agreed that Murphy's use of language was broadly reflected in his notes. Donnelly and Fahy had conducted the first interview on 21 February 1999 from 8.25 a.m. until 12:20 p.m. King and Reidy had taken over at 1:35 p.m. The Donnelly and Fahy material was made available to King and Reidy before their interview and they could see that Murphy had given a detailed account of his movements on the day of the bomb. They were instructed by Mr Foley to concentrate on movements before and after the day of the bomb. Murphy denied that he had ever been in Omagh and gave an account of his movements on previous days. The interview finished at 3.25 p.m. Murphy had an opportunity to read over the notes after the interview. He had never been criticised for altering or adding anything onto notes. McGrath and

Hanley conducted the next interview. Hanley was well-known for his involvement in high profile cases. King and Reidy conducted their second interview at 6:50 p.m. on 21 February 1999. That interview covered Murphy's movements and the phone contacts were also put to him. Mr Foley had suggested putting the phones to him. Donnelly and Fahy interviewed from 9:30 p.m. until 11:52 p.m.. King could not recall being briefed before his final interview at 8 a.m. on 22 February 1999. That interview ended at 10 a.m. King then went back to phone work. He was not involved in any meeting or assessment which considered Murphy's attitude to the questioning. He was not aware if any such meeting took place. His notes did not suggest that Murphy used street slang. He had been given a transcript of the Murphy trial from the incident room at Monaghan prior to giving evidence. After completion of his involvement in interviews he went back to phone work. He and Det Garda Costello compiled information and Det Sgt Clark was preparing documents.

[219] Det Garda Anthony Reidy interviewed Murphy with King. In cross-examination he said that he photocopied notes he had taken as well as a portion of the custody record in order to help him make his statement at the end of the interviews. The photocopier was in the corridor and available to everyone. The reason that he adopted this practice was because he interviewed a large number prisoners and he needed keep his records clear. He was careful to ensure that his notes were accurate. This was a focussed, organised, co-ordinated investigation. Mr Foley would give direction from time to time about the focus of the interview. He assumed the other gardai were checking the account given by Murphy about his movements. He said that the original notes should be provided to the incident room immediately after the interview. Sometimes typed versions were not available as quickly as they might because of the large number prisoners. He had not interviewed with any of the team before this. He had glanced through his evidence in the criminal trial outside court in May 2008. He said that "one of the lads" had mentioned the availability of the transcript to him. He denied that this was the phrase particularly used by gardai and said that it was in common usage. He said that he tried to get an accurate note but did not record some colloquial expressions or words such as "wee". He first became aware during the criminal trial of an issue relating to alteration of the notes of Donnelly and Fahy.

[220] Detective Sergeant McGrath conducted interviews with detective Garda Hanley. He said that the notes were a correct record of what took place in the interviews. In cross-examination he said that he had no substantial disagreement with the evidence of detective Garda Hanley. He may have taken notes at the briefing the day before the arrests were carried out but he had not retained them. He agreed that this was a highly organised investigation. He further agreed that there was an exchange of information and coordination by Mr Foley. He said that memoranda of interview were

immediately put into the incident room, typed and made available. The notes were available in the incident room and there were briefings also conducted in the incident room by Mr Foley. He accepted that the suspicion held by him and other gardai on the first day was that Murphy was in Omagh and was the driver of the bomb car or the scout car. He said that he had no doubt that he knew that Murphy had been interviewed in November 1998. There was no issue about the first five interviews on the first day when Murphy identified his mobile phone number but also stated that he was never in Omagh. He had no specific memory of a reassessment at the end of the first day. There could have been a review. The approach of King and Reidy the following morning at the first interview did not appear different from the line taken the previous day. During that interview Murphy declined to answer any questions and indicated that he wanted to talk to his solicitor but said that he would talk to them after he had seen his solicitor.

[221] Detectives Hanley and McGrath interviewed Murphy from 10:30 a.m. until 12:25 p.m. on 22 February 1999. Between 11:03 a.m. and 11:37 a.m. Murphy spoke to his solicitor. Throughout the interview he declined to answer any further questions. These detectives conducted the next interview starting at 1:45 p.m.. Detective Sergeant McGrath could not recall what occurred between 12:25 p.m. and 1:45 p.m.. He had no doubt that he was updated by either Det Whelan or detective Inspector Foley. He said that he could have had notes relating to the update but he no longer had them. He could not recollect knowing Donnelly or Fahy before this. He could not recollect how it had been decided that the interview on the afternoon of 22 February 1999 should be continuous and that he and detective Garda Hanley should carry out the first two hours. He said that there was an ongoing exchange of information with Northern Ireland and that the material in relation to Murphy taking possession of the Morgan phone on 14 August 1998 and returning it on 17 August came from the incident room. He had never investigated a C2 tax fraud and knew nothing about it. He was not aware that this was a fund raising mechanism for Republicans. It was put to him that the phrase "hole in the head" and the reference to 20 years were concocted. He rejected that. He said that the portion at the end of the interview about Terence Morgan's phone came from Murphy. Just before the end of that interview he said there was a knock on the door which he answered by opening the door and speaking to Donnelly and Fahy who were outside the interview room. He gave them a brief synopsis of the interview. The memorandum of interview does not record detective Sergeant McGrath leaving the interview and he says that he was standing in the space just behind the door when he did this.

[222] Detective Sergeant McGrath was shocked that Donnelly and Fahy had altered their notes. He agreed that the reference to Sile Grew had been rewritten to exclude it. Detectives Donnelly and Fahy apparently believed that Sile Grew was the sister of Colm Murphy's wife. He did not know

anything about the rewriting of the notes. He was not able to say anything about who detected the error or how it was corrected. Detective Sergeant McGrath agreed that Murphy made the admission about the Terence Morgan mobile towards the end of the interview. He said that there was a sequence of discussions leading up to this when Murphy was talking freely about O'Connor. He agreed that initially Murphy did not answer questions and then moved onto saying that he was not in Omagh. It was put to him that Murphy had no recollection of saying "you can work it out for yourselves". At the start of the interviews he agreed that Murphy said that he had nothing to say about the Terence Morgan phone. He said that the admission at the end of the interview came because Murphy by then was speaking freely. He said that he was able to remember standing in the space of the door 10 years after the event because it had been raised in the trial within the trial in the criminal case. He said that he remembered the knock on door, leaving the table and stepping into the opening where he spoke to Donnelly and Fahy. He agreed that if he left the room this should be noted. He agreed that in the criminal trial he said he went outside to talk to Donnelly and Fahy. He said that he did not leave the confines of the interview room and stayed at the door. Unless there was a detailed exchange of information he said that Donnelly and Fahy would not know about what had happened. He agreed that the judge in the criminal case said that Donnelly and Fahy had not told the truth. He agreed that there was no attribution of questions in the handwritten notes.

[223] Donnelly and Fahy conducted a further interview between 6:45 p.m. and 8:50 p.m. on 22 February 1999. Then Murphy was taken to the District Court for an extension. Detective Sergeant McGrath said he was not an expert in relation to extensions but he imagined that it was necessary to demonstrate that the investigation was proceeding expeditiously. He had no doubt that the Supt had the custody record and had been briefed in relation to the interviews, that the custody sergeant was available to answer questions and the solicitor for Murphy was present. He agreed that there was an exchange of information between the teams at different stages of the process. According to the notes Donnelly and Fahy recorded that Murphy said the phones were needed to scout a road, move some gear, rifles or something like that. He agreed that this was a breakthrough. He had no doubt that detective Inspector Foley had been updated on this. When he appeared at Monaghan Court at 9:02 p.m. on 22 February 1999 Supt Flannery said that his answers had not been truthful, that documents needed to be checked and that his alibi needed to be checked. Detective Sergeant McGrath was not surprised that the court was not informed of the admission. He did not know that Supt Flannery had been cross examined in the trial and said that he knew nothing about the reference to the rifles until after the court. He said that the notes would not have been submitted to the incident room until after 8:50 p.m. Supt Flannery may not have seen them. He agreed that Donnelly and Fahy

could have spoken to detective Inspector Foley when Murphy was changing his clothes in preparation for his court appearance.

[224] The next interview took place between 10:48 p.m. and 11:50 p.m. on 22 February 1999. In that interview he said that there was a printout of calls produced (Exhibit 57) but that there was a second document showing movements. He agreed that when a document is produced to a person and referred to in the notes it should be retained. He agreed that the printout of calls had been produced and retained. He said that he did not have the second document when he gave evidence in the Special Criminal Court. He said that he told the court that there was a second document and answered about certain aspects of it. He said that it was his understanding that the phone location document was produced to Murphy in this interview. He agreed that the production of the document should have been noted and that the failure to do so was an omission. He said that there were exchanges all day between the incident room in Omagh and that in Monaghan. He agreed it was good practice to retain documents. Detective Garda Hanley had possession of the document and he cannot say what happened to it. He said that the document was only raised with him when he went into the witness box and that he did not see the significance of it. He was aware that this phone was in Banbridge and the document produced was something similar to the diagrammatic document which had been shown to him by gardai. He agreed that that document did not show locations. He said that no copy of the document had ever been presented. He said that he recalled that detective Garda Hanley handed the memorandum of interview to detective Inspector Foley that night directly. He agreed that the call document was produced the next day but that the location document was not. He said that he had no doubt that there was a second document. It was put to him that in the criminal trial he had indicated that there possibly could have been a document or could have been information about the location of the phone. He was now saying that there definitely was a document but it had gone missing and that was because he did not attach the same significance to the document when asked about it in the criminal trial. It was put to him the proper cell site analysis was not provided to Monaghan until 24 February 1999. He did not believe that there had been an inquiry about the missing document.

[225] The next interview did not start until 10 a.m. the following morning. He believed that the prisoner may have been given exercise and he might have talked to Donnelly and Fahy in the morning. They might have updated themselves. He agreed that the team interviewing should have known about the previous interview the previous night. In the interview commencing at 10 a.m. Donnelly and Fahy record that he said that he did not give the phone to anyone. There was no reference to the admissions he had made the previous night that another person had the phone. He agreed that the questioning referred to people on Exhibit 57 which suggested that it was available at that

interview. He said that he believed that he and Hanley had Exhibit 57 at the next interview between 12:45 p.m. and 1:57 p.m.. He was not sure why there were so few interviews on 23 February 1999. He said that Murphy's wife came to see him between 12:05 p.m. and 12:35 p.m., that he rested between 2 p.m. and 3 p.m. and that his solicitor visited him at 3:05 p.m.. He agreed that there had been a breakthrough in the interview between 12:45 p.m. and 1:57 p.m. He said that the identification of Daly had been confirmed in about 1:30 p.m. on 23 February 1999. Daly had not been arrested in this operation. O'Connor was being interviewed that morning at Carrickmacross and made reference to Seamus Healy but they were satisfied from their inquiries that this was a reference to Seamus Daly. It was put to him that Murphy did not say "that's the lad".

[226] He disagreed that the reference to moving bombs in this interview was a deliberate attempt to incriminate Murphy in Omagh. It was put to him that Murphy did not say that Kevin McShane had a block place in Drogheda since he knew that McShane lived in Ravensdale. He said that the word "blocks" on exhibit 57 was in his writing. He did not recognise the other hand writing on the document. It was put to him that that if Murphy had said that Joe Fee took the phones questions would have been asked about how he got them and where he got them. It was put that Murphy made no incriminating admission. Detective Sergeant McGrath had no specific recall of a discussion about the admission by Murphy that he had knowledge of the use of the phones for bombs. He believed that admissions would have been brought to the attention of the supervising officer and the other teams. He had no specific recall if this happened.

[227] Donnelly and Fahy's next interview was at 4:15 p.m. Detective Sergeant McGrath could not recall specifically speaking to Donnelly but if he had he would have summarised what had occurred. It was put to him that in the criminal trial Donnelly said that Det Sergeant McGrath told him that Murphy had been quiet, quieter than he had been and that they had gone back over admissions that he had made in previous interviews. He said that he thought Donnelly was mistaken. Detective Sergeant McGrath said that the only interview in which Murphy had been quiet was that at 10:35 a.m. on 22 February 1999. Detective Sergeant McGrath that said that Donnelly must have confused the position on the morning of day three with that on the morning of day two. He could not specifically recall having any conversation with Donnelly on the morning of day three. He agreed that he had refreshed his memory from the transcript of his evidence to the Special Criminal Court. He had obtained one copy for himself and one for detective Garda Hanley. He had not discussed the evidence with detective Garda Hanley. He read his evidence in chief and cross-examination in the Special Criminal Court and that of Mr Hanley.

[228] Detective Sergeant McGrath was referred to passages in the Donnelly and Fahy notes after the breakthrough interview where Murphy allegedly said that he only realised later that the phones were used for Omagh. It was put to him that a competent investigating officer would have followed up by referring him to his answer in the breakthrough interview that he knew the phones were to be used for bombs. It was suggested to him that Donnelly and Fahy knew nothing of the alleged breakthrough. Detective Sergeant McGrath said that after every interview the notes were handed to detective Garda Whelan and on one occasion to detective Inspector Foley. He said that Assistant Commissioner Carty had been there on a regular basis. He denied that things had been put in by them to incriminate him. In re-examination he said that the phones document had been faxed at 2140 on 22 February from Omagh to Monaghan. He was aware of ongoing contacts between the incident rooms. He was updated from time to time.

[229] In cross-examination Det Garda Costello agreed that he was involved in compiling documents about telecommunications data assisted by detective Garda King. Det Sgt Clark was part of the team but his responsibility was to compile charts. He provided Exhibit 57 to Hanley on 22 February 1999 containing the list of subscribers and their addresses. He was getting information from Purnell and others and he assisted Det Sgt Clark preparing working documents with the outgoing calls for 585. All of the handwriting on Exhibit 57 was his other than the reference to blocks and NI. Exhibit 57 was the only document he made available according to this recollection. If another document containing cell site analysis was given to Hanley it must have been given by someone else. If there was any such document it would be available within Garda records. McGrath and Hanley say that they presented a document showing cell site locations in respect of the Banbridge bomb during an interview that started at 10:48 p.m. on 22 February 1999. Although Det Garda Costello was aware that the Northern Ireland calls were located in Banbridge on 22 February 1999 no document containing cell site locations was available with him until 24 February 1999. A document entitled "vodafone cell site locations" was received late on 22 February 1999 this was simply a graphic of Exhibit 57 and did not show cell site locations. Although Det Sgt Clark was in the business of creating some telephone charts by way of additional documents there was no document containing cell sites on 22 February 1999 that Costello was aware of. Hanley was given a copy of Exhibit 57 and the original was retained within the office. If there was a cell site document the original should still be in the office.

[230] The fifth named defendant also relied upon certain acts extracts from his trial before the Special Criminal Court in Dublin. At day 4 of the trial detective Inspector Foley gave evidence. He explained that in relation to the interviewing of the fifth named defendant he had arranged for teams of interviewers. Donnelly and Fahy were one of those teams. The practice was

that as soon as the interview was completed the notes were handed to detective Garda Whelan in the incident room. There had been a breakthrough in the interview just before the extension but this had not been mentioned at the extension. There had been a process of reviews in meetings in the course of the interviews to deal with significant developments. Supt Flannery confirmed that no-one had mentioned to him that Murphy had apparently changed his position in interview in relation to the use to which the phones were to be put.

[231] Detective Garda Donnelly gave evidence first on the fifth day of the trial at the voir dire. He said that he had been teamed with Fahy. He said that when the interview notes went out of this custody they were given to detective Garda Whelan. He said that he was an experienced detective. On the same day Fahy said that Donnelly took the notes during the interviews. He explained that detective Inspector Foley was there most of the time and there would be discussion with him after most interviews. Typed versions of the interviews were generally available in the incident room and he agreed that he probably would have found out what happened in the last interview before he started at 10 a.m. on 23 February 1999.

[232] Donnelly came back to give evidence in the main trial on the ninth day of the hearing. He explained that there was a system of typing of the interview notes in the incident room and that there were regular briefings. He said that the three pages of the interview commencing at 3:45 p.m. on 22 February 1999 contained all of what was said. He said that the note was accurate. He said that they had not discarded any notes or made a revision of the notes. He said that there was not another version referring to Sheila Grew. He could not provide any explanation for the existence of any other version of the interview. It was put to him that ESDA analysis showed that he had rewritten the note. He denied that he had done so. He said that it was not possible for him to write another version of the note.

[233] Fahy was also recalled. He said that Sheila Grew was not mentioned. He denied that a page had been discarded in the course of the interview. He denied specifically that a passage on the third page of the interview notes in relation to Sheila Grew had been discarded and rewritten. He said that the notes were written in the interview room. He said that detective Inspector Foley would inform them in the corridor if there was anything they should be aware of.

[234] For many years now it has been common practice both in this jurisdiction and the Republic of Ireland for interviews to be the subject of audio or video recording. In 1999 that was the practice in Northern Ireland but in the Republic of Ireland the authorities were just beginning a pilot scheme. None of these interviews were the subject of any audio or video

recording. In those circumstances one is entirely dependent upon the account given by those who were present in the interview as to what occurred.

[235] Inevitably a handwritten note of an interview will not pick up every word spoken and there is always some risk that the writer may miss or misinterpret some nuance in the words used. There is, of course, also the possibility that such a system might be abused and in order to protect against that various safeguards have been introduced.

[236] I am satisfied on the basis of the material before me that the notes of the interview commencing at 3:45 p.m. on 22 February 1999 were rewritten. The notes were taken by Donnelly and the probability is, therefore, that he was the person who rewrote them. There are various possibilities as to when this occurred. The first possibility is that the rewriting of the notes occurred in the interview itself. The purpose in rewriting the notes was to exclude the reference to Sheila Grew being Murphy's sister-in-law. Presumably that was included by Donnelly because he believed it to be true. The rewriting probably occurred because someone realised that it was not true. It is possible that Fahy drew this to Donnelly's attention but if he knew that the statement was untrue one might have thought that he would have intervened during the interview and prevented it being recorded or would have intervened before the interview note had been completed. The evidence suggests that the original note was completed and the rewriting occurred after that. That points to the rewriting occurring at a later stage.

[237] The second possibility is that the rewriting occurred after the interview but before submission to detective Garda Whelan. That again would have been dependent upon Donnelly or Fahy becoming aware that Murphy was not the brother-in-law of Sheila Grew. It is possible that either Donnelly or Fahy became aware of this inaccuracy as a result of which the interview notes were rewritten before submission.

[238] The third possibility is that the rewriting occurred after the notes had been submitted to the incident room. That could only have occurred in circumstances where the error was noted within the incident room and the notes where provided to the detectives for rewriting. If such an event had occurred it would constitute an indication of serious systemic failure in relation to the integrity of the interviewing process. I cannot come to any conclusion as to whether any of these possibilities is sufficiently likely to constitute a probability. The fact that this occurred, however, means that I have to be careful to treat the evidence in relation to the interviews cautiously.

[239] It is common case that the interview conducted by Hanley and McGrath on the afternoon of 22 February 1999 constituted a breakthrough in that Murphy allegedly admitted that he had obtained the Morgan phone. This breakthrough does not appear to have been communicated to Donnelly

and Fahy who conducted the interview immediately thereafter. In the next interview conducted by Hanley and McGrath that evening Murphy allegedly accepted that his phone had been in Banbridge on the day of the Banbridge bomb. Hanley in particular accepts that this admission was prompted by a document that he put to Murphy which demonstrated the cell site activated by the phone on that day. This document was first referred to by Hanley in the course of his evidence in the Murphy trial. There is no reference to it in the interview records and a copy of it has never been found. McGrath at the Murphy trial apparently had some difficulty in recollecting that there was such a document but by the time of this trial was quite satisfied that there had been such a document. If such a document had existed it would have come from the telecommunications section of the gardai. I had heard evidence from detective Garda Costello that no such document to his knowledge was prepared by that section. I have, therefore, grave reservations as to whether there ever was such a document and accordingly grave reservations about the alleged admission in relation to the phone in Banbridge.

[240] 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 on 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.

Other relevant material

[241] The fifth named defendant is mentioned on a number of occasions in the Rupert e-mails. On 27 February 1999 he 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 the name of Oglaigh na hEireann.

[242] The next reference of significance is in an e-mail of 7 November 1999 when the third named defendant is discussing with Rupert plans to secure the backing of other dissident republican groups for a unified approach under Oglaigh na hEireann. Rupert and the third named defendant discuss setting up a meeting with the fifth named defendant and Rupert reported on that meeting in an e-mail 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 up in 1995 before of the third named defendant split from

the Provisional IRA. The third named defendant had earlier indicated that his 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.

[243] Rupert records meeting the fifth named defendant again on 20 February 2000. On that occasion the fifth named defendant expressed his fury that the Continuity IRA had become a disgrace. He said that the third named defendant was going to have to start the business soon or he was going to look face with his men who were ready.

[244] In my view this is significant and cogent evidence in relation to Murphy. I have already indicated that although it is necessary to exercise caution in relation to the acceptance of the Rupert evidence there is considerable material to corroborate not just the fact that meetings occurred but also to corroborate the substance of those meetings. The statement in respect of Murphy made on 27 February 1999 is multiple hearsay but is based on account given by a person who is noted on a number of occasions to be a member of the Army Council of the Continuity IRA. Its content is supported by the account given by Rupert of his meeting with Murphy on 13 November 1999 when Murphy indicated firstly that he had been a member of the Continuity IRA since 1995 and secondly that he had been regularly carrying on terrorist attacks jointly with the third named defendant from that period. This evidence is strongly indicative of the fact that Murphy is a dedicated terrorist who has been an active participant in carrying on terrorist attacks over a long period.

[245] Finally in respect of Murphy the plaintiffs introduced evidence of his convictions. He was convicted in 1972 of possession of a firearm with intent to endanger life and other related offences. In 1976 he was convicted of membership of the IRA and possession of a firearm with intent to endanger life. In 1983 he was convicted of three firearms offences arising from the purchase of machine guns in the United States as a result of which he was sentenced to five years imprisonment and deported.

[246] I am satisfied on the basis of the above material that there is clear evidence that the fifth named defendant obtained the Morgan phone, 980, the day before the Omagh bomb. I am entirely satisfied that the Murphy phone, 585, and the Morgan phone were used in connection with the bomb run to plant the bomb. This attack was part of a series of terrorist bombs which included Lisburn, Armagh and Banbridge. It was a joint operation between the Real IRA and Continuity IRA. The fifth named defendant was an active participant in attacks carried out by the Continuity IRA and depended upon material provided by the third named defendant for those attacks. It is

common case that when he was interviewed by the Gardai the fifth named defendant lied about the phones when he said that his own phone was in his possession at all times. I consider that the inference is irresistible that the fifth named defendant provided the 585 phone and the 980 phone for the Omagh bomb attack knowing full well the nature of the attack which was going to be conducted. That of course is entirely consistent with the hearsay evidence from the Army Council member that the fifth named defendant was the chief of joint operations with the Real IRA.

Evidence in relation to the sixth named defendant

The interviews of Denis O'Connor

[247] Denis O'Connor resided in Kilkenny in 1998 and 1999. He was at that time the owner of a mobile phone 371. The phone records show that his mobile phone received a call from the 585 phone at 37 seconds past 3:30 p.m. on 15 August 1998 and that the call lasted 61 seconds. The plaintiffs' case is that the 585 phone was one of those used in the bomb run and that it is highly probable that the person who made the call from the 585 phone was one of those involved in planting the bomb. On 22 February 1999 Det Sgt Hunt and detective gardai Lynch and Grennan were directed to travel to Kilkenny and there arrest O'Connor on suspicion of having unlawful possession of explosives. They then travelled back with him to Carrickmacross Garda Station. During that journey the gardai say that O'Connor was cautioned and an interview was conducted in the car commencing at 10:15 p.m. on 22 February 1999. During the interview O'Connor said that he knew a number of builders in Northern Ireland including one who lived in Omagh. He also said that he knew a Seamus Healy from Dundalk. He said that he had a C2 tax clearance certificate for a building company he ran with his brother which he would then loan to other builders at a price of 10% plus VAT so that they could obtain payment without deduction of tax. It is clear that this was an unlawful arrangement designed to evade the payment of tax due. O'Connor explained that he was able to get cheques cashed in banks at Blanchardstown and then take his commission. He said that he had visited Omagh the weekend before the bomb staying with one of the builders. The gardai agreed that this interview took place during the journey and it was not written up until sometime after midnight. No contemporaneous note was made.

[248] O'Connor was next interviewed at 9:40 a.m. on 23 February 2009. He explained that he was a registered contractor and had a C2 certificate. He met a block layer from Omagh in the course of this work who was having 35% tax deducted. He entered into an arrangement to provide him with his C2 for 10% of whatever he made. He was introduced to others working in the building trade on a similar basis including a man by the name of Seamus Healy from Dundalk who was an electrician working in the ladies prison in Mountjoy. Healy then put him onto an accountant call Boyle or Boyd.

O'Connor says that he also provided three copies of his C2 to the fifth named defendant Murphy and that this transaction occurred at about 2:30 p.m. in March or April 1998 in the bank car park at Dundalk. O'Connor says that Healy was with Murphy at the time. He subsequently met the accountant at the airport as he needed to see the original C2 in May or June 1998. In the course of the interview gardai asked O'Connor if the man Healy could be Seamus Daly. O'Connor said that it could be and if he saw a photograph he might know him.

[249] O'Connor was asked about his movements on 15 August 1998. He said that he left home at 8 a.m. that morning to go shooting pigeons with his uncle. He returned home about 2 p.m. and went to a public house in Urlingford where he first received news of the Omagh bomb. In the interview he says that he rang the block layer from Omagh that evening to make sure that he was all right but could not remember receiving any calls that afternoon. He said that he was in the pub from 2:30 p.m. until about 8 p.m. He said that he did not have the phone with him in the pub because he tended to get nuisance calls from friends acting the fool.

[250] While this interview was proceeding it appears that detective Garda Grennan was directed to produce a photo album. He travelled to Monaghan Garda Station and obtained 11 polarised photographs with the names of the individuals on the back. Each of these photographs had a black border. A photo album was prepared containing these 11 photographs and a photograph of Daly, the sixth named defendant. Det Garda Grennan was unable to obtain a photograph of Daly in the same form as the other photographs. In particular the photograph of Daly did not have the same black border. Having compiled an album of the 12 photographs with four photographs sitting face up on each page Det Garda Grennan entered the interview room at 1:25 p.m. and showed the photographs to O'Connor. O'Connor identified photograph number eight as the man he met through the other builder. Photograph number 8 was the photograph of the sixth named defendant. He indicated that the number he used to contact this man was the 213 number. That number is registered to the sixth named defendant. He said that he met this man on four occasions, once at the Red Cow on the Naas Road about March 1998 and three other times outside the Bank of Ireland Blanchardstown. On the three occasions he was accompanied by a good-looking woman who had a child with her. He described the vehicles that the man was driving on these occasions. The Garda witnesses rejected any suggestion that the photograph of Daly stood out like a sore thumb. Having inspected the photographs they are of approximately the same size but the photograph of Daly is noticeably different because of the absence of the border. As was the case with numerous other interviews the time at which the interview ended was not recorded although it was estimated that it ended at approximately 1:45 p.m.

[251] That afternoon at 3:45 p.m. O'Connor made a statement to detective gardai Rice and Flanagan. In that statement he described how he had gone shooting that morning and subsequently gone to Urlingford entering the pub about 3 p.m. He says that he had his mobile phone 371 in his possession and that the phone was switched on and in working order. He said that he was having a conversation when the phone rang. He answered it and recognised the voice as Seamus Healy from Dundalk. He described having met him at the Red Cow and at Blanchardstown. He described him as having black hair, large eyes, being around 6 foot tall with a strong build and a very soft Northern Ireland accent. He described in the statement his first meeting with this person at the Red Cow where he made an arrangement to use the C2. He said that he had carried out a transaction involving the cashing of a cheque at Blanchardstown with this man on 10 or 11 occasions. He said that sometimes this man's girlfriend collected the cash. He said that because he had done a lot of business with this man he recognised his voice immediately. He said that he spoke as if his mouth was half closed and he was talking through his nose. In the statement O'Connor said that the conversation on 15 August 1998 was in relation to the sale of his C2 to the accountant in Newry. O'Connor said that he hadn't heard anything and this man said that he thought there was something funny going on. There seemed to be a suggestion that he was being cut out of whatever the deal was. The call ended with this man saying that he was going to ring the accountant. O'Connor said that the man he knew as Seamus Healy was the same man who made the phone call on his mobile phone on the afternoon of 15 August 1998 and whom he pointed out to detectives in the album of photographs earlier that day. He now believes that this man is called Seamus Daly. He explained that at the time he could only receive calls on his mobile phone because there was an outstanding bill of £900 which has not been paid. This statement clearly is materially different from the account given at interview during the morning where O'Connor said that he had not brought his mobile phone to the pub and explained why. There was no admissible evidence about the reasons for O'Connor's change of position. As a result of an application made on behalf of the sixth named defendant certain Garda evidence in relation to the taking of the statements was ruled inadmissible and I have ignored all of the evidence falling within the ruling.

[252] Det Garda Doherty travelled to Kilkenny to take a statement from O'Connor in December 2001. He had with him the bundle of photographs. The statement corresponds in every material particular with the statement made to gardai at 3:45 p.m. on 23 February 1999.

[253] In assessing the weight to be given to this hearsay evidence it is necessary first to examine the relevant provisions of the Civil Evidence (Northern Ireland) Order 1997. Article 4 provides a mechanism to give the other party an opportunity to have a witness brought to court for cross-examination or to investigate the credibility of a witness. In this case there

was correspondence put before the court from the gardai indicating that they were unable to assist in identifying the present whereabouts of this witness. Either party might have instructed private investigators to seek to pursue this further but neither did so. In terms of investigating the credibility of the witness no application was made to me to seek further time in relation to that and I consider that the sixth named defendant was given every reasonable opportunity to carry out such an investigation.

[254] Considerations in relation to weight are specifically identified in article 5 of the 1997 Order. Although there was no express notice of intention to introduce the hearsay statement of O'Connor the plaintiffs did provide the sixth named defendant with the statements of the gardai upon which they relied in advance of the introduction of this material. I am satisfied that sufficient notice of the intention to introduce these statements was given. Turning then to the specific protections in article 5(3) I consider that if the witness had been available it would have been reasonable and practicable for the plaintiffs to have called him. There is no doubt that his evidence was always likely to give rise to some controversy. In particular the sixth named defendant was always likely to take issue with the fact that O'Connor did not mention receiving the call from the sixth named defendant until his statement made on the afternoon of 23 February 1999. The plaintiffs did produce evidence demonstrating that there was difficulty in tracing O'Connor and although it would have been practicable to instruct private investigators to pursue that further I take into account that neither the plaintiffs nor the sixth named defendant's advisers apparently considered that worthwhile. In the absence of any known location for O'Connor at the time of the trial I consider that it was not practicable for the plaintiffs to call him.

[255] The statement made by O'Connor on which the plaintiffs rely was clearly not make contemporaneously with the occurrence of the matters to which it relates. That must inevitably bear upon the weight to be given to it. The evidence does not involve multiple hearsay. It is common case that O'Connor was involved in a tax fraud and his admissions thereby made him liable to prosecution. That would undoubtedly bear upon his credibility but I do not consider that it demonstrates a motive to conceal or misrepresent matters. There is no evidence to raise any suggestion that O'Connor was involved in any way in relation to the Omagh bomb. This is not a case of someone who is suspected at the time trial of potentially being involved in the behaviour at issue seeking to put the blame elsewhere. The statement was not edited or made in collaboration with another except in so far as it was made to gardai. I do not accept that there is any evidence at all to suggest that gardai manipulated or contributed to the substance of the statement. Having regard to the fact that O'Connor was not available I do not consider that the circumstances in which the evidence is adduced as hearsay is such as to suggest an attempt to prevent proper evaluation of its weight.

[256] Article 6 of the 1997 order specifically provides express provisions dealing with the admissibility of material which might tend to undermine the witness's statement. The sixth named defendant availed of the protection in article 6 (3) (c) by introducing the interview given by O'Connor to gardai in the car and the interview of O'Connor on the morning of 23 February 1999 for the purpose of demonstrating that in neither of those interviews did he mention receipt of the phone and in the interview in the morning of 23 February 1999 he specifically asserted that he did not have his phone with him.

[257] By virtue of article 5 (1) of the 1997 Order the court must have regard to any circumstance from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. For the purposes of this case I accept that the evidence of O'Connor linking Daly to this phone call is the only direct evidence upon which the plaintiffs rely in establishing that the sixth named defendant is liable to them. The issue of how the court should approach the weight to be given to hearsay evidence where it constitutes the sole or decisive evidence in relation to the proof of the fact has been considered in the criminal context recently in the European decision of Al-Khawaja and Tahery v UK (20 January 2009) and in the subsequent decision of the English Court of Appeal in R v Horncastle. Both turned on the proper approach to article 6 of the ECHR.

[258] In Al-Khawaja the European Court concluded that in a criminal case where the hearsay evidence constituted the sole or decisive evidence a conviction based upon such hearsay offended the protections contained in article 6(3)(d) other than in exceptional circumstances. The Court of Appeal in R v Horncastle carefully considered this decision and the authorities from the European Court which preceded it. The Court of Appeal concluded that the statement in Al-Khawaja was not supported by the earlier authorities in the European Court and that the test of whether admission of hearsay evidence offended article 6(3)(d) should be determined by examining the reliability of the evidence in the particular circumstances.

[259] This, of course, is not a criminal case and the minimum rights set out in article 6 (3) are, therefore, not expressly engaged. The entitlement to a fair hearing, however, will often involve consideration of many of the issues identified as minimum rights within article 6 (3) and in my view in this case it is necessary to examine whether the admission of this evidence and the giving of weight to it would render the hearing unfair. The minimum rights set out in article 6 (3) are in the nature of protections afforded to the individual against the State in circumstances where the state is seeking to exercise its retributive power of punishment against the individual. The minimum rights are, therefore, designed to establish a balance between the state and the individual which must, of course, recognise the substantial investigative powers available to the state and the extent of resource also available to it.

The nature of the balance must also recognise the potentially significant consequences for the individual in terms of possible loss of freedom or deprivation of property.

[260] 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.

[261] Against that background I now turn to look at the evidence of O'Connor. In his interview in the car on the evening of 22 February 1999 O'Connor admitted his involvement in the C2 tax evasion arrangement. That marks him out as a dishonest man whose evidence needs to be examined carefully. He referred in that interview to Seamus Healy. There is no suggestion that this was in any way put to him by gardai and all the evidence indicates that this reference was spontaneously provided by him to gardai. It is common case than in the course of the interview on the morning of 23 February 1999 it was the gardai who raised the possibility that Healy was in fact Daly. O'Connor had made it clear that he had met this man on a number of occasions and consequently was a position to recognise him. When the bundle of photographs was produced, therefore, this was not an identification case but a recognition case. In the course of this first interview in the car he was also able to describe Daly's girlfriend, the fact that on one occasion she had a child with her and the types of vehicle used by Daly on the various occasions on which they met. It is clear from the evidence as to how the bundle of photographs was made up that the possibility that Healy was Daly was one which arose in the course of the interview and consequently there is no evidence at all that there was any planned strategy by the gardai to identify Healy as Daly prior to the commencement of the interview. In the afternoon interview O'Connor then went on to describe Daly, to provide the name of the accountant allegedly involved in the C2 arrangement and perhaps most importantly to identify Daly's telephone number, the 213 number, as that by which he made contact with him. In my view that constitutes considerable evidence that Daly and O'Connor were in occasional

if not frequent contact prior to the Omagh bomb and that O'Connor would have been well able to recognise Daly's voice if Daly rang him. The evidence also establishes to a very high standard of reliability that Daly had a reason for being in contact with O'Connor in relation to the C2 certificate. It is an irresistible inference that the user of the 585 phone did not consider that the call was likely to be traced and there was no reason, therefore, why the phone would not be used for non-terrorist purposes.

[262] O’Connor's account in relation to this phone call has undoubtedly differed. His 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. The content of the phone call asserted by O’Connor is consistent with the evidence in relation to the arrangement upon which Daly and O'Connor were engaged. I am entirely satisfied on the evidence that there was a call from the 585 phone to O’Connor’s mobile phone which was answered. O’Connor never made any case that he had given custody of his phone to anyone else and indeed since the phone could not ring out it seems highly unlikely that it would have been of value to anyone else. I also bear in mind that the reason advanced by O’Connor on the morning of 23 February for not taking his phone with him is bizarre. All he had to do was switch his phone off if he was getting nuisance calls. I am satisfied, therefore, that the account given in the statements of the afternoon of 23 February and that of December 2001 is one to which weight can be given although in balancing this evidence with any other evidence it will be necessary to take into account that O'Connor has admitted dishonesty and that this account was not given spontaneously and was preceded by a different account.

Other evidence

[263] The Lisburn bomb was discovered and defused on the morning of 30 April 1998. The telephone evidence demonstrates that the sixth named defendant's mobile phone, 213, received a call at 1922 on 29 April 1998 using a Lisburn cell site from the landline of Sheila Grew. Between 07:58 and 08:30 on the morning of 30 April 1998 the 213 phone made 3 calls in the Republic of Ireland, 2 to the first named defendant and one to Sheila Grew. At 0858 it received a call from the fifth named defendant’s wife's phone 689 using a cell site at Dromore. At 09:23 the 213 phone made a call using a cell site at Linenhall Street Lisburn. At 10:02 the 213 phone received a call using a Lisburn cell site. At 1030 the 213 phone received a call using the Loughbrickland cell site. By 1157 the 213 phone was back in the Republic of Ireland. A warning in respect of the Lisburn bomb was telephoned to the Irish News at 1038 and the codeword given was Marta Pope. The warning was repeated at 1043 and the same codeword given. Three further warnings were given all of which use the same codeword. 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.

[264] The plaintiffs also sought to rely on a connection between the sixth named defendant and the 076 phone. An analyst carried out a comparison of the calls made by the 076 phone and those made by the 213 phone. There were a number of similarities in relation to the persons called and the plaintiffs contended that the similarities were sufficient to enable an inference to be drawn that the 076 phone was a phone attributable to the sixth named defendant. The sixth named defendant points out that the frequency of the calls was dissimilar in the period examined from the frequency of calls by the 213 phone. I consider that it is very difficult to draw any conclusion from this evidence and I give it no weight. Finally the sixth named defendant pleaded guilty on 2 March 2004 to a charge of membership of the IRA, otherwise Oglaigh na hEireann, on the single date of 20 November 2000 and was sentenced to 31/2 years imprisonment.

Conclusions on liability

[265] In relation to the first named defendant I have indicated in paragraph 69 above that the case against him depends entirely upon a connection which the plaintiffs seek to establish between him and the 980 phone. In order to establish that connection they are dependent upon the hearsay and oral evidence of his estranged wife. I have concluded at paragraph 77 that she is an unsatisfactory witness and at paragraph 78 I conclude that there is no basis upon which I could give weight to the account given by Mrs McKenna in interview on the morning of 4 March 1999. I do not consider that the plaintiffs' position is improved by the fact that this defendant has not given evidence. The proper approach to the silence of a party is set out by Lord Lowry in R v IRC ex p 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 an overwhelming case. But, if the silent party's failure to give evidence (or to give 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."

Since no prima facie case has been established against this defendant I do not consider that any adverse inference is justified. Accordingly I dismiss the action against him.

[266] In relation to the third named defendant the case against him depends upon the hearsay evidence of David Rupert. I have found in paragraph 179 that I should give considerable weight to the content of the e-mail traffic. I consider that this material demonstrates that the third named defendant held a significant leadership role in the Real IRA as a result of his defection from the Provisional IRA in the period leading up to the multi-party agreement in April 1998. The evidence demonstrates that he had a particular responsibility in relation to procurement and in those circumstances I consider that the availability of the materials to prepare the bomb could only have occurred with his support and approval. I have already referred to the evidence that there was a policy decision to reduce the amount of time available to locate and defuse bombs beginning in Banbridge on 1 August 1998 and I draw the inference that this was a policy decision instigated or approved by the third named defendant in his leadership position. In light of the fact that there is a proper inference to be drawn that he was responsible for authorising the provision of the material for the bomb I conclude that he is liable in trespass to the plaintiffs on the basis that he intended that the bomb should explode and he foresaw the likely consequence of personal injury particularly having regard to the nature of the time allowed for clearance. In any event I consider that by virtue of this leadership role he is liable as aiding, counselling and directing the commission of the tort. I consider that the failure of the third named defendant to give evidence in answer to this case against him is inexplicable and makes the case against him overwhelming.

[267] I have indicated that paragraph 187 that I am satisfied that there is cogent evidence that the fourth named defendant was a member of the Army Council of the Real IRA at the time of the Omagh bomb. I am further satisfied that he held an important leadership position in the Real IRA at that time and subsequently. There is cogent evidence that the 430 phone was being used by him at the time of the Omagh bomb and the two communications between the 585 phone and the 430 phone on the day of the bomb demonstrate his involvement in directing the operation and participating in it. I consider that he also is liable in trespass to the plaintiffs. He initially entered a defence to this claim but subsequently he instructed his solicitors to come off record. In his case also it is inexplicable that he should not have answered this case if he had an answer to it. I consider that the case against him is overwhelming.

[268] I have indicated in paragraph 246 that I am satisfied that the fifth named defendant obtained the Morgan phone, 980, the day before the Omagh bomb. I am satisfied that the fifth named defendant's registered phone and that phone were used in the bomb run. I am satisfied that the fifth named defendant was at the time an active member of the Continuity IRA and that

this was a joint operation between that organisation and the Real IRA. Against that background the only reasonable inference is that the fifth named defendant provided the phones for the Omagh bomb attack knowing full well the nature of the attack which was going to be conducted. He also has not answered the case against him. I indicated to his legal representatives that in light of the fact that he still had to face a criminal prosecution in the Republic of Ireland I would be prepared to consider stringent arrangements to protect his evidence from publicity or disclosure. Such arrangements would have been effective to protect the integrity of the criminal process. The fifth named defendant did not seek to avail of any such arrangements. I consider in any event that the case against him is overwhelming and that he is liable to the plaintiffs in trespass.

[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 find 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 to 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.

[270] Finally I come to the second named defendant. I have already indicated that the arguments in relation to a representation order in respect of the Real IRA are formidable. I accept that someone who has just joined this organisation would have a different interest in relation to this claim from those who were directing the organisation of the time. I have already found the third and fourth named defendants responsible personally but it is clear that there were others who participated in this attack. I cannot identify those persons as a result of the evidence that I have received in these proceedings but I can certainly readily come to the conclusion that those who were members of the Army Council of the Real IRA on 15 August 1998 bear responsibility for directing this attack as part of the campaign that was being waged at that time. I consider, therefore, that it is appropriate to make a representation order in respect of the fourth named defendant as representing the members of the Army Council of the Real IRA on 15 August 1998. I make the order in respect of the fourth named defendant because the evidence demonstrates that he was a member of the Army Council on that date.

Damages

[271] The plaintiffs claim compensatory damages including aggravated damages together with exemplary damages. I have already indicated in Ruling No 9 that I do not consider that is open to me to make an award of exemplary damages in this case. 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 specific 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 was given and that there was no identification of the vehicle as had 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. In assessing the amount of damages to be awarded to each plaintiff I have taken into account the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (third edition) which broadly indicate ranges of damages dependent upon the adverse medical consequence for the victim.

[272] Many of these cases are claims for psychiatric injury. Such claims occasionally give rise to issues in relation to remoteness. Since I have concluded that the liability of the defendants is based upon trespass, an intentional tort, I do not consider that any issue of remoteness arises (see Wainwright v Home Office [2004] 2 AC 406 and Clerk and Lindsell 19th edition paragraph 2-110). I do not intend to rehearse the detail of the medical reports or the accounts given to me of the enormous difficulties a number of those involved had in coping with the consequences of this bomb. For many the effects are catastrophic and their lives will never be the same.

[273] Mark Breslin was in the back garden of his house just over a mile away from the centre of Omagh when he heard the explosion. He went to the centre of Omagh to his wife's place of work and then eventually to the hospital where after a frantic search he discovered his wife gravely injured. By the time she was moved to Belfast that evening she had died. Mr Breslin developed symptoms of anxiety and depression. He became preoccupied with risk management and developed an adjustment disorder which has

improved substantially. It is clear that he was very deeply affected by the immediate aftermath of the bomb. Damages for dependency are agreed at £160,000. He is entitled to bereavement damages at £7,500 and funeral expenses of £1298.50 to which interest should be added. I will make an award of £5,000 to the estate to reflect pain and suffering leading up to death. I assess general damages at £60,000 to which I add a figure of £30,000 to represent aggravated damages. Interest from the date of issue of the writ should be added to these sums.

[274] Denise Kerrigan was the sister of Lorraine Wilson. She had been in the town centre and had gone to her home which was only a short distance away when she heard the explosion. She went into the town to try to find her sister who was working at the Oxfam shop. She was there before the cordon had been erected and witnessed the injured being transported to hospital and bodies covered with sheets. She saw devastating scenes at the hospital and realised that her sister may be dead. She developed post traumatic stress disorder, clinical depression, anxiety and dysfunctional use of alcohol. She remains vulnerable to clinical depression. I assess general damages at £75,000 to which I will add £30,000 to represent aggravated damages. Interest from the date of issue of the writ should be added to these sums.

[275] Marion Radford was shopping with her son Alan on the day of the bomb. She heard a loud bang and was injured by flying glass. She was taken to hospital and eventually discovered that her son Alan was one of the victims. She developed post traumatic stress disorder and severe clinical depression. She had previously suffered psychiatric illness but prior to this had enjoyed a two-year period of marked stability. Her life has been drastically affected by the bombing. I assess general damages at £100,000 to which I will add £30,000 to represent aggravated damages. Interest from the date of issue of the writ should be added to the sums. I make a further award in respect of funeral expenses at £760 and damages for bereavement at £7,500. interest should again be added to these sums.

[276] Paul Radford is the son of Marion Radford. He was called by his mother to go to hospital and was asked by a police officer to assist injured people arriving into the hospital. He saw horrific injuries. He was eventually informed that his brother had died and formally identified him. He suffered an acute stress reaction with symptoms of avoidance and re-experiencing phenomena. He were still showing signs of depression in January 2008 and at that stage the evidence was that there had been a substantial deterioration in his condition. I assess damages at £75,000 and award a further sum of £30,000 by way of aggravated damages. Interest will be payable as in the other cases.

[277] Stanley McCombe was in Scotland at a pipe band championship when he heard about the bomb. He knew that his wife would have been working on the shop next to where the bomb exploded and eventually discovered that she

was one of the victims when his minister identified her at 11 p.m. that evening. He was unable to get home until the following morning. He has suffered chronic depression. He has continued to exhibit symptoms of anxiety and depression and is unlikely to make a full recovery. I assess general damages at £75,000 to which I will add a figure of £30,000 for aggravated damages. Interest will again be payable. I award agreed damages of £225,000 for dependency. A further award £7,500 by way of bereavement damages and agreed funeral expenses of £2510.95 follows. Interest will be payable on these sums.

[278] Kathy Gallaher was the sister of Aidan Gallaher. She had been in the town centre and returned home when she heard the explosion. She knew that her brother was in the town centre shopping. She watched events on television and remembers her father coming back after 5 a.m. the following morning. She discovered that her brother was one of the victims. She had previous psychiatric difficulties following the death of her grandmother. She developed post traumatic stress symptoms, intrusive memories, avoidance behaviour and irritability. She is a candidate for long-term antidepressant treatment because of her vulnerability. I assess general damages at £50,000 and add a figure of £30,000 for aggravated damages. Interest will be payable on these sums.

[279] Godfrey Wilson was at home at the time of the bombing. He went to look for his daughter Lorraine who was working in the centre of town. He spent long hours at the hospital and then at the leisure centre overnight and identified his daughter who was horribly disfigured. He tried to go back to work but had to stop in November 2001. He developed symptoms of post traumatic stress disorder. It is not anticipated that he will make a full recovery. I assess general damages at £75,000 and award aggravated damages of £30,000. I make a further award of £7,500 by way of bereavement damages and £2689.47 in respect of funeral expenses. Interest will be payable on these sums.

[280] Michael Gallagher worked alongside his son in the family business. He was in the garage working when they heard the explosion. He went into town and then to the hospital where he was caught up in the aftermath of the bombing. His experience of the carnage at the hospital was horrific. He went to a car park in the town centre and found his son's car and eventually the following morning identified his son's body. He developed an acute stress reaction and then post traumatic stress disorder. He has not returned to work. I assess general damages at £75,000 to which I will add a figure of £30,000 to represent aggravated damages. Interest will be payable on these sums.

[281] Gary Wilson is now resident in Australia. He heard the sound of the explosion and saw clouds of debris rising over the town. He made his way to

the town centre to search for his sister and saw dead bodies lying on the ground and seriously injured people coming from the scene of a bomb explosion. He made his way to the hospital and again saw horrific scenes. He subsequently identified his sister's body the next morning. He developed an acute stress disorder leading to post traumatic stress disorder and a severe depressive illness. He had repetitive suicidal thoughts and actions. He emigrated to Australia to get away from his memories of the bombing and has shown improvement since then. He is vulnerable to further depression. I assess general damages at £50,000 and award a further sum of £30,000 by way of aggravated damages. Interest should be added to these amounts.

[282] Edmund Gibson was in Omagh town centre on the day of the bomb and heard the explosion. He experienced the immediate aftermath and saw scenes of physical damage and intense distress. He was aware that his sister was missing. He went on duty as a police officer to assist the victims and witnessed the scenes in the hospital. He identified his sister's body. He developed an acute stress reaction and post traumatic stress disorder and depression. He resigned from the police service suffering an agreed loss of £31,300 to which appropriate interest should be added. I assess general damages at £60,000 to which I will add £30,000 by way of aggravated damages. Interest will be added to these sums.

[283] Colin Wilson was 10 years old at the time of the bombing. He has various special needs. He made his way by bicycle to the town centre to try to find his sister. He was particularly close to her. He witnessed devastation and chaos in the town centre around the hospital. He developed depressive conduct disorder but has made good progress in more recent years. I assess general damages at £40,000 to which I will add a figure of £30,000 by way of aggravated damages.

[284] Geraldine Wilson is the mother of Lorraine Wilson. She witnessed the sound of a bomb and saw the smoke and debris rising in the air. She went into the town centre to look for her daughter and witnessed victims of the bombing had been injured. She then went to the hospital to try to locate her daughter. She developed post traumatic stress disorder and became very significantly depressed. She is functioning at a limited level and has a poor outcome in terms of possible treatment of future prognosis. I assess general damages at £100,000 to which I will add a figure of £30,000 by way of aggravated damages. Interest will be added to these sums.

[285] Finally, although the plaintiffs have maintained a claim for an injunction there is very little evidence in relation to the present position of each of the defendants. In those circumstances I do not consider that I am in a position to exercise my discretion and accordingly decline to make any order.