Neutral Citation No.

Ref:	**McCL8147**

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

Delivered	**08/04/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARGARET KEELEY

Plaintiff/
Appellant:

and

CHIEF CONSTABLE OF THE POLICE
SERVICE FOR NORTHERN IRELAND

Defendant:

_____

McCLOSKEY J

Introduction

[1] This judgment determines:

(a) The Plaintiff's appeal against the order of the Master dismissing the Plaintiff's application to join two additional Defendants pursuant to Order 15, Rule 6 of the Rules of the Court of Judicature.

(b) The Defendant's application under Order 33, Rule 3 seeking the court's determination of the date on which the Plaintiff's cause of action accrued; the date of knowledge of the Plaintiff (if later); and, subject to

the foregoing, the exercise of the court's discretion under Article 50 of the Limitation (NI) Order 1989.

(c) The Defendant's further application for an order dismissing the Plaintiff's action for want of prosecution.

The Plaintiff's Case

[2] This action was initiated by Writ of Summons issued on 16th December 2008. Pursuant thereto, the Plaintiff alleges that she was unlawfully arrested and falsely imprisoned by the Defendant's servants and agents for a period of three days, in 1994. She further asserts trespass to her person, in the form of physical handling and conduct, including words, giving rise to assault. The genesis of the appeal and applications to be determined by the court can be found in paragraph 2 of the Statement of Claim:

> "*The Plaintiff was taken to Castlereagh Detention Centre where she was unlawfully detained for a period of three days. Subsequent to her release from Castlereagh Detention Centre the Plaintiff was falsely imprisoned on two separate occasions by servants and agents of the Defendant at two private dwelling houses in … Belfast*".

While there is an assertion of personal injuries, it appears that the Statement of Claim was not accompanied by any medical evidence. There is no claim for financial loss. In further particulars of the Plaintiff's claim, the following averments are contained:

> "*The Plaintiff alleges that she was arrested in order to bolster the plausibility of her husband's arrest for conspiracy to murder in circumstances in which he was in fact a Covert Human Intelligence Source in the payment, control and employment of the Defendant, was innocent of any such offence and his innocence in this regard was known to the Defendant*".

The Plaintiff's husband is identified as Peter Keeley. In short, the pleading asserts that Peter Keeley was a State informant, that his arrest was a form of orchestrated cover to protect this status and that the Plaintiff's arrest and detention formed part of this elaborate charade.

[3] The Defence contains the following material pleadings:

> "*The Defendant says that at approximately 16.45 hours on 10th February 1994 the Plaintiff was lawfully arrested under Section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989. On foot of the said arrest the Plaintiff*

was lawfully detained until her release at 17.46 hours on 13th February 1994 …

The Plaintiff's alleged causes of action, if any, all of which are denied, are barred by the elapse of time and by the provisions of the Limitation (NI) Order 1989."

The Plaintiff's Reply to Defence contains the following material pleading:

"*The Plaintiff denies that his* [sic] *claim is statute barred. The Plaintiff's date of knowledge for the purposes of Article* [7] *of the Limitation (NI) Order 1989 was 16th October 2007, when the Plaintiff first became aware following consultation with British Irish Rights Watch that she should take legal action in respect of her mistreatment at the hands of the RUC. By reason of the matters aforesaid the Plaintiff was not aware that he* [sic] *had a claim in negligence against the Defendant until October 2007…*

Further and/or in the alternative the Plaintiff will seek to rely on the residual discretion afforded to the court by Article 50 of the Limitation (NI) Order 1989".

The Present Appeal and Applications

[4] An application was then brought on the Plaintiff's behalf for an Order pursuant to Order 15, Rule 6 that two further Defendants – described as Frederick Scappaticci and the Ministry of Defence – be added as Defendants. The factual basis of this application was a series of allegations on the Plaintiff's behalf, directed to the proposed two further Defendants, relating not to her arrest and detention by the police, rather certain subsequent connected events. This application was founded on an affidavit sworn by the Plaintiff's solicitor (notably, not the Plaintiff) which included the following averments:

"*The Plaintiff's ex husband has informed the Plaintiff that at the time of her false imprisonment, assault and interrogation in Belfast in 1994 he was working for the 'Force Research Unit' of the British Army and was jointly 'handled' by RUC Special Branch and MI5 …*

Subsequent to and consequent upon the Plaintiff's false imprisonment, assault and interrogation in Castlereagh Detention Centre the Plaintiff was falsely imprisoned, assaulted and interrogated in the New Lodge Area of Belfast. The Plaintiff briefly caught sight of one of her interrogators thereat and has now identified him as Frederick Scappaticci … [who] *has been widely reported as having been a*

> *longstanding servant and agent of the Ministry of Defence in Northern Ireland …*
>
> *The Northern Ireland Office has chosen to neither confirm nor deny* [this]…
>
> *I have been advised by senior counsel that in order to safeguard the Plaintiff's interests and in order to have the matter fully and fairly aired and justice done between the parties in this matter it is essential that Frederick Scappaticci and the Ministry of Defence be added as Defendants…*".

Three observations regarding this affidavit are appropriate. Firstly, the main affidavit grounding the application should have been sworn by the Plaintiff, not her solicitor. Secondly, the absence from the averments set out above of any indication of *when* the Plaintiff's husband allegedly informed her of his status is glaring. Thirdly, the affidavit failed to comply with Order 41, Rule 5 of the Rules of the Court of Judicature, which requires a deponent to provide **the sources and grounds** of every averment of information or belief.

[5] This unsatisfactory affidavit stimulated a replying affidavit sworn by Mr. Scappaticci's solicitor, containing much comment and sworn argument. This prompted a rejoinder by a different member of the Plaintiff's firm of solicitors. This too was in breach of Order 41, Rule 5 in particular and contained much comment and sworn argument. Moreover, remarkably, the deponent made reference to "*my previous affidavit in support of this application*", in circumstances where he had not sworn any previous affidavit. This deponent makes the following averment, in particular:

> "*… the Plaintiff will say at trial that she has only recently fully identified the putative second Defendant, that she was previously instructed by her now ex-husband not to speak about or in any other way highlight her unlawful detention and mistreatment at the hands of the second Defendant and that prior to the second Defendant's flight from this jurisdiction she was in substantial fear for her own safety in respect of the issuing of any proceedings against him.*"

These particular averments will have to be considered in the light of the evidence available to the court, including the Plaintiff's sworn evidence.

[6] The same solicitor swore a second affidavit some four months after service of the Notice of Appeal challenging the Master's order. Thus one particular feature of this appeal is the generation of certain further evidence not available to the Master. This further affidavit contains averments which suggest to the court the following:

(a) The Plaintiff instructed her solicitors one year or more prior to the issue of the Writ of Summons.

(b) The Plaintiff's first contact with British/Irish Rights Watch ("*BIRW*") occurred in October 2007.

(c) The Plaintiff's initial contact with her solicitors was instigated by BIRW.

The deponent avers that civil actions against State informants give rise to sensitive and complex issues generally. It is further averred that a decision was made not to await the publication of certain unspecified reports by the Historical Enquiries Team ("*HET*"). Notably, this affidavit does not:

(i) Specify the date when BIRW first provided "instructions" to the Plaintiff's solicitors.

(ii) Identify the date when the Plaintiff herself instructed the firm.

(iii) Contain any explanation for the delay between steps (a)/(b) and the issue of the Writ, in November 2008.

(iv) Account for the delay between January and November 2009.

(v) Explain the delay of almost five months between the issue of the amended Legal Aid Certificate and the initiation of the application under Order 15, Rule 6.

These are all significant omissions.

[7] Belatedly, the Plaintiff herself swore an affidavit, for the purposes of this appeal. In this affidavit she avers, in particular, that:

(a) She first became aware in October 2007 that her arrest and detention by the police in 1994 "*had been a sham designed to provide 'cover' to my then husband in his activities as a police informant and covert agent*".

(b) From 1994 she was regularly warned by her husband not to speak to anyone about the "Scappaticci interrogation".

(c) In 2003 she complained by telephone to the Police Ombudsman about all of the events in 2004. She suggests that this elicited no response.

(d) In 2003 she contacted the Stevens Inquiry and made a statement "*about my treatment at the hands of Frederick Scappaticci*".

(e) She heard nothing further from the Stevens Inquiry thereafter.

(f) *After* her "discovery" in October 2007 –

> "*… I attended with* [BIRW] *both to complain about my detention by the RUC at Castlereagh and my subsequent interrogation by Frederick Scappaticci*".

(g) Having done so, BIRW personnel –

> "*… advised me that I should take legal action in respect of my mistreatment at the hands of the RUC and Frederic Scappaticci and referred me to Kevin R Winters & Co with whom I attended on 7th November 2007*".

(h) Mr. Scappaticci's status "*… would not have been entirely clear to me until some considerable time*" after 2003.

The contents of this affidavit immediately throw up two questions:

(a) How and in what circumstances does the Plaintiff assert that she first became aware in October 2007 that her arrest and detention by the police in 1994 had been a charade?

(b) When did the Plaintiff first learn of Mr. Scappaticci's supposed status?

Notably, the Plaintiff's affidavit is silent on each of these important issues.

[8] The evidence before the court includes the following:

(i) The Plaintiff's first written statement provided to the Stevens Inquiry, dated 12th November 2004. This contains the following passages:

> "*I have attended at my solicitor's office to make a statement regarding an incident that took place in 1994 …*
>
> *I do not have faith in the PSNI. I am only prepared to speak to officers of the Stevens Investigation. Around this period* [viz. 1994] *Peter* [her husband] *started to associate with a number of men who had Republican views …*
>
> *Peter and I would regularly drive to Dundalk to socialise with these men …*

I cannot recall any of the conversations with these men …

[Following her 1994 arrest] …

My solicitor at that time was Aidan Deery. The next day after my arrest, the Friday, I spoke to Aidan who told that Peter had been lifted as well. The police asked me questions about me renting a flat in Bloomfield Avenue and a mobile telephone …

I was interviewed for about one hour every day until I was released …

Peter and I were released together …

I was fuming with Peter and demanded an explanation for him …

I also said I had been asked about a mobile phone. Peter said he had given my name as 'they needed a clean phone'. I don't know to whom Peter was referring …

[Later] *Peter told me that 'they' wanted us to go down to Belfast for an interview to debrief us … I understood that this interview was going to be done by the Provisionals …*

[In Belfast] *I recognised 'Scap' as one of these men. He looked the same as when I had met in Dundalk on several previous occasions …*

I faced the wall and heard … Scap's voice …

Throughout this interrogation I was extremely frightened …

[Later] *Scap told me that I could go gesturing with his head towards the door …*

The man I have referred to as 'Scap' I now know to be Frederick Scappaticci and I have recognised him on television as one of the men who had kept me against my will … I am prepared to give evidence regarding this matter".

(ii) The Plaintiff made a second witness statement to the Stevens Inquiry, dated 13th October 2005. This recites, *inter alia*:

> *"I recall that in my first statement I said I was only interviewed once. However, I have remembered that I was in fact interviewed twice as both times were in the same flat … and both times were with Peter …*
>
> *Although I didn't want to go back I realised that if I didn't I would be grabbed by the security team and forced to go …*
>
> *They began to question me in a similar fashion to the way they did the previous week. This revolved around my arrest and detention at Castlereagh and the topics the police questioned me about …*
>
> *I can confirm that Freddie Scappaticci was certainly one of the people asking me questions …*
>
> *Whilst I was being questioned I was frightened and crying …*
>
> *I told* [Peter] *off on the way home for getting me into this trouble …*
>
> *I have been asked if … I have discussed any of the statements … I have made to the police or the contents of them. I can confirm that we* [semble, the Plaintiff and her husband] *haven't spoken about them at all. I have been asked … at what stage did I remember I had been interviewed twice by the Security team and why I didn't inform the police. The answer is that I didn't know I had to, although I remembered at the end of November or the beginning of December 2004 …".*

(iii) Next, there is a short written statement, *apparently* signed by the Plaintiff's husband, dated 15th October 2007. This recites:

> *"I … confirm that at the time you (Margaret Keeley) were arrested … I was working for the Force Research Unit of the British Army. I was jointly handled by RUC Special Branch and MI5. My RUC handlers were …*
>
> *My MI5 handler was known to me as …*

> *The police were aware that you were totally innocent of any charge and knew nothing about any terrorist actions by the PIRA. I was told that your arrest and detention would be good for my cover as an agent for Her Majesty's Government*".

None of the affidavits filed on behalf of the Plaintiff contains any elaboration of this document – its provenance, the circumstances in which it was generated, how it came into the Plaintiff's possession and so forth.

(iv) There is also a "Note of Meeting with Margaret Keeley", dated 16th October 2007 and signed by a BIRW representative. According to this record, BIRW "*acts for*" the Plaintiff's husband. This document recounts an interview of the Plaintiff in reported speech. It includes the following passages:

> "*She managed to catch sight of her interrogator as she was leaving the room and, some years later, recognised him as Freddie Scappaticci …*
>
> *This interrogation took place in the same format one more time, approximately a week later …*
>
> *Margaret was terrified by the whole ordeal …*
>
> *A few years ago, when she realised who her interrogator was Margaret contacted the Police Ombudsman and explained she wanted to make a complaint about her interrogation by Scappaticci …*
>
> *Margaret wants an explanation and an apology for the various interrogations. She is also concerned that her police records may not be clean, due to her arrest and interrogation by Scappaticci…*".

[9] Following completion of the Plaintiff's sworn evidence, the court received the following chronology from her counsel, without objection:

(a) 16th October 2007 – the Plaintiff's meeting with BIRW.

(b) 7th November 2007: the Plaintiff's first attendance with her solicitors.

(c) 9th December 2007: counsel's Opinion.

(d) 9th June 2008: application for legal aid.

(e) 17th September 2008: letter of claim.

(f) November 2009: counsel's advice regarding the joinder of further Defendants.

The court also received a copy of the letter of claim written by the Plaintiff's solicitors. This is dated 17th September 2008 and is addressed to the Police Service. It begins:

> "*We are instructed by the above-named to claim damages (including aggravated and exemplary damages) in respect of personal injuries, loss and damage sustained by her by reason of the false imprisonment, assault, battery, trespass to the person and misfeasance in public office of you, your servants and agents in and about the arrest and detention of our client over a period of four days in Castlereagh Interrogation Centre and subsequently for two separate periods in a flat in … Belfast in 1994. Our client is unable to recall the precise dates of detention.*"

Continuing, the letter provides the pseudonym of the Plaintiff's husband, suggesting that he, -

> "*… has recently informed our client that he is aware that her arrest was carried out by police to provide 'cover' for his activities as a police informant working within the Provisional IRA and that at the time of her arrest, detention and interrogation police were fully aware … that our client was entirely innocent of any wrongdoing or criminal conduct and that her arrest and detention were entirely unlawful and without foundation*".

The letter then provides a brief account of the Plaintiff's instructions regarding her alleged subsequent interrogation by Provisional IRA members in Belfast, including this assertion:

> "*Our client caught sight of her interrogator at the conclusion of her interrogation and some years later recognised him as being one Frederick Scappaticci, another servant and agent of the Defendant.*"

The Writ was issued three months later.

[10] Whereas the Writ was issued on 16th December 2008, the Statement of Claim (which is wrongly dated 1st July 2009) did not follow until July 2010. It was served in circumstances where the Defendant's legal representatives had been obliged to

secure an "unless" order from the Master, which is dated 28th June 2010. This application was brought on due notice to the Plaintiff's solicitors, at a stage when the Writ was of some one and a half years vintage, eliciting the following response:

> "*I referred the drafting of Statement of Claim to counsel who advised that any application by CSO to compel service of a Statement of Claim in the face of a live application to substantially amend the character of the action would fall foul of the over-riding objective. I now advise that we do not intend to serve the Statement of Claim until conclusion of the application to amend.*"

At that stage, the Plaintiff's application under Order 15, Rule 6 to join the additional Defendants was live. It had been initiated in March 2010 and stood adjourned, to enable a further affidavit to be sworn by a solicitor in the Plaintiff's firm. This duly materialised on 22nd June 2010 (paragraph [5], *supra*). The hearing of both summonses ensued and, on 28th June 2010, the Master made separate orders: the aforementioned "unless" order and an order dismissing the joinder application.

The Plaintiff's Evidence

[11] Upon the hearing of this appeal and application, the Plaintiff gave sworn evidence. She was the only person to do so. Initially, she described her arrest and ensuing detention in Castlereagh Detention Centre in 1994. She asserted that during interviews it was put to her that she had rented a flat in Bloomfield Avenue, Belfast. She complained that the interviewing detectives called her names. She learned of her husband's arrest on the last of her three days of incarceration. They were released together. She then recounted how she and her husband went to Belfast a couple of days later, where they were questioned by "*the IRA*", separately, in a flat. She claimed that whilst being escorted into the hall, she caught a glimpse of a man whom she recognised as Mr. Scappaticci. She had not met him previously but had seen him in bars in Dundalk on previous occasions. The thrust of her evidence initially appeared to be that she also recognised his voice and that this voice recognition recurred years later, when she heard him speaking on television. She corrected this quickly, maintaining that she merely *saw* him on television. Only then did she learn the allegation that he was an informant, a State agent. On the previous occasions in bars in Dundalk, it was customary for the wives/women to gather in one group, while the men congregated separately.

[12] According to the Plaintiff, during her interrogation by the IRA she was asked about her interviews with the police. In particular, what had she said during interview? Had she been asked about specific places? Had she been questioned about certain people? She was seated throughout, facing a wall, with her back to the interrogators. This endured for a couple of hours. At its conclusion, the interrogators said that they would contact her further and she was warned to tell n o one about what had happened. A couple of days later, a repeat interrogation ensued. She claimed that her husband underwent a *third* interrogation

subsequently. She recounted that her husband worked intermittently as a painter and decorator. She knew nothing about his "*activities*". Years later, she learned that he was a State agent. In her words, "*He came out and told me*". This first occurred around 2004, apparently coinciding with the "Scappaticci publicity", when he stated that he was "*the same as Mr. Scappaticci*". He "confessed" that he too worked for the British Government. Between 2004 and 2007, her husband said this two or three times. She did not believe him initially, but did so ultimately.

[13] The Plaintiff testified that she "*complained*" to the Stevens Inquiry in 2004/2005. She also contacted the Police Ombudsman's organisation, eliciting no response. She claimed that, unlike her husband, she had no lawyers acting for her. Her husband's solicitor asked her to provide a statement to the Stevens Inquiry, recounting the "interrogations" in Belfast. In 2007, she went to BIRW. At that stage, according to her evidence:

> "*Peter came out totally clean to me, in a phone call … He told me he was a British agent … He said that my arrest in 1994 was all a cover for him*".

According to the Plaintiff, her husband further suggested that she secure legal advice and make contact with BIRW for assistance. She duly did so, in October 2007, following which she first consulted her present solicitors. She further claimed that between 1994 and 2007 she had been the victim of some frightening incidents, involving window breaking and tyre slashing.

[14] When cross-examined by Mr. McEvoy (appearing on behalf of the Defendant and the Ministry), the Plaintiff was unable initially to recall whether she had been questioned about a mobile phone during her police interviews. Then she remembered, testifying that the police had suggested that her phone had been found in a house from which the offence in question – the attempted murder of a senior police officer – had been launched. She claimed that, following their release, her husband had told her that he had taken a mobile phone out in her name and, weeks later, she read in a newspaper that a mobile phone and other items had been found in a flat. She knew that some of those with whom her husband associated in the bars in Dundalk were "*IRA ones*". She suggested that her husband first told her that he was an agent around 2000, when he left for London. They have remained in contact by telephone subsequently. At the stage when he left, she was too afraid to consult a solicitor and remained in this state of fear when she provided a statement to the Stevens Inquiry. The engagement of her present solicitors was stimulated by the advice given to her by BIRW in 2007. By that stage, she felt more confident.

[15] When cross-examined by Mr. Lavery QC (appearing with Mr. Cleland, on behalf of Mr. Scappaticci) she confirmed that she knew in 1994, at the time of the interrogations, that "Scap" was one of her interrogators. [This conflicts with paragraph 5 of the first of her solicitor's affidavits, sworn in April 2010, which avers that the Plaintiff "*… briefly caught sight of one of her interrogators and has **now** identified*

him as Frederick Scappaticci". It is further contradicted by her solicitor's letter of claim]. Then she altered her evidence, claiming that (a) she had seen Mr. Scappaticci both on arrival *and* departure from the "interrogation" premises and (b) she recognised "*fully*" who he was upon seeing him on television nine years later. It was then that she learned he was a British agent. It was also then that she formed her desire to obtain justice for what had been inflicted on her in 1994. Why did she not take action in 2003? She replied, initially, that she was fearful. Then she added that she felt safer from 2003, following the "*outing*" of Mr. Scappaticci. From then, she felt that nothing untoward could occur, since "*… he could no longer say whether I lived or died*". The Plaintiff admitted that she had made no mention of the "television recognition" claim in any of her written statements. When asked to explain this omission, she replied:

> "*Because I didn't feel comfortable to tell this … I didn't want them to think I was really stupid*".

[16] She admitted knowledge that everyone who attended the gatherings in Dundalk bars, including her husband, was connected in some way to the IRA. She said she was unaware of whether her husband assisted the IRA. He had informed her, following their release from police detention, that "*these people*" needed a clean mobile phone. She did not ask him anything further, because "*you don't ask those questions*". She protested to her husband that she did not want to "*get dragged into it*". At this stage, "*different ones*" commented to her that the IRA would want to debrief them. She appeared to suggest that irrespective of the warning described earlier in her evidence she would not have made a complaint to any agency about her arrest or the later interrogations. She claimed that she had no interest in making a claim against the police. Why is she pursuing one now? She replied:

> "*Time has gone on and the truth must be known about how victims were treated by the RUC and informants*".

She suggested that BIRW informed her of her entitlement to compensation arising out of the events in question. She admitted to being familiar with the phenomenon of claims being made against the police. When asked about the Scappaticci publicity in 2003, she replied:

> "*Then it all became public. Then I decided to tell what had happened to me in Castlereagh and how I was treated by the IRA*".

Continuing, she suggested that by 2004 she was less fearful, adding that Mr. Scappaticci had left the country by then. The Plaintiff's explanation for failing to mention the second IRA interrogation in her first statement to the Stevens Inquiry was that she was frightened. She added that on one discrete occasion she telephoned the Stevens Inquiry to report that someone had been following her. She contacted BIRW on her husband's advice, after he had disclosed that her arrest had

occurred only to secure his position, as cover for him. She could not recall when she had first consulted her solicitors. When she did so, she gave them "*the full story*". She knew from the very outset that her interrogators were the IRA "*security team*".

The Limitation (Northern Ireland) Order 1989

[17] Article 7 of the Limitation (Northern Ireland) Order ("*the 1989 Order*") provides:

> ***"Time limit: actions for personal injuries***
> *7.- (1) This Article applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.*
>
> *['Damages in respect of personal injuries' includes a claim for failure by a doctor to diagnose:* ***Adams v Bracknell Forest BC*** *[2005] 1 AC 76. Where the personal injury is based on an intentional trespass to the person, the time limit is the extendable three years under this Article:* ***A v Hoare*** *[2008] 2 All ER 1 (HL), overruling* ***Stubbings v Webb,*** *and not following* ***Devlin v Roche*** *[2002] 2 IR 360 (SC)..]*
>
> *(1A) This Article does not apply to any action brought for damages under Article 5 of the Protection from Harassment (Northern Ireland) Order 1997.*
>
> *(2) Articles 4 and 6 do not apply to an action to which this Article applies.*
>
> *(3) Subject to Article 50, an action to which this Article applies may not be brought after the expiration of the period specified in paragraphs (4) and (5).*
>
> *(4) Except where paragraph (5) applies, that period is three years from-*
>
> *(a) the date on which the cause of action accrued, or*
>
> *(b) the date of knowledge (if later) of the person injured.*

(5) If the person injured dies before the expiration of the period in paragraph (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 14 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 is three years from-

(a) the date of death; or
(b) the date of the personal representative's knowledge, whichever is the later.

(6) Subject to paragraph (7), in this Article and in Article 9, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-

(a) that the injury in question was significant; and

(b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(7) In Article 8 and in Article 9 so far as that Article applies to an action by virtue of Article 9(1) of the Consumer Protection (Northern Ireland) Order 1987 (death caused by defective product) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-

(a) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and

(b) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and

(c) the identity of the defendant;

but, in determining the date on which a person first had such knowledge there is to be disregarded both the extent (if any) of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of Part II of that Order in respect of the loss or damage.

(8) For the purposes of paragraph (6) an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(9) For the purposes of paragraph (6) a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,

but a person is not to be fixed under this paragraph with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.
(10) For the purposes of this Article and Article 8-

(a) "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate); and

(b) regard is to be had to any knowledge acquired by any such person while a personal representative or previously.

(11) If there is more than one personal representative and their dates of knowledge are different, paragraph (5)(b) is to be read as referring to the earliest of those dates."

The second material provision of the 1989 Order is Article 50, which provides:

50.- (1) *If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-*

(a) the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,

the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates.

(2) The court must not under this Article disapply-

(a) Article 8(3); or

(b) where the damages claimed by the plaintiff are confined to damages for loss of or damage to any property, any other provision in its application to an action by virtue of Part II of the Consumer Protection (Northern Ireland) Order 1987.

(3) The court must not under this Article disapply Article 9(2) except where the reason why the person injured could no longer maintain an action was because of the time limit in Article 7 or 8(4).

(4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to-

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(5) In a case where the person injured died when, because of Article 7 or 8(4), he could no longer maintain an action and recover damages in respect of the injury, the court is to have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.

(6) In a case under paragraph (5), or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, paragraph (4) has effect with appropriate modifications, and in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.

(7) A direction by the court disapplying Article 9(2) operates to disapply the provisions to the same effect in

Article 3(1) of the Fatal Accidents (Northern Ireland) Order 1977.

(8) In this Article "the court" means the court in which the action has been brought.

(9) References in this Article to Article 7, 8 or 9 include references to those Articles as extended by any other provision of this Order."

The Issues in Summary

[18] By virtue of the combination of the appeal and interlocutory application recorded in paragraph [1] hereof, it is incumbent on the court to consider the application of Article 7 of the 1989 Order vis-à-vis both the existing Defendant (the Chief Constable) and the two further Defendants whom the Plaintiff seeks to join (Mr. Scappaticci and the Ministry). Plainly, the Plaintiff's cause of action accrued against all three parties in 1994: she cannot, therefore, bring her claim within Article 7(4)(a) of the 1989 Order. Accordingly, it is necessary for the court to determine the date when she first had knowledge of the four matters specified in Article 7(6). The court's determination of this issue will, in turn, resolve the question of whether the limitation period of three years had elapsed since the date of measurement of the Plaintiff's knowledge when the Writ of Summons was issued on 16th December 2008. This exercise will have to consider the existing Defendant and each of the proposed further Defendants individually. If this exercise results in a determination adverse to the Plaintiff, in whole or in part, the next task for the court will be to consider the exercise of its discretion under Article 50 of the 1989 Order. The final task for the court will be to rule on the application of the sole existing Defendant (the Chief Constable) for dismissal of the Plaintiff's action on the ground of want of prosecution.

[19] The primary submission advanced by Mr. Lockhart QC (appearing with Mr. Flanagan) on behalf of the Plaintiff is that the date of her "knowledge" should be determined as October 2007, having regard to the evidence about her interaction with BIRW, the advice which this organisation gave to the Plaintiff and her consequential conduct. Strong emphasis is placed on the averment in the Plaintiff's affidavit and her evidence to the court that she did not learn that her arrest and detention in 1994 were a charade until October 2007. It is submitted, in the alternative, that the court should exercise its discretion in the Plaintiff's favour under Article 50, having regard particularly to the evidence about the Plaintiff's fear; the positive steps which the Plaintiff *did* take in making contact with both the Police Ombudsman and the Stevens Inquiry; the evident capacity of both proposed Defendants to defend the Plaintiff's action, if permitted to proceed; the promptitude with which the Plaintiff acted following her "discovery" in October 2007 and the advice then received by her from BIRW; and, finally, the highly unusual factual and legal matrix of the case which the Plaintiff seeks to make against the Ministry and Mr. Scappaticci.

[20] The submissions of Mr. McEvoy and Mr. Lavery QC, on behalf of the proposed Defendants, emphasize that the Plaintiff plainly knew from the outset viz. in 1994 that Mr. Scappaticci was one of the IRA interrogators. It is further submitted that she cannot claim persuasively to have been in a state of fear post-2003. It is suggested that her failure to act promptly thereafter is insufficiently explained. The absence of any documentary evidence pertaining to the events surrounding the interrogation and the length of time involved, some seventeen years, are additional factors featuring in the resistance to the Plaintiff's application. On behalf of the Ministry, there was a discrete submission that, due to the factor of national security, there will be significant constraints on its ability to fully and actively defend the proposed claim. On behalf of Mr. Scappaticci, it was submitted particularly by Mr. Lavery QC that the evidence establishes that, until 2010, the Plaintiff had clearly decided not to bring a claim against his client. He suggested that her husband's "agenda" is the true stimulus for her change of mind. He further submitted that until 2010 the Plaintiff clearly considered it prudent not to attempt to sue his client, as she considered this was to her advantage. Mr. Lavery also highlighted the prejudice which lengthy delay inevitably generates, suggesting that, at this remove, his client could not realistically adduce alibi evidence or call as a witness anyone who might exonerate him. Finally, on behalf of Mr. Scappaticci, the provisions of Order 15, Rule 4 are highlighted, in support of the submission that the proposed joinder of the two additional Defendants does not involve questions of fact or law in common with those arising in the extant action.

Findings and Conclusions

[21] Any findings of fact which follow will be confined to issues which the court is obliged to determine within the context of this appeal and interlocutory application. I accept that this can extend to issues bearing on the Plaintiff's credibility, insofar as these were explored during the hearing or otherwise arise from the available evidence. This exercise will focus particularly on the provisions of Article 7 of the 1989 Order initially. My assessment of the evidence is as follows:

(a) It is abundantly clear that the Plaintiff was aware that Mr. Scappaticci was one of her interrogators from the time when the relevant events occurred in 1994. This knowledge was in no way altered or enlarged by any subsequent event.

(b) I accept that the Plaintiff was in a state of acute fear in the aftermath of the interrogations and remained fearful subsequently, though to a progressively diminishing extent. In thus finding, I take into account the nature of terrorist organisations and the Plaintiff's good character, which is not in dispute.

(c) I consider that the Plaintiff's diminishing fear did not evaporate suddenly in 2003, but would have continued to reduce thereafter.

(d) In making contact with the Police Ombudsman and in taking the active steps involved in making written statements to the Stevens Inquiry, I consider that the Plaintiff acted reasonably, at a time when she would have been expected to take some positive action.

(e) In my view, the nature of each of the aforementioned steps is more indicative of a wish to make an official complaint than a desire to sue any person or agency for compensation.

(f) Following careful reflection, I accept the Plaintiff's assertion that she first learned in October 2007 that her arrest and detention in 1994 were a sham. While she might have suspected or pondered on this possibility previously, I find that her knowledge did not crystallise until October 2007. This is supported by the written statement of her husband; the date thereof – 15th October 2007; the Plaintiff's conduct in making contact with BIRW (of all organisations); the date when she took this step – 16th October 2007; and the assertion in the ensuing letter of claim from her solicitors that her husband had "*recently informed*" her that her arrest and detention had been a charade.

(g) I find that the Plaintiff's conduct in the wake of the aforementioned "discovery" and the BIRW contact and advice was prompt and reasonable.

(h) The Plaintiff received no legal advice until late 2007or shortly thereafter. In thus finding, I accept her unchallenged claim that the solicitors with whom she had some contact in 2004 were her husband's solicitors and I find that this contact was instigated by him for the purpose of promoting his interests.

(i) The Plaintiff was aware at all times of the phenomenon of claims for damages against the Police Service arising out of arrest and detention.

(j) I find no conscious decision by the Plaintiff not to bring proceedings against any party until October 2007. In my view, she gave no active consideration to this possibility.

(k) I reject the challenge to the Plaintiff's motivation in bringing her action against the Chief Constable and seeking now to join further Defendants. I do not accept that she is motivated by a desire to embarrass the State or to further any agenda or campaign on the part of her husband. On balance, taking into account the nature of the organisation – BIRW – with whom she interacted and from whom she received initial advice in October 2007, I find that she is motivated, at

least in part, in the manner claimed by her viz. to expose the plight of victims and her own ordeal and suffering in particular.

[22] I have already observed that the affidavits filed on behalf of the Plaintiff were unsatisfactory. They do not comply with the Rules and do not fulfil the duty of candour owed to the court. They also suffer from significant omissions, already highlighted. Furthermore, there were several material inconsistencies between the contents of the affidavits and the Plaintiff's sworn evidence. However, I take into account that affidavits are prepared by legal advisers and that deponents repose trust in such advisers in swearing them. Moreover, in the present case, I have already found some laxity on the part of the Plaintiff's solicitors in the compilation of affidavits and I further find that this reflects adversely on them, rather than the Plaintiff. This observation extends to the contents of the initial letter of claim and the imprudent decision consciously taken at a later stage to defer service of the Statement of Claim indefinitely.

[23] I find that there were material internal inconsistencies in the Plaintiff's sworn evidence: these are readily apparent from the summary provided in paragraphs [11] – [16] above. In certain respects, the Plaintiff was not an altogether satisfactory witness. While the court must make some reasonable allowance for the impact of the passage of the years on her memory and some nervousness, she displayed a tendency to deal with some of the questions raised in cross-examination and by the court in a manner designed to bolster her case. Furthermore, she did not comply with the court's exhortation at the outset of her evidence that where she truly did not know the answer to a question she should say so. She contradicted herself in certain respects and her explanations for taking specified steps, the time when these were taken and not taking other steps were not compelling. However, I cannot overlook the overall aura of the framework before the court , which includes the substantial factors of a ruthless terrorist organisation, the Plaintiff's ensuing fear and the murky and frightening world in which she found herself unwittingly immersed. I also balance the consideration that, in giving her evidence, the Plaintiff was exposed to the glare and pressures of a public forum for the first time in the entire saga.

[24] Having made the above findings, the focus of the court's attention must initially be the date when the Plaintiff first had knowledge of the four facts specified in Article 7(6) of the 1989 Order, vis-à-vis each of the three parties concerned , who must be considered separately.

The Chief Constable

I have already found that the Plaintiff first learned in October 2007 of the allegation that her arrest and detention in 1994 were a sham. She initiated proceedings against the Chief Constable just over one year later. I find that the Plaintiff had knowledge that her "injury" was significant in nature from an early stage following the events

of 1994 and, hence, many years prior to the issue of the Writ. Next I turn to consider subparagraphs (b), (c) and (d) of Article 7(6). Given the factors of a ruthless terrorist organisation and the Plaintiff's state of fear, coupled with the events surrounding her husband and his apparent status of double agent, I find that, realistically, this allegation could not reasonably have been ascertained by the Plaintiff prior to October 2007. Furthermore, it is self evidently, a key component of the case which she makes against the Chief Constable. She is not simply making the case that she was entirely innocent of any involvement in the attempted murder of Detective Chief Superintendent Martindale and that the Chief Constable must discharge his onus of justifying her arrest and detention accordingly. Rather, the centrepiece of her case against the Chief Constable is that the arrest and detention were a sham, a grotesque misuse of power by a State agency giving rise to a significant loss of liberty and resulting mental suffering. The main orientation of her case is misfeasance in public office , the approximate private law equivalent of misuse of power in public law. I consider that, as a matter of probability, the correct analysis of the Plaintiff's state of mind prior to October 2007 is that she was indifferent about pursuing a claim against the Chief Constable. In my view, the aforementioned knowledge comes within the ambit of Article 7(6)(b) of the 1989 Order. As regards Article 7(6)(c), I find that the Plaintiff was possessed of the requisite knowledge in 1994. Finally Article 7(6)(d) does not arise: in her case against the Chief Constable, the Plaintiff's allegations are focussed on police officers and their agents and no one else. I conclude that, as regards Article 7(6)(b), the Plaintiff first acquired highly significant knowledge in October 2007. Proceedings were commenced within three years of this date. Accordingly, her cause of action against the Chief Constable is not statute barred.

Mr. Scappaticci

[24] The conclusion that the Plaintiff was possessed of all the requisite knowledge vis-à-vis this party from 1994 is easily made. Mr. Lockhart QC, realistically, acknowledged this tacitly. Thus a claim against this party will be viable only via Article 50 of the 1989 Order.

Ministry of Defence

[25] I have already found that the Plaintiff was aware that she was suffering from a significant "injury" from around 1994. Accordingly, the spotlight turns on Article 7(6)(b) and (c) of the 1989 Order. Plainly, the existence of a possible claim against this party could not have been known to or ascertained by the Plaintiff in 1994 or during the years which followed. The Plaintiff's evidence was that her husband first informed her that he was a State agent/informant in the year 2000. It is common case that, in mid-2003, the "Scappaticci story" exploded into the public domain: see the judgment of the Lord Chief Justice in the ensuing judicial review proceedings ([2003] NIQB 56), paragraphs [2] – [4]. The Plaintiff testified that, at this time, her husband informed her that he was "*the same as Mr. Scappaticci*". According to the judgment of the Lord Chief Justice:

"**[[2]** *On or about Sunday 11 May 2003 articles commenced to appear in newspapers, followed by television coverage, to the effect that the applicant had been an undercover agent working within the IRA for the security services as an informer, with the code name of Stakeknife. It is a matter of notoriety that the IRA pursues and executes persons suspected of being informers, and it was not in dispute that the naming of the applicant as Stakeknife has put his life in severe danger. The applicant has made vigorous attempts to dispel the suspicion by making public denials, through press statements and a television appearance, but press interest in his identity has not diminished.*

[26] The Plaintiff now seeks to make the case that Mr. Scappaticci was acting as the Ministry's servant/agent in relation to her interrogation/detention by the Provisional IRA in 1994. This, rather than an allegation of sham arrest and detention – which is directed against the Chief Constable – is the focus of her proposed claim against the Ministry. Thus the Plaintiff was possessed of certain material knowledge from mid-2003. Bearing in mind Article 7(9)(b) and (c) of the 1989 Order, I must consider, the question of the additional knowledge which the Plaintiff might reasonably have been expected to acquire with the assistance of legal advice which she should reasonably have obtained. In considering this question, I reflect particularly on the knowledge actually possessed by the Plaintiff at this time, in particular her husband's "confession" to her that he was "*the same as*" Mr. Scappaticci. I further take into account the vintage of the Provisional IRA ceasefire; my earlier finding about the Plaintiff's diminishing state of fear; her husband's departure from Northern Ireland some three years previously and her awareness that Mr. Scappaticci similarly departed the country shortly after mid-2003. I must also have regard to the Plaintiff's willingness to have contact with a solicitor in 2004, her ensuing provision of two witness statements to the Stevens Inquiry and the contents of such statements. I consider that, taking into account these findings and factors, the Plaintiff should reasonably have sought legal advice within approximately one year of the "publicity explosion" in mid-2003. I further consider that such advice can reasonably be expected to have conveyed to her the availability of the claim which she *now* seeks to make against the Ministry. Thus, for the purposes of Article 7(4)(b) of the 1989 Order, I find that the clock began to tick in mid-2004, with the result that the limitation period of three years expired in mid-2007. The Writ was not issued until December 2008. Thus I conclude that the Plaintiff's proposed claim against the Ministry of Defence is statute barred.

Article 50: Discretion

[27] It follows that the Plaintiff's proposed claim against Mr. Scappaticci and the Ministry cannot be permitted to proceed unless the court exercises its discretion under Article 50 of the 1989 Order in her favour. Reference to authority is unnecessary in support of the two basic propositions that Article 50 confers a broad discretion on the court and the list of factors contained in Article 50(4) is not exhaustive. The essential character of Article 50 was explained by Lord Bingham in ***Horton –v- Saddler*** [2007] 1 AC 307, in the context of considering the equivalent English statutory provision (Section 33 of the 1980 Act), as follows:

> "*In resolving an application under Section 33 the court must make a decision of which the inevitable effect is either to deprive the Defendant of an accrued statute-bar defence or to stifle the claimant's action against the tortfeasor who caused his personal injuries. In choosing between these outcomes the court must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair and it must have regard to all the circumstances of the case and in particular the six matters listed in subsection (3).*"

I also take into account the statement of Auld LJ in ***KR –v- Bryn Alyn Community Holdings*** [2004] 2 All ER 716:

> "[74] … *(ii) The burden of showing that it would be equitable to disapply the limitation period lies on the claimant and it is a heavy burden. Another way of putting it is that it is an exceptional indulgence to a claimant, to be granted only where equity between the parties demands it …*
>
> *(iii) Depending on the issues and the nature of the evidence going to them, the longer the delay the more likely, and the greater, the prejudice to the Defendant …*
>
> *(viii) Where a judge has assessed the likely cogency of the available evidence, that is, before finding either way on the substantive issues in the case, he should keep in mind in balancing the* [?]*…pective prejudice to the parties that the more cogent the claimant's case the greater the prejudice to the Defendant in depriving him of the benefit of the limitation period*".

These principles are fully consonant with the exposition of Lord Diplock in ***Thompson –v- Brown Construction*** [1981] 2 All ER 296 (at p. 303) that, in exercising this statutory discretion, the court –

> "*… is making an exception to a general rule that has already catered for delay in starting proceedings that is due to excusable ignorance of material facts by the Plaintiff as distinct from his lack of knowledge that the facts which he does know may give him a good cause of action in law*".

Some illumination of the exercise that the court must perform is provided in the opinion of Lord Brown in ***A –v- Hoare*** [2008] 1 AC 844:

[*"[84] …**84** With regard to the exercise of the court's discretion under section 33 of the 1980 Act, however, I would make just three brief comments—not, let it be clear, in any way to fetter a discretion which the House in Horton v Sadler [2007] 1 AC 307 recently confirmed to be unfettered, but rather to suggest the sort of considerations which ought clearly to be in mind in sexual abuse cases in the new era which your Lordships are now ushering in, first, by departing from Stubbings v Webb and, secondly, by construing section 14(2) so as to transfer from that provision to section 33 consideration of the inhibiting effect of sexual abuse upon certain victims' preparedness to bring proceedings in respect of it.*

*[86] **86** Secondly, through the combined effects of Lister v Hesley Hall Ltd and departing from Stubbings v Webb, a substantially greater number of allegations (not all of which will be true) are now likely to be made many years after the abuse complained of. Whether or not it will be possible for defendants to investigate these sufficiently for there to be a reasonable prospect of a fair trial will depend upon a number of factors, not least when the complaint was first made and with what effect. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, that will be one thing; if, however, a complaint comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past), that would be quite another thing. By no means everyone who brings a late claim for damages for sexual abuse, however genuine his complaint may in fact be, can reasonably expect the court to exercise the section 33 discretion in his favour. On the contrary, a fair*
[2008] 1 AC 844 Page 872

trial (which must surely include a fair opportunity for the defendant to investigate the allegations—see section 33(3)(b)) is in many cases likely to be found quite simply impossible after a long delay.

[28] My determination of the Article 50 issues, in the context of the principles rehearsed above, is as follows:

(a) The period of delay is of some fourteen years' duration and is plainly of substantial dimensions.

(b) I find that the Plaintiff has advanced reasonable explanations for her delay during the greater part of this period.

(c) Given the singular nature of the allegations against Mr. Scappaticci and the Ministry and the publicity explosion which occurred some eight years ago, coupled with ensuing events, including the Stevens Inquiry and the intermittent publicity vis-à-vis the Plaintiff's husband, I reject the argument that they will be significantly impeded in their ability to defend themselves.

(d) In particular, I am of the opinion that such evidence as Mr. Scappaticci and the Ministry may wish to present to the court will not be significantly less cogent than evidence presented by them some years earlier.

(e) There is no evidence that any particular witness of significance is no longer available to either of the proposed further Defendants – by reason of death or infirmity, for example.

(f) The attendance of witnesses at any trial can be secured by the issue of a subpoena.

(g) The Ministry's "neither confirm nor deny" policy is a matter of choice and would have been the same if these proceedings had been initiated earlier.

(h) The events of October 2007 impact on all three parties, in the sense that a vital link in the chain first came to the Plaintiff's attention then.

(i) The Plaintiff's reaction to this discovery was plainly prompt and reasonable. In particular, she did not delay in seeking legal advice.

(j) In light of the further information provided to the court concerning the immediately ensuing period of around one year, I find that the delay in issuing proceedings thereafter was not excessive.

(k) Both Mr. Scappaticci and the Ministry will have the opportunity of being legally represented throughout the proceedings and will be able to mount a vigorous challenge to the Plaintiff's allegations, by invocation of the interlocutory powers available to the court and in cross-examination of the Plaintiff. This is clear from the conduct of the hearing before me. Furthermore, it is clear that Mr. Scappaticci's legal representatives have been assiduous and active on his behalf since the events of mid-2003.

[29] I also accord weight to the nature and gravity of the Plaintiff's allegations. Self-evidently, they give rise to acute public concern and interest. The court provides a forum in which the issues arising can be the subject of orderly, dispassionate, independent and impartial judicial adjudication. The provision, rather than the denial, of access to the court is in principle preferable where the issues sought to be litigated raise important questions relating to the rule of law itself. The core of the doctrine of the rule of law is, in the *ipsissima verba* of Lord Bingham –

> "*… that all persons and authorities within the state, whether public or private, should be bound by and entitled*

> *to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*".

Lord Bingham continues:

> "*Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably*".

[The Rule of Law, pp. 8 and 60].

The Plaintiff's allegations raise the spectre of a grave and profound assault on the rule of law and an affront to public conscience, as measured by right thinking members of society generally.

[30] For completeness, although unnecessary, I consider the application of Article 50 vis-à-vis the Chief Constable. In doing so, I have noted in particular the assertions of prejudice in the replying affidavit filed on this party's behalf. The relevant averments establish the possibility that important witnesses may not be available to the Chief Constable at the trial. However, this is not put forward with certainty and, moreover, the court must take into account the availability of the mechanism of a subpoena ad testificandum. There is also the possibility of evidence being adduced in one of the alternative modes permitted by Order 38 of the Rules of the Court of Judicature. Furthermore, invocation of the provisions of the Civil Evidence (NI) Order 1989 will be possible. I also reiterate, without repeating, my observations in paragraphs [23] and [29] above. For this combination of reasons, had it been necessary to do so I would have exercised the court's discretion under Article 50 in the Plaintiff's favour against the Chief Constable.

[31] Turning to the final issue to be determined, I am of the opinion that the Plaintiff's extant action against the Chief Constable has not progressed with all due expedition. Some two and a half years have elapsed since the Writ of Summons was issued and, during this period, there was a delay of some twenty months in serving the Statement of Claim. The explanations advanced in the affidavits of the Plaintiff's solicitors are not altogether convincing. I consider that there has been slackness and a consequential failure to proceed with appropriate expedition. I accept that this is attributable, in part, to the initiation of the application under Order 15, Rule 6 and the appeal and further application on behalf of the Defendant which this duly stimulated. This provides but a partial explanation. However, it is well settled that an action may be dismissed for want of prosecution only where there has been inordinate delay in its conduct, giving rise to a likelihood of serious prejudice to the Defendant. See, for example, ***Allen –v- Sir Alfred McAlpine*** [1960] 1 All ER 543 (per Salmon LJ,). While I have found that there has been delay on the part of the Plaintiff's solicitors in their conduct of these proceedings, it is not of the inordinate variety. Furthermore, I find no material consequential prejudice accruing to the

Defendant. Accordingly, the application to dismiss for want of prosecution is refused.

Disposal

[32] To give effect to the above findings and conclusions:

(a) The court's determination of the date of the Plaintiff's knowledge, vis-à-vis all parties, is set out in paragraphs [23] – [26] above. It favours the Plaintiff as regards her extant action against the Chief Constable, but not vis-à-vis either of the proposed further Defendants.

(b) As regards the proposed further Defendants, I exercise the court's discretion under Article 50 of the 1989 Order in the Plaintiff's favour. In the absence of the conclusion set out in paragraph [23] above, I would have done likewise vis-à-vis the Chief Constable.

(c) Accordingly, I allow the appeal against the order of the Master. Thus the Plaintiff's application to add Frederick Scappaticci and the Ministry of Defence as further Defendants in her action against the Chief Constable of the Police Service succeeds.

(d) The Defendant's application for an order dismissing the Plaintiff's action for want of prosecution is refused.

The mixed nature of the overall outcome might suggest that, in the exercise of the court's discretion, no party should either benefit or be penalised in costs. However, all parties will have an opportunity to address the court on this issue. The court would welcome information on the conventional costs orders in the Masters' Courts in applications of this kind.