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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**24/09/2018**

115714/2015

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

JOHN CHRISTOPHER WALSH

Plaintiff

and

MINISTER OF JUSTICE, DAVID FORD, MLA
DR TONY McGLEENAN, QC
Ms KAREN QUINLIVAN, QC
MR SEAN DEVINE, LLB
MR KEVIN R WINTERS, SOLICITOR

Defendants

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BURGESS J

Introduction

[1] By Writ of Summons undated (but date stamped as issued by the Central Office on 10 December 2015) the plaintiff, a personal litigant, sought, inter alia, aggravated damages against each of the defendants and a declaration nullifying a judgment dated 18 June 2012 made by Weatherup J in judicial proceedings instituted by the plaintiff. On the same date a further document was served headed "Statement of Case". This clearly represented the basis of the claim set out in some 152 paragraphs the allegations made against each of the defendants and the context and background giving rise to those allegations.

[2] This latter document was later supplemented by an amended document, again of some considerable length, dated 4 February 2016. Defences were filed and delivered as were Notices for Further and Better Particulars by the defendants.

[3] Each of the defendants then issued summonses seeking orders from the Master striking out the proceedings in all its respects on the grounds of that no feasible cause of action was disclosed, or that the proceedings were scandalous, frivolous or vexatious and an abuse of the process of the court. In the case of the third, fourth and fifth defendants an additional ground was included in the application, namely that the proceedings were unintelligible.

[4] During the hearing before the Master the plaintiff sought leave to further amend the Writ of Summons and the Statement of Case. No formal order was made during the course of the hearing but the arguments before the Master incorporated the basis of the claims contained in the proposed amendment. Therefore, all issues which the plaintiff sought to pursue were considered and decided upon by the Master. By orders of 10 April 2017 the Master in a detailed judgment first granted the requested amendment to the Writ of Summons and Statement of Case, but then ordered in the case of each of the defendants that the Writ of Summons and the pleadings be struck out as:

(a) Disclosing no reasonable cause of action.

(b) Frivolous or vexatious.

(c) An abuse of the process of the Court pursuant to Order 18 Rule 19(1) of the Rules of the Supreme Court (NI) 1981 and the inherent jurisdiction of the High Court.

[5] For the sake of completeness Rule 19(1) provides:

> "Where the plaintiff is required by these Rules to serve a Statement of Claim on a defendant when he fails to serve it on him, the defendant may, after the expiration of the period fixed by or under these Rules for service of that Statement of Claim, apply to the court for an order to dismiss the actions, and the court may be order dismiss the action or make such order on such terms as it thinks just."

[6] The court notes in this context that the court in such an application may:

(a) On its own motion invoke the inherent power of the court – *Strong v Translink* [1999] NIJB 215.

(b) Personal litigants should generally be given the benefit of any lack of clarity and their pleadings should be interpreted with appropriate latitude.

(c) A document not strictly in the form of a Statement of Claim can, with any additional document, be treated as the Statement of Claim – *Gregg Foster, a*

Man and One of the People v McPeake and others [2015] NIMaster 14 (Master Bell).

[7] The plaintiff appeals the decisions of the Master to strike out the actions. I will return to the grounds of appeal after setting out the background.

The Background

[8] The background giving rise to these proceedings has been rehearsed in a number of judgments in judicial review proceedings instituted by the plaintiff, and by the Court of Appeal in those proceedings. It is also set out in a judgment of the Master. In the present proceedings the Plaintiff's claims relate to the conduct of those proceedings and alleged failings on the part of his own legal representatives, the actions of the Department and their legal representative. I therefore intend to set out what I have determined as the facts and issues which are salient to the issues in these proceedings, but can confirm that the court has read all documents, judgments and submissions.

[9] The plaintiff was convicted at Belfast Crown Court on 7 December 1992 on a charge of possessing a coffee jar bomb with intent, contrary to Section 3 of the Explosives Substances Act 1883. He was sentenced to 14 years' imprisonment of which he served 7 years before his release. On 7 January 1994 the Court of Appeal dismissed the plaintiff's appeal. On 27 March 2000 the Criminal Cases Review Commission referred the case back to the Court of Appeal. On 7 January 2002 the Court of Appeal dismissed the appeal. In January 2007 the plaintiff was granted leave to re-open the appeal and on 10 March 2010 the Court of Appeal upheld the appeal and quashed the conviction.

[10] In quashing the conviction the Court of Appeal set out to evaluate in detail the evidence, including new evidence which had given rise to the leave to appeal. I can categorise the new evidence under the following headings, namely:

(i) A statement from a Private Boyce contradicting in two respects his evidence at the trial.

(ii) The significance of the absence of fingerprints on the coffee jar and sellotape around the coffee jar.

(iii) Evidence relating to the alleged presence of RDX explosive on the plaintiff's hand.

(iv) The alleged non-disclosure by the police/prosecution of the presence of "a top IRA man" in the area at the time of the arrest of the plaintiff.

(v) An inference drawn by the earlier Appeal Court as to false evidence given by a Mr Bradley.

The above were supplemented by the conclusion of the Court of Appeal in 2007 that the trial judge should not have drawn an adverse inference based on an alleged failure by the plaintiff to mention in police interviews his later evidence as to a person or man preceding him into the relevant alleyway.

[11] The test the Court of Appeal applied was set out at paras [33]-[37] of its judgement in the following terms:

> "[33] In this case, of course, fresh evidence has been introduced. The approach which the court should apply in those circumstances is set out in the opinion of Lord Bingham in R v Pendleton [2002] 1 CAR 441.
>
> > "The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate the evidence to the rest of the evidence which the jury heard. For these reasons, it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."
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> Of course we are well placed to identify the considerations which led to the finding of guilt because we have the reasoned, written judgment of the learned trial judge and therefore not subject to the disadvantage identified in this passage where the decision is the unreasoned verdict of the jury.
>
> [34] Applying these principles it seems to us that the fresh evidence relating to Private Boyce and the admission by the Crown that he could not have entered the Suffolk Road as stated in his evidence relates to a deficiency in the evidence of Private Boyce which was in any event identified by the learned trial judge. He specifically found that since there was nothing unusual occurring there was nothing to cause any of the soldiers to remember the details of what happened until the events began to unfold. The recollection seven years later that the appellant was static rather than moving when he first saw him is of no more than modest significance.

> [35] There is no doubt that the evidence of Inspector Glass prevented any submission contending that the absence of fingerprints on the coffee jar was a point in favour of the appellant. Some of his evidence appears to have misled the court although there is no suggestion that this was deliberate. The fresh evidence indicated a strong likelihood that if the coffee jar had been handled by the appellant as alleged a fingerprint would have been detectable immediately thereafter. It was also clear, however, that the forensic bagging techniques used at that time raised the possibility that any such fingerprint would have been lost in transfer. If this evidence had been before the learned trial judge it would have been for him to evaluate its significance on the issue of whether the forensic evidence was neutral.
>
> [36] The non-disclosure point is more doubtful. The thesis on which the top IRA man was arrested was that he had transported the bomb carrier to the scene. He was extensively questioned about this and there was no evidence to connect him to the incident. There was no evidence of any other person in the vicinity of the coffee jar at any material time and the question remained as to how it got there. The reference to the top IRA man could at best have provided a partial theory. We have already commented on the previous court's approach to Bradley's evidence.
>
> [37] As a result of the second hearing before the Court of Appeal the adverse inference which formed the main criticism of the appellant's evidence has fallen away. The fresh evidence in relation to fingerprints might reasonably have affected the learned trial judge's view as to whether the forensic evidence was neutral. The second statement from Private Boyce gives some material which might have affected the evaluation of his reliability. For those reasons we are left with a significant sense of unease about the safety of this verdict. We bear in mind that the appellant is a person of previous good character. It is on that basis that we allow this appeal."

[12] There are two points that can be made in relation to the above decision, namely:

(a) The Court of Appeal had the benefit of the transcript of the evidence given at the trial, the reasoned decision of the trial judge, the new evidence that had

been introduced, including hearing the witnesses relevant to that new evidence, and the representations then made on behalf of the Crown and of the plaintiff; and

(b) The Court of Appeal were obliged to approach their view of that evidence within the context of the test that applied, which was not as to whether the plaintiff was innocent of the charge which he faced, but rather that, having considered the evidence, it had a significant sense of unease about the correctness of the verdict, based on that reasoned analysis of the evidence. Therefore, the court made no "declaration" as to the innocence of the plaintiff.

[13] Following the Court of Appeal decision the plaintiff made an application for compensation under Section 133 of the Criminal Justice Act 1998 ("the 1998 Act") which represented the adoption of Article 14(6) of the International Covenant on Civil and Political Rights and provides as follows:

> "(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

[14] On 23 June 2010 the Secretary of State wrote a "minded to refuse" letter stating that it was not believed that the "reversal" of the conviction was based on a new, or newly discovered fact. Furthermore, it was believed that, even if there were a new or newly discovered fact, Mr Walsh had 'so far failed to establish that such a fact had shown beyond reasonable doubt that there had been a miscarriage of justice – in the sense that he is demonstratively innocent'.

[15] The grounds for the application for compensation were set out in a detailed submission dated 19 August 2010 ("the Submission"), settled by Edward Fitzgerald QC, the senior counsel then acting on behalf of the plaintiff and Mr Sean Devine, the fourth defendant in this action. At para 2 of the Submission, para [37] of the judgment of the Court of Appeal is set out and at para 3 it was argued that these factors, looked at in the context of the case as a whole, plainly meant there had been a "miscarriage of justice" - and that the plaintiff should never have been convicted in the first place. At para 4 it continues:

> "[4] The applicant further relies upon the emergence of photographs at the conclusion of this Appeal which clearly demonstrate that the device was where he said it was in his police interview as being overwhelmingly demonstrative of his innocence and the fact that he did not have a fair trial from the outset.
>
> [5] In all the circumstances the Secretary of State is invited to the view that this case comfortably sails over the threshold for an award pursuant to Section 133."

[16] The Submission then sets out under a number of paras the "obvious overlap between the grounds for bringing the appeal and the reasons why it was then advanced there had been a miscarriage of justice". It reiterated all of the points to which I have referred above, and at para 11 refers to the fact that the Secretary of State was in a "fairly novel position of having to consider further fresh evidence which "is devastating" to the Crown case, yet was not advanced as a ground of appeal" – clearly a reference to the photographs. The Secretary of State was invited to closely examine the photographs in the light of some of the passages from the transcript of evidence, which were then set out in the Submission. That included what was proffered as an important matter, namely that the prosecution case was that no photographs of the device were in existence as it sat on the wall. Instead, at the end of the appeal it emerged that in fact the photographs were in existence.

[17] The Submission then continued to consider the application of the statutory provision and the test that should be applied by the Secretary of State. I will return to this. The following representations were made:

> "41. It is quite clear that the whole case against the defendant hung by a thin thread. There were not many strands to this thread and it is, with respect, difficult to see, even without the "new facts" how the applicant was convicted in the first place, however, what little case there was has been damaged very badly.
>
> …
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> 43. … the court therefore took a "view on the correctness of the verdict based on a reasoned analysis of the evidence". It is respectfully submitted that these passages point the Secretary of State in the right direction in the sense that it is implicit in this that the Applicant should never have been found guilty and the development since only served to reinforce this.

> 44. For these reasons it is submitted that this is clearly a case in which the Secretary of State should consider compensating the applicant for the time which he should never have spent in prison. It is respectfully submitted that this is precisely the type of applicant that Parliament must have had in mind when providing the Minister with these powers.
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> 45. The applicant is clearly innocent and, in any event, should not have been convicted." (The emphasis is that of the court)

[18] Stopping at this point this court can conclude, I believe with confidence, that by the Submission the Secretary of State had before him all of the evidence in the case which had been considered, evaluated and weighed by the Court of Appeal; had the view of the Court of Appeal as to the impact of that evaluation; and the submissions on behalf of the plaintiff on two grounds (a) that he was innocent but (b) in any case that he should never have been convicted. I will return to the test as now to be applied by the Secretary of State as reformulated by the Supreme Court in *R (On the Application of Adams v Secretary of State for Justice and McDermott and McCartney's Application)* [2011] UKSC 18 and [2011] NI 42 ("the 2011 Test"), but it useful to refer to the first two categories of cases the 2011 Test states should be considered in dealing with the concept of 'miscarriage of justice', namely:

> "The first category is where the fresh evidence shows clearly that the defendant is innocent of the crime of which he was convicted.
>
> The second category is where the fresh evidence is such that had it been available at the time of the trial no reasonable jury could properly have convicted the defendant."

[19] I believe that the Submission firmly placed before the Secretary of State that the plaintiff fell to be considered in category 1, but in any event would fall within category 2.

[20] While the Submission is dated 10 August 2010 it would appear not to have been forwarded by the instructing solicitors (the fifth named defendants) to the Department of Justice until a letter of 29 September 2010, marked as received on 1 October 2010.

[21] The next step appears to be an application for judicial review presumably based on the "minded to refuse" letter of the 23 June 2010. The court does not have the application itself but does have the decision of Weatherup J dated 9 March 2011

based on that application ('the 2011 Judgement'). There were three aspects to the application for judicial review, namely:

(a) What is referred to as the decision of the Department of Justice in respect of the plaintiff's application under Section 133 of the 1988 Act.

(b) The decision of the Chief Constable of the PSNI in the conduct of the prosecution in the trial and the appeals.

(c) The decision of the Northern Ireland Human Rights Commission (NIHRC) for assistance with the appeals against conviction and in the aftermath of the appeals.

The court had in the interim period also joined the Public Prosecution Service (PPS) as a Notice Party in order to cover all aspects of matters in relation to the prosecution of the plaintiff and the appeals against his conviction. The applicant appeared in person at that leave hearing. As we will see his solicitors (fifth named defendants) came on to record again later in the sequence of events.

[22] The 2011 Judgement in relation to the application in relation to (a) above, the Section 133 application, concluded that it should wait for what became the 2011 Test which at that time was still outstanding. As the June 2010 letter from the Department made clear it saw the obligation to lie on the plaintiff to prove that he was innocent in order to establish that there had been a miscarriage of justice. The judicial review proceedings in respect of the Section 133 application and that in respect of the NIHRC were adjourned pending the decision of the Supreme Court. Leave was refused against the Chief Constable and the PPS.

[23] By letter dated 16 June 2011 the Department wrote to the plaintiff advising that they had looked again "in detail" at the application applying the 2011 Test. They indicated that they had not yet reached a decision and asked for the views of Mr Walsh. However the letter concluded with the expressed view of the Department that it was minded to refuse the application for compensation. In reaching that view they referred to the fingerprint evidence; and the contradictory evidence of Private Boyce. Of course at this point in time they had all of the evidence contained in the Submission, including that which had been addressed by the Court of Appeal in its decision to quash the conviction, including the evaluation of that evidence juxtaposed with the evaluation of the evidence given at the trial and the reasons given by the trial judge. The Department's view was that substantive elements of the evidence on which the plaintiff had been convicted still remained intact and therefore the evidence accepted by the court had not so undermined the case against the plaintiff at the trial that no conviction could possibly be based on the remaining evidence. No reference was made to the additional evidence of the photographs referred to in the Submission.

[24] On 23 June 2011 the plaintiff took up the opportunity to respond to the above letter and it is worth setting this out in detail in order to show all of the issues that had been articulated to the Department, including those in the Submission. In the letter the plaintiff states:

> "However, I would agree with you that my case is not a "miscarriage of justice" in the ordinary meaning of that term. My understanding of what a miscarriage of justice would be is along the lines in some case where, after a conviction, some significantly fresh fact, that had simply been overlooked or misinterpreted, had come to light that would have altered the Trial verdict. In my case facts were known, doctored, tailored, manufactured, concealed, contrived, etc, in order to secure my conviction: although they need consider the Prosecutor, Gary McCrudden's role in "coaching his Military witnesses (the idea of any "coaching" having been involved was first disclosed by one of Mr McCrudden's own witnesses). The first it was ever disclosed that the same Military Witness had claimed to have seen me in possession of the coffee jar bomb was 9 full months after I had been charged with the offence. The same Military witness retracted his Trial Testimony 6 years after my Trial. Mr McCrudden falsely informed the Lord Chief Justice, and me, that his witness could no longer be traced. Mr McCrudden made this false claim after the court had requested that that Witness come before it and explain himself. At the close of my last Appeal I took one of Mr McCrudden's files which contained photographs which he had not wanted the court to be aware of, and, during cross-examining me at the Trial set about to discredit me for claiming to have been shown those Photographs during interrogations. These are all now matters for the record that you, and the Justice Minister, seemingly wish to ignore in order to imply that I am the guilty one.
>
> After all these months I do not think there is anything that I could reasonably say in my defence that would ever satisfy you, or the Justice Minister who have decided I am guilty and not shifting from that position.
>
> The above line has been proved right as the Minister of Justice has been in collaboration with both the PSNI/PPS in regard to the illicit doctoring of the evidence against me. Your last email to me falsely alluded to "substantial"

> evidence indicating my guilt – it is quite telling that you have made no attempt to explain what evidence it was that you were referring to."

[25] At this point, over and above the evidential aspects of the plaintiff's case and their evaluation by the Court of Appeal, the Minister had the Submission including the additional point that was raised regarding the photographs. He also had the firm representation that the plaintiff was innocent, which by this time had been defined as Category 1 under the 2011 Test, but that in any case he satisfied what was now Category 2. To that body of evidence was now added the additional argument put forward by the plaintiff that there had been collusion between all of the authorities involved in the prosecution against him – including the involvement of the Minister in a "conspiracy" to prove him guilty notwithstanding the decision of the Court of Appeal.

[26] By letter of 5 July 2011 the Department wrote on behalf of the Minister addressing the issues raised in the letter from the plaintiff. It set out what they said were "at least" three elements of evidence that remained intact. They reiterated their conclusion that:

> "Whilst taking account of the new factual evidence that led the Court of Appeal to quash (the) conviction, and the remaining evidence presented against you at your trial, the evidence against you has not been so undermined that no conviction could possibly be based on it. I have therefore decided on behalf of the Department you are not entitled to compensation."

[27] The NIHRC made its submissions in relation to the 2011 review giving rise to the decision of 5 July 2011. It submitted that there were additional items of new evidence which it was suggested the Department had not taken into account, namely the non-disclosure of the presence of the top IRA man, the evidence in relation to explosive residue transfer and fibre residue transfer. It also commented on the 3 substantive matters relied on by the Department as remaining intact, namely the allegation of the presence of RDX detected on the applicant's left hand which the trial judge had determined had to be left out of account; the Department's reliance on a rejected explanation for the applicant's present at the scene which was not probative of his possession of explosives, and that forensic evidence relating to the absence of explosives on fibres and absence of fingerprints would have undermined the forensic evidence put forward by the Crown.

[28] A further review was carried out by the Department and on 10 May 2012 it confirmed its view that the evidence had not been so undermined that no conviction could possibly be based on it.

[29] Therefore, in addition to all of the matters before the Department to which I have referred above can now be added the arguments put forward by the NIHRC which not only covered all of the issues raised both by and on behalf of the plaintiff but also the arguments put forward disputing the grounds put forward by the Department to justify their decisions.

[30] The matter was brought back before the Divisional Court (Weatherup J) who handed down its judgement on the 18 June 2012 ('the 2012 Judgement'). The competing arguments concerned whether the Department considered the case in accordance with the approach laid down by the Supreme Court, and whether it had taken into account matters that it should not have taken into account or failed to take into account, matters it should have taken into account. The arguments were made on behalf of the plaintiff that the Department had taken an overly restrictive approach when considering the judgment of the Court of Appeal in quashing the conviction, and further the elements of the evidence that were argued by the Department to have remained intact could not be sufficient to support a conviction.

[31] In the 2012 Judgment Weatherup J set out in detail the elements of the evidence relevant to the exercise by the Department of the power given to it under Article 133. That included the submissions of the NIHRC – see paras [22]-[23] of the Judgment. Under the heading "The 2012 Review by the Department", between paras [28] and [45] he addressed each element and in particular the interaction between those elements. His conclusion can be stated in terms, namely that there had been a failure by the Department to assess a number of aspects of forensic evidence – the fingerprints and the "presence" of RDX on the plaintiff's left hand – and a failure to take into account other forensic evidence available at the second criminal appeal in relation to residue and fibre transfers. This forensic evidence had then to be weighed in conjunction with all other factors to be taken into account by the Department. The court determined that the Department's review was incomplete and the matter was referred back again to the Department to reconsider its decision in the light of the 2012 Judgment. It is important to note that the only decision under the 2012 Decision was to refer the matter back to the Department.

[32] Apart from this careful analysis of all of the evidential factors to be considered, the court also made further statements, important in my view in their own right, but also in the context of the present proceedings:

(a) The determination was to be considered in the words of the 2012 Judgment at paragraph [45] to ascertain whether the case fell within Category 2 or Category 3. Reading the voluminous papers, it appears to this court that the plaintiff took considerable issue with his legal representatives' failure in his eyes to argue before Weatherup J that this case fell within Category 1. I find however that this submission has no merit. First the court was considering a defective assessment by the Department of the evidence on which to determine which category it would fall into. The court recognised there was further material but it was

at the "first checkpoint" – namely had the evidence been properly assessed? Once the assessment was properly carried out in accordance with court's criteria, a further determination was required by the Department - was it satisfied that the evidence allowed the case to fall into Category 1 or 2 – remembering if it concluded it was unable to satisfy the Category 2 test, clearly there was no prospect of satisfying the test for Category 1:

and

(b) Explicit and inherent in a considerable number of documents and assertions relating to the motivation of parties – bias, duress and economic pressures to name a few, contributed in the view of the plaintiff to the Department being incapable of carrying out an objective and reasoned determination. It is argued that this left the plaintiff in a position where there was no legitimate form of authority for deciding his entitlement to compensation. Weatherup J addressed this point full on in two passages:

(i) The first set out that the process had been determined by Parliament as that to afford a remedy to those whose convictions were quashed. At paragraph [26] and [27] it is stated that:

> "[26] However, the task is to decide the issue by taking into account what the Court of Appeal quashing the conviction has stated but without being governed by what has been stated or not stated. The Court of Appeal in hearing the appeal is performing a different task and applying a different test to the task being undertaken and the test being applied by the Minister. The Court of Appeal is determining the safety of the conviction. The Minister is determining whether the applicant could possibly have been convicted on the evidence now revealed. Perhaps this is a test best suited to a Judge accustomed to making an assessment of evidence in criminal proceedings, rather than a Minister, no doubt advised by legally qualified officials, but Parliament has decided in Section 133 of the Act that this is a decision for a Minister. (emphasis added)

[27] While the decisions of the Courts provide the material on which the Minister will make a decision, it is for the Minister to make the assessment. The Minister must form his own view in relation to the material. I refer to Lord Kerr at paragraph 169 of the report in *Adams* -

> 'In my opinion, the decision as to whether the statutory conditions have been fulfilled is one for the Secretary of State to make and he may not relinquish that decision to the Court of Appeal. True, of course, it is that the material on which the decision is taken will derive in most cases from the judgment of the Court of Appeal. True it also is that it would not be appropriate for the Secretary of State to depart from the reasoning that underlies that judgment unless for good reason it is shown to be erroneous but the Secretary of State must make his own decision based on all relevant information touching on the question whether there has been a miscarriage of justice".

(ii) The second passage comes in paragraph [48] of the 2012 judgment which states:-

> "[48] The Supreme Court decided that *MacDermott and McCartneys Application* fell within Category two and should be the subject of compensation. <u>There was some debate as to whether this Court should decide the issue of entitlement to compensation on this application for judicial review. At first instance I do not propose to make such a decision.</u> Entitlement to compensation for miscarriage of justice is a decision for the Minister as stated in the legislation. <u>At appellate level there may be a different approach but at first instance this is a matter for the Minister</u>. I refer the decision

> back to the Minister to reconsider in the light of this judgment." (emphasis added)
>
> In this paragraph the court identified that there "may be a different approach at appellate level", having referred to *MacDermott and McCartneys Application* where the Supreme Court did decide the question of which category and the right to compensation.

[33] Therefore at this stage the ball was firmly back with the Department to reassess the evidence and make a decision based on that reassessment and the 2011 Test. I am satisfied that by that stage every conceivable evidential consideration had been ventilated and, as importantly, a legal process was still available should the Department again refuse to award compensation – a process which had the potential to allow that decision to be made by a Court, as opposed to the Department.

[34] Undoubtedly the whole process of the application for compensation had been delayed as we know by the shortcomings of the Department identified in the two Judgments. I have no doubt that this would have unnecessarily added to the already traumatic impact this whole ordeal will have caused Mr Walsh. However that could have been addressed in the event that compensation was determined as due to him.

[35] Before a further decision was made by the Department, the plaintiff made a personal application for a Writ of Coram Nobis for review of the 2012 Judgment. This was based on the statement that the court in that Judgment had referred to "the presence of RDX explosive" on Mr Walsh's left hand, whereas the evidence of a Dr Lloyd referred to a mimic substance used in the manufacture of foam plastics producing similar readings. Having considered such a procedure to be obsolete, Weatherup J nevertheless set out his reasons for concluding he would not have changed his judgment. The fact is that he had clearly stated in his 2012 Judgment that Dr Lloyd's evidence had to be considered by the Department, drawing explicitly this evidence to the Department's attention and the need to consider it in conjunction with other forensic evidence.

[36] The same proceedings also addressed:

(i) Complaints against the other defendants in this action. It is suffice to record in terms that such complaints were over time addressed by the respective professional bodies.

(ii) The absence of an independent and impartial tribunal, repeating the issues raised in the 2012 Judgment – see above. It is worth noting that whilst referring to the statutory provision set down by Parliament the learned judge at paragraph [14] refers to "the supervisory jurisdiction of the court" of the Department's decisions.

[37] Mr Walsh pursued a number of courses after the refusal for the issue of the Writ of Coram Nobis. This included an application to the European Court of Human Rights which would appear to have come to nought. It also included complaints to the professional bodies of the second, third, fourth and fifth defendants to these proceedings. Those complaints were considered and found to have had no basis.

[38] Jumping ahead for a moment, in 2014 the plaintiff sought the Court of Appeal to extend time to appeal the two judgments of Weatherup J. This was refused. At para [9] the Lord Chief Justice in an ex tempore judgment stated:

> "But as I have said there is not material that we can see in terms of the submissions which were made to the various courts or the material which has been advanced by Mr Walsh which indicates that counsel on his behalf has done anything other than present perfectly, proper, professional approach to what was a difficult case for counsel and undoubtedly a difficult personal case for Mr Walsh and we recognise that."

[39] This court takes into account, in its own determination, that the appellate court has addressed the conduct of the legal representatives on which Mr Walsh bases the present claims and found no criticism let alone a breach of duty, bias or duress.

[40] On 9 May 2013 the Department determined that "a jury might or might not have convicted" the plaintiff on "that evidence" – that is "the eyewitness statements and (your) unconvincing explanation for your presence at the scene at the time". No other evidence is stated as having been relied on for this conclusion, in particular there was no reference to any allegation of the presence of RDX, the evidence of fingerprints (or their absence) or the role of fibre transfer.

[41] At that point it was open to Mr Walsh to take a similar course as he had done on two previous occasions, namely to apply for judicial review of that decision, or, arguably, seeking to continue with the judicial preview that had resulted in the Court returning the matter to the Department.

[42] However no proceedings were taken by him, a matter which has caused this court considerable surprise. The court had indicated in the 2012 Judgment that it had a supervisory role over the Department's approach to its determination, including reference to the *MacDermott and McCartneys Application* where the Supreme Court substituted its view for that of the relevant Department. If the plaintiff had taken the step open to him in the context of the process determined by Parliament, it was open to him to argue that the Department was wrong in its conclusion: and that on the evidence it had before it, including the evidence articulated in the Submission, the NIHRC's response, and that adduced and argued

at two previous hearings, the court could consider not just if it met the Category 2 test, but also Category 1 if Mr Walsh wished to advance that argument in such proceedings.

[43] Having failed to take the step open to him, it is clear to this court that Mr Walsh seeks to litigate issues in a different forum, one outwith the statutory route laid down by Parliament. In respect of the Department, he seeks to use this route of a writ of summons for damages in substitution for the statutory process with which he failed to engage, but of which he was clearly fully aware. As regards his legal representatives, damages could only be awarded on the basis of a failure on their part through a breach of duty or under the other headings to obtain compensation for him under the Section 133 route. But despite the fact that this route was still open if the plaintiff had chosen to afford his representatives the opportunity to argue his case after the latest decision by the Department, he chose not to pursue it, and thus deprived them of that opportunity.

[44] I am satisfied that to that point everything possible had been put forward by his legal representatives over a long period of time, resulting in directions from a court on two occasions as to what evidence the Department had to look at and the test to be applied. I am also perfectly satisfied that if Mr Walsh had pursued the judicial review it was open to his legal representatives to comment further on all the evidence that had been put forward, on the assessment by the Department, and to put forward his argument into which Category he would have fallen. Even if there had been any shortcoming in arguments on this latter point up to that stage (and given the matters being considered by the court at the relevant time I do not accept that there was) they could easily have been corrected. That is - as and when the 2013 decision would have come to be considered, then at that stage it may be that he would have felt aggrieved if the argument had not been put forward that his case fell to be determined under Category 1. However, we never reached that stage due to Mr Walsh failing to take the steps open to him which might well have accorded him at least one of his motives in taking the proceedings, as set out in his notice of appeal, namely to vindicate him in respect of what was clearly a serious crime, but above all one for which he spent a considerable period of his life in custody in respect of an offence for which, eventually, it was determined by the courts that there had been a miscarriage of justice.

[45] I therefore determine that without more the present proceedings represent an abuse of process in seeking to substitute these proceedings for a failure on the part of the plaintiff to pursue the statutory remedies open to him to satisfy any claim that might be open to him to seek compensation for his wrongful conviction.

[46] Given that determination I can deal briefly with certain other of the arguments put forward by Mr Walsh. First the legislation provides that the authority charged with making decisions under Section 133 is the Department, not the individual Minister. Therefore any claim against David Ford in his capacity as Minister is misconceived. This seems to have been accepted by Mr Walsh when

appearing before the Master. Secondly as regards Mr McGleenan Q.C., the position is straightforward. As Counsel for the Department he owed no duty to Mr Walsh, and in any case there is no evidence whatsoever, indeed to the contrary, that any representation pointed to by Mr Walsh was not one which was relied on by the Court at any stage. Thirdly, serious allegations of misconduct have been made against his legal representatives, none of which has any foundation in fact. There is no evidence that his representatives have not put forward his case robustly and fearlessly. At times they have used their professional judgement as to how best to argue that case, but as I have pointed out, even if in the past this fell short of Mr Walsh's wishes, by his inactivity he has deprived them and himself of the opportunity to consider how his case could have been presented after the 2013 Decision. It is a matter of regret to this Court, before whom Mr Walsh has always acted with the greatest courtesy and restraint, that he should feel that his legal representatives not only in his eyes failed him, but acted with motives such as alleged.

[47] The Master's judgement carefully considered the grounds put forward by the defendants in terms of the proceedings being frivolous and vexatious. I am happy to adopt his reasoning for striking out the Writ and proceedings against each of the defendants, but point to my primary conclusion that these proceedings are an abuse of process, seeking to institute proceedings which were properly to be decided under the relevant statutory provisions, which for some reason the plaintiff did not seek to continue.

[48] I therefore dismiss this appeal, and will hear any argument on costs.