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Judgment: approved by the Court for handing down
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Delivered: **05/02/2016**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Patrick Arthurs as personal representative of Declan Arthurs (deceased)

Plaintiff;

and

Ministry of Defence

and

Chief Constable of the Police Service of Northern Ireland

Defendants.

Master Bell

Introduction

[1] On 8 May 1987 Declan Arthurs was one of nine persons shot dead in Loughgall by soldiers. The incident has given rise to various legal processes and

proceedings. The complex history of those processes and proceedings may be summarised as follows.

[2] Firstly, there was a criminal investigation. Officers from the Royal Ulster Constabulary Criminal Investigation Department, the Scenes of Crime Department and the Northern Ireland Forensic Laboratory attended at the scene on the day of the shooting. Subsequently, police officers conducted lengthy interviews with soldiers. On 21 July 1988 the RUC forwarded a report to the Director of Public Prosecutions for Northern Ireland on the outcome of their investigation. On 22 September 1988 the Director concluded that the evidence did not warrant the prosecution of any person involved in the shootings.

[3] Secondly, there was an inquest. Following adjournments to allow litigation regarding the powers of coroners to reach a decision, an inquest into the death of Mr Arthurs and the others who died at Loughgall opened on 30 May 1995. On the first day of the inquest, counsel representing the family of Mr Arthurs and five of the other families asked for the proceedings to be adjourned. This adjournment was refused and counsel was instructed by the six families to withdraw from the hearing to seek a remedy by way of judicial review. The hearing of the inquest proceeded without representation for any of the nine families. The Coroner heard 45 witnesses and it was concluded on 2 June 1995 that all nine men had died from serious and multiple gunshot wounds. The family of Mr Arthurs sought judicial review of the Coroner's decisions and, in a judgment of 24 May 1996, the High Court refused to quash the Coroner's decisions or the jury verdict.

[4] Thirdly, civil proceedings were instituted. A writ commencing civil proceedings in respect of Mr Arthurs' death issued in 1990. A Statement of Claim was served on 24 January 1994. A defence was served on 3 March 1994. The civil proceedings as originally issued were against the Ministry of Defence. Subsequently, however, an order was granted to add the Chief Constable of the Police Service of Northern Ireland as a second defendant. It is with these civil proceedings that this application is concerned. It is important to note that this court is not tasked with any role in connection with either the criminal investigation into the death of Mr Arthurs or the inquest into his death.

[5] On 4 May 2001, on an application from the next-of-kin of the nine men killed at Loughgall, the European Court of Human Rights concluded in *Kelly & Others v United Kingdom* (Application 30054/96) that the proceedings for investigating the use of lethal force by the security forces had been shown to disclose the following shortcomings :

(i) a lack of independence of the investigating police officers from the security forces involved in the incident;

(ii) a lack of public scrutiny, and information to the victims' families, of the reasons for the decision of the DPP not to prosecute any soldier;

(iii) the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;

(iv) the soldiers who shot the deceased could not be required to attend the inquest as witnesses;

(v) the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings;

(vi) the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

Accordingly the Court found that there had been a failure to comply with the procedural obligation imposed by Article 2 of the European Convention on Human Rights and that there had been, in that respect, a violation of Article 2.

[6] In an affidavit filed by the plaintiff, Gemma McKeown from the Committee for the Administration of Justice deposed that, after the delivery of the decision in *Kelly & Others v United Kingdom*, the families of the deceased engaged with the Historical Enquiries Team of the PSNI which had been put forward in a package of measures to remedy the violation of Article 2 found by the Court. The HET delivered a Review Summary Report on 5 January 2012. The following year, Her Majesty's Inspectorate of Constabulary delivered an inspection report which indicated its belief that the HET's approach to state involvement cases was inconsistent with the UK's obligations under Article 2. On 30 July 2013 the HET advised the Committee for the Administration of Justice that it had suspended all current reviews into cases involving the army.

[7] Counsel for the second defendant informed me in his skeleton argument that on 23 September 2015 the Advocate General for Northern Ireland announced that new inquests will take place in relation to the nine persons who died at Loughgall. At the direction of the Lord Chief Justice, as President of the Coroners' Service, Weir LJ conducted preliminary hearings in January 2016 in all of what are sometimes referred to as "the legacy inquests" to assess the readiness of each of those cases.

The Application

[8] The application before me is an application by summons dated 29 June 2015 for an order pursuant to Order 24 Rule 19 of the Rules of the Court of Judicature dismissing the second defendant's defence. (The application originally contained a typographical error and sought dismissal of the plaintiff's action but this was

amended by the court upon the first listing of the summons.) The plaintiff accepts that an alternative to such an order would be an Unless Order, namely an order that, unless the second defendant serves a list of documents, the second defendant's defence should be struck out. Indeed it is the preference of the plaintiff that an Unless Order be granted rather than the second defendant's defence be struck out.

[9] On the initial listing of the application it was represented to me that there were very great practical difficulties in providing a list of documents and that the second defendant required additional time in order to serve a list. Principal amongst these difficulties were the volume of sensitive documentation that had to be considered with a view to deciding what was relevant; the servicing of the forthcoming coroner's inquests in the legacy cases; and the number of people available to perform the task of considering the documents. Considering that it was inappropriate to simply accept assertions from counsel on such matters, I adjourned the application and required the second defendant to file an affidavit setting out in sworn evidential form the difficulties in complying with any discovery order. I also required the second defendant to comply, at least in part, with his duty to disclose by filing an initial list of non-sensitive documents within 4 weeks. The second defendant submitted that a list of non-sensitive documents could be provided but that it would almost certainly require to be amended as further non-sensitive documents were located. A list of non-sensitive documents was subsequently served on 8 October 2015.

[10] The plaintiff filed an appeal of my decision to adjourn the application to strike out the second defendant's defence. That appeal was listed before Mr Justice Stephens who was provided with a skeleton argument by plaintiff's counsel which referred to a number of European and other authorities. Upon hearing that those authorities had not been opened to me, Mr Justice Stephens referred the application back to me for a full decision on the application prior to the hearing of any appeal.

Plaintiff's Submissions

[11] The plaintiff's first principal argument is that there has been a breach of Article 2 of the European Convention on Human Rights. It was submitted that *Öneryildiz v Turkey (*ECtHR Application no. 48939/99*)* is authority for the proposition that, where Article 2 is engaged, the obligation imposed on a state is to act with "exemplary diligence and promptness". This, it was argued, is the standard to be applied in these civil proceedings and the second defendant has not acted according to that standard in regard to the provision of a full list of documents.

[12] The plaintiff's second principal submission is, in reaching a decision on this application, the court is not entitled to take account of the limited resources available to the second defendant in a time of economic austerity and that, in the context of Article 2, the lack of resources is no answer to any complaint about delay. Counsel

drew my attention to the following passage in *Güleç v. Turkey* (Application no. 21593/93) where the court stated :

> "81. Loss of life is unfortunately a frequent occurrence in south-east Turkey in view of the security situation there (see the above-mentioned Kaya judgment, p. 326, § 91). However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, or, as in the present case, a demonstration, however illegal it may have been."

and argues that this demonstrates that the state is required to comply with Article 2 no matter what burdens it faces.

[13] The plaintiff also relies on two further decisions of the European Court of Human Rights, namely *Makaradze and Sikharulidze v Georgia* (Application 35254/07) and *Dybeku v Albania* (Application No 41153/06), as authorities for the submission that a state is required to comply with Article 2 no matter what burdens it faces in terms of resources.

[14] The plaintiff's third principal submission is that Article 6 ECHR is also engaged by these proceedings and the obligation of the state is to organise its legal system to enable it to comply with Convention requirements. Hence the case law makes it clear that the state is obliged to provide sufficient resources to enable compliance with Article 6. As a consequence, any lack of resources cannot be a relevant factor for the court when determining whether delay is compatible with Article 6. In particular, the plaintiff submits that there is a breach of the principle of the equality of arms if the second defendant is treated more favourably by reason of being a public authority. Counsel argued that there is no suggestion that any limits on the resources of the plaintiff would have been considered when deciding whether to extend time. In this context it was submitted that the state has greater resources than an individual litigant and that this suggests that the court should be particularly reluctant to accept a delay caused by a lack of resources in a public authority.

[15] The plaintiff also offers the decision of *R (Noorkoiv) v Secretary of State for the Home Department and Another* [2002] 1 WLR 3284 in support of this application. Noorkoiv had been convicted of a criminal offence and was serving a life sentence. He instituted legal proceedings in connection with the delay that had occurred in fixing a date for his hearing before the Parole Board, challenging the lawfulness of his detention under Articles 5(1) and 5(4) of the ECHR. The Secretary of State's position was that lack of resources prevented any improvement on the procedures that were in place. It was explained that the Parole Board was constrained by the availability of judicial and psychiatric members when scheduling hearings. Noorkoiv's challenge under Article 5(1) of the Convention was dismissed but he was

successful in his challenge under Article 5(4) of the Convention. In their decision the Court of Appeal made a number of remarks in respect of resources, including a comment by Buxton LJ that it was the obligation of the state to organise its legal system to enable it to comply with Convention requirements.

Second Defendant's Submissions

[16] The second defendant filed a replying affidavit sworn by Assistant Chief Constable Kerr of the PSNI. The affidavit makes a number of points. Firstly, it sets out the difficulties which the second defendant asserts exist in fulfilling its discovery obligations. ACC Kerr deposes that searches will be required in relation to material that may include electronic, microfiche and hard copy searches in stores which hold in excess of 9.5 million intelligence records.

[17] Secondly, as to the importance of the task, ACC Kerr deposes that the discovery exercise must be conducted in such a way as to ensure that the PSNI exercises its statutory obligation of protecting life and preventing crime.

[18] Thirdly, in terms of resources, ACC Kerr deposes that there are approximately 54 legacy inquests and a number of civil actions to be serviced by the PSNI Legacy Support Unit.

[19] Fourthly, ACC Kerr describes the processes involved. These are :

(i) Legacy Support Staff gather all documents pertaining to the case;

(ii) Identification of relevant documentation

(iii) Identification of material which requires PII consideration;

(iv) Consultation with counsel regarding PII matters;

(v) Counsel prepares an opinion on possible PII claims;

(vi) Counsel's PII opinion is considered by PSNI Legal Services Branch;

(vii) Consideration of PII submissions by the Chief Constable

ACC Kerr deposes that, if the second defendant was to provide a time frame to the court at this stage, that time frame would be "many months".

[20] In relation to the Article 2 argument, the second defendant submitted that civil proceedings were expressly excluded from the assessment of a state's compliance with its procedural obligations under Article 2. Counsel referred me to *Hugh Jordan v United Kingdom* (Application No. 24746/94) and *McShane v United Kingdom* (Application No. 43290/98) as authorities on this point. The second defendant also relied upon the decision of the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] 1 A.C. 182. Hence, it was submitted, the argument that Article 2 prevented the court from taking into account the second defendant's lack of

resources when considering the issue of any delay in providing a list of documents was not well founded.

[21] The second defendant submitted that the sheer number of legacy inquests and civil actions were overwhelming the Chief Constable's ability to service the discovery and disclosure processes.

[22] The second defendant submitted that the case law advanced by the plaintiff did not provide any authority for the proposition that Article 6 prohibited a court from taking into account the resources of the second defendant when permitting it time to provide a list of discoverable documentation.

Consideration

[23] Civil litigants owe each other obligations. These obligations include, for example, a plaintiff clearly stating the case he alleges against a defendant; a defendant clearly stating his defence to the case alleged against him; and each party making discovery of the documents they hold which relate to the matters arising in their litigation. Court rules set time limits within which these procedural steps should be taken. Once the necessary procedural steps have been taken, the action is readied for trial and, if the outcome cannot be settled by negotiation between the parties, a hearing will take place and a decision rendered by the court. Occasionally, however, there is a delay in one of the procedural steps and the party not at fault brings an application for that step to be fulfilled. Such applications can seek one of a variety of remedies. The first remedy is simply an order that the procedural step be taken within a particular time period. The second remedy is an Unless Order providing that, unless the procedural step has been completed within a particular time, a particular sanction will be imposed. The third remedy is that, in the light of the failure to perform the procedural step, the action should be lost by the defaulting party. In the case before me, the second defendant did not provide a list of documents in the time allowed for and the plaintiff made an application seeking the first remedy. I granted that remedy on 6 March 2015, namely an order that a list should be provided within 6 weeks. Although a list of non-sensitive documents was served on 8 October 2015, a list of sensitive documents has not yet been served and the plaintiff has now, not unreasonably, applied for either the second or the third remedy to be granted.

The Article 2 Argument

[24] It is clear from the Article 2 jurisprudence that where a state uses lethal force there must be some form of effective official investigation (*McCann v United Kingdom*). In *The Matter Of Three Applications By Hugh Jordan For Judicial Review* [2014] NIQB 11 Stephens J summarised the nature of an Article 2 compliant investigation which had been considered by the Strasbourg Court in *Jordan v UK* (2003) 37 E.H.R.R. 2 and in *Nachova & others v Bulgaria* (2006) 42 EHRR 43 :

"(a) The essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."

(b) The form of such an investigation may vary in different circumstances. The Strasbourg Court did not specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. The aims of fact finding, criminal investigation and prosecution can be carried out or shared between several authorities, as in Northern Ireland, and the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. However the available procedures have to strike the right balance.

(c) Whatever mode of investigation is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

(d) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. That in order for the investigation to be effective, "the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice" (paragraph 112 of *Nachova*).

(e) The investigation is also to be effective in the sense that it is *capable of leading to a determination* of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means.

The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

(f) A requirement of promptness and reasonable expedition is implicit. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

(g) There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.

(h) In all cases the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. In respect of this matter I would add that the next-of-kin must be involved regardless as to their personal circumstances or attributes."

[25] Counsel for the second defendant submitted that the availability of civil proceedings, undertaken at the initiative of the relatives and not involving the identification or the punishment of the perpetrator of an unlawful killing, cannot be taken into account in the assessment of the state's compliance with its procedural obligations under Article 2. In support of that position, the second defendant offered two European authorities. In *Hugh Jordan v United Kingdom* (Application No. 24746/94) the court said :

"As found above (see paragraph 111), civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator.

> As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention."

In the following year a similar approach was taken by the court in *McShane v United Kingdom* (Application No. 43290/98) where the court said :

> "The Government have referred to the fact that there are pending civil proceedings which the applicant is not taking steps to expedite. While, civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of an award of damages, it is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see also *Hugh Jordan v. the United Kingdom*, cited above, § 141)."

[26] This emphasis on an inquest or on criminal proceedings as being the mechanism for discharging the procedural obligation under Article 2 can also be seen reflected in domestic law in the decision of the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] 1 A.C. 182 :

> "The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public enquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case."

[27] The plaintiff relies heavily in his argument on the case of *Öneryildiz v Turkey (*ECtHR Application no. 48939/99*).* Counsel argues that, where Article 2 is engaged by the proceedings the obligation imposed on a state is to act with exemplary diligence and promptness. The plaintiff argues that this standard applies whenever Article 2 is engaged and so applies to criminal investigation, inquests and civil proceedings. That portion of plaintiff's argument which is based on *Öneryildiz v Turkey* is, in my view, entirely misconceived. Counsel invites me to apply a test that the defendants must act "with exemplary diligence and promptness" in the disclosure of the documents in this civil litigation. However paragraphs 94-96 of

Öneryildiz v Turkey, in which the "exemplary diligence and promptness" standard is set out are clearly discussing the criminal investigation into the deaths at the municipal rubbish tip and not dealing with civil proceedings. Indeed in paragraph 113 the court notes the dates on which the police arrived on the scene and interviewed the victim's families, the public prosecutor began a criminal investigation and the two mayors were committed for trial in the criminal courts and then states "accordingly, the investigating authorities may be regarded as having acted with exemplary promptness." There is no indication in the decision of the court in *Öneryildiz v Turkey*, or any other authority cited to me, that the "exemplary diligence and promptness" standard ought to be applied in civil proceedings.

[28] The plaintiff also submits that the effect of Article 2 is that I must ignore the lack of resources available to the second defendant in the carrying out of the disclosure exercise. The plaintiff has advanced this point using *dicta* from the decision on *Güleç v. Turkey* in support. This argument stems in my view from a misunderstanding of what the decision is referring to. The *dicta* should not be taken as referring to civil proceedings brought by the next of kin of a deceased person but rather to the official investigation carried out by the state (whether a criminal investigation by police which is then considered by prosecutors and may lead to a prosecution in the criminal courts or, alternatively, an inquest in a coronial court).

[29] Another Article 2 authority advanced by the plaintiff in support of the assertion that the court should not take into account resourcing issues is that of *Makaradze and Sikharulidze v Georgia* (Application 35254/07). This was a case where Mr Makaradze died in prison. Most of the decision in that case is taken up with the obligation on the authorities compelling hospitals, whether civil or prison hospitals, to adopt appropriate measures for the protection of patients' lives. The court did also state the requirement of an effective independent judicial system so that the cause of death of patients in the care of the medical profession can be determined and those responsible made accountable. But it is not, in my view, authority for the proposition that a court should not take into account the resources and difficulties in complying with discovery obligations in civil litigation brought by a deceased's family.

[30] A further authority relied upon by the plaintiff is *Dybeku v Albania* (Application No 41153/06). This was a case where a sentenced prisoner requested to be transferred to a medical facility on the ground that his detention conditions were inappropriate to his state of health and put his life at risk. He complained to the court that there had been a breach of his Convention rights but did not rely upon any specific article under the Convention. The Court considered that his complaint fell to be determined under Article 3. Hence this is not an authority for how I should interpret and take into account Article 2 of the Convention in respect of the second defendant's discovery obligations in civil litigation brought by a deceased's family.

[31] The plaintiff's submission that, under Article 2 of the Convention, I may not take resourcing issues and resourcing difficulties into account in terms of the

amount of time I allow them to fulfil their obligation to produce a list of documents in these civil proceedings is therefore misconceived as far as these civil proceedings are concerned and, as I indicated earlier, this court is not tasked with any role in connection with either the criminal investigation into the death of Mr Arthurs or the inquest into his death to which Article 2 clearly does apply.

[32] That is not to say that Article 2 has no relevance whatsoever to this discovery application. Rather than aiding the plaintiff's argument, however, it comes to the aid of the second defendant. It is well understood that section 6 of the Human Rights Act 1998 provides that it is unlawful for a court to act in such a way that is incompatible with a Convention right and the courts are well used to the impact of the ECHR as it applies to the discovery process. Thus, for example, in a case where a mental patient has assaulted a hospital nurse and the nurse sues the hospital and asks the hospital to provide the patient's records as part of the discovery process, the Article 8 rights of the patient will be taken into account and the consent of the patient or his representatives will usually be sought. It is of course even more important to take into account the Article 2 rights of individuals. In his affidavit ACC Kerr deposes that every document considered in the discovery process has to be considered in terms of Article 2 issues. It is very clear from the facts contained in the decision in *Kelly & Others v United Kingdom* that the security forces knew that there was to be an attack on Loughgall police station on the day of the shooting. Whether this knowledge stemmed from electronic interceptions or from information provided by an informant is not clear. However, if it is the latter, then that individual's Article 2 rights will inevitably be an important concern to the second defendant. It would be tragically inappropriate if, in order to progress litigation which claims the Article 2 rights of Mr Arthurs were breached at Loughgall, a court order were made which had the effect of causing the discovery process to be rushed and which resulted in the Article 2 rights of other individuals being breached, perhaps with fatal results.

The Article 6 Argument

[33] It is common between the parties that Article 6 is engaged by these proceedings. The issue is therefore, in a case where there has been delay, how the court should approach that delay. I addressed this issue in *Patrick Ferran v Chief Constable of the Police Service of Northern Ireland* [2010] NIMaster 4. (This was an action where the defendant sought the striking out of the action on the basis that the defendant's right under Article 6 of the European Convention on Human Rights to a trial within a reasonable time had been breached.) After reviewing a number of authorities, I summarised the position as follows :

> "I conclude therefore that, by analogy, where a civil action has not been brought to a hearing within a reasonable time, I should approach the case in the following way :
>
> (i) If, through the action or inaction of a plaintiff, a civil action is not brought a hearing within a reasonable time, there is

necessarily a breach of the respondent's Convention right under Article 6(1).

(ii) For such breach there must be afforded such remedy as may (section 8(1) of the 1998 Act) be just and appropriate or (in Convention terms) effective, just and proportionate.

(iii) The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established.

(iv) If the breach is established before a final hearing, the appropriate remedy may be a public acknowledgement of the breach or action to expedite the hearing to the greatest extent practicable.

(v) It will not be appropriate to stay or dismiss the proceedings unless there can no longer be a fair hearing.

(vi) The public interest in the final determination of civil litigation requires that an action should not be stayed or struck out if any lesser remedy will be just and proportionate in all the circumstances.

(vii) The court does not act incompatibly with a respondent's Convention right in continuing to entertain civil proceedings after a breach is established in a case where there can still be a fair hearing, since the breach consists in the delay which has accrued and not in the prospective hearing."

That decision was appealed and the appeal was heard by Gillen J (as he then was). In his decision *Patrick Ferran v Chief Constable of the Police Service of Northern Ireland* [2010] NIQB 137 Gillen J stated :

> "Nonetheless I share entirely the view expressed by Master Bell that the test under Article 6(1) of the Convention to hear a case within a reasonable time is still met by declaring that it is not appropriate to stay or dismiss proceedings unless (a) there can no longer be a fair hearing; or (b) it would otherwise be unfair to have the case determined. (See Attorney General's Reference (No. 2 of 2001). For my own part therefore I do not consider that Article 6 of the Convention materially alters the approach that the courts have adopted to applications such as this for dismissal for want of prosecution. Consideration of the earlier principles would inevitably lead to a conclusion as to whether or not there can be a

fair hearing of the action because of the impact of the passage of time. In this case I am satisfied that there could no longer be a fair hearing."

[34] There may or may not be a breach of the reasonable time guarantee in Article 6 in respect of the time it has taken for this civil litigation against the state to come to trial. However that is not an issue at this time. The issue before me is whether the delay in completing the discovery process justifies the striking out of the second defendant's defence. In the application now before me the plaintiff has not made any submission that there can no longer be a fair hearing or that it is otherwise unfair to have the case determined at trial. As a result therefore the Article 6 argument cannot provide an appropriate legal basis to justify striking out the second defendant's defence.

The General Law

[35] Given that I consider the plaintiff's arguments regarding the application of Article 2 and Article 6 to be flawed, what then are the provisions which must be applied to the application before the court ? I consider that they are those provisions which have been applied for many years in such applications. Having been ordered to serve a list and having missed the time limit imposed by my order of 6 March 2015, the second defendant essentially asks me to extend time for compliance. The authority in this jurisdiction on such an application is *Davis* v *Northern Ireland Carriers* [1979] NI 19. In *Davis* v *Northern Ireland Carriers* Lord Lowry held that where a time limited is imposed by rules of court the court must exercise a discretion and should consider :

1. whether the time is already past (a court will look more favourably on an application made before time has elapsed).

2. if time has elapsed, the extent to which the party is in default

3. the effect on the opposing party (and in particular if he can be compensated in costs)

4. whether a hearing on the merits has taken place or would be denied by the refusal of the application)

5. whether there is a point of substance to be made which could not otherwise be put forward

6. whether the point is of general not merely particular significance

7. that the rules of court are there to be observed.

[36] In addition, as with all applications under the Rules of the Court of Judicature, I must consider the overriding objective as set out in Order 1 Rule 1A of the Rules which provides :

> "*The overriding objective*
>
> 1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable -
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to -
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
>
> (3) The Court must seek to give effect to the overriding objective when it-
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule."

[37] The very existence of this Rule recognises that there is no such thing as a "one size fits all" approach to High Court litigation. A simple tripping case with a small number of witnesses will be dealt differently from a clinical negligence action which has resulted in catastrophic injuries. Accordingly, the time allowed for the parties to complete the necessary steps will differ from case to case as judges assess the realistic needs of the parties in the light of other relevant factors.

[38] The second defendant submits that it would be contrary to the overriding objective for the court to ignore his finite resources as this would be omitting to take into account a significant and relevant matter. He also submits that there has been a minor delay caused due to the complexity of the case and the tasks involved in providing discovery. Counsel also indicated that the matter may yet require consideration of a closed material proceeding under the Justice and Security Act

2013. He further submits that the delay which there has been has not yet reached a point where it could be described as "unacceptable".

[39] The plaintiff seeks that, at the least, I should make an Unless Order, namely an order that, unless the second defendant serves a list of documents within a set period of time, the defence will be struck out. In *Hytech Information Systems Limited v Coventry City Council* [1997] 1 WLR 1666 an Unless Order was described as "an order of last resort, not made unless there was a history of failure to comply with order orders. It was the part's last chance to put its house in order."

[40] I have considered all the facts and circumstances in this case and the submissions of both parties. This is not a case where a defendant has failed over a period of many years to produce discovery. This is a case where an order requiring a list of documents was made less than 12 months ago and the party subject to that order is claiming unprecedented difficulties have prevented it from complying as yet in a context where it has a statutory responsibility to avoid handing over information which might put the lives of others at risk. Having regard to the applicable law, I am obliged to take those factors into account.

[41] Nevertheless, I regard the second defendant's estimate that the discovery process is likely to take "many months" as unfortunately vague. It might be argued that it was inevitably vague given the scale of the task but the lack of more detail as to current progress and possible resolution is troubling.

[42] The plaintiff argues that the discovery process should not be allowed to continue indefinitely. I agree. The plaintiff also argues that there is obviously a close relationship between the disclosure obligations that will arise in the context of the inquest into Mr Arthurs' death and those that will arise in the context of these civil proceedings.

[43] At the time of the hearing before me the review of the various legacy inquests before Weir LJ had not commenced. The review of the readiness by the parties in connection with an inquest into the death of Mr Arthurs took place on 26 January 2016. Having available the audio recording of that review, I take judicial notice of the following :

(i) Counsel for the Ministry of Defence and the Chief Constable informed the coroner that, in relation to PSNI materials, two folders of sensitive material had been located together with nine boxes of non-sensitive material. Counsel stressed that this case was at the very outset of the process and that the task of searching for and collating material was still ongoing.

(ii) Counsel for the families submitted that some sensitive material must have been identified and placed before the Secretary of State for her decision to pass a decision on whether to grant a new inquest to the Advocate General.

> Counsel for the Ministry of Defence and the Chief Constable agreed that the process of identifying sensitive material was not now "starting from scratch".

However it was not clear from the submissions of counsel for the Ministry of Defence and the Chief Constable whether the sensitive material placed before the Secretary of State was sensitive material in the possession of the Ministry of Defence or sensitive material in the possession of the Chief Constable.

[44] What the plaintiff asks me to do is to make an Unless Order which would impose an obligation upon the second defendant that it is clear, if it were for a relatively brief period of time, the second defendant could not comply with. If I were to make an Unless Order with a relatively short period of compliance, it would almost inevitably be followed by applications by the second defendant to extend time. In the event that time was not extended, judgment could be marked against the second defendant. I am aware that this is an outcome that neither party before me wants. It is not sought by the plaintiff as it would deny the plaintiff the opportunity to explore with relevant witnesses the role of the police on the day of Mr Arthurs' death. It is not sought by the second defendant as it would deny him an opportunity to defend the actions of his staff on that day.

[45] Having regard to all the facts and circumstances of this case I have concluded therefore that neither the striking out of the second defendant's defence nor the granting of an Unless Order is an appropriate remedy. I therefore dismiss the plaintiff's application and I make no order as to costs.

[46] However, the role of the judiciary has changed over the years and judges now have a role in reviewing actions and the progress that is being made by the parties in meeting their obligations under the Rules and in getting cases ready for trial. Both before the Queen's Bench Masters prior to a case being set down for trial, and before the High Court judges after an action has been set down for trial, the system of reviews is designing to ensure that the parties are properly diligent in respect of their duties.

[47] This action, being a personal injuries action, may be listed for review by one of the Queen's Bench Masters at any time on request by any of the parties. Anticipating that such a review will be sought by the plaintiff in the near future, I now indicate to the second defendant that a detailed response to the following issues is likely to be sought at that review or reviews :

(i) What work has been done so far in connection with discovery in these civil proceedings insofar as it applies to sensitive documents ?

(ii) What staffing resources are currently allocated to the discovery process in these civil proceedings ? An answer is likely to be required in terms of number of persons and hours per week of staff time.

(iii) If Step 1 in ACC Kerr's description of the discovery process has not yet been completed, when is it anticipated that the Legacy Support Staff will have gathered all documents pertaining to the case ?

I make it clear that this is not an exhaustive list of questions in respect of which answers will be sought from counsel for the second defendant at any future review or reviews. They are set out here for illustrative purposes only. I also note that, in the event counsel has insufficient instructions to answer such questions, the Master has a power under Order 32 Rule 14 to issue a summons requiring any person to attend court as a witness and to examine him.

[48] At a review any party who considers that the litigation is not being sufficiently progressed by one of the other parties may, without the issue of a summons, apply for an appropriate order. The usual approach of the Queen's Bench Masters to reviews can be expected to apply: having regard to all the facts and circumstances, where a party is not making appropriate progress a court order can be anticipated to be imposed.

[49] The court recognises that the second defendant is experiencing significant difficulties in respect of servicing both the legacy inquests and the related civil proceedings. The task is extensive and must be carefully managed so as to balance the rights of all involved. However the second defendant must recognise that the remedy that lies in the hands of the court hearing these civil proceedings, namely the striking out of its defence and marking judgment in favour of the plaintiff, is a remedy which is not available to a coroner's court. While neither of the parties wish, for different reasons, to see that remedy being granted, it is the ultimate sanction in the event that there is continuing delay in making proper discovery once it reaches the point which the court concludes is unacceptable.