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Judgment: approved by the Court for handing down | *Delivered:* **03-12-08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS

PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS

DEFENDANTS

_____

RULING NO 14

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MORGAN J

[1] This application arises as a result of the intention of the plaintiffs to adduce in evidence a newspaper article published in the Independent newspaper on 8 November 2008 and portions of a book entitled "Great Hatred, Little Room" by Jonathan Powell who was at one stage Private Secretary to the Prime Minister. The plaintiffs also seek to call Sean O'Callaghan to prove matters contained in a statement and supplemental statement prepared by him. The third named defendant contends that I should not admit any of this evidence either on the basis that is not relevant or alternatively because I should exercise my discretion not to admit it.

The evidence of Mr O'Callaghan

[2] Sean O'Callaghan is a convicted murderer who was an active member of the Provisional IRA during the early 1970s. He claims that he ceased involvement with the organisation in April 1976 and moved to England. He returned in August 1979 and alleges that he rejoined the organisation for the purpose of passing information to the Special Branch in the Republic of Ireland. He claims that by 1984 he was made Officer Commanding of the Provisional IRA's Southern Command. He gave himself up to British police

in November 1998 and was sentenced to 2 life terms and 529 Years imprisonment for various terrorist offences.

[3] Mr O'Callaghan alleges that in early 1985 he attended a meeting with other leading provisional IRA members including his number two, Dickie O'Neill, Thomas "Slab" Murphy the Officer Commanding the Northern Command, Kevin Hannaway the quartermaster general, a man named Brennan and the third named defendant. Mr O'Callaghan alleges that the purpose of the meeting was to discuss the procurement of deer hunting rifles for the purpose of killing soldiers and policemen. He says that it was clear from the meeting that once the rifles had been procured the third named defendant would take control of them. He further alleges that the third named defendant raised the issue that ammunition was strictly regulated and hard to come by for such rifles and a plan was required on how to get it.

[4] Mr O'Callaghan further alleges that the third named defendant was Mr Murphy's right-hand man. He says that he was aware of this as a result of conversations with his number two, Dickie O'Neill, and Patrick Currie, his security officer. He also alleges that his quartermaster in the Southern Command reported to him that the third named defendant was in charge of arms and explosives moved into the North.

[5] Mr O'Callaghan alleges that he was told by Dickie O'Neill and Patrick Currie that the third named defendant was kneecapped in 1975 as a result of a dispute between the Official IRA and the Provisional IRA. He further alleges that in 1985 Dickie O'Neill reported to him that the third named defendant and a man named Hardy were taking cars from the provisional IRA car pool without permission. He says that he instructed his security officer to tell the third named defendant to stop it.

[6] Mr O'Callaghan further alleges that the third named defendant was involved in a militarist coup led by Ivor Malachy Bell in 1984 within the provisional IRA. He alleges that he was briefed on this by his security officer and Martin McGuinness because he was due to participate in the jury at Bell's court martial but avoided being on that jury.

[7] Mr O'Callaghan alleges that in 1985 he was asked to help organise the following years General Army Convention. He says that the then Chief of Staff, Kevin McKenna, indicated to him that he wished to see the third named defendant voted onto the executive of the organisation. For the reasons explained by him he contends that this was an indicator of the seniority of the third named defendant's position within the organisation.

[8] Mr O'Callaghan offers assumptions about the rise of the third named defendant within the organisation when Mr Murphy became Chief of Staff and also suggests that there were discussions which made it apparent to him

that the third named defendant amongst others was involved in the provisional IRA's Libyan arms procurement operation. He does not elaborate on the persons with whom those discussions took place or the reasons why they did so indicate.

[9] The plaintiffs indicated their intention to call Mr O'Callaghan at a stage when it was believed that their case was coming to an end. As appears from his background this witness comes with a considerable baggage. In addition he has been the author of a book which describes his experiences but apparently does not mention the third named defendant. Mr O'Higgins SC may need to investigate whether the third named defendant is mentioned in earlier manuscripts held by the publishers. Mr O'Callaghan was also involved in a recent criminal trial in rather unusual circumstances which may require investigation. The third named defendant submits that it is clear that any cross-examination of Mr O'Callaghan will require considerable background research and that this would have been well known to the plaintiffs. It has been disclosed by the plaintiffs that Mr O'Callaghan was retained to assist with media and fundraising by the Omagh Victims Legal Fund from 12 March 2001 until 8 August 2003 and during that period was paid £500 per week plus VAT.

[10] The first question to be considered in the case of this kind is whether the evidence, if true, is likely to be probative of a matter in issue in the trial. The sense in which evidence may be so probative is helpfully set out by Lord Bingham in O'Brien v Chief Constable [2005] UKHL 26 at paragraph 4.

> "4 That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, inquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-

> maker the opportunity to consider it. For while there is a need for some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters. Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the inquiry."

[11] I do not consider that there is any evidential value in Mr O'Callaghan's supposition of what might have happened when Mr Murphy became Chief of Staff but the remainder of the evidence in my view, if true, might assist the plaintiffs in seeking to prove that Mr McKevitt was a relatively senior and important member of the provisional IRA during the mid-1980s. That fact, if proved, together with other facts might contribute to a case that Mr McKevitt held such a senior position until the late 1990s. All of this may have a bearing on the issue of whether the third named defendant held a leadership position in the Real IRA at the time of the Omagh bomb as alleged by the plaintiffs. I consider, therefore, that the relevance test is passed except for the material by way of supposition about what might have happened when Mr Murphy became Chief of Staff.

[12] Mr O'Callaghan is able to give direct evidence of the circumstances of his alleged meeting with the third named defendant in early 1985, the fact that he instructed his security officer to tell the third named defendant not to use the provisional IRA car pool and the fact that Kevin McKenna spoke to him about the third named defendant becoming a member of the provisional IRA's executive. In relation to each of these matters he can be subject to cross-examination. He alleges that he appointed his security officer and that Kevin McKenna was introduced as Chief of Staff by him at a meeting of the GHQ.

[13] The other allegations appear to rely on accounts given by others and the weight to be given to that evidence among other things depends on the extent to which the evidence is available to be tested by the defendants. It is in the nature of criminal organisations that there will often be no opportunity to test or evaluate the accounts allegedly given by witnesses of plainly doubtful credibility.

[14] The approach which the court should take to the exercise of discretion in this area is again helpfully sent out by Lord Bingham of paragraph 5 of O'Brien.

> "5 The second stage of the inquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole."

Applying that principle I consider that I should permit the plaintiffs to introduce the evidence in respect of the matters set out in paragraph 12 above but not to allow evidence in relation to the matters referred to in paragraph 13. That reflects the difference in weight which the court would be obliged to give to such evidence in the circumstances of this case.

The newspaper article and the book

[15] The Independent newspaper article is entitled "The afterlife of the IRA : The dissident groups bent on shattering the peace in Northern Ireland". It refers to the fact that the third named defendant was convicted of directing terrorism in the Republic of Ireland largely on the evidence of Mr Rupert. The article alleges that Mr McKevitt was the IRA's quartermaster general and that when he walked out he took some of its material with him. There is no source for this allegation within the article and no apparent identification of the journalist who wrote the article. It is, therefore, an assertion which is impossible to evaluate. I consider that I could not give any material weight to an allegation consisting of mere assertion. For that reason as a matter of discretion I consider that I should not admit it.

[16] There are a number of references in Jonathan Powell's book to the third named defendant. He is referred to as "the long-time quartermaster general of the IRA responsible for all their weapons and materiel". There is no source for that allegation. There is also a suggestion in the book that the third named defendant founded the Real IRA and moved weapons and materiel to them. Again no source for this assertion is provided within the extract. This is a serious allegation which, if proved, would significantly assist the plaintiffs' case. The credibility and reliability of these assertions is, however, impossible to evaluate. In the absence of some process of identification of the source which enables the allegation to be evaluated I do not consider that I should admit evidence of this type.

[17] In the adversarial system it is for the plaintiffs to adduce evidence which can be evaluated and rebutted. If the evidence proposed to be adduced consists of mere assertion without any indication of the source it is virtually impossible to evaluate and therefore likely to be of no assistance. The plaintiffs submit that the assertion can be answered by the defendant in the witness box but there must be something of substance to answer before that arises. If the plaintiffs want to introduce this evidence it is for them to establish the source of these allegations so as to enable the court to examine the question of weight.