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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Bernadette McKearney
as the personal representative of the estate of Kevin McKearney (deceased)

Plaintiff;

and

The Director of Public Prosecutions for Northern Ireland

Defendant.

Master Bell

INTRODUCTION

[1] On 3 January 1992 Kevin McKearney and John McKearney were in a butcher's shop in Moy, County Tyrone when a gunman walked in and fired shots at them from a Browning 9mm pistol. Kevin McKearney fell to the ground and the gunman then fired four more shots at him. Kevin McKearney died at the scene. John McKearney died of his injuries some three months later.

[2] Bernadette McKearney sues as the personal representative of the estate of Kevin McKearney (hereafter "Mr McKearney").

[3] Litigation was commenced against the Chief Constable and the Ministry of Defence by a writ which issued on 19 May 2014 (Writ number 14/52164). The writ alleges negligence, misfeasance in public office and

breach of Article 2 of the European Convention on Human Rights (hereafter "Article 2").

[4] On 6 May 2016 the plaintiff issued an application to amend this writ and to add the Director of Public Prosecutions for Northern Ireland (hereafter "the Director") as a third defendant and the Secretary of State for Defence as a fourth defendant. On 24 October 2016 I granted her application that the Secretary of State for Defence be added as a defendant. On 12 June 2017 I ordered that the Director must provide further discovery to the plaintiff. The final aspect of the plaintiff's application, namely to add the Director as a defendant, stands adjourned.

[5] On 8 August 2017 the plaintiff changed her litigation approach and issued a separate writ against the Director (Writ number 17/74810) alleging a breach of Article 2. (The writ contains a typographical error in that at one point it refers to "Gabriel Wiggins deceased" rather than to Mr McKearney. No issue was taken in respect of this). Three days after the issue of this new writ, the plaintiff also served a Statement of Claim in respect of the new writ.

[6] The plaintiff presents her action against the Director on the following basis :

> "Servants, agents, or employees of the defendant failed to pursue all possible leads to establish the circumstances of Mr McKearney's death and/or establish wrongdoing …. contrary to section 6(1) with Schedule 1, Part 1, Article 2 of the Human Rights Act 1998."

In particular, the plaintiff essentially criticises the Director's failure to prosecute three persons for the murder of Mr McKearney : Alan Oliver, Laurence Maguire, and a person referred to as "Suspect Five" in the Historical Enquiries Team's report into Mr McKearney's death.

APPLICATION

[7] The Director has now issued a summons under Order 18 Rule 19 of the Rules of the Court of Judicature seeking that the new writ against him be struck out.

[8] Somewhat unusually, it was accepted on behalf of the plaintiff that the plaintiff cannot succeed in this application due to the way in which the domestic law currently stands. This was because it was conceded by Mr Scott that the decision in *McKerr* [2004] 1 WLR 807 on the retrospective nature of Article 2 requires the plaintiff's case to be struck out by me. Under the current law as set out in *McKerr*, Article 2 does not apply in domestic proceedings before 2 October 2000 when the Human Rights Act 1998 came into force. Hence it cannot be invoked in order to give the court jurisdiction in domestic

proceedings in respect of an event which occurred before that date, as Mr McKearney's death did. Nevertheless Mr Scott submitted that this position is not as fixed as may be thought. In *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] AC 1355 Lord Neuberger, after outlining conflicts between domestic and Strasbourg jurisprudence on this point, said :

> "In the light of this rather unsatisfactory state of affairs, there would be much to be said for our deciding the issue of whether *McKerr* remains good law on this point. However, given that it is unnecessary to resolve that issue in order to determine this appeal, we ought not to decide it unless we have reached a clear and unanimous position on it. We have not."

Despite the authority of *McKerr* which binds me in the decision I must reach in this application, both parties considered that, the overriding objective notwithstanding, it would be useful to have the issues ventilated and hence desirable for me to hear submissions and issue a written judgment. Mr Scott indicated that he anticipated losing the *McKerr* point before me, on appeal to the judge, and also on appeal to the Court of Appeal before he has an opportunity to invite the justices of the Supreme Court to consider whether *McKerr* remains good law.

THE DIRECTOR'S SUBMISSIONS

[9] Mr Henry, who appeared on behalf of the Director, submitted that, in respect of the opening sentence in the statement of claim regarding the particulars of breach of statutory duty ("Servants, agents, or employees of the defendant failed to pursue all possible leads to establish the circumstances of Mr McKearney's death and/or establish wrongdoing"), the plaintiff fundamentally misunderstood the role of the Director and that the Director's role was exclusively concerned with prosecution decisions and conducting criminal trials. The Director had no investigatory role. He did not therefore have any responsibility for pursuing all possible leads. Mr Henry emphasised that the role of the Director was to take the fruits of a police investigation and apply the test for prosecution to them. Mr Henry notes that the pleadings criticise the Director for failing to follow all reasonable leads. The expression "all reasonable leads" is, he argued, taken from European case law. However such a criticism can only be levelled against the police or a body with an investigative function. It cannot be levelled at a statutory body that has no investigatory role. Therefore, even if the criteria under Article 2 were satisfied, this means that there is no arguable case against the Director and the pleadings should be struck out.

[10] Mr Henry submitted that the Director could not be criticised, and therefore should not be a defendant in any civil litigation, where he is legally unable to make the prosecution decision which the plaintiff in this case seeks. He argued that, on the basis of the evidence furnished to the Director which is referred to in the plaintiff's statement of claim, the correct decisions were made by him.

[11] Mr Henry submitted that the crux of the plaintiff's case was that Oliver and the individual referred to as Suspect Five should have been prosecuted on the basis of what Vicky Ahtty said during police interview; that Maguire should have been prosecuted for murder because he bought the car that was used in the murder, and that Ahtty should have been prosecuted for murder rather than conspiracy to murder. However Mr Henry submitted that the original prosecution decisions cannot be validly criticised. He argued :

(i) The evidential aspect of the test for prosecution was not satisfied so as to allow the Director to prosecute Maguire for the murder of Mr McKearney. Mr Henry also argued that Maguire nevertheless received a sentence of 480 years imprisonment in respect of the offences for which he was prosecuted.

(ii) Ahtty was initially charged with the murder of Mr McKearney but was subsequently prosecuted for conspiracy to murder as a result of having made admissions in respect of transporting the weapons used in the McKearney murders. Mr Henry argued that this reflected Ahtty's role in the crime. The statement of claim indicates that Ahtty was sentenced to 10 years imprisonment at Belfast Crown Court when he pleaded guilty to conspiracy to murder.

(iii) In respect of the other suspects who were arrested, including Oliver and Suspect Five, they made no admissions and there was no evidence against them.

(iv) To suggest that Suspect Five and Oliver should have been prosecuted on the basis that they were named by Ahtty demonstrates a fundamental misunderstanding of the criminal law. They were interviewed and made no admissions. They was no other evidence against them. A decision to prosecute them in such circumstances would therefore have been unlawful. The plaintiff suggests that the confession of one accused could be used against another accused. The starting point is that it cannot and is inadmissible.

> There are exceptions to this general rule but these would require some other supporting evidence.

THE PLAINTIFF'S SUBMISSIONS

[12] Mr Scott submitted that the plaintiff's case was not "unarguable or almost uncontestably bad". Although the plaintiff does not allege that the Director was in breach of the substantive limb of Article 2 of the ECHR, she does allege that he was in breach of the procedural obligation under Article 2. The procedural obligation is a separate and autonomous duty to carry out an effective investigation. The cases of *Silih v Slovenia* (2009) 49 EHRR 37 and *Jelic v Croatia* (2015) 61 EHRR 43 provide that the procedural obligation binds the state throughout the period in which the state can reasonably be expected to take measures with an aim to elucidate the circumstances of a death and establish responsibility for it.

[13] Mr Scott conceded that, where an unlawful death does not result in a prosecution, then that lack of prosecution does not automatically mean that Article 2 has been breached. Nevertheless Mr Scott submitted that the failure to prosecute Oliver, Maguire and Suspect Five for the murder of Mr McKearney amounts to a breach of Article 2 in the circumstances where the Director had the evidence which he had, or might potentially have had appropriate evidence.

[14] In particular, Mr Scott submitted that the Director bore a statutory responsibility to ask the question whether Ahtty was willing to give evidence against Oliver and Suspect Five. To do otherwise would imply a very passive approach in respect of his statutory functions under the Prosecution of Offences (Northern Ireland) Order 1972. Mr Scott began by arguing that this position was "driven by" the new position regarding SOCPA agreements under the Serious Organised Crime and Police Act 2005 but subsequently adjusted his argument to submit that there was only "significant involvement" in this process by the Director.

[15] I will set out the plaintiff's submissions in more detail below as I set out my conclusions on the points that were raised during oral argument.

THE TEST FOR STRIKING OUT

[16] Order 18 Rule 19 of the Rules of the Court of Judicature provides :

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a)."

[17] The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts.

[18] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[19] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal for Northern Ireland reviewed the authorities on the test to be applied in such applications. It held that the summary procedure for striking out pleadings was only to be used in "plain and obvious" cases; it should be confined to cases where the cause of action was "obviously and almost incontestably bad"; and that an order striking out should not be made "unless the case is unarguable".

[20] The Court of Appeal in *O'Dwyer* quoted Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 693-694, a passage approved by the House of Lords:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a

> cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[21] Applications to strike out require to be considered in two parts. Firstly, I may consider whether the plaintiff's claim ought to be struck out on the ground that it discloses no reasonable cause of action. In considering this part of an application, the effect of Order 18 Rule 19(2) is that the parties are not entitled to offer any evidence, whether oral or on affidavit. Secondly, I may consider whether the plaintiff's claim ought to be struck out on the ground that it is frivolous and vexatious. Frivolous and vexatious are of course the terms used by lawyers to mean that the case is "obviously unsustainable" (Lindey LJ in *Attorney General of Duchy of Lancaster v L & NW Ry* (1892) 3 Ch 274 at 277). In considering this part of an application, the parties are entitled to offer evidence on affidavit.

[22] Applying these principles, I consider that this application ought to be granted and the action struck out on the basis that the pleadings disclose no reasonable cause of action and also on the ground that it is frivolous and vexatious. I shall now set out the reasons why I regard the plaintiff's statement of claim as defective.

DOES THE DIRECTOR HAVE AN INVESTIGATIVE ROLE ?

[23] It was submitted by Mr Henry that all the relevant activities in relation to the Director's activities in this case took place between 1992 and 1995. This meant that the statute governing the Director's statutory functions was the Prosecution of Offences (Northern Ireland) Order 1972 and hence not the Justice (Northern Ireland) Act 2002 which currently governs the Director's role.

[24] If, contrary to Article 2, there has been a failure to carry out an effective investigation into the death of a person, it is obvious that the domestic litigation for that failure must be aimed at the authority or authorities who bear responsibility for carrying out that investigation, and not against those who do not bear such responsibility. For litigation being heard before the Strasbourg court it would, however, be the United Kingdom as a nation state which was the defendant.

[25] Mr Henry submitted that the Director had no investigative role. However the position is perhaps slightly more nuanced than he suggested. Article 5(b) of the 1972 Order provides that it shall be the function of the Director :

> "to examine or cause to be examined all documents that are required under article 6 of this Order to be transmitted or

> furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated"

Hence, in any case where the Director saw that there was a matter which had not been attended to by the investigating officer, it enabled the Director to issue an interim direction so that the *lacuna* was dealt with. Nevertheless I do not consider that this ability amounts to the Director having even an indirect investigatory role. Mr Henry's expression of there being a power vested in the Director to direct proofs would appear to be a reasonable description of the power granted under Article 5(b) of the 1972 Order.

[26] In addition to that statutory power, the Director also possessed a further power under Article 6(3) of the 1972 Order :

> "It shall be the duty of the Chief Constable, from time to time, to furnish to the Director facts and information with respect to –
>
> (a) indictable offences alleged to have been committed against the law of Northern Ireland;
> (b) such other alleged offences as the Director may specify;
>
> and, at the request of the Director, to ascertain and furnish to the Director information regarding any matter which may appear to the Director to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the Director to be necessary for the discharge of his functions under this Order."

Again, I do not consider that this power amounts to giving the Director an investigatory role. Rather it amounts to the Director making a request to an office-holder who did have an investigative function to exercise that function in respect of a particular allegation that a criminal offence had been committed. In the event that a Chief Constable declined to comply with a request under Article 6(3) made by the Director, the Director would have been powerless to force a Chief Constable to comply. His only remedy would have been to apply to the High Court for judicial review of the Chief Constable's failure to act.

[27] In general, the possession of an investigatory role suggests that an office holder would have the power to carry out the usual investigative steps that criminal investigations involve. Typically these include the power to conduct searches, the power to require the production of documents, and the power to require suspects to attend for interview. The Director did not possess such powers. So despite the nuances which I have outlined that must

be taken into account, I do accept the main thrust of Mr Henry's argument that there was a clear division in functions between the Director and the police, leaving the police responsible for investigations and the Director responsible for prosecutions.

[28] If there was an insufficient investigation of the death of Mr McKearney such as to amount to a breach of Article 2, it is not therefore the Director who is the appropriate defendant. The appropriate defendant is the Chief Constable rather than the Director. The allegation in the statement of claim that the Director "failed to pursue all possible leads to establish the circumstances of Mr McKearney's death" is therefore defective.

[29] It must also be recognised that it is not the statutory function of the Director under the Prosecution of Offences (Northern Ireland) Order 1972 "to establish the circumstances" of an individual's death. That is the function of the coroner. It is the function of the Director to assess whether the available evidence gathered by police investigators is sufficient to prosecute an individual who has been reported to him and, if so, to initiate and conduct the appropriate criminal proceedings.

ARTICLE 2 AND PROSECUTING AUTHORITIES

[30] Mr Scott argued, however, that the application of Article 2 is broader than merely applying to those with an investigatory role. Effectively the plaintiff argues that a failure to prosecute in circumstances where a prosecution is merited also amounts to a breach of the procedural limb of Article 2 and the statement of claim therefore alleges that the Director "failed …. to establish wrongdoing" in respect of Mr McKearney's death.

[31] The majority of Strasbourg cases dealing with the procedural limb of Article 2 are concerned with the actions or inactions of the investigative arm of a state into a death. Such cases deal with matters such as the failure to obtain witness evidence (*Gulec v Turkey*, [1998] 28 EHRR 1210; the failure to carry out a reconstruction of events (*Nachova v Bulgaria*, 6 July 2005, ECHR 2005-VII); inadequate forensic testing (*Gul v Turkey*, 14 December 2000); the presence of a perfunctory autopsy (*Kaya v Turkey*, 19 February 1998) and other such investigative steps.

[32] In *Nochova v Bulgaria*, however, the Strasbourg Grand Chamber considered that prosecutors ignored highly relevant facts and thus shielded a particular individual from prosecution (para 114-119). The Court concluded that the conclusions of the prosecutors were characterised by serious unexplained omissions and inconsistencies and that there had been, therefore, a violation of the procedural limb of Article 2.

[33] The effect of Article 2 is that an investigation into an individual's death must be capable of leading to the identification and punishment of those responsible for the death. However the Strasbourg court held in *Avsar v Turkey* (10 July 2001) that this is not an obligation of result, but of means. The Court stated :

> "The Court reiterates that the obligation under the procedural aspect of Article 2 is one of means not result. The fact therefore that one suspect, amongst several, has succeeded in escaping the process of criminal justice is not conclusive of a failing on the part of the authorities."

[34] In an example therefore of where a person commits murder and then commits suicide, there is no automatic breach of Article 2 simply because the murderer puts himself beyond the reach of prosecution. Nevertheless it would be a breach of Article 2 if the investigation into the murder was insufficient to show that it was committed by the person who subsequently committed suicide.

[35] In her book "A Practitioner's Guide to the European Convention on Human Rights" (3rd edition 2007) Karen Reid summarises the position of the procedural limb of Article 2 as it applies to prosecution authorities as being that :

> "… lack of prosecution or conviction will therefore not be decisive, as long as the authorities … reach decisions supported by a careful analysis of the facts…. [However] even if a prosecution is brought and suspects stand trial, the Court will examine whether this is a meaningful or serious exercise with any realistic prospect of bringing the perpetrators to account."

This would appear in my view to be a correct summary of the position under the Strasbourg case law.

[36] It is clear from the statement of claim that the plaintiff wishes to challenge the decision of the Director for failing to prosecute three persons : Alan Oliver, Lawrence Maguire, and Suspect Five for offences in connection with the murder of Mr McKearney. The mechanism used to challenge the Director's decision is the procedural limb of Article 2 rather than an application for judicial review (which of course would now be out of time) or an action for misfeasance in public office (which is an intentional tort where the relevant intention is bad faith and which legal practitioners recognise as often being difficult to prove).

[37] It is of course a statement of the obvious to observe that not every crime which is committed will result in a prosecution. Criminal proceedings will only be brought by the Director in those cases where the test for prosecution is met. In the period 1992 to 1995, the time decisions in the cases which are at issue were made by the Director, the Code for Prosecutors (hereafter "the Code") which now applies to prosecutions in Northern Ireland had not been promulgated. However the test for prosecution in Northern Ireland has for many years remained the same, and so the statement of the test for prosecution in the Code therefore also reflects the approach taken during the period 1992-1995.

[38] Para 4.1 of the Code provides :

> "Prosecutions are initiated or continued by the PPS only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if: (i) the evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and (ii) prosecution is required in the public interest – the Public Interest Test."

[39] Para 4.8 of the Code sets out in more detail what the Evidential Test is :

> "A reasonable prospect of conviction exists if, in relation to an identifiable suspect, there is credible evidence which the prosecution can present to a court and upon which an impartial jury (or other tribunal), properly directed in accordance with the law, could reasonably be expected to find proved beyond reasonable doubt that that suspect had committed a criminal offence. This is different to the test which the court will apply, which is deciding whether the offence is proved beyond reasonable doubt i.e. it must be sure that the defendant is guilty before it can convict."

[40] Simply because there has been no outcome of a prosecution of an individual does not mean that the Director has failed in his role to prosecute. It will frequently be a reflection of the position that the Evidential Test has not been satisfied.

[41] Where there is insufficient evidence to meet the test for prosecution in relation to an offence, the Director's failure to prosecute cannot in my view amount to a breach of Article 2. The position might be different if the Director had announced that, despite sufficient evidence, he had decided on public interest grounds not to prosecute. Clearly it would then at least have been arguable that there had been a breach of Article 2. Likewise if, having received sufficient evidence to prosecute from investigating police, the

Director had failed to make any decision, then that too would, in my view, have been capable of amounting to a breach of Article 2.

[42] The statement of claim in this case does not allege material facts which indicate that the Director failed to carry out a careful analysis of the facts presented to him in the police investigation report into the death of Mr McKearney. The statement of claim does not allege at any point that the evidence submitted to the Director was sufficient to meet the test for prosecution. To adopt the language used in *Avsar v Turkey*, it merely points to "result".

THE FAILURE TO PROSECUTE OLIVER AND SUSPECT FIVE

[43] Ahtty admitted in interviews with the police that he was involved, with Oliver and Suspect Five in the movement of firearms prior to the murder of Mr McKearney. While admissions are admissible against the maker of those admissions, they are not generally admissible against other persons. Mr Henry submitted therefore that there was no evidential basis in 1992 for prosecuting Oliver and Suspect Five for the murder of Mr McKearney.

[44] Mr Scott submitted that there were exceptions to the general rule in respect of admissions. He referred me to the decision of the House of Lords in *R v Hayter* [2005] UKHL 6 where Lord Steyn noted :

> "The rule about confessions is subject to exceptions. Keane, *The Modern Law of Evidence* 5th ed., (2000) p 385-386, explains :
>
> > "In two exceptional situations, a confession may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused by his words or conduct accepts the truth of the statement so as to make all or part of it a confession statement of his own. The second exception, which is perhaps best understood in terms of implied agency, applies in the case of conspiracy: statements (or acts) of one conspirator which the jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it.
> >
> > . . .

> There is also a third exception, in fact an extension of the second: when, although a conspiracy is not charged, two or more people are engaged in a common enterprise, the acts and declarations of one in pursuance of the common purpose are admissible against another. This principle applies to the commission of a substantive offence or series of offences by two or more people acting in concert, but is limited to evidence which shows the involvement of each accused in the commission of the offence or offences. It cannot be extended to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill-defined."

[45] Mr Scott submitted that in *Hayter* the House of Lords therefore agreed that there was an exception to the principle that confessions were only admissible against their makers. He submitted therefore that at any time after 2005 the Director could have reconsidered the evidence and used the newly admissible evidence to prosecute Oliver and Suspect Five. I do not agree. This is because I do not accept that aspect of Mr Scott's submission that, after the 2005 decision of *Hayter*, it was incumbent upon the Director to go back through all previous prosecution decisions made by him and his staff and to examine whether there were cases which could now be prosecuted in the light of that decision. That would have been an impossible task.

[46] However there exists a further reason why I must reject Mr Scott's argument. In *Hayter* the certified question for their Lordships was :

> "In a joint trial of two or more defendants for a joint offence is a jury entitled to consider first the case in respect of defendant A which is solely based on his own out of court admissions and then to use their findings of A's guilt and the role A played as a fact to be used evidentially in respect of co-defendant B?"

I do not consider therefore that the *Hayter* exception is of any assistance to this plaintiff as its application is limited to joint trials. Ahtty was charged with the murder of Mr McKearney but that charge was later withdrawn. Ahtty was then convicted of a charge of conspiracy to murder which was substituted for the original charge. It would not therefore now be possible to have a joint trial of Ahtty, the maker of the admission, and Oliver and Suspect Five, against

whom Ahtty's admission might be used. Similarly, this is not a case where either of the exceptions discussed in Keane, *The Modern Law of Evidence* apply.

[47] Mr Scott also argued that the Director might use the powers under sections 71-75 of the Serious Organised Crime and Police Act 2005 to have Ahtty give evidence against Oliver and Suspect Five. The statement of claim contains no assertion of fact that Ahtty is willing to act as a prosecution witness and give such evidence. Mr Scott submitted that, in circumstances where a defendant has admitted that he has committed a murder and he has named other persons as having assisted him in carrying out that murder, there is a legal obligation upon the Director to enquire of the police service whether or not the defendant is willing to give evidence in court against those other persons. Mr Scott argues that this is the impact of the procedural obligation of Article 2 extending into the Director's area of responsibility. In support of this submission Mr Scott offers a number of quotations from the decision in *Jelic* including :

> "While it is uncertain whether any of the information given to the prosecuting authorities and the police would have resulted in convictions, it is nevertheless expected of national authorities that they pursue all possible leads to establish the circumstances in which a person has been killed, in order to comply with their procedural obligations under Article 2 of the Convention."

and

> "Failure by the authorities to pursue the prosecution of the most probable direct perpetrators undermines the effectiveness of the criminal-law mechanism aimed at prevention, suppression and punishment of unlawful killings. Compliance with the State's procedural obligations under Article 2 requires the domestic legal system to demonstrate its capacity and willingness to enforce criminal law against those who have unlawfully taken the life of another."

[48] In the application of the principles established by the Article 2 case law I do not consider that it is good law that, where a defendant has made admissions to the police that he was involved in a criminal act with an accomplice (who has not made admissions and against whom there is no evidence) which caused the death of a deceased, the Director is in breach of Article 2 if he does not ask the police to ask the defendant whether the defendant is willing to give evidence against the accomplice. In my view that is an investigative step which it is the responsibility of the police to explore and not a step which the prosecuting authority is required to initiate. Mr Scott made an important point in his oral submissions when he agreed that Article 2

does not impose an obligation unless there is a corresponding duty to act. Hence in my view the Director is entitled to assume that any case where a defendant is willing to give evidence against his accomplice or accomplices will be brought to his attention by the police who bear the responsibility for evidence-gathering in criminal investigations. To hold otherwise would be to breach the clear division between investigative functions and prosecutorial functions which Parliament has enacted in the relevant legislation.

THE FAILURE TO PROSECUTE MAGUIRE

[49] The position in respect of Maguire is that under police interview he admitted his involvement in a wide variety of offences.

[50] I was provided by the parties with a copy of the indictment which Maguire faced in May 1994. Maguire was tried with two other defendants and he faced 44 counts as follows ;

> 5 counts of murder
> 1 count of attempted murder
> 6 counts of conspiracy to murder
> 6 counts of possession of a firearm with intent to endanger life
> 5 counts of possession of a firearm in suspicious circumstances
> 1 count of wounding with intent
> 1 count of doing an act with intent to cause an explosion likely to endanger life
> 1 count of possession of an explosive substance in suspicious circumstances
> 2 counts of belonging to a proscribed organisation
> 1 count of directing the affairs of a terrorist organisation
> 2 counts of aggravated burglary
> 1 count of assault occasioning actual bodily harm
> 1 count of taking a motor vehicle without consent
> 3 counts of robbery
> 1 count of attempted robbery
> 1 count of hijacking
> 1 count of blackmail
> 1 count of attempted blackmail
> 2 counts of claiming that goods had been contaminated
> 1 count of possession of materials to be used for contaminating goods

[51] I was also provided by the parties with a copy of correspondence dated 2 May 2017 between Ms McKevitt from the Director's office and the plaintiff's solicitor. Ms McKevitt stated :

> "I have now considered the relevant DPP file. The resulting prosecution involved a number of accused. Offending of

several different types and also over several different dates were considered. Some resulted in a prosecution decision and others resulted in a no prosecution decision.

In respect of Mr Maguire, he was considered for the offences of murder in relation to both Mr Jack and Mr Kevin McKearney, but a no prosecution decision was directed. The decision is contained within a single document that relayed to the RUC the various prosecution and no prosecution decisions by the DPP. The relevant extract from that document dated February 1994 is copied below :

> 'There is insufficient evidence to prosecute Laurence George Maguire in relation to the McKearney and Hyster murders and other cars purchased by Maguire.' "

[52] I have been provided with a transcript of the sentencing remarks by Lord Justice MacDermott in connection with the trial of Maguire and Others. On a plea of guilty he was sentenced to five life sentences and a range of other sentences, including a sentence of 20 years imprisonment on each of four different counts. An affidavit from Ms McKevitt exhibits a newspaper report from the Independent newspaper stating that Maguire received 480 years imprisonment for the large number of offences of terrorism he pleaded guilty to. (This fact is not referred to in the statement of claim. Rather it merely states that Maguire was not indicted for any offences relating to the murder of Mr McKearney.)

[53] In her affidavit Ms McKevitt avers on behalf of the Director:

> "From the plaintiff's pleadings it appears that the complaint is that Maguire's suggested act of purchasing a car for the UVF for general use should have resulted in a charge or charges pertaining to the murder of Mr McKearney.
>
> The case pleaded against the PPS is not that Maguire bought the car specifically for the McKearney murder, but rather that he bought it generally for the UVF."

[54] The trial bundle submitted to this court by the plaintiff contains the police interviews of Maguire. The relevant portion is as follows :

> "Q. Is there anything else you want to tell us about ?
>
> A. There's a couple of other things where I was asked to buy two other cars for jobs.

Q. What jobs were they for ?

A. I didn't know at the time but I bought a white Ford Granada which was used at the Hyster murders. I knew afterwards that it had been used in the murders.

Q. What was the other one ?

A. An orange coloured Masda or Toyota car. I'm not sure which. It was used at the McKearney's, Moy.

….

Q. Did you take any part in the McKearneys or Hyster murders ?

A. No, I didn't know what they were using the cars for until after the murders were done.

….

Q. What did you think the car was to be used for ?

A. Truthfully I didn't know at that stage.. I didn't know what sort of things they were into. At first there was a lot of talk of robberies.

Q. When did you realise that it had been used in the McKearney shootings ?

A. After I'd seen it on the News.

Q. Was that before or after Hyster ?

A. After I think. Was it not put down as the first shooting of the New Year. "

[55] Mr Scott submits that it was improper that these admissions did not lead to Maguire facing a criminal charge in relation to Mr McKearney's death. He submitted that this admission shows a pattern, namely that Maguire bought cars which were subsequently used in murders. Maguire had been asked to buy a car which was then used in the Hyster murders. Some six weeks later he was asked to buy another car which would subsequently be used in the McKearney murders. I consider that, given that this was the available evidence, the Director's decision not to prosecute Maguire for the

murder of Mr McKearney cannot amount to a breach of Article 2. The UVF were engaged in a wide range of criminal activities. The indictment preferred against Maguire illustrates this : murders, robberies, illegal possession of firearms and explosives, aggravated burglaries and other offences. The admissions set out above do not amount to a viable basis for a murder charge.

[56] Should the admission have however led to the preferment of a less serious charge ? It is clear that not every possible criminal charge must inevitably be preferred against a defendant. It represents good practice for prosecutors to be selective in preferring the charges that a defendant faces. At the current time this good practice is reflected in the Code for Prosecutors which states as follows :

> "4.39 The choice of offences in respect of which a defendant is to be prosecuted is an important function of the Public Prosecutor.
>
> 4.40 In many cases the evidence will establish a number of possible offences. Care must be taken to ensure that the offence or offences to be prosecuted adequately reflect the seriousness of the criminal conduct in respect of which the Test for Prosecution is met, that they provide the court with an appropriate basis for sentencing an offender and that they enable the case to be presented in a clear and effective manner.
>
> 4.41 The Public Prosecutor should not prosecute more offences than are necessary in order to encourage a defendant to plead guilty to some. In the same way, the prosecutor should not proceed with a more serious offence, which is not supported by the evidence, so as to influence a defendant to plead guilty to a lesser offence. Prosecutors are not permitted to "plea bargain". "

There is no fact alleged in the statement of claim which asserts that anything incorrect has been done in regard to the charges against Maguire.

[57] Judicial criticism has often been visited on prosecutors for the "overloading" of indictments, a practice which leads to long and complex trials. An example of such judicial criticism may be found in Lord Lowry's remarks in the Northern Ireland Court of Appeal in *R v Donnelly and others* [1986] NIJB 32 where he said (albeit in a "supergrass" context) :

> "The Court of Appeal in England, admittedly in a jury context, has depreciated long and complex trials and the overloading of indictments in *R v Turner (Bryan James)* 61 Cr

App Rep 67, [1975] Crim LR 451, and *R v Thorne* 66 Cr App Rep 6. In each case many accused were prosecuted in reliance on accomplice evidence. In *R v Thorne* Lawton LJ said (at p 11):

> 'The main ground of appeal was that the trial was so long and became so complicated by the numerous issues which had to be considered that it was impossible for the appellants to have a fair trial. Let it be said at once that no one has criticised the learned judge's handling of this case save on details . . . Like Topsy, this case just grew and grew. In the end it became a mammoth of a case. Until a few weeks ago it was the longest criminal trial ever in our Courts. Others of the same breed are around. Their extinction is desirable . . . This Court has noticed a tendency recently for prosecuting counsel to overload indictments. There must be an end to this. Indictments must be kept short. No more accused should be indicted together than is necessary for the proper presentation of the prosecution's case against the principal accused. Necessity, not convenience, should be the guiding factor.'

We respectfully endorse the views of Lawton LJ although we believe that a tendency towards unnecessary length and complexity, which he so rightly condemns, is much more likely to confuse a jury than a judge sitting alone, who has the benefit of a complete or partial transcript and his own notes and who will be alert from the beginning to the main issues of fact and law and will not have to wait for a summing up to put them in perspective."

[58] Similar concerns were expressed by Lord Justice Bridge in the case of *R v Andrew Novac* (1977) 65 Crim App R 109 at 118 where he said:

> "We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing of all convictions except on conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment containing 38 counts does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted in a trial of quite unnecessary length and complexity

> … Quite apart from the question of whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wider and more important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial or by one moderately long or four short separate trials. We answer unhesitatingly that whatever advantages were expected to accrue from one long trial … they were heavily outweighed by the disadvantages. A trial of such dimensions puts an immense burden on both judge and jury. In the course of a four or five day summing up the most careful and conscientious judge may so easily overlook some essential matter. Even if the summing up is faultless, it is by no means cynical to doubt whether the average juror can be expected to take it all in and apply all the directions given. Some criminal prosecutions involve consideration of matters so plainly inextricable and indivisible that a long and complex trial is an ineluctable necessity. But we are convinced that nothing short of a criterion of absolute necessity can justify the imposition of the burdens of a very long trial on the court."

[59] Where an individual is brought to justice after a long involvement in crime, whether that be crime of a fraudulent, sexual or terrorist nature, the number of potential offences which might be charged might be in the hundreds. It is clear that prosecuting authorities are granted significant discretion in the number and type of charges which may be contained in an indictment. In the context where Maguire was prosecuted for the extensive number of criminal charges which he faced and was sentenced in the way that he was, I do not consider that it can be successfully argued that the omission of a charge based on Maguire's verbal admissions that he purchased a car which was subsequently used in the murder of Mr McKearney amounts to a breach of Article 2.

PARTICULARS OF BREACH OF STATUTORY DUTY

[60] Another defect in the statement of claim is contained in paragraph 41 which follows immediately after the particulars of breach of statutory duty, in that it alleges :

> "By reason of the above Mr McKearney has suffered personal injury, damage and humiliation."

Logically this cannot be correct in that, even if the Director did breach the procedural limb of Article 2, Mr McKearney had already sadly died and

therefore cannot have suffered personal injury, damage or humiliation as a result.

PERSONAL INJURY

[61] The statement of claim contains the following allegation at paragraph 40 :

> "By reason of the matters stated above, injuries were caused to Mr McKearney by breaches on the part of the servants, agents or employees of the Defendant of the Human Rights Act 1998."

Given that Mr Scott has in his written submission made the point that the plaintiff does not allege that the Director was in breach of the substantive limb of Article 2, I have assumed that paragraph is a "cut and paste error" in that paragraph 40 of the Statement of Claim in respect of Writ number 14/52164 is a paragraph in similar terms and is tailored to describe the allegations against the Chief Constable and the Ministry of Defence.

[62] Likewise, a further defect in the statement of claim is in relation to the particulars of personal injuries to Mr McKearney. These state that Mr McKearney suffered bullet wounds to the chest that caused haemothorax and haemopericardium due to lacerations of the lungs and superior vena cava. These injuries were fatal. The particulars go on to state that by reason of the aforementioned breach of Article 2 the Plaintiff has suffered loss and damage. Such particulars of personal injury would be entirely appropriate to be included had the Director been sued for a breach of the substantive limb of Article 2 (ie being responsible in some way for causing the death of Mr McKearney). Again, however they cannot be justified in an action where the Director is being sued in respect of the procedural limb of Article 2 (ie being responsible in some way for the failure to carry out an effective investigation into his death.) Any failure to carry out an effective investigation into Mr McKearney's death logically cannot have led to his death.

THE INCLUSION OF MATERIAL FACTS

[63] By way of completeness I note that Order 18 Rule 7(1) provides :

> "Subject to the provision of this rule, and rules 10,11, 12 and 23, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or his defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits."

[64] The "White Book", 1999 edition, states the following at paragraph 18/7/11 in respect of material facts :

> "It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139. "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v Rex* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193)."

[65] In *NEC Semi-Conductors Ltd v IRC* [2006] STC 606 Mummery LJ made the following observations at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well-known pleading requirements, should suffer the consequences with regard to such matters as limitation."

[66] In this context I observe that the statement of claim does not contain the allegation of a material fact that an investigation file was submitted by the police to the Director for his consideration as to what criminal proceedings

should be instituted. The statement of claim merely states that a report by the Historical Enquiries Team of the Police Service stated that Maguires "alleged involvement in the McKearney murders will be included in a DPP file covering all his criminal activities." I consider that such a fact ought to have been included as a material fact which logically requires to be proved by the plaintiff in this action. Nevertheless, I do not take what I regard as a mere oversight into account in my decision in this application.

CONCLUSION

[67] I conclude for the reasons set out above that the statement of claim in this case is defective. It does not contain facts which, if proved true, could lead a court to conclude that the allegations concerning a breach of Article 2 contained in the statement of claim have been proved. It is in my view, to use the language of *O'Dwyer* "plain and obvious" that the Director has no function to "pursue all possible leads to establish the circumstances of Mr McKearney's death and/or establish wrongdoing". To state otherwise is to entirely misunderstand the role of the Director as defined by statute. I must therefore strike out the litigation under Order 18 Rule 19(1)(a) on the ground that there is no reasonable cause of action against the Director. In reaching this view I have not taken into account the affidavit evidence provided by the parties.

[68] Even if I had not reached this conclusion in respect of Order 18 Rule 19(1)(a), I would have struck out the litigation against the Director under Order 18 Rule 19(1)(b) on the basis that it was frivolous or vexatious, that is to say obviously unsustainable. I agree with Mr Henry's submissions that, on the basis of the evidence submitted to the Director, in respect of Mr McKearney's murder, the Director's decisions were entirely appropriate. In reaching this view I have taken into account the affidavit evidence provided by the parties.

[69] Even if my decision had not been as set out above, I would of course have been obliged to strike out the litigation against the Director because of their Lordships ruling in *McKerr* and the non-retrospectivity point conceded by Mr Scott.

[70] Mr Henry also submitted that this action was also "doomed to fail" under the limitation point which he raised. Given the circumstances that I consider that the litigation must be struck out under Order 18 Rule 19, and that the same result must occur because of the *McKerr* point, I do not consider that it is necessary for me to consider the limitation point.

[71] Nothing of course in this decision affects the plaintiff's litigation against the Chief Constable, the Ministry of Defence and the Secretary of State for Defence which now continues.