Neutral Citation No: [2024] NIMaster 8 *Judgment: approved by the court for handing down (subject to editorial corrections)*	*ICOS No:* **16/3205, 16/3209, 14/74992** *Delivered:* **11/04/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

(1) PATRICK ASKIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PATRICK ASKIN (DECEASED) AND ON BEHALF OF THE DEPENDANTS OF THE DECEASED

(2) ALAN WHITE BY HIMSELF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET PEGGY WHITE (DECEASED)

(3) DEREK BYRNE

Plaintiffs

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

First Defendant

and

MINISTRY OF DEFENCE

Second Defendant

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Third Defendant

Mr Frank O'Donaghue KC leading Mr Stephen Toal BL (instructed by KRW Law) for Mr Askin
Mr Brian Fee KC leading Mr Nick Scott (instructed by KRW Law) for Mr White
Mr Cormac Ó Dúlacháin SC leading Mr Malachy McGowan (instructed by KRW Law) for Mr Byrne
Mr Paul McLaughlin KC (instructed by the Crown Solicitor) for the Defendants
Mr Adrian Colmer KC leading Ms Julie Ellison (instructed by the Attorney General) proposed fourth Defendant

MASTER HARVEY

Introduction

[1] This is an application by the defendants for a direction pursuant to Order 33 rule 3, that limitation be dealt with as a preliminary issue. The rule provides that such a preliminary matter can be dealt with before, at or after the trial of the main action. In the event that I accede to the defendant's application, it is a matter for the trial judge as to when this issue is determined.

[2] Further, the defendants seek a direction as to the law governing jurisdiction requesting that it is dealt with at this interlocutory stage.

[3] The defendants therefore assert that they are not requesting that limitation be tried at this point in its entirety, as would occur in an application under Order 32 rule 12A of the Rules of the Court of Judicature (Northern Ireland) 1980.

[4] The plaintiffs oppose the application and do not believe that limitation should be dealt with as a preliminary issue at all.

[5] The parties referred me to a long list of authorities on these issues which I have considered even if not expressly referred to in this judgment.

Defence submissions

[6] The pleadings and dates of the source material relied on by the plaintiffs set out at paragraph 24 of the statement of claim are such that these claims are out of time, with some of the material relied on having been available to the plaintiffs over 20 years before the proceedings were commenced. Moreover, if the plaintiffs seek to rely on material made available after proceedings commenced, it would be a legal impossibility for the claim to have commenced before the plaintiffs had the requisite knowledge, in line with the supreme court decision in *AB v MoD* [2012] UKSC 9.

[7] On the law governing jurisdiction, the cross-border nature of the alleged torts is essential to the identification of the governing law of limitation. Since the injuries were sustained in the Republic of Ireland ("ROI"), the defendant's position is that the torts occurred in that jurisdiction and that the ROI law of limitation applies to the torts.

The substantive law governing the claims is determined by reference to the dual actionability rule, ie in order to be actionable in Northern Ireland ("NI") the claims must be actionable under the law of both NI and ROI. The current claims are actionable under the laws of both NI and ROI. There is no reason to apply the "flexible exception" to the dual actionability principle. The court must therefore take account of both the law of NI and the law of ROI and where the court does so, the court applies the limitation rules from both jurisdictions, which in substance means the shorter of the two periods, per Article 3 Foreign Limitation Periods (NI) Order 1985 ("the 1985

Order"). There is no reason for setting aside the general limitation principle on the ground that it would conflict with public policy, per Article 4 of the 1985 Order or that it would amount to "undue hardship" for them to be applied to these claims Since there is no power to extend time under ROI law, the claims are statute barred.

[8] In the present case it is clear that "the substance" of all of the torts alleged by the plaintiffs occurred in ROI. It is of note that the plaintiffs' claims do not provide any particulars of those actions/omissions which took place in NI and those which took place in ROI. The pleadings therefore provide no foundation for any claim that the torts took place in NI. The defendants claim that the law governing jurisdiction will not change with amendment to pleadings.

Plaintiff's submissions

[9] These claims are not out of time as there has been concealment by these defendants. This is not a case where time began to run from the date of the explosions. The plaintiffs could not, by mere knowledge of the fact of having been caught up in a car bomb, have known that they had a cause of action as against these defendants, nor is it the case that an innocent victim of a car bombing is expected, of their own motion, to mount a personal investigation into the identity of perpetrators or conspirators. The discharge of such functions in cases of serious crime are entrusted to state authorities and it is those authorities that have the legal powers and resources to further such investigations. Regardless of the limitation code applied by the court, the temporal issue will turn on when it can be said that the veil of secrecy was lifted so that the plaintiffs had the means of knowledge to advance these claims. therefore, the date of knowledge starts when that veil of secrecy is lifted.

[10] The plaintiffs maintain that even if the claims are outside the relevant limitation period, the court should in any event disapply that limitation period on the basis that to do otherwise would cause undue hardship to the plaintiffs.

[11] The limitation issue requires a hearing on the facts as it is not a case that simply turns on the calculation of time from the date of the bombing. There are factual issues on limitation, and it would be very unwise for the court to consider these in advance of the full trial.

[12] The plaintiffs are also vehemently opposed to a determination on the jurisdiction issue at this interlocutory stage. As a starting principle they claim there are all sorts of dangers with the court that will hear the substantive limitation point not being the court which decides which law applies.

[13] The plaintiffs will say the planning of the attacks occurred in NI, the perpetrators were from NI, they met and made their plans and assembled the bombs in NI, they were facilitated by state authorities in NI, and they then drove across the

border and set the bombs off in ROI. In short, the plaintiffs submit that the causes of action arose in NI and so NI limitation law applies. The only exception is reference to "planting and detonating a bomb" in the statement of claim which did occur in the ROI.

[14] The court will be required to apply the "in substance" test necessitating a detailed examination of a lot of factual information and to hear a lot of evidence before it can safely conclude where each cause of action arose. This needs to be dealt with as one package rather than seeking to hive off one aspect as a superficial shortcut that will actually prolong the case and may lead to appeals and references back.

[15] If the court concludes the causes of action arose in the ROI, they are actionable as a matter of ROI law. They satisfy the double actionability rule. If Article 3 of the Foreign Limitation Periods (Northern Ireland) Order 1985 ("the 1985 Order") is engaged and the limitation law of the ROI falls to be applied, then Article 4 of the 1985 Order requires that the limitation law should not be applied if it would operate to time-bar these proceedings because that would be contrary to public policy and would cause undue hardship. In that case, there is no limitation bar on the action.

[16] The answer as to where each of the torts were committed is clear. The negligence, misfeasance in public office and conspiracy to perform an unlawful act arise from the defendants' actions inside NI as they have no jurisdiction in the ROI. Any informant working within the Glenanne Gang would have been primarily engaged in NI, had a relationship with handlers operating for agencies based in NI and would have learned of the plan in NI.

[17] The claim for assault and trespass to the person mostly occurred in NI. Two allegations occurred in the ROI, namely planting and detonating the bomb but it again relates to the actions of those working for Northern Irish public authorities and Northern Irish terrorists.

Legal principles

Limitation as a preliminary issue

[18] The defendant's application is pursuant to Order 33 rule 3 which is in the following terms (emphasis added):

> "Time, etc, of trial of questions or issues
>
> 3. The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried <u>before, at or after</u> the trial of the cause or matter

and may give directions as to the manner in which the question or issue shall be stated."

[19] The extension and/or disapplication of the limitation period, and the factual issues relevant thereto, may be tried by a judge as a preliminary issue: *Moane v Reilly* [1984] NI 269.

[20] In a medical negligence case, *Cooke v Western HSSB*, QBD, NI, 3 March 2000, Gillen J refused to order a preliminary trial of the issue whether to extend the limitation period because the state of medical knowledge at the time of the alleged negligence would be relevant to both the limitation and the liability issue, therefore it was appropriate to hear evidence on the matter at trial.

[21] The power to determine a preliminary point should be sparingly exercised. It is often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided. The practice of allowing preliminary points frequently adds to the difficulties of an appellate court and may increase the cost and time of legal proceedings. Unless a point of law, if decided one way, is going to be decisive, a preliminary point will rarely be appropriate: *Ryder v Northern Ireland Policing Board* [2007] NICA 43 [2008] NIJB 252; *Delaney v John Eastwood & Sons* [1948] NI 66.

[22] An issue of law should only be tried as a preliminary issue if the legal point is short and easily resolved, and the factual issues are complex, and should be designed to lead to judgment for one party or at least to a material shortening of the issues at the trial: *Donaldson v Chief Constable* [1989] 7 NIJB 21, at 27-9.

[23] Though the issue be described as one of law, it may be necessary to hear some factual evidence: *Deighan v Sunday Newspapers* [1987] NI 105, at 107H (Carswell J).

[24] Trial of a preliminary issue of law must be based on facts which are proved or at least agreed for the purpose of the preliminary issue: *McCabe v Ireland* [1999] 4 IR 151.

[25] Under both limitation codes in ROI and NI, the plaintiffs say the temporal issue will turn on when it can be said that the veil of secrecy was lifted so that the plaintiffs had the means of knowledge to advance this claim. They argue this therefore requires a hearing on the facts. In *Barnard's Application* [2017] NIQB 82 (at para 61) the PSNI produced a draft unfinished report entitled "South Border Security Situation" which introduces itself as the Historical Enquiry Team's overarching report into its reviews of a number of terrorist related deaths in the south border area of NI between 1972 to 1978 and states that associated with many of the deaths are allegations of collusion by loyalist terrorists, who included among the numbers serving police officers and soldiers of the British Army. The plaintiffs state that establishing the date

at which limitation begins to run will therefore require consideration not just of the disclosures in relation to the Dublin and Monaghan bombings, but also the disclosures in relation to the other incidents in the Glenanne Series.

The law governing jurisdiction

Private international law

[26] The rules of private international law governing cross-border claims have been revised on two occasions in recent years. For events occurring after 11 January 2009, the applicable rules are contained in a combination of EC Regulation 864/2007 (Rome II Regulation) and the Law Applicable to Non-Contractual Obligations (England, Wales and Northern Ireland) Regulations 2008. The Rome II Regulation applies a general rule that the law governing cross-border torts is the law of the place where the damage occurred (Article 4). The general rule may be displaced in favour of the law of a different country where, in light of all the circumstances of the tort, it is more closely connected with a different country.

[27] For events occurring after 1 May 1996 and before the Rome II Regulation came into force, the applicable rules are contained in Part 3 of the Private International Law (Miscellaneous Provisions) Act 1995. This Act abolished the common law rule of dual actionability and replaced it with a new general rule for personal injury cases, that the governing law of the tort is the law of the country in which the plaintiff was located when injury was sustained. The general rule may be displaced if it is "substantially more appropriate" to apply the law of another country.

[28] Both of the above statutory schemes are not retrospective in nature and do not apply to these proceedings as the tort occurred in the early 1970's. The claims are therefore governed by common law principles.

Common law

The "in substance" test

[29] The common law test involves an analysis of the component parts of the claim and the identification of the law of one country where the tort was "in substance" committed. In personal injury cases, this is invariably the place where the plaintiff was located at the time the injury was sustained.

[30] The leading common law authority is the decision of the Privy Council in *Distillers (Biochemicals) Ltd v Thompson* [1971] AC 458. The plaintiff was an Australian child, born with deformities after her mother used a drug containing Thalidomide during pregnancy. She sued in Australia against the English company which had manufactured and packaged the drug in England, not providing warnings that they

were not appropriate for expectant mothers and sold it to an Australian company. There was an interlocutory application at the start on the case on a preliminary issue of jurisdiction. It identified three possible interpretations to where the tort occurred if there was a multi-jurisdictional element. Firstly, if every element occurred there, secondly if the last element occurred there and thirdly the cause of action arose in the jurisdiction if the act on the part of the defendant which gives the plaintiff his cause of complaint has occurred within the jurisdiction. It was ultimately held that the third approach was correct as the plaintiff bought the drug in Australia and the tort occurred there. The court affirmed the decision in *Jackson v Spittal* [1870] LR 5 CP 542 and held that;

> "the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong (p468 at F)."

[31] The approach in England as indicated by Lord Pearson in Distillers at 468E was as follows:

> "…It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question where in substance did this cause of action arise?"

[32] The court did consider there may be a difference in situations where there is separation in time and place between the negligent behaviour of the defendant and the resulting damage to the plaintiff, but they did not feel it necessary to give an opinion in the context of that case.

[33] In *Metall Und Rohstoff AG v Donaldson* [1989] 3 WLR 563, the Court of Appeal applied the "in substance" test to a complex cross border claim by a Swiss company. The plaintiff alleged a civil conspiracy against the American parent companies of a London brokerage firm which had engaged in a fraudulent metal trading scheme. The court held that most of the alleged acts of conspiracy had taken place in New York, but the substantial damage sustained by the plaintiff had been caused by the actions of the broker in London. The substance of the claim was therefore in England. The court also explained the relationship between the "in substance" test and the double actionability rule, which applied if the substance of the claim took place abroad:

> "In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to

> English law, it can properly be said that a tort has been committed within the jurisdiction of our courts. In answering this question, they should apply the now well familiar `substance' test previously applied in such cases as *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, *Castree v ER Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248 and *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd's Rep. 91. If on the application of this test, they find that the tort was in substance committed in this country, they can thenceforth wholly disregard the rule in *Boys v Chaplin* [1971] A.C. 356; the fact that some of the relevant events occurred abroad will thenceforth have no bearing on the defendant's liability in tort. On the other hand, if they find that the tort was in substance committed in some foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed. (Per Slade LJ at 590. See also at 583)"

[34] Another application of the test in the context of personal injury litigation is *Durham v T & N plc and Others* [1996] Lexis Citation 1819, in which the plaintiff, living in England, was exposed to, and inhaled asbestos dust in the course of his employment while working with a company in Quebec. A claim was brought against the employer, which was the parent company of the factory and based in England. The plaintiff later died of mesothelioma. An issue arose as to whether the limitation law in Quebec or England applied as there was a difference between the rules in each jurisdiction. It was argued that it would be an undue hardship to apply the limitation period applicable in Quebec, but the court held that in substance the tort had occurred there and stated, at page 9:

> "It would in our judgment be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time,"

[35] A contrary argument in *Durham* based upon the defendants exercising control from England and the damage ultimately being experienced in England years later was found to be "highly artificial and unpersuasive." The court concluded:

> "The plaintiff was working at the Atlas factory in Montreal when he inhaled the dust which caused the injury from

> which, 38 years later, he unhappily died. It was the lack of appropriate precautions in that factory which was the immediate cause of his death…… Looking back over the series of events constituting the tort once completed, we have no doubt but that in substance the plaintiff's cause of action arose in Quebec." (per Lord Bingham MR)

[36] In the case of *Connolly v RTZ Corp PLC* (No 3) [1999] CLC 33, which was similar to *Durham*, the plaintiff worked in Namibia and ingested toxic materials and died. The court held that in substance the cause of action arose in Namibia, and that it would not be contrary to public policy to apply the limitation rules in Namibia given they were similar to those in England and in fact provided for the same period of time within which to bring the claim from the deemed date of knowledge.

[37] All of these cases were considered and applied recently by the Court of Appeal in *Sophocleous v Secretary of State FCA* [2019] 2 WLR 956. The court was considering preliminary issues in a claim for assaults allegedly perpetrated by members of the UK armed forces during the colonial administration in Cyprus during the late 1950s. As with the present case, there were allegations of control of UK forces from within the jurisdiction. The court affirmed the general approach to personal injury claims is that the tort occurs in the place where the damage was sustained and held that they occurred in Cyprus. The court also held that the allegations of vicarious liability and joint liability made no difference to the outcome as the law recognises only one tort, namely that of the perpetrator. The Court of Appeal rejected the argument that the claim based upon vicarious liability meant that the tort occurred in the UK, notwithstanding that English principles of vicarious liability may govern. It held that:

> "17 …The acts of violence relied on all occurred in Cyprus. The fact that it is said that the defendants are vicariously liable for the acts of the perpetrators of that violence (as to which there may no doubt be some argument) cannot make any difference to the place of commission of those violent acts…
>
> 21 This makes it clear that there is only one tort. If that tort was committed by the primary actor in Cyprus, the fact that a person jointly liable for the commission of the tort was elsewhere when he gave the relevant assistance makes no difference to the fact that the tort was committed in Cyprus…
>
> 23 The general approach of the private international law of negligence is to ask where in substance the cause of action arose: see *Distillers Co (Biochemicals) Ltd v Thompson*

> [1971] AC 458, 468e, per Lord Pearson. In personal injury cases this is, in general, the place where the injury is suffered……."

[38] In *Sophocleous*, the Court of Appeal rejected the argument that the claim based upon vicarious liability meant that the tort occurred in the UK, notwithstanding that English principles of vicarious liability may govern:

> "…Mr Zachary Douglas QC for the claimants submitted that it was the English law of vicarious liability that would determine whether the defendants would be liable for the acts of the perpetrators and the question whether the defendants' predecessors exercised control over the relevant personnel was an exclusively English law question. That may be true but as the judge said [2018] EWHC 19 (QB) at [66] vicarious liability is not in itself a tort. It is a legal rule which imposes liability for someone else's tort. It is where that tort is committed that must be decisive, namely Cyprus."

[39] Similarly, the court analysed the claim based upon joint tortfeasors by reference to the recent analysis of the relevant principles of joint liability by the Supreme Court in *Fish & Fish v Sea Shepherd* [2015] 2 WLR 694. The Supreme Court was split on the outcome in that case, but unanimous on the applicable principles. For the majority, Lord Toulson stated:

> "21. To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further…"

Lord Sumption also stated:

> "38 It is now well established that if these requirements are satisfied the accessory's liability is not for the assistance. He is liable for the tortious act of the primary actor, because by reason of the assistance the law treats him as party to it…Thus a person may incur liability as a

> joint tortfeasor by assisting in the organisation or preparation of acts of physical destruction (*Monsanto plc v Tilly* [2000] Env LR 313, paras 45–46); or by helping the primary actor to find the victim whom he intended to attack (*Shah v Gale* [2005] EWHC 1087 (QB)).”

[40] In the present case the parties differ on where in substance the torts alleged by the plaintiffs occurred. The defendants state that the claims do not provide any particulars of the actions or omissions which took place in NI and those which took place in ROI and therefore provide no foundation for any claim that the torts took place in NI. The plaintiffs assert the planning and preparation for the attacks occurred in NI but clearly plead that the planting and detonating of the bombs occurred in ROI.

Double actionability

[41] If the court holds that the torts occurred in the ROI, it is necessary to consider the double actionability rule. This rule provides that an action for an alleged tort committed in another jurisdiction can be successful in a domestic court only if it would be actionable under the laws of both jurisdictions. The rationale of the double actionability rule is partly that persons conducting themselves in a particular country should not be liable if by the law of that country there is no liability for such acts or if they are excused or released from liability for such acts, see *Boys v Chaplin* [1971] AC 356 at 398E per Lord Pearson.

[42] In *Red Sea Insurance v Bouygues* [1994] 3 WLR 926, the Privy Council approved the following formulation of the rule which appeared in Dicey & Morris Conflict of Laws (2nd Ed) in the following terms:

> "(1) as a general rule an act done in a foreign country is a tort and actionable as such England, only if it is both;
>
> > (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort;
> >
> > (b) actionable according to the law of the foreign law where it was done.
>
> (2) but a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”

[43] In the *Red Sea case*, the Privy Council also approved the statement of principle from the speech of Lord Wilberforce in *Boys v Chaplin*. The statement makes clear that the general rule will normally apply and while the court does have a flexible power to disapply some part, or even all of the foreign law, the flexible exception should only be applied where there are "clear and satisfying" grounds for doing so. The grounds for doing so should be determined following a detailed analysis of the content and purpose of the relevant foreign rule and the underlying policy for that provision.

[44] I note the detailed opinion from Mr Michael Collins, Senior Counsel from the ROI which has been obtained by the defendants. He opines that each of the torts alleged by the plaintiff are recognised under ROI law and are therefore actionable for the purposes of the rule in *Boys v Chaplin*, which if correct means that the claim is actionable in both jurisdictions and there is arguably no need for application of the flexible exception. Pursuant to Article 3 of the 1985 Order, the court would take account of ROI law in the determination of these claims in accordance with the dual actionability principle, including Irish limitation law.

[45] However, it is common ground that in ROI the principle of foreign state immunity is recognised and that if these claims had been brought against these defendants in ROI the court would decline jurisdiction on account of this immunity. Therefore, if the claims are not actionable, the question arises as to whether the flexible exception should be applied.

Foreign sovereign immunity

[46] The defendants assert this is a matter of procedure not substantive Irish law and is not taken into account, meaning that a court in NI could hear the claim and apply ROI law in substance, including its limitation law and could disapply the procedural law of foreign state immunity by virtue of the flexible exception to the dual actionability principle. They state that a contrary conclusion would mean that claims against UK public authorities involving activities out of the jurisdiction could never be maintained in the UK, since the dual actionability test would never be satisfied.

[47] The basis for this is that laws of procedure form part of the lex fori and are considered only by the courts of the country before which the proceedings are pending. Foreign laws which are substantive in nature form part of the law which governs the determination of the relevant dispute (lex causae) and may therefore be applied by a UK court which is required to determine the dispute in accordance with the laws of that other country.

[48] Applying the approach set out by Lord Wilberforce in *Chaplin v Boys*, the court must examine the policy and purpose of the Irish rule of sovereign immunity to ascertain whether it has any application to these claims. The rule is intended to reflect the sovereignty and independence of a state, in a claim before the courts of another

state and arguably serves no purpose in proceedings against UK public authorities before a UK court. It would appear there is no similar reason of public policy to disapply the entirety of Irish law including its law on limitation. The defendants therefore contend that it would be wrong in principle for this court to fail to have any regard to the law of the place where the torts occurred, in circumstances, where the law of that country recognises the alleged wrongful acts to be actionable.

[49] The plaintiffs on the other hand are seeking that ROI law is disapplied in its entirety as it would represent undue hardship and be contrary to public policy. The defendants take a contrary view stating that simply because it is less generous is not reason to disapply the law of ROI as its core principles are similar to the limitation law of NI.

Foreign Limitation Period

[50] The plaintiffs assert that the Foreign Limitation Periods (Northern Ireland) Order 1985 ("the 1985 Order") applies. Pursuant to Article 8(1) of the 1985 Order, it applies to proceedings commenced after it came into force but makes no distinction between causes of action arising before or after it came into force.

[51] Prior to the enactment of this Order, the rules of private international law regarded foreign limitation law as a matter of procedure, unless the effect of the law in question operated to prevent the person from bringing the claim at all, rather than preventing them from obtaining a remedy. This meant in most cases in which English courts took account of foreign law in determining claims, they applied English rules of limitation, see the Supreme Court decision in *Iraqi Civilian Claims v MOD* [2016] 1 WLR 2001. The Law Commission in its Report on Classification of Limitation in Private International Law (No 114) made recommendations which led to the provisions in the Foreign Limitation Periods Act 1984 (analogous to the provisions in our 1985 Order), including the abolition of the differing treatment of foreign limitation laws and to require courts which applied foreign law to the determination of disputes, also to apply the relevant foreign limitation law.

[52] In accordance with the common law principles above, the limitation period applicable to these proceedings would not have expired. The relevant provisions of ROI limitation law operated as a defence to a claim, which could be waived, and not to bar the claim. Accordingly, ROI limitation law would have been regarded as a rule of procedure by a NI court and the relevant NI limitation provisions would have applied. These provisions were found in a combination of the Statute of Limitations (NI) 1958 as amended by the Limitation (Amendment) (NI) Order 1976, which provided the court with a discretion to extend time in personal injury cases and also applied to causes of action accruing both before and after it came into effect (per section 9D 1958 Act and section 5 1976 Order). In light of the availability of a discretion

to extend time, it could not be said that the relevant limitation period had already expired in 1985.

[53] Since the limitation period had not expired in 1985, the question arises whether the court should determine the limitation law governing the claims in accordance with the 1985 Order. Article 3 provides as follows:

> "3(1) subject to the following provisions of this Order, where in any action or proceedings in a Court in Northern Ireland the law of any other country falls (in accordance with the rules of Private International Law applicable by any such Court) to be taken into account in the determination of any matter:
>
> The law of that other country relating to Limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> Except where the matter falls within Paragraph (2), the law of Northern Ireland relating to Limitation shall not so apply.
>
> (2) a matter falls within this paragraph if it is a matter in the determination of which both the law of Northern Ireland and the law of some other country fall to be taken into account."

[54] The general rule contained in Article 3 is therefore twofold: (i) if the law of another country is to apply to a claim, it must include the limitation law of that country and (ii) to disapply the NI law of limitation to the claim. The exception in Article 3(2) relates only to the second limb of the general rule in Article 3(1). NI limitation law is not disapplied, where the court is required to apply the rule of dual actionability. The result as far as the defendants argue, is that the NI court applies both limitation laws, which means, in effect the shorter of the two limitation periods.

[55] If these causes of action are actionable in the ROI and in NI, the general rule is satisfied, there is no need to consider whether the flexible exception should be applied. Article 3 of the 1985 Order is engaged, and the applicable law would be the ROI limitation law.

[56] Assuming the above to be correct, the next question the court must ask is does Article 4 operate to disapply the limitation period. Even if these actions had been brought outside of the relevant limitation period in the ROI the court must consider the application of Article 4 which provides:

> "4.-(1) In any case in which the application of Article 3 would to any extent conflict (whether under paragraph (2) or otherwise) with public policy, that Article shall not apply to the extent that its application would so conflict.
>
> (2) The application of Article 3 in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

[57] Article 4 therefore provides two exceptions to Article 3. Firstly, where the application of Article 3 would conflict with public policy. Secondly, where it would cause undue hardship to a party to the action. If either exception apply, there would be no limitation bar on the actions.

Undue hardship

[58] In *Naraji v Shelbourne* [2011] EWHC 3298 (QB) at [176] Popplewell J identified that the question the judge should pose whether the time period prescribed by the limitation provision is such that its application would deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it if acting with reasonable diligence and with knowledge of its potential application.

[59] The approach set out in Naraji was cited with approval by the Court of Appeal in *Bank St Petersburg OJSC v Arkhangelsky* [2014] 1 WLR 4360 at [17] and [19]. The Court of Appeal identified factors relevant to whether there was reasonable diligence eg:

> "(a) Any unusual difficulties in effecting the steps necessary to bring the claim;
>
> (b) The reasonableness of any expectation of the claimant, though subsequently falsified, that a particular means of bringing the claim within the foreign limitation period will be effective;
>
> (c) Any efforts in fact made, albeit without success, to bring the claim and the reasons for their failure;
>
> (d) Any special factors which have made it unusually difficult for the claimant to bring the claim within the time prescribed by the foreign limitation period."

[60] In *Durham* and also in *Connolly* the courts held that just because another jurisdiction has a less generous limitation period, this was not undue hardship. It is clear from the authorities that the mere fact that a foreign limitation period may be shorter or that the proceedings may be out of time under the foreign law, does not of itself amount to undue hardship. Instead the court must look for some aspect of the foreign law which is fundamentally contrary to justice.

[61] The plaintiffs argue that their difficulty is that they had no prospect of bringing this action before the courts in the ROI. As the report of Mr Collins SC states, the Irish courts have upheld the time-barring of a claim when the plaintiffs cannot have brought an action against the defendant prior to the expiration of the limitation period. Such a position would they say, amount to undue hardship.

Public policy

[62] The plaintiffs assert that Irish limitation law is not contrary to UK public policy per se, simply that in the individual circumstances of this case it is contrary to public policy.

[63] In *Alseran* [2018] 3 WLR at 845-6, Leggat J considered the position if foreign limitation law is held to be contrary to public policy. Leggat J held, albeit obiter as it was not required for the purposes of the judgment due to his decision on other issues, that if foreign limitation law is contrary to public policy, then UK limitation law does not apply and the claim is in time. UK limitation law does not "fill the gap", accordingly, if Article 3 is disapplied in these claims then the effect is that the claim is in time.

[64] In its report, the Law Commission recommended that public policy and undue hardship should be determined by analysing whether the application of the relevant foreign limitation period would be contrary to "fundamental principles of justice."

[65] The defendants assert that Irish law is almost identical to the law of NI, save that the applicable limitation period is two years from date of knowledge and there is no discretion to extend. They claim that neither of these differences amount to undue hardship as Irish law permits postponement for minor and incapacitated plaintiffs, postponement on account of lack of knowledge or means of knowledge and it permits postponement in the event of concealment of essential facts by a defendant.

[66] It is submitted by the defendants that the court can answer clearly that the applicable Irish limitation laws are not fundamentally contrary to principles of justice and that it would not amount to "undue hardship" for them to be applied to these claims.

[67] The plaintiffs argue with some force that public policy should dictate that state agents who allegedly plan and implement a terrorist atrocity should be held to account and there is no more grave subject matter in the courts.

[68] The plaintiffs assert the fatal flaw in the defendant's approach is their concession that if these claims had been brought against these defendants in ROI, an Irish court would decline jurisdiction on account of foreign sovereign immunity. If the plaintiffs cannot bring a claim in ROI and Irish limitation law is applied in NI meaning the plaintiffs cannot bring their claims in the UK, then the state actors faced no prospect of being brought to account in a civil court for their involvement in murder, which is clearly contrary to public policy.

The Recast Brussels Regulation

[69] Article 4(1) of the Recast Brussels Regulation (Regulation No. 1215/2012) provides:

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

[70] The plaintiffs state that the Recast Brussels Regulation applies to the "Askin" and "White" actions as, in accordance with Article 66(1), they were commenced after 10 January 2015, whereas Mr Byrne's case was commenced in 2014 so the regulation does not apply. There is no doubt the defendants to this action are domiciled in NI.

[71] Article 7 gives the plaintiffs discretion to sue in another member state but these plaintiffs have chosen to sue in the defendants' home state which they say is in line with the general principle and also in keeping with the criterion of the "centre of interests", which determines the Member State whose courts are best able to hear and to rule upon the dispute.

[72] The position under the Recast Brussels Regulation is qualitatively different to the position under the Private International Law (Miscellaneous Provisions) Act 1995.

[73] Section 11(2)(a) of the 1995 Act states that the choice of applicable law:

> "for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, [is] the law of the country where the individual was when he sustained the injury".

The defendants are not able to rely on the provisions of that Act by virtue of section 14. which states that it does not apply to acts or omissions committed before it

commenced. The plaintiffs argue it is therefore illegitimate to proceed on the basis that the key is where the individual was when he sustained the injury.

[74] Accordingly, the plaintiffs argue that the causes of action arose in NI and the Recast Brussels Regulation provides that at least two of the actions should, as a general rule and also on the facts of this action, be brought in NI and, consequently, Northern Irish limitation law would apply.

Consideration

[75] In order to determine where the torts occurred, one must look at the factual matrix and the legal principles to be drawn from the case law.

[76] Put simply, the plaintiffs claim against the defendants who are public authorities operating in NI for their alleged actions in NI arising out of the alleged planning and preparation conducted by individuals based in NI acting for a group based in NI where individuals who lived in NI drove vehicles stolen in NI containing bombs built in NI with explosives obtained in NI to the ROI. It is, in the plaintiffs' submission, a prime example of "the place where it happens may be quite fortuitous and should not by itself be the sole determinant of jurisdiction" as stated in the *Distillers* case. They point to the statement of principle from that case, as Lord Pearson stated:

> "Decisions under statutes of limitation are not applicable. The question in that context being when did the cause of action accrue so that the plaintiff became able to sue, the answer is that the cause of action accrued when it became complete, as the plaintiff could not sue before then. But when the question is which country's courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor".

[77] The plaintiffs, however, have not supplied detailed particulars or facts which would assist the court in applying the relevant legal principles in relation to limitation. They plead that the gang travelled to the ROI with "weaponry, explosives and all necessary ancillary equipment previously stored in Northern Ireland" and the defendants and the government of NI had knowledge of perpetrators and their previous terrorist past, leading up to May 1974. The key facts at paragraphs 15, 19, 24 of the amended statement of claim as currently drafted therefore arguably do not reach the requisite standard. The core allegation that the attacks were planned in NI and the gang drove over the border to ROI are material facts for the purposes of

limitation. As currently pleaded the defendants assert that the height of the particulars provided do not go past the level of allegation.

[78] In the statement of claim at paragraph 24(2.4) it is asserted that a named individual was informed by another named individual that the bomb was assembled at a particular farm. No further particulars are provided. The defendants say these pleadings are wholly inadequate.

[79] The court must look back over the series of events and determine where in substance this cause of action arise. The difficulty in dealing with such a determination at this interlocutory stage in my view is twofold. It requires detailed particulars which the plaintiffs state they cannot provide until they have discovery. Secondly, I consider it requires a hearing on the facts which may well include evidence by way of affidavit or from witnesses before a court can conclusively decide the issue. If as claimed by the plaintiffs, the overwhelming majority of the acts on which the claims are based took place in NI then the plaintiffs say that clearly the court must apply NI law when determining the limitation issue.

[80] The defendants treat the fact that the bombs detonated in the ROI and the "damage" occurred there as conclusive of the fact that the torts were committed in the ROI rather than in NI. The plaintiffs assert this was rejected in *Distillers* as being the wrong approach as the degree of connection between the cause of action and the country concerned should be the determining factor.

[81] If the defendants are correct, and ROI limitation law applies then the court will not be applying the Article 50 discretion in accordance with the Limitation (Northern Ireland) Order 1989. Where a claim is brought under the Fatal Accidents (Northern Ireland) Order 1977, it must be brought within three years from either the date of death of the deceased or within three years of the date of knowledge of the person for whose benefit the claim is brought, whichever is the later. Where the primary limitation period expired rendering a dependant's Fatal Accidents Order claim statute barred, the court can be asked to exercise its discretion to disapply the primary limitation period and allow the claim to proceed under the provisions of Article 50 of the 1989 Order.

[82] Article 50(1) states:

> "50.-(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which – the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and any decision of the court under this paragraph would prejudice the defendant or any person whom he represents, the court may direct that those provisions are

not to apply to the action, or are not to apply to any specified cause of action to which the action relates."

[83] Furthermore Article 50(4) of the 1989 Order directs as follows:

> "(4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[84] ROI limitation law does not allow the conduct of such a balancing exercise as all that is relevant is the date of knowledge or concealment and that is why the defendants argue it is essential to determine the relevant governing law first. It might

be argued that the court's inability to carry out such a balancing exercise could constitute undue hardship such as to disapply the ROI limitation law which makes no such provision. The authorities referred to above counter that, deeming that simply being less generous is not enough to justify disapplying the applicable law from another jurisdiction.

[85] If, as is asserted by these plaintiffs, the planning of the atrocities took place in NI, the perpetrators were from NI, they made their plans in NI, assembled the bombs in NI, facilitated by state authorities in NI and they travelled to ROI and set the bombs off, the facts supporting that must be made out in the pleadings. They are currently deficient in that regard. As with other aspects of this case, the question arises as to whether, after discovery has been provided, the situation may improve as the plaintiffs may have available to them the documents which support such allegations. At that point, the question as to whether the claims are out of time inevitably involves mixed issues of law and fact and there may be issues regarding alleged concealment.

[86] Under both limitation codes the temporal issue may turn on when it can be said that the veil of secrecy was lifted so that the plaintiffs had the means of knowledge to advance this claim. This therefore requires a hearing on the facts as it is not a case that simply turns on the calculation of time from the date of the bombing.

[87] In order to determine the jurisdiction issue as to the law governing limitation, the court has to determine a number of factors in relation to where the cause of action arose. This will require the hearing of evidence as well as considering the legal principles referred to above. Once the court has reached a conclusion on that issue, it can then go on to determine whether the claims are statute barred but once again, this may require evidence to be heard and there are mixed issues of fact and law.

Dealing with preliminary points

[88] There is some helpful commentary from the Court of Appeal albeit in an employment law case, regarding the issue of preliminary points. *In Ryder v NI Policing Board* [2007] NICA 43 Kerr LCJ stated that:

> "the power to determine a preliminary point should be sparingly exercised" as it is "often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

[89] In the same case, Girvan LJ stated at paragraph 7:

> "the dangers posed by inappropriate preliminary issues are pointed out in Tilling v Whitman [1980] AC 1. At 17 Lord Wilberforce said:
>
> > `I…have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the costs and time of legal proceedings.'
>
> Moreover, Lord Scarman at 25 said –
>
> > 'Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense.
> >
> > Unless a preliminary point of law, if decided one way, is going to be decisive, a preliminary point will rarely be appropriate…Tribunals must approach with caution and care the question whether a preliminary issue should be ordered."

[90] It can thus be credibly argued that dealing with preliminary points should be sparingly exercised given the difficulties in isolating a solitary topic.

[91] While *Ryder* highlights the inherent difficulty in an employment law context, the recent case of *Carberry v Ministry of Defence* [2023] NIKB 54 demonstrates that preliminary points in legacy cases may not commend themselves in a matter of such complexity.

[92] In *Carberry,* McAlinden J dealt with the issue of when to address limitation points at paragraph 180, observing:

> "Finally, although guidance contained in the caselaw steers the court towards addressing the issue of limitation and to reaching a decision on this issue before going on (in an appropriate case) to make a determination on the substance of the dispute between the parties; in order to properly come to a determination on the limitation issue, it is usually appropriate and, in a good number of cases, it may be necessary, to hear all the available evidence prior to determining the limitation issue. By adopting such a course, the court gains a clear insight into the evidence that

> is now available, and the quality and cogency of that evidence and it also gains an appreciation of the nature and extent of the evidence which previously would have been available but is no longer available due to the passage of time. The evidence is carefully examined at that stage not for the purpose of making a determination on the substance of the dispute between the parties but rather it is examined in order to ascertain whether such a fair determination can be made on the basis of both parties being able to present relevant, cogent, and reliable evidence to the court. "

[93] It is the plaintiffs view in this case that what might appear as a shortcut could prolong matters, for example if a decision is made partially on the law applying which may be subject to appeal and lead to 2-3 hearings on that issue then 2-3 more hearings on the substantive limitation point and still the parties would be nowhere near the trial.

[94] It may be that the trial judge does not follow the approach in *Carberry* and decides that the limitation issue should go first. In the defendants' view this would avoid discovery and a closed material proceeding which they assert is a more proportionate means to deal with the action.

[95] Recent decisions in this jurisdiction highlight the difficulty in dealing with limitation as a preliminary issue and taking such an approach when the evidence has not been heard. The decision in *Carberry* demonstrates that it may be preferable to hear all the evidence first in order to test whether the cogency of the evidence has been impacted by the delay.

Conclusion

[96] The court must determine where the causes of action arose. This involves applying the "in substance" test and the principles which can be drawn from the various authorities. If the causes of action occurred in NI, NI limitation law applies. This is supported by Recast Brussels Regulation. That would mean Article 3 of the 1985 Order is not engaged. If they occurred in the ROI, then the court must consider the double actionability rule. If the claims can be brought in both ROI and NI, then ROI limitation law applies, the court may disregard the ROI procedural law in relation to foreign sovereign immunity and apply the substantive law in relation to limitation, unless there is reason to disapply the latter on the ground of either undue hardship or public policy, by virtue of Article 4 of the 1985 Order.

[97] I do not agree with the plaintiff's assertion that no direction should be made pursuant to Order 33 rule 3. Having regard to the overriding objective, there is at the

very least an arguable defence that these claims are statute barred. Through the case management process, the trial judge can determine when to deal with this crucial issue. There will clearly be several difficult case management choices in this case. As was observed in the *Donaldson* case, a court at an interlocutory stage should only deal with such matters it if is short and easily resolved. If one thing is clear, this is not such a case.

[98] I consider that the issue of limitation, both in terms of the law governing limitation and the substantive issue as to whether these cases are statute barred, and the point at which to deal with such matters is a decision for the trial judge as it clearly involves mixed issues of law and fact.

[99] I have considered all the material available to me at this interlocutory stage in great detail and conclude that the court may ultimately, subject to the discretion of the trial judge, consider all the evidence to determine if the law of NI or ROI applies as it needs to determine where the acts occurred. This will also require evidence on behalf of each of the plaintiffs regarding their date of knowledge which will differ between each of them. No real evidence emerged from plaintiffs regarding their date of knowledge other than the source material which is from various dates ranging from the early 1990s onwards. I note the proceedings were issued in 2014 (Byrne) and 2016 (Askin and White).

[100] While I am satisfied that in principle this court can deal with the law governing jurisdiction, I do not consider in the circumstances of the present case that I have all the material available to me at this interlocutory stage to fully and properly address the issue. The question of which law governs jurisdiction is so inextricably bound up with the limitation issue generally, which in turn involves mixed issues of law and fact surrounding the whole case.

[101] While preliminary points may present potential difficulties, I consider that the limitation issue to be determined in this case has at least the potential to prove decisive meaning this is in my view an appropriate case for a direction under Order 33 rule 3.

[102] I therefore grant the defendant's application and direct that limitation should be tried pursuant to Order 33 rule 3. This will also require a determination on the law governing jurisdiction. It is a matter for the trial judge to determine if this should be dealt with before, at or after the trial of the main action. Costs of this application shall be costs in the cause.