Neutral Citation Number: **[2024] EWHC 62 (KB)**

Case No: KB-2022-004780

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2024

Before :

MR JUSTICE SOOLE

- -

Between :

(1) JOHN CLARK **(2) JONATHAN GANESH** **(3) BARRY LAYCOCK**	**Claimants**
- and –	
(1) GERRY ADAMS **(2) THE PROVISIONAL IRISH REPUBLICAN ARMY**	**Defendants**

Anne Studd KC (instructed by **McCue Jury & Partners LLP**) for the Claimants
Richard Hermer KC and Edward Craven (instructed by **Howe & Co**) for the First Defendant

Hearing date: 21 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 19th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Soole :

1. The three Claimants in this action respectively suffered injuries as a result of bombing incidents, attributed to the Provisional Irish Republican Army (PIRA), at the Old Bailey in March 1973, London Docklands in February 1996 and the Arndale Centre Manchester in June 1996. By this action, commenced on 9 May 2022, they claim damages limited to '*£1 for vindicatory purposes*' against Mr Gerry Adams (as First Defendant) and the PIRA (as Second Defendant). The Claimants allege that Mr Adams, a former President of Sinn Fein, was a leading member of the PIRA at all material times, including membership of its Army Council. Mr Adams denies any such membership or role.

2. This action was commenced shortly before the coming into force (17 May 2022) of the relevant provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 whereby a '*relevant Troubles-related civil action*' may not be brought. An action falls within that description if it is (a) to determine a claim arising out of conduct forming part of the Troubles and (b) founded on tort, delict or fatal accidents legislation: s.43.

3. The claim is brought against Mr Adams both personally and in a representative capacity. The Amended Claim Form (ACF) describes that representative capacity as '*representing the* [PIRA] *&/or the PIRA Army Council &/or leaders &/or members of PIRA*'. The Amended Particulars of Claim (APOC) describe that capacity as '*…a representative of the Second Defendant both having the same interests in the claim*': para. 36.

4. The claim is framed in the torts of assault/battery (ACF) and alleges that Mr Adams '*…acted together with others in furtherance of a common design to bomb the British mainland*' (APOC para. 37); and '*…was directly responsible in his various roles within the Second Defendant organisation and particularly in the Army Council for the decisions made to place bombs on the British mainland in 1973 and 1996*' (para. 38).

5. The ACF refers to the Claimants' injuries and values the claim at '*The nominal value of £1 for vindicatory purposes*.' The APOC provide particulars of injury for each Claimant, together with reference to medical reports on the First and Third Claimants (para. 39); and under the heading '*Damages Sought*' state '*For the avoidance of doubt in respect of their pain suffering and loss of amenity the Claimants between them claim £1.00 for vindicatory purposes.*': para. 40. The prayer for relief seeks '*1. £1 for vindicatory purposes*' plus statutory interest thereon and costs.

6. The Claimants and Mr Adams are represented by solicitors and Counsel. The PIRA is unrepresented.

7. By application notice dated 16 January 2023 Mr Adams applies for orders and declarations that:

   (1) the claim against the PIRA is struck out - on the basis that an unincorporated association cannot be sued in its own name;

   (2) the claim against him is struck out, insofar as made in a representative (rather than personal) capacity;

(3) the claims do not enjoy 'QOCS protection' on costs, because they do not *'…include a claim for damages…for personal injuries*' within the meaning of CPR 44.13(1)(a);

(4) there be inspection of certain documents mentioned in the APOC. Various documents having now been supplied by the Claimants, this application is not pursued, save as to a consequential application for costs.

This judgment concerns applications (1), (2) and (3).

8. By Consent Order dated 30 March 2023, time for service of Mr Adams' Defence was extended until 42 days after determination of these applications.

Application (1): The claim against the PIRA

9. This first application can be taken shortly. The claim proceeds on the basis that the PIRA is an unincorporated association. On behalf of the Claimants Ms Anne Studd KC in oral argument acknowledged the principle that – absent (as here) any relevant statutory exception - an unincorporated association is not a legal entity and thus cannot be made a defendant in its own right to an action: London Association for the Protection of Trade v. Greenlands Ltd. [1916] 2 AC 15; cited in Breslin & ors v. Seamus McKenna & ors [2009] NIQB 50 at [83], a personal injuries action arising from the Omagh town centre bombing in August 1998.

10. In circumstances where Mr Adams disputes representation of the PIRA, Ms Studd contended that he had no entitlement to make an application for the claim against the PIRA to be struck out. However she accepted that it was open to the Court to take that course of its own motion if it thought appropriate to do so.

11. Ms Studd submitted that the Court should not take that course. Rather, it should await the process of disclosure. As a result of that exercise the Claimants might obtain information which would (if necessary) enable someone other than Mr Adams to be appointed as representative of the PIRA and its relevant members. This course would incur no additional cost for Mr Adams.

12. Further such a course would be consistent with that taken in Breslin. In that case 'The Real Irish Republican Army' (RIRA), an unincorporated association, was a named defendant. There was no interlocutory application to strike out the claim against the RIRA and the claim proceeded to trial against all the defendants. In his judgment the trial judge (Morgan J) dismissed the claim against the RIRA on the basis of the principle identified in London Association for the Protection of Trade: see Breslin at [83]; see also in the Northern Ireland Court of Appeal (NICA) sub nom Breslin & ors v. McKevitt & ors [2011] NICA 33 at [74(a)]. Ms Studd submitted that this Court should likewise defer its decision pending (at least) the process of disclosure.

13. I reject this argument. Since an unincorporated association is not a legal entity and therefore cannot be joined as a party in its own right - whether as claimant or defendant - there is no basis for it to remain a party for any purpose. It is irrelevant that in Breslin, for whatever reason, the RIRA remained a defendant until the conclusion of the trial. As the judgment made clear, the claim against that defendant had to fail because of the principle of law. It follows that the claim against the PIRA must be struck out.

Application (2): The representative action

14. The governing provision is CPR 19.8. As material this provides:

'*(1) Where more than one person has the same interest in a claim – (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*

(2) The court may direct that a person may not act as a representative.

(3) Any party may apply to the court for an order under paragraph (2).

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule – (a) is binding on all persons represented in the claim; but (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court."

15. The most relevant recent authorities on the application of this provision are the decisions in Emerald Supplies Ltd v. British Airways plc [2011] Ch. 345; [2010] EWCA Civ 1284 and Lloyd v. Google LLC [2022] AC 1217; [2021] UKSC 50.

16. In Emerald the claimants purported to bring a representative claim on behalf of all other direct or indirect purchasers of BA's freight services, alleging unlawful price-fixing. The Court of Appeal upheld the judge's decision to strike out the representative claim on the basis that the other parties whom the claimants sought to represent did not have 'the same interest' in the claim. In his judgment Mummery LJ (with whom Toulson and Rimer LJJ agreed) stated:

'*62. In my judgment, Emerald's case for a representative action, whether as originally pleaded or as proposed to be amended, is fatally flawed. The fundamental requirement for a representative action is that those represented in the action have "the same interest" in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest" as Emerald.*

63. This does not mean that the membership of the group must remain constant and closed throughout. It may indeed fluctuate. It does not have to be possible to compile a complete list when the litigation begins as to who is in the class or group represented. The problem in this case is not with changing membership. It is a prior question how to determine whether or not a person is a member of the represented class at all. Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify someone entitled to damages against BA. The proceedings could not accurately be described or regarded as a representative action until the question of liability had been tried and a judgment on liability given. It defies logic and common sense to treat as representative action, if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.

64. A second difficulty is that the members of the represented class do not have the same interest in recovering damages for breach of competition law if a defence is available in answer to the claims of some of them, but not to the claims of others: for example, if BA could successfully run a particular defence against those who had passed on the inflated price, but not against others. If there is liability to some customers and not to others they have different interests, not the same interest, in the action.

65. In brief, the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in proceedings that were properly constituted as a representative action before *the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest.*' [emphasis in the original].

17. In Lloyd v Google, the Supreme Court stated in particular:

(i) '*Only one condition must be satisfied before a representative claim may be begun or allowed to continue: that is, that the representative has "the same interest" in the claim as the person(s) represented*': [69];

(ii) '*The purpose of requiring the representative to have "the same interest" in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others*': [71];

(iii) '*…a distinction needs to be drawn between cases where there are conflicting interests between class members and cases where there are merely divergent interests, in that an issue arises or may well arise in relation to the claims of (or against) some class members but not others. So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person…*': [72];

(iv) '*Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost…*': [75];

(v) '*…while…the class of persons represented should be clearly defined, the adequacy of the definition is a matter which goes to the court's discretion in deciding whether it is just and convenient to allow the claim to be continued on a representative basis rather than being a precondition for the application of the rule.* [Emerald] *illustrates a*

general principle that membership of the class should not depend on the outcome of the litigation.': [78].

18. As noted above, the claim against Mr Adams, both personal and representative, is advanced on the basis that Mr Adams was at all material times a member of the PIRA and of its Army Council. The Claimants support that contention by reference to 29 pleaded matters: see APOC paras. 37.1-37.29. They accept that proof of those allegations is a matter for trial. Thus Ms Studd's skeleton argument, having cited these and further allegations of fact, states: '*In the event those facts are proved, there will be an issue for the trial judge whether the provisions of CPR 19.8 are satisfied. This is a fact-sensitive decision – as it was for Morgan J in* [Breslin]'.

19. In Breslin two of the six defendants were sued both personally and as representatives of the RIRA. As noted, the RIRA was also sued as a defendant in that name.

20. Following a lengthy trial, Morgan J held that the members of the RIRA Army Council on 15 August 1998 bore responsibility for the Omagh bombing on that day; that the evidence demonstrated that the defendant Mr Campbell was a member of the Army Council on that date; and that it was appropriate to make a 'representation order' under the comparable NI provision (Order 15 rule 2) in his respect: [270]. However the judge declined to make a representation order against any individual to represent all members of the RIRA; for those who joined RIRA after the bomb would have a different defence to those who had been members at the time: see the summary in the NICA decision in Breslin at [72]. Morgan J found four named defendants (including Mr Campbell in his personal and representative capacity) liable to the plaintiffs for damages for trespass to the person.

21. Amongst the various grounds of appeal and cross-appeal was an appeal against the representation order in respect of Mr Campbell. The NICA held that the order was inappropriate. Its reasons were:

'*(a) There is no evidence that the class of persons which the order purported to bind was numerous. The claim as pleaded was a claim against the RIRA, the membership of which might well be numerous, but the judge rightly rejected the claim for judgment against that unincorporated entity, which was a fluctuating body of persons involved in a criminal conspiracy with individual members being parties to distinct separate criminal enterprises, albeit carried out under the umbrella of the RIRA.*

(b) The individual members of the Army Council did not each have the same interest. In this tort claim the plaintiffs had to prove that individual persons were liable as tortfeasors for trespass to the person. While membership of the Army Council may be some evidence that a member thereof was a party to the tort (either being involved in the planning or execution of the enterprise) a member of the Army Council who did not participate in the relevant acts, being, for example, absent from a relevant meeting or unaware of the enterprise would have a defence to a claim in tort. Accordingly not all members of the Army Council as at 15 August 1998 had the same interest for the purposes of Order 15 rule 12.

(c) Before the court may make a representation order it must authorise the named person to represent the relevant class. The court must be satisfied that he can properly represent the interests of the class to be represented which is to be bound by any

judgment. Campbell was not participating in the proceedings and was thus not representing his own interests much less those of others.

(d) There is nothing to suggest that the plaintiffs would be able, in the words of Pickford LJ, to "try their rights more fairly or get their remedy more certainly[1]*" if a representation order was made against Campbell or any of the other tortfeasors sued. Before another party could be held liable as a joint tortfeasor the plaintiffs would have to prove that the other party was a participant in the tort which is not of itself established simply by proof of membership of the Army Council, for the reasons already given.*' [74].

22. Ms Studd cites Breslin as a prime example of a case where the court made its decision as to whether one or more of the defendants could be sued in a representative capacity only at the conclusion of the trial and having heard the evidence. In the same way the court in the present case should not strike out the claim against Mr Adams in a representative capacity but should leave that to be determined after full trial.

23. To the same effect, Ms Studd relies on the decision of Irwin J (as he then was) in Oxford University v. Webb [2006] EWHC 2490 (QB). This was a claim for injunctive relief in respect of the activities of the Animal Liberation Front (ALF), an unincorporated association described in the particulars of claim as '*a criminal terrorist organisation which employs acts of violence and intimidation against persons connected with scientific research on animals. The identities of its members, participants and supporters is kept secret so as to facilitate criminal activity. Robin Webb who is held out as a spokesman for the ALF is sued on his own behalf and as representing members, participants and supporters of the ALF.*'

24. As first issued, the claim sought injunctive relief against the ALF in that name. As Irwin J noted, '*no point was taken at that stage that it was improper to join or serve the ALF*': [5]. Upon an ex parte application, the claim was amended so as to add Mr Webb as defendant, sued in a personal and representative capacity as above. Mr Webb applied to set aside that order. The judge considered '*a vast quantity of material…bearing on the history of the ALF and associated groups*' [14]. On behalf of Mr Webb it was submitted that he was neither a member of the ALF nor of the ALF Supporters Group; that there was no evidence that he had ever been involved in illegal activities; and that he was not in the same position as others within the animal liberation movement who had crossed the line into unlawful activity: [33].

25. The judge did not accept this. Having considered all the evidence he concluded that Mr Webb should continue as defendant in a representative capacity, observing: '*Indeed, it is difficult to see who could better represent an unincorporated association apart from its chosen public spokesman…In any event…I find that Robin Webb is a central and pivotal figure in this organisation, who is fully adherent to its aims, strategy and tactics*': [67].

26. Ms Studd submits that these cases demonstrate that it is procedurally appropriate to defer the question of whether a person should continue to be a defendant in a

[1] Mercantile Marine Association v. Tom [1916] 2 KB 243 at 248.

representative capacity (CPR 19.8(1)(b)) until the determination of that factual issue up to and including at full trial.

27. In her written argument Ms Studd in any event submitted that, the application having been made under CPR 3.4 (not CPR 24), it must proceed on the assumed basis of the truth of the pleaded case.

28. As to Emerald and Lloyd Ms Studd acknowledged the '*general principle*' that membership of the relevant represented class should not depend on the outcome of the litigation: Lloyd at [78]. However she submitted that it would be wrong to treat that as an immutable principle to be applied in every case. To do so would allow the members of a secretive criminal organisation to evade responsibility. She contrasted a claim against a golf club where the members of the unincorporated association and the appropriate representative could readily be identified.

29. Further, the effect of striking out the representative claim at this stage would be to prevent the Claimants from using the process of disclosure so as to obtain relevant information e.g. as to the membership and structure of the organisation. All members of the PIRA were engaged in a common conspiracy to achieve their ends by violent means; and (as in Webb and Breslin) the identification of the relevant class and its appropriate representative for the purpose of the action could and should be considered in the light of all the evidence; in this case at full trial.

30. On a wider canvas, the ability to pursue a claim against a defendant in a representative capacity would be frustrated if the procedure could be defeated by that person's mere denial (in this case, yet to be pleaded) of membership of the organisation or of the relevant class of persons therein. True it was that the action would continue against Mr Adams in his personal capacity and would be based on the same pleaded allegations that he was at all material times at the heart of the PIRA; but the Court should not stifle the claim which was pursued in a representative capacity.

31. Ms Studd acknowledged that the authorities on claims against defendants in a representative capacity drew a distinction between claims for injunctive relief and for a money judgment, being more favourable to the use of the procedure in the former category: see e.g. the discussion of the authorities in Webb at [46]. However, as Breslin showed, that distinction did not compel the Court, in a claim for money judgment, to refuse to allow the issue of representative capacity to proceed to determination after full trial.

32. Turning to the identification of the relevant class(es) to be represented, Ms Studd accepted in argument that the pleading identified these too widely. She submitted that it would be necessary but sufficient for the pleading to be modified so as to limit it to those who were members of the PIRA/its Army Council between 1973 and 1996. She submitted that this was supported by a range of material referred to in the APOC, including the terms of the Irish Republican Army (IRA) 'Green Book' which set out the aims of that organisation and the obligations of all its volunteers.

Conclusion on representative capacity

33. For two principal reasons advanced by Mr Hermer, I am persuaded that the claim against Mr Adams in a representative capacity should not be permitted to continue and

must therefore be struck out. The first concerns the Claimants' selection of Mr Adams as representative of the classes of persons which they have identified. The second concerns the Claimants' identification of those classes. In each case, the representative claim fails to satisfy the critical requirement of 'the same interest'.

Mr Adams as representative

34. The Claimants' selection of Mr Adams as representative of the identified classes of persons conflicts with the general principle (Lloyd; Emerald) that the question of whether a person meets the 'same interest' condition should not depend on the outcome of the litigation. It has to be satisfied from the outset. As the Claimants accept, the question of whether Mr Adams was at the material times a member of the PIRA and/or of its Army Council and/or one of its 'leaders' is a question of fact that can only be determined at full trial. Therefore the question of whether he has 'the same interest' as members of those pleaded classes depends on the outcome of the litigation. As Mummery LJ stated in Emerald (in the context of claimants in an allegedly representative capacity): '*At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest" as Emerald*': [62]. The same logic applies to a claim against a defendant in an allegedly representative capacity. Pending full trial (as the Claimants accept) it is not possible for the Court to conclude that Mr Adams has the same interest as the classes of persons which the Claimants seek to sue and to be represented. Thus, as Mr Hermer submits, the Claimants' casting of Mr Adams as a representative of these classes assumes what it has to prove.

35. I do not accept that the decisions in Webb or Breslin provide any support for the submission that the general principle is qualified or can otherwise be disregarded for any of the reasons advanced by the Claimants. The decisions in Webb and at first instance in Breslin preceded the decisions in Emerald and Lloyd and thus took no account of the general principle which these articulate. The decision of the NICA in Breslin post-dates Emerald and makes no reference to it; but by that stage the point was academic, the case having gone to full trial. In addition Webb was a claim for injunctive relief and Irwin J noted the '*rather different approach*' of the authorities between actions for an injunction and for a money judgement: [46].

36. I readily appreciate the difficulties which the secretive nature of this organisation poses for the Claimants. However I do not think that this problem, nor their consequent wish to advance the representative claim through the process of compulsory disclosure (CPR Part 31), provide any reason to depart from the general principle. In any event, as Mr Hermer submitted, Mr Adams' duty of disclosure does not depend on whether or not the claim is made against him in a personal or representative capacity, but on whether the potentially relevant documents are or have been in his control: CPR 31.8.

37. I also do not accept that application of that principle gives undue power to the defendant who denies that he/she does not have the same interest as those in the class of persons which the claimant has selected him/her to represent. In the great generality of cases the identification of the appropriate representative(s) will be uncontentious and unproblematic.

38. For completeness, I do not accept that anything turns on the fact that Mr Adams' application is made pursuant to CPR 3.4 rather than CPR 24; nor therefore that consideration of the claim against him in a representative capacity must proceed on an assumed basis that the capacity is established. That written submission was rightly not developed in oral argument. In short, the form of the procedural challenge cannot defeat the general principle.

39. This first reason is sufficient to require the representative claim to be struck out.

The identification of the class(es) to be represented

40. Further and in any event, the Claimants have failed to identify a coherent class of defendants with 'the same interest'. In reaching that conclusion I again acknowledge the difficulties for the Claimants in pleading the claim in the context of a secretive proscribed organisation. However the claim is inadequate both in form and substance.

41. As to the statements of case, the ACF variously identifies the classes to be represented as the PIRA, its Army Council, 'leaders' and members; without further definition or temporal qualification. By contrast, in its title the APOC make no reference to the representative capacity; and its contents simply identify Mr Adams as a representative of the PIRA [36], i.e. without reference to any natural or legal person.

42. In argument Ms Studd had no option but to recognise the difficulties in the pleaded case; and in particular accepted that the absence of any temporal limitation on the identified classes could not be justified. Her informal proposal was to insert a cut-off date (1997) for the members of the PIRA and/or its Army Council. In my judgment this proposed revision fared no better. Thus (to take but one simple example) it did not begin to address the problem of demonstrating that a member of the PIRA/the Army Council for a period commencing after 1973 and ending before 1996 had the same interest as one who was a member at the time of the subject bombing incidents.

43. In any event, as a matter of substance I accept Mr Hermer's submission that the identification of the relevant class(es) is necessarily more problematic than in the unsuccessful attempt in Breslin. In that case the focus was on one bombing incident on one day in August 1998. The present case concerns three bombing incidents over the period of 23 years. In my judgment all the reasons given by the NICA against a representation order in Breslin apply *a fortiori* to the present case.

44. Accordingly the claim against Mr Adams in a representative capacity must be struck out. The claim against him in a personal capacity continues; and on the basis of all the pleaded allegations of a leading role in the PIRA and its Army Council.

QOCS protection

45. Subject to disapplication in certain circumstances, the effect of the Qualified One-Way Costs Shifting (QOCS) regime is to prevent a successful defendant to proceedings which include '*a claim for damages…for personal injuries*' from enforcing (without the permission of the court) orders for costs made against the claimant, save to the extent that the aggregate amount of such orders does not exceed the aggregate of any orders for or agreements to pay the claimant damages interest and costs: CPR 44.13-44.14.

46. Those provisions are disapplied where the proceedings have been struck out on the grounds that the claimant has disclosed no reasonable grounds for bringing the proceedings; or that the proceedings are an abuse of process; or that the conduct of the claimant is likely to obstruct the just disposal of the proceedings: CPR 44.15; see also the provisions on disapplication where the claim is found to be '*fundamentally dishonest*': CPR 44.16.

47. Mr Hermer submits that QOCS protection does not apply to this claim for the nominal sum of £1 '*for vindicatory purposes*'; and that the Court should make a declaration to that effect, pursuant to its wide powers under CPR 3.1(2)(m).

48. Ms Studd contends that this is a claim for damages for personal injuries within the meaning of CPR 44.13(1)(a). As I understood her position in oral argument, she did not dispute that the Court had power to make the requested declaration if it reached a contrary view. However she submitted that even if (contrary to her primary case) the present claim did not enjoy QOCS protection, the application was premature since the Claimants could apply to amend the claim so as e.g. to seek substantial damages and/or to delete the references to '*vindicatory purposes*'.

First Defendant's submissions

49. Mr Hermer submits that the issue turns on the construction of CPR 44.13(1)(a), namely whether the claim includes a claim for damages for personal injuries. His argument took the following course.

50. First, the pleaded causes of action are in the torts of assault and battery. As is uncontroversial, these are actionable *per se*, i.e. without proof of damage.

51. Secondly, a claim of damages for personal injury involves a claim for general damages for pain and suffering and loss of amenity (PSLA) and, usually, special damages, i.e. financial loss consequent on the injuries.

52. Thirdly, the Claimants' solicitors had in correspondence expressly disavowed a claim for general and special damages. Thus their 'letter of notice' dated 22 June 2022 (post-dating the issue of the unamended CF) states:

> '*12. While the Claimants are entitled to claim general damages (for,* inter alia, *pain, suffering and loss of amenity) special damages (any quantifiable monetary losses including, but not limited to, loss of earnings/future income, medical and treatment costs, etc.), aggravated damages and interest pursuant to* [s.35A SCA 1981], *they are instead claiming damages for vindicatory purposes only limited to the sum of £1.*
>
> *13. The Claimants are bringing this vindicatory claim because, in the face of compelling evidence to the contrary, your continued denial of your leadership, and even membership, of PIRA and thus any role in the Attacks – all the while them having to bear witness to you evading any form of accountability and blaming others for your actions – has had the continuing effect of exacerbating their pain and suffering.*'

53. In their substantive response by letter dated 29 September 2022, Mr Adams' solicitors referred to the contrast between that disavowal of a claim for substantial damages and the original POC which included a claim for aggravated and exemplary damages; and

asked the Claimants to clarify whether these were being pursued. They also asked a number of questions including: '*14. We assume that the reason why there is no contemporaneous medical evidence at all for the Claimants is because no claim for damages for personal injury are sought (consistent with their public statements)…rather than a contumelious default of PD 16.4. Please confirm*' and '*15. Please confirm whether or not your clients have or have obtained legal insurance against the risk of adverse costs orders. If not, why not?*'

54. By letter dated 11 October 2022 the Claimants' solicitors stated that the reference to aggravated and exemplary damages in the POC was an error and requested consent to a deleting amendment. This deletion has been made in the APOC. As to question 14 they replied '*we can confirm that no claim for damages for personal injury is sought beyond the vindicatory sum of £1*'. As to question 15, it stated that the question was inappropriate and that in any event the claim had QOCS protection.

55. Mr Hermer submits that, by the very terms of the Claimants' statements of case and correspondence, they were not seeking damages for personal injury. The torts relied on were actionable *per se*. The nominal £1 remedy was not dependent upon proof of any personal injuries. On the contrary, the Claimants were claiming vindicatory damages at that fixed nominal sum.

56. Fourthly, this characterisation of the claim was supported by the genesis and legislative history of QOCS. The new regime followed the recommendations of the report of Sir Rupert Jackson on costs in civil litigation (2009) and was the latest attempt (post-legal aid and post-recovery of success fees/ATE premiums) to address the typical inequality of arms between claimants and defendants in such litigation: see the discussion by the Supreme Court in Adelekun v. Ho [2021] UKSC 43; [2021] 1 WLR 5132 at [1]-[3]. A claim for £1 vindicatory damages by claimants supported by crowdfunding against an uninsured individual defendant was far removed from the considerations which had led to QOCS.

57. Fifthly, the Court must look at the substance, rather than the form, of the claim. In substance it was indistinguishable from a claim for declaratory relief, namely for a declaration that Mr Adams was liable for the torts alleged. Had the claim been pleaded in that way, it could not be suggested that it was a claim for damages for personal injury. The Claimants could be in no better position by pleading it as a claim for nominal vindicatory damages. If it were otherwise, there would be no principled reason for distinguishing between a claim for declaratory relief in respect of tortious liability for personal injuries and a claim for such relief in respect of some other tort.

58. Mr Hermer accepted that QOCS protection would apply in circumstances where the damages claimed in a conventional personal injury claim were limited to a small fraction of the potential recovery, say £1000; but not if the claim were for vindication of rights as in the present case.

59. Mr Hermer emphasised that he was not submitting that the claim was an abuse of process so as to fall within that particular exception to QOCS protection (44.15(a)). Rather, this simply was not a claim for damages for personal injury.

60. The distinction between a claim for substantial and nominal damages was further reinforced by the Glossary to the CPR which treated damages as compensatory. Thus

the Glossary '*guide to the meaning of certain legal expressions used in these Rules*' describes '*Damages*' as '*A sum of money awarded by the court as compensation to the claimant*'. A nominal sum of £1, claimed for vindicatory purposes and founded on torts which were actionable *per se* did not constitute compensation. Mr Hermer cited a number of cases where the court had had regard to the Glossary when determining disputes concerning the meaning and effect provisions of the CPR: see also Howe v Motor Insurers Bureau ([2017] EWCA Civ 932; [2018] 1 WLR 923) at [37] where the Court of Appeal did so in the context of CPR 44.13(1)(a).

61. However, acknowledging the limit placed on the Glossary by CPR 2.2(1): '*The glossary at the end of these Rules is a guide to the meaning of certain legal expressions used in the Rules, but is not to be taken as giving those expressions any meaning in the Rules which they do not have in the law generally*', Mr Hermer made clear in argument that the Glossary was not at the heart of his case.

62. On the issue of whether this was a claim for compensation, Mr Hermer also pointed to the Claimants' solicitors failure to give a direct response to the request for confirmation that the Claimants had made applications for criminal injury compensation to the Criminal Injuries Compensation Authority (CICA) or its predecessor (CICB). The Court was invited to draw the inference that such compensation had been sought and received.

Claimants' response

63. Ms Studd pointed first to the pleaded case in the APOC. At [39] these set out the injuries suffered by each Claimant. This was followed at [40] by the claim for damages '*in respect of their pain suffering and loss of amenity*' but limited the total claimed to the nominal sum for vindicatory purposes. This was a claim for '*damages for personal injuries*' but with the amount limited to that nominal sum. The position was no different from a claim for substantial damages where the claimant chose to limit the amount claimed to a modest fraction of its full value, e.g. a claim limited to £1000. Proper advantages of taking that course would include e.g. limiting the costs of the claim (e.g. in respect of expert evidence) and/or of the fee payable for issuing the claim; and/or taking account of the limited means of the defendant and/or wishing to vindicate rights by a nominal award.

64. The appropriate mechanism for dealing with disparity between the amount of the claim and the costs was not the removal of QOCS protection but the principle of proportionality in the assessment of costs of the successful claimant.

65. The position was not affected by the additional wording '*for vindicatory purposes*'; but if those words were regarded by the Court as material they could be deleted. Likewise the claim could be amended so as to claim substantial damages limited to (say) £1000.

66. It was immaterial that the torts were actionable without proof of damage. The pleaded claim was for damages for personal injuries. Further, in the context of bombing incidents it would be very difficult for the assault or battery to be proved without proof of injury.

67. The parties' correspondence provided no assistance. The focus must be on the pleaded statements of case; but in any event the Claimants' solicitors' letter of 11 October 2022

made clear that damages for personal injury were being sought, but not in an amount '*beyond the vindicatory sum of £1*'.

68. As to the background, the Jackson report expressly rejected the possibility of restricting QOCS to limited categories of personal injury cases '*such as low value cases or CFA*' and recommended that it should apply to '*all personal injury cases*': para. 4.2. That recommendation was accepted and resulted in the unqualified language of CPR 44.13(1)(a). If the Rules Committee had considered limiting the protection to claims of a certain minimum value, it would have said so.

69. As to the policy behind the protective regime, the Court of Appeal had confirmed that the intention was to provide a broad costs protection to claimants in personal injury actions: see Brown v. Commissioner of Police for the Metropolis [2019] EWCA Civ 1724; [2020] 1 WLR 1257; also McDonald v. Excalibur & Keswick Groundworks Ltd [2023] EWCA Civ 18; [2023] 1 WLR 2139 at [34]. In Brown - a 'mixed claims' case – the Court (i) stated that the question for a judge considering the exercise of discretion in a mixed claims case was whether '*the proceedings can fairly be described in the round as a personal injury case*' [57]; (ii) used the broad language of a claim '*in respect of*' personal injuries ([54], [55], [57], [64]); and (iii) emphasised the '*certainty*' which the QOCS regime was intended to provide: *'Any claimant can make such a claim knowing that he or she will not be the subject of any adverse costs order in an amount higher than the sum (if any) which they recover in the proceedings'* [64]; see also [63].

70. The argument that the claim fell outside QOCS protection was tantamount to saying that it was an abuse of process; and yet reliance on that exception to protection was expressly disavowed. The abuse of process exception provided a necessary safeguard, but no such case was or could be advanced.

71. Ms Studd accepted that the claim would fall outside the regime if the only remedy sought had been a declaration of liability – because it would not be a claim for damages. However that was not this case. The claim was expressly for damages, albeit in a nominal sum; and, as she put it, 'damages means damages'.

72. The CPR Glossary provided no support, because it was no more than a guide and did not give any meaning which the rule – and in particular the words '*damages for personal injuries*' – had in the law.

73. I add that the parties made reference to the decision of the Supreme Court in Ashley v. Chief Constable of Sussex Police [2008] UKHL 25; [2008] 1 AC 962 and to the discussion of '*vindicatory damages*' in McGregor on Damages (21st ed.) at 1-008 and 17-001 et seq.; but neither submitted that these were of direct assistance in the present case. Ashley held that, in circumstances where the deceased claimant's estate and dependants had been fully compensated by the police for the consequences of the incident in which he had been shot and killed, they were nonetheless entitled to pursue a disputed claim of assault and battery for the purpose of vindicating their contention that the killing had been unlawful.

Conclusions on QOCS protection

74. I accept that the Court should exercise its case management powers so as to make a declaration at this stage on the issue of QOCS protection. This is consistent with the

objective of achieving certainty for the parties at an early stage (Brown at [64]). I do not consider that the contingent possibility of an application to amend the claim is a sufficient reason to postpone the decision.

75. I consider the following relevant principles to apply:

(i) The issue should in principle be determined by reference to the pleaded claim i.e. the ACF and APOC. It is these statements of case which should identify the nature of the claim;

(ii) in a case where the statements of case show a genuine ambiguity as to the nature of the claim, it may be legitimate to consider contemporaneous correspondence between the parties in order to resolve the ambiguity. However the Court should act cautiously in this respect and keep its principal focus on the statements of case;

(iii) the expression '*damages…for personal injuries*' in the rule should be given a broad interpretation, reflecting the broad policy aim (Brown, McDonald); and avoiding undue technicality;

(iv) the focus must be on whether it is a claim for damages for personal injuries, rather than the particular cause(s) of action which supports that claim: see Brown: '*46…a claim for damages for personal injury is not a cause of action at all. A cause of action is, for example, a breach of duty or a claim under a statute. A claim for damages in respect of personal injury is a claim for a particular head of loss arising out of the breach or misconduct of the defendant. The two are not the same at all. 47…it is wrong to construe these rules by reference to a cause of action, in circumstances where the rules themselves make no such reference. The words used in the relevant rules are "proceedings" and "claim", and I have set out the proper interpretation of those words above. There is no reference to "causes of action" in these rules, so to import such a concept, when the rule-makers have not done so, is not a proper method of interpretation.*';

(v) whilst a central purpose of the QOCS protection is to achieve equality of arms in an area of litigation where (absent legal aid or recovery of success fee/ATE premium) there would typically be inequality, it is irrelevant that a particular claim, which falls within the language of the rule, is outside that norm. Thus if the claim is one for damages for personal injury, it is irrelevant that (if so) the particular claimant is well-funded and the defendant uninsured and of modest means;

(vi) the claimant's motive for or purpose in bringing the action is in principle irrelevant. As Lord Bingham stated in Ashley: *'…it is not the business of the court to monitor the motives of the parties in bringing and resisting what is, on the face of it, a well recognised claim in tort.*' [4]. This is of course subject to the doctrine of abuse of process and the exception provided by the QOCS rules in that respect: 44.15(a).

76. Turning to the statements of case, the ACF alleges that by the act of '*the Defendant*' (singular) and pursuant to a '*common design*' each of the Claimants has suffered assault/battery and injury as a result of the respective bombing incident; claims '*nominal vindicatory damages for assault/battery in respect of loss and damage caused as a result of bomb attacks..*'; and values these at a '*nominal value of £1 for vindicatory purposes*'. The APOC likewise allege assault and battery ([23]) pursuant to a common

design ([37]); in each case causing personal injury ([1], [9], [13], [22]) and loss and damage ([9], [13], [22]), in each case providing particulars of injury ([39]) but no particulars of loss and damage; claim damages '*in respect of their pain suffering and loss of amenity*' [40]; and limit the claim to the sum of '*£1.00 for vindicatory purposes*': [2], [40] and the prayer for relief, para.1.

77. In my judgment these pleadings set out the necessary ingredients of a claim for damages for personal injury within the meaning of the rule; and contain no averments which are inconsistent with such a claim.

78. I do not accept Mr Hermer's central arguments that such characterisation of the claim is defeated (individually and/or collectively) (i) by the fact that a claim in assault/battery is actionable without proof of damage and/or (ii) by the absence of a claim for substantial (as opposed to nominal) damages and/or (iii) by the statement that the nominal sum is claimed '*for vindicatory purposes*' and/or (iv) on the basis that the claim is in substance a claim for declaratory relief only.

Actionable without proof of damage

79. The principle is expressed by Lord Rodger in Ashley as: *'A claimant has no cause of action in negligence unless he has suffered injury or damage. By contrast, battery or trespass to the person is actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity: the law vindicates that right by awarding nominal damages.*'[60].

80. Accordingly if the statements of case contained no reference to personal injury and the Claimants succeeded in establishing liability at trial, they would be entitled to nominal damages in any event. Thus if they establish each ingredient of their actual pleaded case, i.e. including the consequence of personal injury, their remedy will be no different. That is because the claim limits the remedy to (£1) nominal damages. However it does not follow from this equivalence of remedy that the claim is to be characterised as one for non-injurious assault/battery. That submission both excises a material part of the pleaded claim, i.e. the injuries, and confuses the nature of the claim with the causes of action (cf. Brown). The causes of action are in assault and battery; the claim is for damages for personal injury.

Substantial or nominal damages

81. I accept, of course, that the conventional remedies for a claim of damages for personal injury typically include an award of general damages (PSLA) and special damages for past/future loss consequent upon the injury. Furthermore, and consistently with the claim for nominal damages only, the claim of '*loss and damage*' does not plead special damages nor (since deletion) aggravated and exemplary damages.

82. However the APOC contain the express averment of '*pain suffering and loss of amenity*' ([40]) and plead particulars of injury. I consider that this is a sufficient pleading of a claim for general damages for PSLA, but limited in amount to a nominal £1.

83. I do not consider that the correspondence between the parties points in a different direction. First, I see no true ambiguity in the language of the statements of case.

Secondly, and in any event, whilst the Claimants' solicitors' letter of notice dated 22 June 2022 disavows any claim for general damages (para. 12), the following paragraph (13) refers to '*the continuing effect of exacerbating their pain and suffering*'; and their subsequent letter of 11 October 2022 states, in answer to a question seeking confirmation that no claim for damages for personal injuries are sought, *'we can confirm that no claim for damages for personal injury is sought beyond the vindicatory sum of £1.*' Whilst the language of this correspondence could undoubtedly be clearer, it is ultimately consistent with the pleaded claim for damages for personal injury limited to a nominal £1.

For vindicatory purposes only

84. In my judgment these words in the pleaded claim in no way diminish its status as a claim for damages for personal injury within the meaning of the rule.

85. First, the motivation or purpose for bringing a claim is irrelevant; subject only to the principles of abuse of process: see Ashley and CPR 44.15(b). The charge of abuse is expressly disavowed in the present case. In the light of the language used in cases such as Ashley it is understandable that the pleading includes reference to '*vindicatory purpose*'. However this is strictly immaterial to the characterisation of the claim and should be treated as mere surplusage.

86. Secondly, even if (i) there remains a class of damages in English law known as vindicatory damages (cf. the discussion in McGregor) and (ii) the statements of case were construed as a claim for such damages, it would still be a claim for damages for personal injury within the meaning of the rule. In my judgment the necessary broad construction of the rule does not impose any limitation on the nature of the damages to be awarded, provided that they are for/in respect of personal injury: see Brown and McDonald. For the reasons already given, the pleaded claim meets that description. In my judgment it would be wrong to apply the CPR Glossary so as to equate and confine 'damages' to 'compensation' and Mr Hermer was right to place less emphasis on that point in his oral submissions. As Ms Studd submitted, damages means damages.

87. The point may be tested another way. A claimant may properly decide to limit the amount of damages claim for personal injury to a sum which does not reflect the full compensation which the law would otherwise provide. This may be for a number of reasons including limiting the fee payable for issuing the claim and/or limiting the costs of pursuing a claim for full compensation and/or having regard to circumstances where the particular defendant is of limited means and/or where the principal wish is to establish liability and thereby vindicate rights. Mr Hermer rightly accepted that QOCS protection would apply in circumstances where the damages claimed in an otherwise conventional personal injury claim were limited to a small fraction of the potential recovery, say £1000.

88. I can see no difference of principle where such a claim is limited to an award of £1 nominal damages. There may be a range of personal injury cases where the claimant for good reason limits the remedy to a nominal sum. For example, as discussed in argument, in a claim of sexual abuse against an uninsured defendant of limited means where the purpose is to vindicate the claimant's right to bodily integrity. The Jackson report recommended that the proposed regime should apply to all personal injury claims. That recommendation was accepted. I see no basis for the Court to impose any

qualification by reference to the amount of damages claimed; nor therefore to require a claimant to pursue substantial damages in a small sum in order to obtain protection.

Declaratory relief only?

89. I also reject the argument that the present claim is in substance one for declaratory relief alone. In the absence of any challenge to the claim as an abuse of process, I see no conflict between the form and substance of the claim. It is a claim for damages for personal injury, limited to a nominal award of £1.

90. In this respect a useful contrast can be made with the case of Ashley. In that case the Claimant's estate/dependants had been fully compensated by the police. The claim for assault/battery was allowed to proceed. However as Lord Scott recognised, there might be an issue as to whether the appropriate remedy was '*an award of vindicatory damages or simply a declaration of liability*': [23]. In the present case there has been no compensation from either Defendant. Accordingly, if the claim were established, there would be no reason to consider a remedy other than the nominal damages which are claimed.

91. For completeness I do not accept that the Claimants' lack of substantive response to the request for confirmation that applications for criminal injuries compensation were made to the CICA or CICB has any materiality. It does not justify an inference that they have received such compensation, alternatively compensation in the full measure of damages which an unlimited civil claim would provide. In any event I consider that any award of criminal injuries compensation would constitute a gratuitous collateral benefit to be disregarded in the calculation of civil compensation from a tortfeasor.

92. For all these reasons I conclude that the claim enjoys QOCS protection.

Summary of conclusions

93. The claim against the PIRA must be struck out; because of the established principle of law that an unincorporated association is not a legal entity and therefore cannot be sued in its own name.

94. The claim against Mr Adams in a representative capacity must be struck out. The claim against him in a personal capacity proceeds.

95. The claim is for damages for personal injury within the meaning of CPR 44.13(1)(a) and accordingly enjoys QOCS protection on costs.

96. I will hear from Counsel on the appropriate form of order.