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| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **07/09/2018** |

**IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**Mary McAleese on behalf of David McAleese (deceased)**

**Applicant;**

**and**

**The Ministry of Defence**

**and**

**The Chief Constable of the Police Service of Northern Ireland**

**Respondent.**

**------**

**Master Bell**

**INTRODUCTION**

[1] On 20 December 1972 Mr David McAleese was waiting for a lift to work when he was shot dead on the Newtownards Road, Belfast. Although no proscribed organisation claimed responsibility, loyalist paramilitary organisations were suspected of being responsible.

[2] On 11 May 2017 the applicant's solicitor issued a pre-action protocol letter to the Crown Solicitor's office seeking eighteen categories of documents held by the Ministry of Defence and the Chief Constable. On the same date the applicant's solicitor also issued a summons seeking the same

documentation by way of an application for pre-proceedings discovery under section 31 of the Administration of Justice Act 1970.

[3] The applicant seeks a vast range of investigatory and intelligence material from the Ministry of Defence and the Police Service of Northern Ireland both in connection with the murder of Mr McAleese and, more broadly, in terms of general intelligence summaries being circulated in the weeks prior to, and following, Mr McAleese's death. The applicant indicates that the purpose of the application is to obtain access to this investigatory and intelligence material in order to determine whether :

(i) An agent or informant of the police or army was involved in the planning and/or preparation of the attack on Mr McAleese; and/or

(ii) An agent or informant of the police or army was involved in the execution of the attack on Mr McAleese; and/or

(iii) Information was passed to the police or army by an agent or informant regarding responsibility for the murder of Mr McAleese and not all steps were taken to bring all those responsible to justice and to prevent such activity happening again.

[4] The application is grounded by two affidavits from Kevin Winters, solicitor. One of the exhibits to these affidavits is a draft Writ. That draft Writ alleges negligence, misfeasance in public office and breach of Article 2 of the European Convention on Human Rights. The defendants have filed two affidavits, one by Aaron Fuller and one by Assistant Chief Constable Mark Hamilton.

[5] The applicant was represented by Ms Anyadike-Danes QC and Mr Scott with the respondent being represented by Mr Aldworth QC and Mr Warnock. I am grateful to counsel for their helpful oral submissions and skeleton arguments.

## THE PARTIES' SUBMISSIONS

*The Applicant's submissions*

[6] The applicant submitted sections of a report by the PSNI's Historical Enquiries Team (hereafter "HET") into Mr McAleese's murder. The report sets out that Mr McAleese had been struck by two bullets while standing on the Newtownards Road, Belfast. Both bullets exited his body and neither was recovered. On the day of Mr McAleese's murder a spent cartridge case was found on the Mountpottinger Road, approximately 200 yards from the scene

of Mr McAleese's murder. Forensic tests established that the cartridge was of 9 mm calibre and that it had been fired from a Lugar pistol. The following month, on 3 January 1973 a vehicle was stopped containing four men. These were Edward Martin, Joseph Miller, William Bingham and David Barr. Upon being searched Edward Martin was found to be in possession of a 9 mm Lugar pistol. Forensic tests linked the Lugar pistol to two murders, namely that of Sandra Meli in Belfast on 2 December 1972 and James Mullan in Bangor on 21 December 1972. The tests also confirmed that the Lugar pistol had discharged the cartridge found on the Mountpottinger Road.

[7] Police charged the four men with the murders of Mr McAleese, Sandra Meli, and James Mullan. The HET Report states that the only evidence connecting them to the murders was the Lugar pistol. The HET Report notes that an internal police report dated 6 March 1973 was sent to the Chief Constable's office which stated that there was no evidence, circumstantial or direct, to connect any of the accused to the murder of David McAleese and recommending that the murder charges be withdrawn.

[8] The Director of Public Prosecutions considered that the evidence was insufficient to sustain not only the murder charge in respect of Mr McAleese's death but also the murder charges in respect of the deaths of Sandra Meli and James Mullan and those charges were withdrawn. Martin was subsequently convicted of possession of a firearm with intent to commit an indictable offence, theft, taking a motor vehicle without the owner's consent and driving without insurance. He was sentenced to three years imprisonment. Miller was convicted of theft, taking a motor vehicle without the owner's consent and driving without insurance. He was sentenced to 12 months imprisonment, suspended for two years. Bingham and Barr were convicted of theft and allowing themselves to be carried in a stolen vehicle. They were both sentenced to 9 months imprisonment, suspended for two years.

[9] The HET Report comments :

> "At first sight, it may seem a little odd that the four men would be charged with David's murder on what, today, would be regarded as no more than speculative evidence. …. The investigators had a stark choice to make – either release them through a lack of evidence, and run the risk of them continuing their criminal behaviour, or make a calculated decision to charge them with the murders, remand them in custody, and use the time it would give them to try to build the evidential case against the four. They clearly chose the latter option, but no further evidence was forthcoming. The DPP had no choice, therefore, but to discontinue proceedings for all the murder charges.

[10] Counsel for the applicant submitted at the hearing that the murder of Mr McAleese was "forensically linked" to the murders of Sandra Meli and James Mullan. This submission was based on the fact that the spent cartridge was found 200 yards away from the scene of Mr McAleese's murder on the same day.

[11] Mr Winters goes further than stating that the murders of Mr McAleese, Sandra Meli and James Mullan were "forensically linked". In his second affidavit Mr Winters refers to :

> "the fact that the same weapon was used in all three murders."

[12] The HET Report states that an intelligence report was received on 6 January 1973 naming a member of the Red Hand Commandos as being responsible for the murder of Mr McAleese. The intelligence report also stated that he had been on foot when he carried out the shooting and that he had used a pistol. The man was later charged and convicted of an unconnected offence of handling stolen goods. Subsequently, a further intelligence report was received in 1975 naming the same individual.

[13] The HET Report also reviewed intelligence in connection with Mr McAleese's murder. The Report stated:

> "There was no intelligence which could have prevented David's murder."

[14] The HET Report ends by stating:

> "The HET concludes that there are no new lines of enquiry or investigative opportunities that could bring about the identification or prosecution of those responsible for David's murder."

[15] Mr Winters also exhibited to his second affidavit two extracts from the book entitled "Lost Lives", jointly written by five authors. These extracts describe the circumstances of the murders of Sandra Meli and James Mullan. They assert that both individuals were murdered by loyalist paramilitaries.

[16] In his affidavit Mr Winters avers that 2003 Report of the Independent Commission of Inquiry into the Dublin and Monaghan Bombings by the retired Mr Justice Barron (hereafter "the Barron Report") considered allegations that the Royal Ulster Constabulary and the Army had involvement with loyalist organisations. Mr Winters avers that the Barron Report found a number of these allegations credible.

[17] Mr Winters also exhibits to his second affidavit a copy of the HET Report into the murder of Patrick Benstead who was murdered on 2 December 1972. That report refers to Albert Baker a member of the East Belfast UDA in 1972. In 1973 Baker surrendered himself to police in England and admitted his part in four murders which took place in Belfast during 1972 and 1973. The HET Report states that later in 1973 he was convicted on four counts of murder and sentenced to life imprisonment. After his conviction Baker provided witness evidence against a number of persons in respect of terrorist offences. A number of persons were charged on the basis of his evidence. However during their trial, Baker was deemed to be an unreliable witness and the charges against those defendants were withdrawn. Subsequently, in a letter dated 4 November 1985, Baker wrote to Father Denis Faul. In this letter he made allegations about the murder of Patrick Benstead. The HET Report then states:

> "He alleged in the same letter, the RUC knew who killed Patrick and the other Catholics murdered in the area at the time."

[18] Mr Winters's affidavit evidence also avers that, following a complaint by the McAleese family, the Police Ombudsman for Northern Ireland is carrying out an investigation into police misconduct or serious criminality regarding the murder of Mr McAleese. The court was not informed of the exact nature of the complaint. However it appears from correspondence exhibited to Mr Winters's affidavit that the complaint has been accepted as part of an Ombudsman's investigation entitled Operation Medfield which is being carried out into police misconduct or serious criminality involving the murders of Patrick Benstead and others. A summary of the terms of reference for that investigation is as follows:

> "To establish if there is evidence of criminality and/or serious disciplinary misconduct by:
>
> (i) Identifying whether a member of the RUC was culpable in the murder, either through direct involvement, disclosure of information or provision of other assistance to those responsible.
> (ii) Identifying whether any person who was culpable in the murder was afforded protection by a member of the RUC, resulting in that person not being held accountable for serious criminality.
> (iii) Identifying whether the RUC held intelligence which if acted upon could have prevented the murder or assisted in the identification or apprehension of those responsible.

(iv) Identifying if the RUC pursued all reasonable lines of enquiry during the investigation."

*The Defendants' submissions*

[19] The first potential defendant, the Ministry of Defence, filed an affidavit by Aaron Fuller, a Policy Officer. Mr Fuller does not seem to realise that the draft writ includes a claim under Article 2 of the Convention and suggests that the proposed causes of action are twofold, namely negligence and misfeasance in public office. Mr Fuller observes that the basis of the alleged negligence and alleged misfeasance in public office claims are completely unclear and unspecified.

[20] Mr Fuller suggests that the applicant's central allegation is that there was un-particularised collusion between the proposed defendants and the person who murdered Mr McAleese. He argues that the applicant has not advanced a sufficient evidential basis to support a claim of collusion, or broadly of negligence or misfeasance in public office. Indeed he states that the Ministry of Defence is of the view that there simply is no evidential basis for an allegation of collusion.

[21] Mr Fuller argues that the application for pre-proceedings discovery is "in essence a wholly speculative fishing exercise". He suggests that it is being argued that because broadly there are credible allegations of collusion with Loyalist organisations and because there was an allegation that a UDA member was involved in Mr McAleese's murder, there must have been collusion, negligence or misfeasance in Mr McAleese's death. This, he states, does not follow as a matter of logic.

[22] Mr Fuller argues that although the applicant refers to the allegation made by Albert Baker that the police "knew who murdered Mr Benstead and other Catholics in the area", the applicant failed to refer to the reference within the HET Report that Baker had been described as an "unreliable witness" during a criminal trial at which he gave evidence and also failed to refer to correspondence from ACC White which stated that all of Baker's allegations had been investigated and were found to be malicious.

[23] Mr Fuller argues that the fact that the Police Ombudsman is carrying out an investigation in respect of the death of Mr McAleese and others is not in any way evidence of collusion.

[24] The second potential defendant, the Chief Constable, filed an affidavit by ACC Mark Hamilton who has responsibility for the Legacy and Justice Department of the PSNI. Similarly to Mr Fuller, ACC Hamilton does not seem to realise that the draft writ includes a claim under Article 2 of the Convention and suggests that the proposed causes of action are twofold,

namely negligence and misfeasance in public office. ACC Hamilton observes that the basis of the alleged negligence and alleged misfeasance in public office claims are completely unspecified.

[25] More importantly, ACC Hamilton states that Mr Winters's affidavits contain no direct evidence which substantiates any allegation of negligence or misfeasance by the Chief Constable.

[26] ACC Hamilton expresses the belief that the material submitted by Mr Winters in relation to the remark by Albert Baker that the RUC "knew who murdered Mr Benstead and other Catholics in the area" does not amount to evidence supporting a claim in this case. He observes that it relates to a different murder than the murder of Mr McAleese. He notes that Albert Baker was described as "an unreliable witness" during criminal proceedings in which he gave evidence.

ACC Hamilton also observes that the HET Report into the murder of Patrick Benstead notes that the allegations made by Baker were investigated by the RUC and that the HET had seen correspondence dated 4 April 1989 from ACC White from the RUC Crime Department in which the ACC had written :

> "He [Baker] then began a scurrilous campaign against the RUC in general and also against specific officers. He alleged collusion with loyalist paramilitaries and passing firearms to same. All allegations were fully investigated and found to be completely malicious … Some four years ago the complaints and allegations ceased, probably because Baker had been given some inkling of a release date."

[27] ACC Hamilton notes that an Ombudsman's investigation is being undertaken in relation to the death of Mr McAleese and others. He argues, however, that the fact of an investigation is not in itself evidence of collusion or the basis of a claim for negligence or misfeasance in public office.

[28] ACC Hamilton argues that the applicant has not identified any evidence for maintaining that the Chief Constable had information which could have prevented the murder of Mr McAleese, or colluded in his murder, or that the investigation which was conducted was negligent or constituted misfeasance in public office.

[29] ACC Hamilton also states that the Chief Constable would not in any event accept that a common law duty of care in negligence arises in the circumstances. (I am of the view that, given that there is no draft statement of claim, such an assertion is premature.)

[30] ACC Hamilton makes reference to an internal report dated 6 March 1973 which was made to the Chief Constable's office which stated:

> "The place where the cartridge case was found was so remote from the scene of the murder that it would be impossible to infer that it had any connection."

[31] ACC Hamilton avers that the applicant had sufficient knowledge to raise enquiries in relation to this matter before now. He confirms that, if proceedings are issued against the Chief Constable, the Chief Constable intends to rely upon a limitation defence.

[32] The remainder of ACC Hamilton's affidavit deals with the process which would follow if an order for pre-proceedings discovery was granted in this application. He explains the labour intensive nature of such a process, the possibility of a Public Interest Immunity claim and of a Closed Material Procedure under the Justice and Security Act 2013. He observes that, because the proposed claim is presently lacking in detail, it can only be assessed at a very general level and this might necessitate a more cautious approach to PII. He notes that, because the claim also appears to be highly speculative in nature, this makes any assessment of relevance more problematic. ACC Hamilton then deals with the financial and operational constraints faced by the PSNI in "policing the past". He refers to affidavits previously made by ACC Kerr and ACC Hamilton in other legacy litigation as to these operating constraints. (Somewhat unhelpfully copies of these previous affidavits were not exhibited and are therefore not before me).

**LEGAL PRINCIPLES**

[33] Section 31 of the Administration of Justice Act 1970 provides a power of the court to order disclosure of documents before the commencement of proceedings:

> "On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim in respect of personal injuries to a person or in respect of a person's death is likely to be made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
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> (a) to disclose whether those documents are in his possession, custody or power ;and

(b) to produce to the applicant such of those documents as are in his possession, custody or power."

[34] Order 24 Rule 8 of the Rules of the Court of Judicature sets out the procedure for making an application under section 31 of the 1970 Act :

> 8. – (1) An application for an order under section 31 of the Administration of Justice Act 1970 for the disclosure of documents before the commencement of proceedings shall be made by originating summons and the person against whom order is sought shall be made defendant to the summons.
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> (2) An application after the commencement of proceedings for section 32(1) of the said Act for the disclosure of documents by a person who is not a party to the proceedings shall be made by summons in Form No.28A in Appendix A, which must be served on that person and on every party to the proceedings other than the applicant.
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> (3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must-
>
> (a) in the case of a summons under paragraph (1) state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the High Court in which a claim for personal injuries is likely to be made;
>
> (b) in any case specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of a claim for personal injuries and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.
>
> (4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.
>
> (5) An order under the said section 31 or 32(1) for the disclosure of documents may be made conditional on the applicant's giving security for the costs of the person

> against whom it is made or on such other terms, if any, as the Court thinks just, and shall require the person against whom the order is made to make an affidavit stating whether any documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become to them.
>
> (6) No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce–
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> (a) in the case of a summons under paragraph (1), if the subsequent proceeding has already been begun, or
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> (b) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena duces tecum to produce the documents at the trial."

[35] Order 24 Rule 9 provides:

> On the hearing of an application for an order under rule 3, 7 or 8 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[36] It may be useful at this point to observe that the case law in England and Wales on the subject of pre-proceedings discovery needs to be handled with caution given the divergence between our two jurisdictions in the tests to be applied by a court since the introduction in England and Wales of the Civil Procedure Rules. (For example, the test under the English Rules requires an assessment of whether discovery is "desirable" rather than "necessary").

[37] The classic statement of the law with respect to discovery of documents in *Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 remains applicable :

> "Discoverable documents are not limited to documents which would be admissible in evidence nor to those which would prove or disprove any matter in question, any document which it is reasonable to suppose contains information which may enable the party (applying for discovery) either to

> advance his own case or damage that of his adversary. If it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences it must be disclosed."

[38] There are two recent and relevant decisions of the Northern Ireland courts in respect of discovery. Although not a decision on pre-proceedings discovery, *Flynn v Chief Constable of the Police Service of Northern Ireland* [2018] NICA 3 is significant because it is a legacy case concerning allegations of collusion by state agents. The Court of Appeal considered the overall approach to discovery with particular reference to this type of case, involving a wide-ranging application for specific discovery involving large amounts of documentation going back over considerable periods of time. Referring to Chapter 9 of the Review of Civil and Family Justice in Northern Ireland ("The Gillen Report") the Court observed:

> "[27] At paragraph 10.38 the Gillen Report recommended an approach based on the principles of standard disclosure and reasonable search that apply in England and Wales with the safeguard of an application for specific discovery on Peruvian Guano lines, if appropriate. Standard disclosure requires a party to disclose only the documents on which he relies and those which adversely affect his own case, adversely affect another party's case or supports another party's case.
>
> [28] The most significant change in the Rules of the Court of Judicature since the publication of the Campbell Report is the introduction of the overriding objective in Order 1 Rule 1A to enable the court to deal with cases justly. That requires the court to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule. The Gillen Report recognised that in some cases ever increasing searches for any document that might be relevant to the issues can place an inordinate and disproportionate burden in terms of time and cost. We consider, therefore, that in any case where the existing approach to discovery or disclosure may give rise to onerous obligations or would prevent a case being dealt with expeditiously and fairly the court should intervene with a view to finding a proportionate response, saving expense and ensuring that the parties are on an equal footing. The nature of that intervention will respond to the particular circumstances of the case and may require some greater case management but the court should be careful to ensure that any increase in case management is appropriate.

> [29] Although these principles have been developed in the context of voluminous and complex clinical negligence and commercial cases their application is clearly appropriate in any case in which the Peruvian Guano approach together with strict application of Order 24 is likely to prevent the case being dealt with expeditiously and fairly. This is plainly such a case. The proceedings were issued nearly 10 years ago. Issues of disclosure have been live between the parties for nearly 6 years. Not every legacy case will require detailed case management but cases such as this which involve applications for disclosure of material quantities of sensitive information are likely to require a tailored approach.
>
> [30] Proportionality will first affect the extent of the search for documents. In this case that ought not to present material difficulties. The relevant material has been recovered from PONI and is now available for interrogation. The helpful identification by Colton J of the outstanding legal issues and factual matters enables the applicant to focus its search.
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> ….
>
> [34] The identification of a proportionate approach in each of these cases will be fact sensitive. Any judge dealing with such a case will have to make appropriate discretionary judgements as to the extent of search, the degree of appropriate redaction and the opportunity for dealing with issues by way of gisting or formal admissions. Any appellate court will be very slow to interfere with such discretionary fact specific decisions."

[39] Although the *Flynn* decision did not involve an application for pre-proceedings discovery, the tests and principles which apply in Order 24 rule 7 applications are equally applicable to applications for pre-proceedings discovery, and in that respect the observations with regard to proportionality are particularly apt.

[40] The second recent and relevant decision of the Northern Ireland courts is *Sullivan v Chief Constable and the Ministry of Defence* [2018] NIMaster 5 where Master McCorry dismissed an application for pre-proceedings discovery after concluding that the necessity of pre-proceedings discovery was not made out.

[41] In *Sullivan v Chief Constable and the Ministry of Defence* Master McCorry summarised the principles to be applied by a court considering an application for pre-proceedings discovery as follows:

"The applicant must demonstrate in her grounding affidavit ;

(i) that both (s)he and the persons against whom the application is directed are likely to be parties to subsequent proceedings;

(ii) *prima facie*, that the persons against whom the application is directed have, or have had, in their possession custody and power, the documents described in the schedule to the summons;

(iii) that the documents sought are relevant to an issue arising or likely to arise out of that claim (and in deciding what is relevant the court will be guided by the principles set out in *Peruvian Guano*); and

(iv) that an order for disclosure of the documents is necessary, or necessary at this stage of the case."

[42] I agree with Master McCorry's summary of the applicable principles and will now proceed to consider their application in this case.

**LIKELY TO BE PARTIES TO SUBSEQUENT PROCEEDINGS**

[43] In *Dunning v United Liverpool Hospitals Board of Governors* [1973] 1 WLR 586 the Court of Appeal for England considered the provision for pre-proceedings discovery for the first time. The applicant had been a hospital patient who, after admission with a cough, at first seemed to improve but then suddenly became gravely ill. Her application was for discovery of her medical records and case notes. Following a High Court ruling that discovery of her records should be made, the hospital appealed to the Court of Appeal where its appeal was dismissed. Lord Denning M.R. stated :

"So the one question is this: is a claim in respect of personal injuries "likely to be made" in subsequent proceedings? To that question the answer is: it all depends on what is contained in the medical reports and case notes. If they contain information pointing to negligence on behalf of the hospital board, then a claim is "likely to be made": but if not, then a claim is not likely …. So the likelihood of a claim depends on the outcome of the discovery. It depends on what Dr. Evans finds in the medical reports and case notes. How do you apply the section to this situation? It is difficult, but I think that we should construe "likely to be made" as meaning "may" or "may well be made" dependent on the outcome of

> the discovery. One of the objects of the section is to enable a plaintiff to find out — before he starts proceedings — whether he has a good cause of action or not. This object would be defeated if he had to show — in advance — that he had already got a good cause of action before he saw the documents."

In his concurring judgment James LJ stated :

> "In order to take advantage of the section the applicant for relief must disclose the nature of the claim he intends to make and show not only the intention of making it but also that there is reasonable basis for making it. Ill-founded, irresponsible and speculative allegations or allegations based merely on hope would not provide a reasonable basis for an intended claim in subsequent proceedings."

[44] *Black and others v Sumitomo and others* [2002] 1 WLR 1562 arose in the context of heavy prospective litigation in the Commercial Court concerning a possible claim for unlawful conspiracy to manipulate the copper market. The High Court had ordered nine categories of pre-proceedings discovery and the prospective defendants appealed to the Court of Appeal. Giving the judgment of the Court Rix LJ stated :

> "[66] The phrase "a claim… is likely to be made" is no longer part of the amended section 33(2) and therefore on any view these authorities are no longer binding. If, however, it matters, my own interpretation of these authorities is as follows. In *Dunning v United Liverpool Hospital's Board of Governors [1973] 1 WLR 586* both Lord Denning MR and James LJ agreed that the word "likely" in that phrase did not mean "more likely on the balance of probability than not" in the absence of disclosure but meant "may" or "may well" or "reasonable prospect" if disclosure was granted. It is harder to say what Stamp LJ thought "likely" meant, for he did not gloss its meaning: but he too agreed, at p 591, that in deciding whether a claim was likely it was permissible for the court to consider, on the evidence before it, whether disclosure was likely to produce "a worthwhile and catchable fish". He added, at p 591, that "The word 'likely' must in my view be read as connoting that the respondent to the application is likely to be a party to a worthwhile action by a litigant not acting irresponsibly". I do not myself believe that Stamp LJ was there construing the section—and certainly not the word "likely" which is repeated in that sentence without being glossed — so

much as laying down a principle as to the exercise of discretion. If, however, he was construing the section, then in my respectful opinion, he was alone in doing so in this way. James LJ, in a passage picked up and cited by Stuart-Smith LJ in *Burns v Shuttlehurst Ltd [1999] 1 WLR 1449, said [1973] 1 WLR 586* , 593:

> "In order to take advantage of the section the applicant for relief must disclose the nature of the claim he intends to make and show not only the intention of making it but also that there is reasonable basis for making it. Ill-founded, irresponsible and speculative allegations or allegations based merely on hope would not provide a reasonable basis for an intended claim in subsequent proceedings."

That, however, as it seems to me, is clearly not an attempt to construe the section but a statement of principle as to the exercise of its discretion. That is shown by a similar discussion in *Shaw v Vauxhall Motors Ltd [1974] 1 WLR 1035* , which was a case entirely about discretion, for jurisdiction was there common ground. As to construction, which was therefore not in issue, Lord Denning MR there stated his view that in *Dunning's* case this court had held that the phrase meant "may" or "may well be made" dependent on the outcome of the disclosure. That was an obiter dictum, but it seems to me that it was entirely correct.

[67] As for *Burns v Shuttlehurst Ltd [1999] 1 WLR 1449* , it is possible that Stuart-Smith LJ (with the approval of the other members of the court) did intend to adopt, on his reading of *Dunning v United Liverpool Hospital's Board of Governors [1973] 1 WLR 586* , the test of "a worthwhile action or a reasonable basis for the intended action" as having been laid down by James and Stamp LJJ as the test for deciding whether a claim was "likely to be made": but if so, it follows from what I have said above that I would respectfully disagree with that interpretation. If that was his intention, the question might arise, although the amendment to section 33(2) makes the possibility a theoretical one, whether the interpretation of *Dunning's* case found in *Burns v Shuttlehurst Ltd [1999] 1 WLR 1449* is part of the ratio of the latter case and binding on this court, whatever *Dunning's* case said. Happily, however, that question need not trouble the determination of the present appeal.

> [68] What, however, these authorities on the unamended section in my judgment reveal, and usefully so, is as follows. First, that at any rate in its origin the power to grant pre-trial disclosure was not intended to assist only those who could already plead a cause of action to improve their pleadings, but also those who needed disclosure as a vital step in deciding whether to litigate at all or as a vital ingredient in the pleading of their case. Secondly, however, that (as what I would call a matter of discretion) it was highly relevant in those cases that the injury was clear and called for examination of the documents in question, the disclosure requested was narrowly focussed and bore directly on the injury complained of and responsibility for it, and the documents would be decisive on the conduct or even the existence of the litigation. Thirdly, that on the question of discretion, it was material that a prospective claimant in need of legal aid might be unable even to commence proceedings without the help of pre-action disclosure."

[45] In this jurisdiction Stephens J (as he then was) dealt with this element of the test for pre-proceedings discovery in *Begley v Cowlin & Sons Ltd and Others* [2015] NIQB 62:

> "The purpose of pre-action disclosure is to assist those who need disclosure as a vital ingredient in deciding who to sue and as a vital ingredient in pleading their case. There are various jurisdictional thresholds before an order can be made and if the applicant satisfies those thresholds then there remains an exercise of discretion. So in order to obtain an order pursuant to Section 31 the jurisdictional threshold involves establishing that the respondent is "a person who appears … to be likely to be a party to subsequent proceedings … in which a claim in respect of personal injury to a person or in respect of a person's death is likely to be made". Likely to be made means "may" or "may well be made" *dependent on the outcome of the disclosure* see *Dunning v United Liverpool Hospitals Board of Governors* [1973] 1 WLR 586. It does not mean "more likely on the balance of probability than not" *in the absence of disclosure*. Rather as I have indicated it means "may" or "may well" or "reasonable prospect" if disclosure is granted see *Black and Others v Sumitomo Corporation and Others* [2001] EWCA Civ. 1819. "

[46] In my view therefore the authorities do not permit a court to consider the strength of the evidence that an applicant already holds when considering

the likelihood of proceedings against a respondent. In the circumstances of this application I consider that, in the event that discovery were to produce documents showing blameworthy action by the police or army, then it is likely that the Ministry of Defence and the Chief Constable are likely to be parties to proceedings brought by the applicant.

**POSSESSION CUSTODY AND POWER OF DOCUMENTS**

[47] This element of the test is uncontentious. Both the respondents possess the documents described in the schedule to the summons.

**DOCUMENTS RELEVANT TO AN ISSUE ARISING OR LIKELY TO ARISE OUT OF THAT CLAIM**

[48] Again, this element of the test is uncontentious. Some of the documents sought are clearly relevant to an issue arising or likely to arise out of the potential claim. It is perhaps less easy to be satisfied that each and every category of documents sought is relevant. If the applicant's suspicion that there was collusion is misplaced, then the documents will be of no assistance whatsoever in the *Peruvian Guano* sense of advancing her own case, damaging that of the respondents, or leading to a train of enquiry which may have either of the first two consequences.

**WHETHER DISCLOSURE OF THE DOCUMENTS IS NECESSARY, OR NECESSARY AT THIS STAGE OF THE CASE**

[49] In determining under Order 24 Rule 9 whether discovery is not necessary or necessary at this stage of the cause or matter, Parker LJ held in *Dolling-Baker v Merrett* [1991] 2 All E R 890 CA. that it is for the party objecting to the order for discovery to satisfy the court that discovery is not necessary, or not necessary at the stage the cause or matter has reached.

[50] I am satisfied that pre-proceedings discovery is necessary so as to enable the applicant to formulate her case for the purposes of commencing an action. Currently, it is not possible for her to draft a statement of claim because she does not know whether there is a sufficient basis on which a valid claim can be made.

[51] The existence of an ongoing investigation by the Police Ombudsman into the murder of Mr McAleese and the subsequent police investigation into it does not lead me to conclude that pre-proceedings discovery is unnecessary. In my view the word "necessary" in Order 24 Rule 9 is focussed on the potential legal proceedings which may be commenced by the applicant against both respondents. The Police Ombudsman's investigation will not in itself have the effect of making available to the applicant documents which she considers are required in order to decide whether or not she has a viable claim against either of the respondents.

**THE DISCRETION OF THE COURT**

[52] As Stephens J observed in *Begley v Cowlin & Sons Ltd and Others*, once the four jurisdictional criteria for pre-proceedings discovery have been considered, the court must then move to consider whether in the exercise of its discretion an order ought to be granted. In *Shaw v Vauxhall Motors Ltd* [1974] 1 WLR 1035 Buckley LJ said;

> "It is common ground between the parties that this is a case which falls within the scope of section 31 of the Administration of Justice Act 1970; and that section confers upon the court a discretion which is not fettered by the terms of the section by any conditions whatever. It is, of course, however a discretion which must be exercised with the proper considerations in mind and must not be exercised in an arbitrary manner."

[53] From the earliest days of the passing of the 1970 Act, however, the courts have not been willing to allow the power to order pre-proceedings discovery to be used in merely speculative cases. Buckley LJ continued speaking about the discretion of the court by saying:

> "This power to order discovery before proceedings are commenced is certainly not one which should be used to encourage fishing expeditions to enable a prospective plaintiff to discover whether he has in fact got a case at all."

[54] In *Black and others v Sumitomo and others* Rix LJ considered how this discretion of the court should be exercised:

> "That discretion is not confined and will depend on all the facts of the case. Among the important considerations, however, as it seems to me, are the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure. In the present case, the loss complained of is a speculative market loss of $126 million. ….
>
> That is the injury or loss for which Mr Black seeks a remedy. I am far from saying that there is no basis for a complaint that Mr Black has suffered such a loss, which remains to be seen. That, however, is not the question save in the sense that if it could be said that there was no real prospect of such a loss having been suffered then this application would fail at the very outset. This, therefore, is not a case where the prospective claimant has suffered some reasonably plain injury or loss, at

> any rate on the face of things – such as following medical treatment, or following an accident at work or on the roads, or because of the sale of unfit goods, or non-delivery, or some other breach of contract. …
>
> In such circumstances, unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure, escape the probing eye of the litigation process and thus possibly all detection, I think that the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition. …
>
> In my judgment, the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a mere fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required. The more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise."

[55] The application of these principles may be seen in *Smith v Secretary of state for Energy and Climate Change* [2013] EWCA Civ 1585. Mr Smith was employed by the National Coal Board for 30 years. For much of this time he worked underground. He claimed that he was never provided with hearing protection and has suffered hearing loss as a result. He sought pre-proceedings discovery of his work medical records, personnel records, and an extensive set of documents which might help to establish the noise levels experienced in the various pits where he worked and his employers' knowledge of those levels and the consequent risks. The Court of Appeal allowed pre-proceedings discovery of some, but not all, of the categories of documents sought. In reaching this decision the Court of Appeal considered what it had said earlier in *Black and others v Sumitomo and others.* Underhill LJ, giving the judgment of the court, said :

> "I accept of course that it cannot have been the intention of the rule-maker that a party should be entitled to pre-action disclosure in circumstances where there was no prospect of his being able to establish a viable claim; but in such a case

> disclosure could and no doubt would be refused in the exercise of the discretion which arises at the second stage of the enquiry. … The point remains that if, in the present case, there was no reason to believe that the Appellant might have suffered noise-induced hearing loss then it would not be right to order pre-action disclosure; and even if he had got over that hurdle but the claim could nevertheless be characterised as "speculative" it might be wrong to require any disclosure which was onerous."

[56] The case law suggests therefore that a prospective defendant should not be put to the trouble of giving pre-proceedings discovery in respect of an action which may never be brought. Hence the courts are less willing to give pre-proceedings discovery where the claim is speculative. The respondents submit that this application is just such a speculative application and that I ought to dismiss it in the exercise of my discretion. It is therefore at this point that I am obliged to consider whether there is any evidential support which might give the application a proper basis.

*The Spent Cartridge*

[57] The applicant places much weight on the fact that a spent cartridge was found 200 yards from where Mr McAleese was murdered. The HET Report provides a summary of a police report, dated 19 February 1973, by Detective Sergeant Finlay, after Martin, Millar, Bingham and Barr had initially been charged with the murders of Mr McAleese, Sandra Meli and James Mullan. Detective Sergeant Finlay stated:

> " … an empty cartridge case was found 70 yards up the Mountpottinger Road, from the junction with Newtownards Road. The cartridge case was lying on the left hand pavement as one goes towards the Albertbridge Road. It was approximately 200 yards in a direct line from the spot where the body was found. As a result of forensic examination and test firing of the gun, it was found that the empty shell appeared to have been used in the particular gun found in the possession of the four accused. … It is not possible to say how long the empty shell was lying on the pavement, nor is it possible to prove that the contents of the shell (bullet head) was in fact the one that killed Mr McAleese. It should be noted at this stage that there is a series of buildings between where the empty shell was found and where the body was found."

[58] The HET Report states:

> "The cartridge case was found approximately 200 yards in a direct line from the scene of David's murder. However there

> was no direct line of sight between the two locations because it was a built up area."

[59] What the HET Report concluded was;

> "The weapon that had ejected the spent cartridge case that was discovered 200 yards from the scene of David's murder was linked through ballistic evidence to two other murders in the East Belfast area."

The HET report notes that an internal police report dated 6 March 1973 was sent to the Chief Constable's office which stated :

> "There is no evidence, circumstantial or direct, to connect any of the accused to the murder of David McAleese. The place where the cartridge case was found was so remote from the scene of the murder that it would be impossible to infer that it had any connection."

[60] I do not consider that the available evidence is capable of supporting the statement in Mr Winters's affidavit that the same weapon was used in all three murders or even capable of supporting the assertion made by counsel for the applicant during the hearing that the weapon used to murder Mr McAleese was "forensically linked" to the murders of Sandra Meli and James Mullan. While one can say that the *spent cartridge* is forensically linked to the murders of Sandra Meli and James Mullan, it is not possible to say that the murder of Mr McAleese is forensically linked to the murders of Sandra Meli and James Mullan unless one has concluded that the cartridge found on the Mountpottinger Road was from one of the shots fired at Mr McAleese. This was not a conclusion which Detective Sergeant Finlay, or the HET were prepared to reach.

[61] There are undoubtedly difficulties with mounting an argument that the spent cartridge found at Mountpottinger Street was from one of the shots fired at Mr McAleese. There is no mention, for example, that the motorist who was driving past Mr McAleese and saw him slump to the ground saw another car in the vicinity from which a shot had been fired. Margaret Porter made a written witness statement stating that she saw Mr McAleese fall forward onto the ground. At the time she had been driving her car along the Newtownards Road. She stated that the only vehicle nearby at the time was a Corporation bus and it was about 200 yards in front of her. If there had been another vehicle mentioned, then the argument might have been made that the spent cartridge had been ejected within the car and that, if someone had got out of that car in Mountpottinger Street, then the cartridge, perhaps caught up in his clothing, might have fallen to the ground.

[62] A pistol is of course a short range weapon. It is not being suggested by the applicant that the shots which killed Mr McAleese were taken from 200 yards away in a straight line of sight. Indeed Mr Warnock on behalf of the defendants observed in his skeleton argument that there were a number of buildings between where the cartridge was found and where Mr McAleese was shot. The other possible argument therefore is that the shots which killed Mr McAleese were fired by an individual on foot. The ejected cartridges were then picked up by that individual as he left the scene of the murder on the Newtownards Road. He then either accidentally dropped one of the cartridges, or it fell out of his pocket, as he made his way along the Mountpottinger Road. This is no evidence to support this as a viable theory. Hence, while is accurate to say that the Lugar pistol can be forensically linked to the murders of Sandra Meli and James Mullan and to the spent cartridge found on the Mountpottinger Road, it cannot be said that the Lugar pistol is "forensically linked" to the murder of Mr McAleese.

*The Barron Report*

[63] The applicant also seeks to rely on conclusions found in the Barron Report. On behalf of the first respondent, Aaron Fuller has sworn an affidavit in which he stated;

> "It is also the position of the MOD that the proposed claim is speculative and that the application for pre-proceedings discovery is in essence a wholly speculative fishing exercise. It appears to be argued that because broadly there are credible allegations of collusion with Loyalist organisations and because there was an allegation that a UDA member was involved in Mr McAleese's killing and a related murder, there must have been collusion, negligence and or misfeasance relating to the death of Mr McAleese. This does not follow as a matter of logic. There has been no evidence adduced to substantiate such an allegation."

[64] I consider that there is no evidential assistance to this application in the averments made by the applicant concerning that report. The Barron Report did not address the murder of Mr McAleese in any specific way. What the applicant effectively wishes me to do is draw an inference from the fact that, because that report considered allegations that the RUC and the Army had involvement with Loyalist organisations, and because the Barron Report found a number of those allegations credible, then there may have been some connection between the RUC and/or the Army in connection with the death of Mr McAleese.

[65] The Barron Report states:

> "As the former Northern Ireland Secretary Dr John Reid pointed out to the Commission by letter dated 26 February 2002: "It is a matter of record that some RUC and UDR officers were convicted of collusion with Loyalist paramilitaries in the 1970s." "

However, when considering whether there was collusion between the perpetrators and the authorities in Northern Ireland in relation to the Dublin and Monaghan Bombings, the Barron Report concluded:

> "… it is the view of the Inquiry that this inference is not sufficiently strong. It does not follow even as a matter of probability."

[66] In *Thorn Security Ltd v Siemens Schwartz AG* [2008] EWCA Civ 1161 Mummary LJ described what an inference is:

> "The drawing of inferences is, of course, a familiar technique in judicial decision making. It enables a judge to conclude that, on the basis of proven facts A and B, a third fact, C, was more probable than not.

[67] In *Jones v Great Western Railway Company* (1930) 144 LT194 at page 202, Lord Macmillan held that:

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

[68] This distinction between inference and conjecture has been recognised across the Common Law world. In Canada, the Court of Appeal in New Brunswick stated in *Parlee v. McFarlane* (1999) CanLII 9446 (NB CA):

> "Once again, we must underscore the fundamental difference between conjecture and inference. The first is not a reliable fact finding tool for the simple reason that it does not rest upon a compelling evidentiary foundation. As such, it has no place in judicial decision-making. The second is the product of a time-honoured fact-finding process. This process involves the extraction of a logical conclusion from cogent evidence. As such, it is unquestionably a reliable weapon in the judicial fact finding arsenal."

[69] Similarly, in Australia Kitto J, sitting in the High Court stated in *Jones v Dunkel* (1959) 101 CLR 298:

> "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."

[70] The Barron Report therefore contains no facts from which any legally valid inference may be drawn in respect of the death of Mr McAleese.

*The Ombudsman's Investigation*

[71] The applicant also seeks to rely on the fact that the murder of Mr McAleese now forms part of an investigation by the Police Ombudsman. On 4 May 2016 the Police Ombudsman accepted a complaint made by the family of Mr McAleese in relation to the murder of Mr McAleese. That complaint was accepted to be dealt with as part of Operation Medfield. According to its terms of reference, this investigation was established to establish whether there was any evidence of criminality and/or serious misconduct by police officers in relation to murders carried out by paramilitaries. I accept the argument on behalf of the defendants, however, that the mere fact that an investigation is being undertaken is not in itself evidence of the fact that serious misconduct or criminality has taken place. The purpose of the investigation is to discover whether such misconduct or criminality occurred and the existence of the investigation prior to it having reached any conclusions cannot in itself be evidence grounding a claim for negligence. It may, of course, be that in due course the Ombudsman's investigation does uncover relevant evidence but that is an entirely separate matter.

*The Lost Lives material*

[72] The applicant also seeks to place in evidence material from the book "Lost Lives" in relation to the deaths of Sandra Meli and James Mullan. While it might appear to be a natural and reasonable assumption that the murders of Sandra Meli and James Mullan were carried out by loyalist paramilitaries, using an extract from "Lost Lives" to prove this as a matter of fact to a court is more difficult. The admission of hearsay evidence in civil cases is governed by the provisions of the Civil Evidence (Northern Ireland) Order 1997. The 1997 Order provides of course that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. However, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. I have been offered no affidavit by the authors of the material from

the book to indicate what their sources were. I am unable therefore to attach any evidential weight to the excerpts from the book.

*The Albert Baker assertion*

[73] A further evidential strand upon which the applicant seeks to rely is the statement by Albert Baker. Given both the source of this statement, namely that it is a statement by a person whose evidence on other matters was deemed unreliable by the Northern Ireland courts, and its vagueness, in that there is no indication as to whether or not Baker was referring to the murder of Mr McAleese, it not possible to accord it any evidential weight in this application.

[74] The respondents invited me to place some reliance on the fact that the HET Report refers to correspondence dated 4 April 1989 by ACC White from the RUC Crime Department in which the ACC had written:

> "He [Baker] then began a scurrilous campaign against the RUC in general and also against specific officers. He alleged collusion with loyalist paramilitaries and passing firearms to same. All allegations were fully investigated and found to be completely malicious … Some four years ago the complaints and allegations ceased, probably because Baker had been given some inkling of a release date."

I do not consider that I can attach any evidential weight to ACC White's statement for exactly the same reasons that I could not attach any weight to the material for the "Lost Lives" material offered on behalf of the applicant. Without direct evidence from ACC White there is no way of knowing the sources or grounds of the beliefs he expressed and no way of assessing his statements.

*Army involvement*

[75] In *Sullivan v The Chief Constable of the PSNI and the Ministry of Defence* the applicant was able to point to the nearby activity of the army which was of particular concern to the Sullivan family. Shortly before the murder, while driving home from a wedding in Andersonstown, the Sullivans' car was stopped twice by army road blocks close to their home. The HET checked army records and could find no entries of any road blocks on the route that night. However there is no such involvement of the military either in the vicinity of Mr McAleese's murder or in connection with the investigation into his death.

[76] The HET Report states

> "The family have concerns about the involvement of the army in the enquiry into David's murder. The family originally

> lived in Seaford Street and their home was searched in 1971. David was arrested and taken into custody. The family were concerned that the incident may have been linked to David's death.
>
> There are no references whatsoever to the army in any of the case papers available to the HET. There is no record that David had previously come to the attention of the security forces in any way prior to his murder and no indication that the military played any part in the investigation into David's murder. The HET has been unable to find any police or army record of the search in Seaforde Street in 1971."

[77] The absence of any connection of any military personnel to the circumstances of, or investigation into, the murder of Mr McAleese is, in my view, a significant point in assessing that the application in respect of Ministry of Defence documentation is speculative.

**Conclusion**

[78] Mr Scott submitted on behalf of the applicant that legacy cases involving deaths which occurred during the Troubles could be divided into three categories. Firstly, there were cases where there were no grounds to believe that there had been collusion by the security forces. Applications for pre-proceedings discovery in such cases, he submitted, would amount to "pure fishing expeditions". Secondly, there were cases where there was reason to believe that there could be a valid claim because there were facts which gave rise to a concern. In such cases, he submitted, applications for pre-proceedings discovery were justifiable. Thirdly, there were cases where a plaintiff already had sufficient evidence to initiate an action. In this category of case Mr Scott submitted that an application for pre-proceedings discovery would be unnecessary. I agree with counsel's threefold classification. I am not satisfied, however, that I would have described the second category of cases in the way which he has done. To adopt language similar to that of Underhill LJ in *Black and others v Sumitomo and others*, it might be better to describe the second class of cases as those where there is "some reason to believe" that there had been collusion.

[79] When properly analysed, the affidavits of Mr Winters contain little factual evidence of any weight which would provide any evidential support that could justify the granting of an order for pre-proceedings discovery. What exists is an absence of supporting evidence together with unspecified allegations of negligence and misfeasance. Indeed, the application in this case is even weaker than that in *Sullivan v Chief Constable and the Ministry of Defence* given the currently ongoing investigation by the Police Ombudsman which may, once it has concluded, provide a proper basis for an application for pre-proceedings discovery.

[80] The application is therefore in a wholly different category from that in *Smith v Secretary of State for Energy and Climate Change* where the factual evidence showed that Mr Smith had been employed by the National Coal Board for 30 years and was suffering from hearing loss and sought pre-proceedings discovery of documents which might show a causal link. In my view the statement by Rix LJ in *Black and others v Sumitomo and others*

> "… I think that the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition"

would appear to be entirely apposite in the application before me.

[81] I am also of the view that, even if it had been appropriate to grant an order for pre-proceedings discovery in this case, the breadth of the order being sought by the applicant would not have been proportionate. Firstly, coming to the nature of the documents sought, the application for pre-proceedings discovery is very wide. It was not confined to documents which one party should be disclosing to another at an early stage of litigation. The application seeks materials not only into the murder of Mr McAleese but also material in respect of the murders of Sandra Meli, James Mullan, and Patrick Benstead. Secondly, this application is for a considerable amount of intelligence documents in circumstances where there will inevitably have to be a PII exercise carried out. At a time when there is a Police Ombudsman's investigation which will examine the unredacted versions of all relevant investigatory and intelligence documentation connected with the murder of Mr McAleese, it cannot be a proportionate action to require police to undertake a time consuming redaction process with the purpose of allowing the applicant to examine a redacted version of the same documents.

[82] For these reasons, in the exercise my discretion, I dismiss this application.