Neutral Citation No: [2019] NIQB 90 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McA11073** *Delivered: 27/9/2019*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

PATRICK FRIZZELL

-v-

PSNI

_____

McALINDEN J

[1] This is an application brought by the Plaintiff in this action for an order pursuant to Order 24 Rule 17 of the Rules of the Court of Judicature and under the inherent jurisdiction of the court for permission for the disclosure of documents which will be provided by way of discovery by the Defendants in this lead case, with permission being sought for such disclosure to be provided to the other Plaintiffs and their legal representatives in the linked mid-Ulster murder cases, whether issued or pending.

[2] The summons was issued on 6 March 2019 and the summons is supported by an affidavit which was sworn by Mr Anurag Deb dated 6 March 2019. I have carefully considered the contents of the affidavit and the paragraph that I wish to draw to the attention of the parties is paragraph 10 and it reads as follows:

> "At the review on 7 September 2018 at which I attended counsel for the plaintiff, Mr Justice Maguire directed that three cases Frizzell, Dillon and McKearney should progress as the Vanguard cases. The other actions were deemed non-Vanguard cases and would be able to proceed to a certain point before being stayed. Mr Justice Maguire designated the actions in this way due to the submission by the defendants that it would be in effect impossible for discovery to proceed across all the mid-Ulster actions and that there was a need to have certain actions progress ahead of the others, inter alia, due to the

> volume of discovery and the number of cases in the group. Those actions were to cover the main issues across the wider mid-Ulster actions."

[3] This paragraph sets out the factual background to the making of the application in this case. I also refer to a helpful position paper which was presented by the representatives of Mr Frizzell and the Defendants at the review on 22 February 2019. This sets out and expands the factual matrix underlying the application in this case. I do not consider that it is necessary to quote from that document. I simply refer to it and I place emphasis on the fact that it is an agreed document.

[4] This application is brought pursuant to Order 24 Rule 17 and under the inherent jurisdiction of the court and Order 24 Rule 17, for the avoidance of any doubt, states that:

> "Any undertaking whether express or implied not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the court or referred to in open court unless the court for special reasons has otherwise ordered on the application of the party or of the person to whom the document belongs."

This provision sets out the implied undertaking which is owed by any person receiving documents disclosed or discovered in the course of proceedings and it quite clearly states that this undertaking persists and remains in place until such time as the document is read to or by the court or referred to in open court. It is quite clear that the documentation which is the subject of this application has not been in any sense referred to or by the court or opened to the court in the course of the Frizzell proceedings and, therefore, the implied undertaking clearly applies to the documentation which is the subject of this application.

[5] The legal basis for the relaxation of or any exception to that undertaking is contained, set out and explained in two important decisions. The first decision is a decision of the House of Lords in *Crest Homes plc v Marks* [1987] 2 All ER 1074 and the second decision is a more recent first instant case of the High Court in England and Wales, *ACL Netherlands and Others v Lynch and Hussain* [2019] EWHC 249 (Ch) and I will refer to both those cases at this juncture. The first passage from the speech of Lord Oliver in *Crest Homes* that I would wish to refer to is set out at page 1078 at letter e and it states:

> "The implied undertaking is one which is given to the court ordering discovery and it is clear and is not

> disputed by the appellants that it can in appropriate circumstances be released or modified by the court."

It is important to note that the undertaking is one which is given to the court and it can be released by the court in appropriate circumstances.

[6] The other passage of Lord Oliver's speech in *Crest Homes* that I wish to refer to is contained in page 1083 of the report at letter a and it states that:

> "I do not for my part think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this and this is the general principle that is illustrated. That the court will not release or modify the implied undertaking given on discovery save in exceptional circumstances and where the release or modification will not occasion an injustice to the person giving discovery."

So the key tasks for the court in this matter are firstly to examine whether there are exceptional circumstances which would justify releasing or modifying the implied undertaking; and, secondly, to consider whether the modification or release of the implied undertaking will give rise to or occasion injustice to the person giving discovery.

[7] Those are rather general issues and these general issues were helpfully fleshed out in the decision of *ACL Netherlands* and it is to this decision that I now turn. There are a number of important paragraphs in the judgment of Hildyard J and I think it is important that I refer to these paragraphs in detail. The first paragraph I would refer to is paragraph [23] and it is the commencement of the judge's analysis of the relevant case law and legal principles. When referring to the legal framework in England and Wales, it is important to remember that the Civil Procedure Rules form the basis of the legal framework in England and Wales whereas the Rules of the Court of Judicature form the legal framework in this jurisdiction but on this particular issue there is a great degree of similarity between the provisions and the same principles should obviously apply. So at paragraph [23] to [26] the judge stated that:

> "23. The rules of procedure in the CPR requiring (a) the disclosure of documents relevant to the issues in the case and (b) the exchange of witness statements setting out the evidence to be given by each witness at trial are fundamental features of almost all litigation in this jurisdiction involving a serious contest of fact. Disclosure reflects and promotes "the public interest in

ensuring that all relevant evidence is provided to the court" (*per* Jackson LJ in *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 at [56]). The exchange of witness statements alerts each party to what the opponent's witnesses are going to say at trial and thereby both promotes the prospect of informed settlement before trial and avoids unfair surprise at trial. Both thereby promote the overriding objective at the apex of the CPR.

24. However, both to seek to preserve as far as possible the litigant's right to privacy and confidentiality (of which these rules do constitute an invasion in the public interest) and thereby also to promote compliance with these rules, the court has controlled the use that may be made of such documents. In particular, it has insisted that, without its leave or the consent of the disclosing party (or the witness in the case of a witness statement), no use should be made of them for a purpose other than for the purpose of the proceedings in which they were disclosed or exchanged unless and until they become public by being read in court.

25. In the nineteenth century, the court would require an express undertaking to prevent such collateral use. Over the course of time, this became so standard that it came to be implied. Now the prohibition is expressly and exhaustively set out in the CPR, in CPR 31.22 (as regards the use of disclosed documents) and in CPR 32.12 (as regards the use of witness statements).

26. I stress these matters and their long history by way of emphasising the substantial importance attached to the prohibition against collateral use, and the public interest in its observance. The rules, in other words, may be procedural in form: but they give effect to important public policy, and in exercising its discretion to give permission for collateral use, the Court must be circumspect and protective of that policy. I would stress also that the obligations that the relevant rules impose are owed to the court.

[8] In paragraph [27] of the judgment the judge also considers the definition of the word "use" in the context of collateral use of documents and he quotes from a case of *IG Index plc v Cloete* [2015] ICR 254 and he states:

> "40. What the rule precludes is the use of the document(s) disclosed. 'Use' is a wide word. It extends to (a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard 'use' as extending to referring to the documents, and to any of the characteristics of the document, including its provenance."

[9] The court then went on to consider the scope of the exceptions to the rule against collateral use and it referred to the case which I have already referred to which is the *Crest Homes* case. At paragraph [30] the court then, having considered the case of *Crest Homes,* made the following, I say central, crucial and important observations from which it is clear that the court will only release or modify the restrictions where:

(a) There are special circumstances which constitute cogent and persuasive reasons for permitting collateral use.

(b) The release or modification will not occasion injustice to the person giving disclosure. Further, the burden is on the applicant to persuade the court to lift the restrictions. This burden is particularly heavy and the burden is even greater when the permission is sought by or on behalf of or for the benefit of the person who is not a party to the action in which the documents are disclosed.

[10] So it is quite clear that there must be cogent and persuasive reasons for permitting collateral use and the burden for establishing such reasons is a heavy burden. The court in the *ACL Netherlands* case also went on to state that there was another important issue which had to be taken into account and that issue was the potential for injustice to the person making disclosure. The court concluded that in order to be satisfied that disclosure was appropriate the court had to be satisfied that release or modification of the implied undertaking will not occasion injustice to the person giving disclosure. These are the tests which the court has to apply and perform in the exercise of its judicial discretion in this case.

[11] Paragraphs [32] and [33] of the judgment are important. The judge stated at paragraph [32]:

> "The real question in this case is whether the Applicants have discharged the burden on them to

> show both sufficiently cogent and persuasive reasons for permitting collateral use, taking into account any injustice to the person giving disclosure."

The judge then stated at paragraph [33]:

> "In my view, the burden is such that, in reality, it will usually be difficult, if not impossible, to obtain permission for collateral use except where the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect."

[12] The test is not one merely of the relevance of the documents to the particular case. The *ACL Netherlands* decision clearly indicates that there must be some public interest in favour of onward disclosure which outweighs the public interest and policy underlying the restriction that the rules reflect and this presents a high burden for the Plaintiff to satisfy in the present case.

[13] The court in *ACL Netherlands* then at paragraph [37] went on again to consider the restrictive nature of the scope for collateral disclosure and the judge stated at paragraph [37]:

> "For permission to be given there must be special circumstances, and the release must not occasion injustice to the person giving the disclosure".

[14] It is apparent from the cases which I have cited that the court should not give permission for use or disclosure of information or documents obtained from another party without a careful examination of the circumstances and the need for any such disclosure must be properly justified. Hildyard J referred to the test of actual and immediate necessity gleaned from the case of *Sita UK Group Holdings Limited and another v Andre Paul Serruys and others* [2009] EWHC 869 (QB). He also referred to another decision of Warby J in *Barry v Butler* [2015] EWHC 447 (QB) where the judge refused such an application stating that: "it is not even said that the documents are necessary for the investigation as opposed to being merely of interest". So, in essence, the fact that the documents are relevant is not the test in this context. There must be an overriding public interest in disclosure and there must be a justification of necessity.

[15] The judge in the *ACL Netherlands* case went on to state that in most cases it would be inappropriate to seek the release from the collateral use restriction in respect of wholesale categories of documents and therefore one has to have intense regard to the actual documentation for which the disclosure provisions are being sought.

[16] So having regard to the relative novelty of the issues in this case, it is important I think to summarise the principles that will be applied by the court in coming to a decision in this case. First of all it is a matter for the discretion of the court. The court will only exercise its discretion if there is a clear and strong justification for making an exception to the general rule that collateral use is not permitted. There must be a clear public interest in making such an order and there must be a close examination of the effects of making such an order to ensure that no harm is caused to the legitimate interests of the party making disclosure in this case or who may be required to make disclosure in this case.

[17] Bearing these matters in mind I have now to examine the basis of the case made by the Plaintiff which the Plaintiff says justifies disclosure in this case. The basis of the case is set out in the skeleton arguments provided by the Plaintiff and in the Plaintiffs' submissions entitled "Plaintiffs Form of Words of the Reasons that the Plaintiff Submits Amount to Special Circumstances which Constitute Cogent and Persuasive Reasons" which said document is dated 7 April 2019.

[18] The reasons that are set out therein are that disclosure in this particular instance is a proportionate response to the resourcing issues, is the least interventionist response to the resourcing issues, and is the least intrusive way of avoiding unnecessary delay in the non-Vanguard actions. It prevents disruption of important relationships between non-Vanguard Plaintiffs and their solicitors. It promotes efficiency of non-Vanguard actions and prevents disruption of the mid-Ulster client group.

[19] Mr McGuinness took issue with the reasons provided by the Plaintiff in this document and argued quite forcefully that they really did not constitute cogent and persuasive reasons with an underlying basis of public policy which would justify deviation from the normal rule that collateral use is not permitted.

[20] I take the view that the reasons put forward in this document are really examples of matters encompassed within an overarching theme which is to the effect that the manner in which these cases are being managed, with Vanguard and non-Vanguard cases, and the reasons behind the management of these cases as Vanguard and non-Vanguard cases, are, in essence, related to issues of resourcing and issues of manpower within the various State agencies which are being joined as Defendants in these actions. In essence, these resourcing issues are, at this stage, preventing the continuance of a number of these mid-Ulster cases. If the State is not able by reason of the limited resources and limited manpower at its disposal to provide a system and a process whereby all these cases can be dealt with at the same time and can be dealt with speedily, then the inability of the State to provide such a framework or such a system does constitute an issue of concern in relation to the fulfilment of the State's Article 6 duties to provide a fair hearing by an independent and impartial tribunal within a reasonable time. It is the "within a reasonable time" clause of that particular provision which is of direct relevance in this case.

Therefore, if, by means of resource limitations, all these cases cannot proceed at the same time and if, by means of a change or alteration or relaxation of the implied undertaking in relation to the discovery issue in these actions, some progress can be made in the non-Vanguard cases, then it is incumbent upon this court to make the necessary adjustments and to make an order in relation to a relaxation of the implied undertaking to ensure that the proper investigation of those cases can take place and that the families of the deceased in those various non-Vanguard cases can engage meaningfully and openly with their lawyers and can discuss all documentation which is relevant to their cases which is disclosed during the course of the normal discovery procedures in the lead Vanguard cases. To do otherwise would represent an abdication by the court of its responsibility and duty under Article 6 and could give rise to a situation where lawyer/client relationships in the non-Vanguard cases could be adversely affected and damaged by reason of the inability of those lawyers to openly and frankly discuss documents relevant to those particular clients with those particular clients because of the existence of the implied undertaking in the lead Vanguard cases.

[21] This court finds that there are special circumstances in the context of this body of cases which constitute cogent and persuasive reasons based on public policy considerations which compels the court to make an order varying/dispensing with the implied undertaking which normally applies in relation to discovery.

[22] The court has to be very mindful of the potential for harm to the interests of the person or party making disclosure and, therefore, it is essential that a strictly and comprehensively drafted Order should reflect the thinking of the court in terms of the relaxation of the implied undertaking in this case.

[23] The court has carefully considered the draft Order which has been provided in the Frizzell case and the court has considered the Plaintiff's and the Defendants' submissions on the format and content of the draft Order. The court has concluded that at this stage the draft Order does represent an appropriate and workable framework for a procedure which involves the dispensation and relaxation of the implied undertaking in this case.

[24] The court, having given careful consideration to the various provisions set out in the draft Order, is satisfied in general that it does present a workable framework for disclosure in these cases, by providing appropriate safeguards and protections for the interests of the Defendants. However, having regard to submissions that were made earlier today in relation to the precise content of the Order, the court does not intend to finalise the Order to be made in this case for a further period of 21 days, during which time the parties, hopefully by agreement, can suggest appropriate amendments to the court or, if agreement cannot be reached, the parties can return to the court with separate submissions as to appropriate amendments to this draft and these matters will then be adjudicated upon and a final Order will then be made upon the expiry of the 21 day period. But I must emphasise at this stage that, in general, I consider the protections set out in

the draft Order to be appropriate. There is an issue in relation to the definition of "use" which has been the subject of some discussion today. There is also the issue of whether the Order should specifically include any provision for any party to return to the court so that the court can adjudicate upon any alleged breach of the Order and whether the Order should specifically deal with the consequences of any established breach i.e. not only that an individual may well be held to be in contempt of court but that the entire process of disclosure should be revisited by examining afresh whether the Order itself provides appropriate protection for the interests of the Defendants.

[25] One issue which I think can be readily addressed is the issue of the definition of "use". It will have to be further refined with consideration being given to "use" in the context of the legacy inquest process. The second issue which may be easily dealt with is the issue of a specific reference to a pro forma copy of the implied undertaking being provided to each individual to whom any document is disclosed.

[26] Finally, in reaching the decision I have reached in this case, I have also considered the recent Supreme Court decision in the case of *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38. This was a case involving open access to justice, open and transparent justice, and I was keen to ensure that any Order that I might make in this case involving the relaxation of the implied undertaking would be consistent with the principles set out in the decision of the Supreme Court. Having carefully considered the submissions made by both parties in relation to the ruling of the Supreme Court in the *Cape Intermediate Holdings* case, I am entirely satisfied that the ruling that I have made today does chime with the principles set out in that case and in particular the practical guidance given by the Supreme Court at paragraphs [45] and [47] of that judgment.

[27] The Order that I make today is that, in principle, I am satisfied that the implied undertaking in the Frizzell case and the other lead Vanguard cases can be altered in the context of the non-Vanguard cases that have been specifically identified in the draft Order. I was minded to finalise that Order if possible today but in order to ensure that the parties were given the opportunity to further refine the Order and address the issues that have been raised today I will hold off finalising the Order to be promulgated by this court for a period of 21 days and either an agreed Order can be submitted to the court for approval or further argument in relation to the refinement of the Order can be made in 21 days' time and at that stage I will then finalise the Order.

POSTSCRIPT

[28] This matter came back before me on 29 October, 2019 for finalisation of the Order. I am deeply indebted to all Counsel for their industry and constructive engagement in reaching a consensus view on the content of much of the Order and the Court was only required to adjudicate on two clauses, namely: paragraph 12 and paragraph 13 (d). Having considered the submissions of the parties in respect of

their respective proposals, the Court is persuaded by the Defendants' arguments in respect of paragraph 12 and the thrust of the Plaintiff's arguments in relation to paragraph 13 (d). I now attach the finalised Order to this judgment in the hope that this may provide a template which might be used in other legacy civil litigation.

2017 No. 44663

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION

BEFORE THE HONOURABLE MR JUSTICE McALINDEN

on Friday the 18th day of October 2019
and
Tuesday the 29th October, 2019

PATRICK FRIZZELL
as the personal representative of the estate of Brian Frizzell (deceased)
Plaintiff

-v-

(1) CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND
(2) MINISTRY OF DEFENCE
(3) SECRETARY OF STATE FOR NORTHERN IRELAND
(4) ALAN OLIVER
(5) ANTHONY MCNEILL
(6) JAMES HARPER
Defendants

UPON APPLICATION OF Counsel for the Plaintiff for an Order pursuant to Order 24, Rule 17 of the Rules of the Court of Judicature and pursuant to the inherent jurisdiction of the Court

AND ON HEARING Counsel for the Plaintiff and Counsel for the First, Second and Third Defendants

AND ON READING the documents recorded on the Court file as having been read

IT IS ORDERED that:

1) The implied undertaking not to use material provided by the Defendants to the Vanguard Plaintiffs in the linked Mid-Ulster actions (as defined in the Schedule to the Appendix of this Order) as part of the discovery process for any collateral use shall be varied, pursuant to Order 24, Rule 17 of the Rules of the Court of Judicature (NI) 1980 and/or the inherent jurisdiction of the Court.

2) The circumstances of the variation of the implied undertaking are set out in the Appendix to this Order.

[INSERT NAME]
Proper Officer

Filed date [INSERT DATE]

Appendix

Extent of variation

1) The implied undertaking that attaches to discovery provided by the Defendants[1] in this action is varied to permit:
    a. documentation (and/or other materials) provided by the Defendants to a Vanguard Plaintiff and his legal representatives as part of the discovery process in a Vanguard Mid-Ulster action ("Vanguard discovery") may be provided by the Vanguard Plaintiff's legal representatives to a Plaintiff in a non-Vanguard Mid-Ulster action, provided that documentation is relevant to the non-Vanguard action ("the varied undertaking material");
    b. the use of the varied undertaking material for the purpose of the non-Vanguard action. "Use" is defined in paragraph 3 below.

Identification of Mid-Ulster actions

2) Non-Vanguard Mid-Ulster actions are identified in Schedule A. Varied undertaking material may not be provided to a Plaintiff of any action not identified in Schedule A. Actions not identified in Schedule A may apply to the Court to be added to Schedule A.

Use of varied undertaking material

3) The varied undertaking material may be used in a non-Vanguard action only for the purpose of that non-Vanguard action. "Use" includes but is not limited to:
    a. A non-Vanguard Plaintiff consulting with their legal representatives about their own non-Vanguard action;
    b. A non-Vanguard Plaintiff and/or their legal representatives reviewing the varied undertaking materials in connection with that non-Vanguard action, including but not limited to: identifying the strengths and weaknesses and/or identifying material issues;
    c. Instructing an expert for the purpose of the non-Vanguard action;
    d. Once the stay on the non-Vanguard actions imposed by Mr Justice Maguire on 7 September 2018 has been lifted, use of the varied

[1] Defendants in this Order includes the first three Defendants. It does not include the individual Defendants

undertaking materials to form the basis of interlocutory applications in a non-Vanguard action.

e. Providing the varied undertaking materials to the Coroner in an inquest to which a Vanguard or non-Vanguard Plaintiff is an interested person for use in that inquest as though the varied undertaking materials were disclosed as part of those inquest proceedings, subject to any order of the Coroner in that inquest;
f. Any other use sanctioned by the Court following an application made to the Court.

4) Neither the Plaintiff in this action nor a non-Vanguard Plaintiff shall provide any of the varied undertaking material to any person. The provision of any documentation pursuant to this Order shall only be done by the Plaintiff's legal representatives. A record shall be kept of such provision including: the date of provision, the person to whom it was provided, the material provided and the purpose of the provision.

5) A non-Vanguard Plaintiff may not use the varied undertaking material outside their Mid-Ulster action. The use of varied undertaking materials outside a non-Vanguard action includes providing the material to any individual who is not a Plaintiff in the non-Vanguard actions this would include, but is not limited to, journalists or non-governmental organisations ("NGOs").

6) No individual to whom varied undertaking material has been provided shall permit, cause or allow publication of the material in any forum or format whatsoever, whether in print, orally or electronically.

Attachment of implied undertaking

7) From the moment a non-Vanguard Plaintiff comes into possession of the varied undertaking material they shall be subject to the implied undertaking. The implied undertaking is an obligation owed to the Court. Any breach of the implied undertaking can be sanctioned by the Court, including by way of contempt of court proceedings.

8) Any party who believes that there has been a breach of the implied undertaking may bring an application before the Court to determine if the implied undertaking has been breached and, if so, for the Court to determine the appropriate sanction, including terminating the variation of the implied undertaking permitted under this Order.

Assessment of relevance

Establishing individual identification of material

9) The Defendants shall provide the list of documents in a Vanguard action in Word format.

10) Vanguard discovery should be provided (as far as possible) from the Defendants with sequential page numbering to the Vanguard Plaintiff to whom it is relevant only. Alternatively, the Plaintiffs shall add sequential page to the Vanguard discovery. Any additional discovery that is provided by the Defendants, e.g. if discovery is provided in tranches; if further discovery is provided or when sensitive discovery is provided, then the pagination shall follow-on from all previous discovery to ensure each page of discovery has an individual page number.

Basis of assessment of relevance

11) Not all Vanguard discovery will be provided to the non-Vanguard Plaintiffs. Only Vanguard discovery that is relevant to a non-Vanguard action will be provided to that non-Vanguard action, thereby becoming varied undertaking material. Accordingly, the Vanguard discovery shall be assessed for relevance against the up-to-date statement of claim (including any amendments) lodged in each individual non-Vanguard action.

12) Any list of documents provided will indicate documents which have been provided to another Vanguard Plaintiff, "common documents". Common documents will only be assessed once for relevance as follows herein and the Vanguard Plaintiff's different legal representatives will agree in writing prior to any assessment of common documents which legal representative will carry out the assessment; should agreement not prove possible an application will be made to the Court to adjudicate, the costs of any such application not to be borne by the Defendants.

13) The relevant process for assessment of relevance shall be as follows:
    a. Insofar as it has not already been assessed in any other Vanguard action, a Vanguard Plaintiff's legal representative shall assess its Plaintiff's Vanguard discovery for relevance to each individual non-Vanguard action (whether or not represented by the same legal representatives) against the statement of claim provided in that non-Vanguard action;
    b. A Vanguard Plaintiff's legal representative will provide the Court and the Defendants with a table (an example of the format is given at Schedule B) ("the table") setting out:
        i. Each individual page number of Vanguard discovery;
        ii. The table shall indicate which page numbers make up the documents as described on the list of documents, where possible;
        iii. The name of the non-Vanguard action Plaintiff;
        iv. In respect of each non-Vanguard action, the Plaintiff's legal representatives shall mark against each page number whether they consider the document relevant or irrelevant;

v. If the document is considered relevant, the Plaintiff's legal representatives shall indicate to which paragraph of the statement of claim the document is relevant.

c. When a Vanguard Plaintiff's legal representatives have assessed relevance for each document provided in the Vanguard discovery against all non-Vanguard actions then the table shall be provided to the Defendants and the Court;
d. The Defendants shall then consider the table and, within 6 weeks of the date of provision of the table or longer as is permitted by the Court following an application made by the Defendants to extend time, shall indicate whether they disagree with the provision to each non-Vanguard Plaintiff of the material identified as relevant in their action;
e. Should the Defendants consider the material irrelevant when the Plaintiff has considered it relevant then the Defendants shall mark that on the table;
f. The Plaintiff will within 14 days of the Defendants' response as per para 13(e) above set out its reasons in writing for the consideration of the material as relevant;
g. Within a further 14 days the Defendants will respond to these reasons;
h. Should the Defendants consider that some factor other than relevance requires a document not to be provided to the non-Vanguard Plaintiff then the Defendant shall set out their reasons for that position;
i. The Plaintiff shall have the opportunity to make an application to the Court pursuant to the Court's inherent jurisdiction and/or Order 24, r17 for release of documents that the Defendants object to pursuant to sub-paragraphs (e) or (f) above. Such representations shall only be made once for each "tranche" of discovery, unless the non-Vanguard Plaintiff can establish there has been a material change of circumstance warranting a further application;
j. No Vanguard discovery may be provided to a non-Vanguard Plaintiff until either:
    i. the Defendant has indicated its agreement on relevance; or
    ii. the Court has granted an application for a document's release to the non-Vanguard Plaintiff.
k. At the conclusion of the process envisaged within this paragraph the Vanguard Plaintiff's legal representative will distribute the varied undertaking material to the relevant non-Vanguard Plaintiffs on the condition that the document at Schedule C is signed before any documentation is provided.

14) Any material that the Plaintiff makes an application to have released to a non-Vanguard action shall not be provided to the non-Vanguard Plaintiff unless the Court has granted its release.

15) When considering what material shall be provided from the Vanguard discovery to the non-Vanguard Plaintiffs:

a. the Plaintiff and the Defendants shall consider only Vanguard discovery;
b. the Defendants are under no obligation to conduct any search or investigation for material not contained in the Vanguard discovery until the stay on discovery in non-Vanguard actions has been lifted.

16) Documents provided to a non-Vanguard Plaintiff may not be shared with another non-Vanguard Plaintiff who has not been provided with that same document.

Consequential matters

17) Provision of material provided in discovery in Vanguard actions to the Plaintiffs of non-Vanguard actions does not discharge the Defendants' discovery obligation. The direction of Mr Justice Maguire made on 7 September 2018 that "non-Vanguard cases can proceed up to, but not including, discovery" remains.

18) Any party to this action or non-Vanguard Plaintiff may apply to vary the order or any of its provisions.

19) There shall be liberty to apply.

Schedule A

Non-Vanguard actions

Action	Name	ICOS
1	Briege O'Donnell on behalf of Dwayne O'Donnell	
2	Michael Armstrong on behalf of Tommy Armstrong	
3	Malachy Rafferty	
4	Denis Carville on behalf of Denis Carville Junior	
5	Paul Boyle on behalf of Patrick Boyle	
6	John Boyle	
7	Michael Boyle	
8	Jim Boyle	
9	Jacqueline McKeown (nee Boyle)	
10	John McIntyre on behalf of Daniel McIntyre	
11	Paul Magee on behalf of Fergus Magee	
12	Jacqueline Rogers on behalf of Dessie Rogers	
13	Mary Molloy on behalf of Thomas Molloy	
14	Conor Casey on behalf of Thomas Casey	
15	Anthony Fox on behalf of Charlie and Tess Fox	
16	Kevin Hughes on behalf of Frank Hughes	
17	Linda Hewitt on behalf of Sam Marshall	
18	Colin Duffy	
19	Tony McCaughey	

Vanguard actions

Action	Name	ICOS
1	Patrick Frizzell on behalf of Brian Frizzell	
2	Mary Rennie on behalf of Katrina Rennie	
3	Olive Duffy on behalf of Eileen Duffy	
4	Martina Dillon on behalf of Seamus Dillon	
5	Ruairi Cummings	
6	Christopher Cummings	
7	Bernadette McKearney on behalf of Kevin McKearney	
8	Mary Ellen McKearney on behalf of Jack McKearney	

Schedule B

Example of table to be provided by Plaintiff to Court and Defendants setting out:

a) Frizzell page number and document title
b) Non-Vanguard action Plaintiff
c) Whether relevant or irrelevant
d) If relevant, which paragraph of the statement of claim it is relevant to

Frizzell page	Title	Olive Duffy	Mary Rennie	Conor Casey	Paul Magee
100	Doc X	Relevant: [11]	Relevant [20]	Irrelevant	Irrelevant
101		Relevant: [11]	Relevant [20]	Relevant [17]	Irrelevant
102	Doc Y	Relevant: [11]	Relevant [20]	Irrelevant	Irrelevant

Schedule C

I, [INSERT NAME], the non-Vanguard Plaintiff in the [INSERT] action, have been provided with the documents set out in the attached appendix on [INSERT DATE] ("the documents") by [INSERT NAME] pursuant to the Order of the High Court [DATED] varying the implied undertaking in the Vanguard Mid-Ulster actions ("the Order").

I confirm that I have read the Order and that I understand, in particular:

a) I may not use the documents outside my Mid-Ulster action.
b) I may not provide the documents to any individual who is not a Plaintiff in the non-Vanguard actions e.g. journalists or non-governmental organisations ("NGOs").
c) I shall not publish, or permit, cause or allow publication of the documents in whatever forum or format, whether orally, in print or electronically.
d) The documents provided to me may not be shared with another non-Vanguard Plaintiff who has not been provided with that same document.

In particular, I understand that from the moment I come into possession of the documents I am subject to an implied undertaking not to use the documents outside my own case. I understand this is an obligation owed to the Court. I understand that any breach of the implied undertaking can be sanctioned by the Court, including by way of contempt of court proceedings.

I understand that should there be any breach of the implied undertaking as herein varied, this order may forthwith cease to have any effect and amongst other things I may be required to return any varied undertaking documentation, or copies of the documentation, I have received.

Signed:…… Dated:……

Signed:…… Dated:……
Solicitor for the Vanguard Plaintiff [INSERT]