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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	***Delivered:*** **02/03/2018**

No. 15/076135

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

MARY SULLIVAN on behalf of JAMES SULLIVAN Deceased

Plaintiff;

AND

THE CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND
and
THE MINISTRY OF DEFENCE

Defendants

Master McCorry

The plaintiff on her own behalf and on behalf of the estate of her late husband James Sullivan, applies for an order pursuant to Section 31 of the Administration of Justice Act 1970 and Order 24, rule 8(1) of the Rules of the Court of Judicature in Northern Ireland 1980, for pre-proceedings disclosure of records which she believes would have been created and remain in the possession of the defendants, around the time of the sectarian murder of the deceased by members of a loyalist terrorist gang (the "UVF") on 8th February 1975, at the family's home at Lesley Street, Ligoneil, Belfast. The plaintiff herself was also shot but survived.

[2] The application is grounded on the affidavit filed 11th August 2015 sworn by Gavin Booth, a legal executive in the firm of KRW Law, the plaintiff's then solicitors, and an affidavit filed 15th February 2017 by the plaintiff herself. A detailed pre-proceedings discovery letter was sent on 10th March 2015. A detailed replying affidavit was sworn on 4th November 2016 by Assistant Chief Constable Mark Hamilton on behalf of the first named

defendant. Aaron Fuller, a policy officer within the Ministry of Defence likewise swore a replying affidavit on 22nd September 2016.

[3] In 2011 the Historic Enquiries Team, having reviewed the murder and subsequent investigation, released its report. A copy of the Review Summary Report is exhibited to the grounding affidavit. The two guns used by the killers were subsequently recovered and three persons arrested but could not be connected with the deceased's murder and no-one was arrested or charged in respect of it. An intelligence report named one suspect but the enquiry team could not find any record of his having been arrested or questioned. One matter of particular concern to the family was that shortly before the killing, driving home from a wedding in Andersonstown; their car was stopped twice by army road blocks close to their home and they question why the terrorists were not also stopped. The enquiry team has checked army records and can find no log entries of any road blocks on that route that night. There are no new lines of enquiry.

[4] The family were not happy with the HET Report. In her affidavit the plaintiff avers that in 2013 they became aware that Her Majesty's Inspectorate of Constabulary (HMIC) issued a report which was critical of the Police Service of Northern Ireland and the Historic Enquiries Team following which the HET was dissolved and replaced by the PSNI Legacy Investigation Unit. One of the criticisms of the HET in the HMIC Report was that it allegedly treated cases involving State agencies more favourably than other cases, arousing the family's suspicions that it covered up certain incidents, and this confirms in their mind the family's belief that there was collusion between state agents and the killers, which forms the core of their intended proceedings.

[5] The plaintiff served a draft provisional statement of claim for the purposes of the application, alleging negligence, misfeasance in public office and breach of statutory duty by the defendants, their servants and agents and breach of article 2 of the European Convention on Human Rights (investigative only). This was subsequently amended to provide particulars of assault and murder specifically alleging that the defendants operated an agent who was involved in the murder, and their vicarious liability for his actions. The particulars of misfeasance specifically allege that the defendants caused and permitted the deceased to be shot and killed, caused and permitted a terrorist to feel safe to conduct the killing and use of road blocks to assist the killers' getaway. In order to meet the assertions of the defendants that any action would be time barred they plead the criticisms of the HET by HMIC and the emerging "evidence" of state collusion following publication of the De Silva Report in December 2012.

[6] Section 31 of the Administration of Justice Act 1970 provides:

"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 -
(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."

[7] The relevant rule of court is Order 24, rule 8. Rule 8 (1) which provides:

"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 the order is sought shall be made defendant to that summons."

Rule 8 (3) provides:

" A summons under paragraph (1) …. 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."

[8] Rule 8 (6) provides:

"No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce -
(a) in the case of a summons under paragraph (1), if the subsequent proceeding has already been begun …"

My understanding of the meaning of this provision is that in practical terms the applicant in a pre-proceedings application for disclosure is required to satisfy the same tests as it would in a specific discovery application under Order 24 rule 7 in an action which had already commenced. Order 24, rule 7 provides:

"(1) Subject to rule 9, the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party

to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

And in (3) provides:

"(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified as described in the application and that it relates to one or more of the matters in question in the cause or matter."

[9] 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, is: pending implementation of the recommendations set out at chapter 10 of the Lord Justice Gillen's Review Group's Report on Civil Justice: as pertinent as a general statement today as it ever was.

“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.”

[10] However, this must be read in the light of the provisions of the modern Order 24, including the Order 24, rule 9 stipulation that discovery will be ordered only where necessary, and also of course with due regard to the overriding objective at Order 1, rule 1A. The effect of the modern rule governing applications for specific discovery is summarised at paragraph 24/7/2 of the 1999 edition of The Supreme Court Practice (the “White Book”) in the following terms:-

“This (the application) must be supported by an affidavit stating that in the belief of the deponent the other party has or has had certain specific documents which relate to a matter in question. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power, and (b) relevance of the specified documents (Astra National Productions Ltd v Neo Art Productions Ltd [1928] W.N. 218). This case may be based merely on the probability arising from the surrounding circumstances or in part on specific facts deposed to. See

too Berkeley Administration v McClelland [1990] F.S.R. 381 where at p382 the Court restated the principles as follows: (1) There is no jurisdiction to make an order under RSC, O.24,r7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party. (2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure. (3) The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure."

[11] For completeness sake, 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."

[12] The principles to be applied by a court considering an application for pre-proceedings discovery may therefore be summarised 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.

[13] At hearing and in his skeleton argument plaintiff's counsel sought to argue that the tests for pre-proceedings discovery were actually easier than for specific discovery, with the only requirement being relevance. With respect that does not accord with my understanding of the principles to be applied and is inconsistent with Order 24 rule 8(6). An applicant in an application for pre-proceedings must satisfy the same tests as an applicant seeking specific discovery under Order 24 rule 7.

[14] In John Flynn v Chief Constable of the Police Service of Northern Ireland (delivered 22nd January 2018), a legacy case with allegations of collusion by state agents, the Court of Appeal, Morgan LCJ delivering the judgment of the Court, 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 Lord Chief Justice 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.*
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> *[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.*
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> *[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.*

[15] At 30 he continued:

> *"[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.*"

Whilst the Flynn case did not involve pre-proceedings discovery, as I have previously indicated 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.

[16] At the hearings of the present applications, and in his skeleton argument, in the context of challenging whether the plaintiff could demonstrate that the defendants were likely to be parties to an action, counsel for the defendant sought to argue that the plaintiff's proposed case was unsustainable on a number of grounds and in so doing he in effect sought to approach the application in the same way as one might approach an application to strike out pleadings as disclosing no reasonable cause of action, and argue that the case made by the plaintiff was inarguable and almost incontestably bad. This prompted the plaintiff to serve the draft statement of claim which it subsequently amended.

[17] However I have some concerns about the approach urged on the court by defendant's counsel because any assessment of the strengths or weaknesses of the plaintiff's case, at this early stage and without pleadings, must be approached with caution. Also, I cannot see how the court at this stage could apply a higher burden on the plaintiff to demonstrate that she had an arguable case than it would in an application to strike out a writ or pleadings as disclosing no reasonable cause of action, where the bar is set low. In Black v Sumitomo Corp. [2001] EWCA Civ 1819, Rix LJ, in the context of the CPR in England and Wales, said:

> "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 Hospitals' Board of Governors [1973] 1 WLR 586 both Lord Denning

> MR and James L.J. 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 L.J. thought "likely" meant, for he did not gloss its meaning: but he too agreed, at p591, 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 catchable fish". He added at p591, 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" …"

[18] In short therefore, the court may consider, on the evidence before it, whether disclosure was likely to produce "a worthwhile and catchable fish". Thus the emphasis is not on whether a cause of action is disclosed but whether disclosure of the documents sought would be likely to result in proceedings by the plaintiff against the defendant. Therefore, I think that an exhaustive analysis of each and every aspect of the various causes of action alleged, inevitably provisionally at this stage, is too restrictive. If it is clear beyond contravention that a point would be inarguable in law then it would be unlikely to result in sustainable proceedings by the plaintiff against the defendant and no amount of disclosure would rectify that. For example this plaintiff initially alleged breach of Article 2 of the Convention on both the substantive and investigative limbs, but clearly as the death occurred in 1975 before the 2000 threshold for article 2 substantive claims, that point would be unarguable and the plaintiff conceded this. On the other hand, again for example, the arguments as to the lack of evidence to support a claim of collusion between the killers and the police or army would entail the court embarking upon a consideration of evidence which would be unsafe, and in a sense defeats the whole purpose of the exercise which is to ascertain if the documents held by the defendants could support the plaintiff's claim. Similarly, any objection to pre-proceedings disclosure based on arguable limitation defences would present similar difficulties and would be unlikely to succeed even in an application to strike out pleadings as disclosing no reasonable cause of action because consideration of the argument would entail assessment of possibly disputed evidence.

[19] Following the initial hearing of the application, in order to bring greater focus to the application, the plaintiff sought leave to file an affidavit by an archivist and after some delay an affidavit was sworn by Ciaran McCairt of "Papertrail Legacy Archive Research", a social enterprise and charity offering specialised legacy research services to the legal profession, courts, media and academia. Such a service may have value in complex discovery applications by identifying the sort of documents which may exist, or be expected to exist, and where they may be held or expected to be held, and can therefore facilitate more focused applications. They cannot however

assist on questions such as relevance or necessity which are not matters of expert evidence but legal issues for the court to decide. In this case these benefits and limitations apply to Mr McCairt's averments and the proposed amended scheduled produced on the basis thereof. My impression of the amended schedule is that whilst the documents and classes of documents are more particularly identified and described, and to that extent the application is more focussed, it does not in any way assist by narrowing the scope or volume of documents requested, or the burden on the defendant if required to provide disclosure based on that schedule, and does not really assist at all on the questions of relevance, or crucially, whether such disclosure is necessary at this stage.

[20] Counsel for the defendants provided a written submission in response to Mr McCairt's affidavit and the amended schedule, which for some unexplained reason, which I am entirely satisfied was not his fault, has only reached me recently. It includes a brief resume of the grounds on which the defendants object to the application, including, as they say, the breadth of the application and the failure to show relevance. He also deals with each of the items requested in the amended schedule on the same grounds.

[21] Adopting the approach to complex discovery cases such as this, proposed by the Lord Chief Justice in Flynn, I make the following observations. Firstly, each case is fact sensitive and requires an approach which is developed for that particular case. I believe that this should include not only the breadth or scope of disclosure but also the stage at which it is being applied for and considered. Secondly, proportionality is a significant consideration, again not only in terms of breadth or scope of disclosure sought, but also the stage at which the application is being made and considered. Thirdly, as with any specific discovery application, the test is not solely relevance but also whether the disclosure sought is necessary, or necessary at that stage (see O.24, rule 9).

[22] This is particularly important in an application for pre-proceedings discovery where the issues have not been fully crystallised by pleadings, including statement of claim and defence. Therefore the party applying must not only demonstrate that the documents exist and are in the possession, custody and power of the respondents, and that they are relevant to the issues explained in the grounding affidavit, letter of claim or draft pleadings. It must go further and demonstrate that discovery is necessary at this pre-proceedings stage. Proportionality comes into play in terms of the breadth of discovery sought and the wider the application in terms of range and volume of documents. It seems to me therefore that this places a greater onus on the party applying to show that the scope of the application is proportionate and necessary at the pre-proceedings stage.

[23] In an application of this type, and given the nature of the issues referred to in the pre-action letter and draft statement of claim, it is possible, indeed likely, that issues of Public Interest Immunity (PII) may arise. The defendants in their skeleton argument say that the speculative nature of the plaintiff's case, particularly on the issue of collusion, is such that it is impossible to say at this stage whether PII issues will arise, or whether there will be need for a Closed Material Procedure. The question is addressed further by Assistant Chief Constable Mark Hamilton in his affidavit sworn 4th November 2016, where at paragraph 9 he refers to disclosure of sensitive intelligence materials and avers that "the disclosure to a plaintiff of any materials of this nature is invariably the subject of careful consideration by PSNI in the event that it wishes to make a claim for Public Interest Immunity in respect of some or all of the documents. Depending upon the outcome of that assessment, consideration may also be given to a request for a Closed Material Procedure under the Justice and Security Act 2013. Both of these procedures can only take place in the context of existing proceedings in which detailed claims and particulars have been provided." The issue was not developed at hearing and the plaintiff did not submit a replying affidavit touching on the issue. Of course, an application for pre-proceedings discovery is itself "proceedings", but by its very nature will not be based on the detailed pleadings and particulars that one would expect in a fully pleaded substantive action. My concern is that the approach to complex discovery, including management of PII issues and possible need for CMPs, proposed by the Lord Chief Justice in Flynn, simply will not work, as well or at all, at the pre-proceedings stage in the way that it would in conventional Order 24 rule 7 discovery.

[24] Having regard to the various points referred to in paragraphs [21] - [23] I conclude that a court considering an application for a pre-proceedings disclosure of wide ranging documentation, including sensitive intelligence material, must proceed with caution. The present case is far removed from the standard disclosure likely to be sought in the more common type of case such as employer's liability or other public liability cases where the Gillen Report recommends at Chapter 10-3 automatic pre-proceedings disclosure of relevant documents. It is important not to attempt to set down a principle or general approach that for example there should never be pre-proceedings discovery ordered in any legacy type case, because each case is fact sensitive. However, when I consider the factual background to this case, the nature of the largely un-particularised allegations made, and the issue of proportionality, I am compelled to conclude that the necessity of pre-proceedings disclosure of the documents sought is not made out, and I dismiss the application accordingly.