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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	***Delivered: 21/04/2022***

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Cortney McWilliams

Plaintiff

and

The Chief Constable of the Police Service of Northern Ireland

Defendant

Appearances

Mr Smith BL (instructed by KRW Law-LLP) for the plaintiff

Mr Rafferty BL (instructed by the Crown Solicitor's Office) for the defendant

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Master Bell

[1] This is what is often referred to by legal practitioners as a "legacy case". It involves competing applications, by the plaintiff in respect of discovery, and by the defendant for full and proper replies to the defendant's Notice for Particulars in respect of what are said to be inadequate pleadings, and how those applications should interact.

[2] Mr Scott appeared on behalf of the plaintiff and Mr Rafferty appeared on behalf of the defendant. I received both oral submissions and written submissions from each counsel.

[3] The plaintiff sues the defendant in connection with the death of Kevin McAlorum, her father, who was murdered as a result of a feud between members of the Irish National Republican Army (hereafter "the INLA"). Mr McAlorum was dropping his children off at school on 3 June 2004 when he was shot dead by two

gunmen. The action is for breach of the Human Rights Act 1998, misfeasance in public office and negligence. In broad terms the allegations against the defendant by the plaintiff in her Statement of Claim are that:

(i) A group of unknown persons murdered Mr McAlorum and that amongst these unknown people, were unknown servants, agents, or employees of the Chief Constable.

(ii) Servants, agents or employees of the Chief Constable were aware that informants in the INLA had previously been involved in murder as part of the INLA feud and failed to take any or proper steps to prevent their future involvement in murder and/or to bring them to justice.

(iii) One or more of the men involved in the murder of Mr McAlorum was a Covert Human Intelligence Source (hereafter "CHIS") under the supervision and/or control of the Chief Constable. Notwithstanding this relationship, the Chief Constable and his employees, officers and/or agents failed to take all reasonable steps to prevent a real and immediate risk of life to Mr McAlorum.

[4] The plaintiff has issued a summons seeking an Unless Order regarding the defendant's discovery. The defendant has issued a summons under Order 18 Rule 12 seeking full and proper replies to his Notice for Particulars dated 27 January 2021. Both summonses were listed before me.

The Defendant's Submissions

[5] The defendant acknowledges that this court made an order for discovery on 17 June 2021 and that a list of non-scheduled documents was ordered to be served within 8 weeks of that date, together with a proposed timetable for service of a list of scheduled documents. The parties corresponded in relation to this and the defendant indicated that he could not provide discovery without more particularised pleadings. The defendant takes the view that 14 separate replies provided by the plaintiff to his Notice for Further and Better Particulars are deficient. A fundamental issue is taken with the replies, arguing that adequate replies inform discovery and that inadequate replies hinder discovery.

[6] The adequacy of the replies is challenged extensively but I shall attempt to summarise these challenges in broad terms. Firstly, the defendant challenges replies which simply refer to the report of, and material held by, the Historical Enquiries Team ("HET") who carried out an enquiry into the murder of Barbara McAlorum. The defendant similarly challenges references to the Billy Wright Inquiry Report. Referring to a report in general terms, or to a broad concept of material held by the person or persons who carried out an enquiry, is submitted to be an inadequate way of particularising a claim within the pleadings. Secondly, the replies in respect of the claim of misfeasance in public office are challenged on multiple grounds. These include the lack of an identification of a specific individual or individuals, the lack of an identification of the power which the plaintiff alleges has been abused, and the nature of the bad faith which is being alleged. Thirdly, the defendant challenges the replies in respect of limitation. The defendant had asked in his Notice for full and

precise particulars in respect of the limitation period for each cause of action. Given that the plaintiff refers to multiple dates and multiple causes of action in her Statement of Claim, the defendant submits that he is entitled to know when those causes of action are said to have arisen.

[7] The defendant began by stating the purpose of particulars, as approved by Edmund Davies LJ in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611:

> "The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs." *Supreme Court Practice* (1970), vol. 1, (para 18/12/2).

[8} The defendant then invited me to adopt the views of Cockerill J in the recent Commercial Court decision of *King v Stiefel* [2021] EWHC 1045 (Comm) where she set out her views on the purposes and requirements of pleadings:

> "145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:
>
> > "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial."
>
> 146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "*(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases …*"

147. This is a point which feeds into the dictum of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm), at [18]-[21]:

> 'The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies.'

148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.

149. Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation."

[9] In respect of the challenge to the replies regarding the claim for misfeasance in public office, the defendant referred me to two authorities. Firstly, I was referred to *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16 where Lord Hope set out the applicable test at paragraphs 41 and 42:

> "41. The correct test for misfeasance in public office was established by your Lordships' judgment following the previous

hearing of this appeal: [2000] 2 WLR 1220. I do not wish to repeat or to analyse what your Lordships said in that judgment. But there are two matters with which I must deal. In the first place it is necessary for me to identify my understanding of the various elements in the light of which the question whether the facts pleaded by the claimants in the new draft particulars satisfy its requirements must be tested. ...

42. The following are the essential elements of the tort which are relevant to the examination of the new draft particulars. First, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimants' loss."

[10] The second authority relied upon by the defendant in respect of misfeasance in public office was *Sandhu v HM Revenue and Customs* [2017] EWHC 60 (QB) where Lavender J stated:

> "As May L.J. said in *London Borough of Southwark v. Dennett* [2007] EWCA Civ 1091, at [21]:
>
> > "… In *Society of Lloyds v Henderson* [2007] WL 281779, Buxton LJ emphasised that for misfeasance in public office the public officer must act dishonestly or in bad faith in relation to the legality of his actions. The whole thrust of the Three Rivers case was that knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be

established. To that end, they need to be identified. As Buxton LJ said at paragraph 49:

> 'In this analysis I leave aside the further difficulty that if a case of subjectively reckless failure to act were to be made good, it would have to be demonstrated who took the decisions not to act and with what knowledge. Nothing in those terms has been demonstrated, or sought to be demonstrated, even with the assistance of the proposed fresh evidence. That is no doubt why the case falls back on objective recklessness, which could be demonstrated by inference: but such demonstration is not enough for the tort of Misfeasance in Public Office.'"

Plaintiff's Submissions

[11] The plaintiff submitted that it was indisputable that discovery was due and had not been provided. She recognises that discovery had not been provided in compliance with the order of 17 June 2021 because the defendant considers that he is unable to provide any discovery until the Notice for Further and Better Replies has been answered. However, she adopts the position that she has pleaded her case sufficiently to allow the defendant to understand the case against him and that therefore he should make discovery.

[12] Mr Scott argued for the plaintiff that there were occasions when a plaintiff required discovery before he was able to properly draft his pleadings. As an authority for this proposition he referred me to the decision of *Ross v Blakes Motors Ltd* [1951] 2 All ER 689. In that case the plaintiff issued a writ claiming damages for the breach of a contract for the sale to him of a car by the defendants, who were car dealers. In his Statement of Claim the plaintiff alleged that it was a term of the agreement that the defendants should deliver the car to customers in strict sequence and rotation in relation to the dates of orders for cars placed with them, and that, in breach of their agreement, the defendants had delivered cars to persons who had placed their orders after the plaintiff had placed his order. Before delivering their defence the defendants asked for particulars of this allegation. The plaintiff gave particulars of one such order for a new car, and reserved the right to add to the particulars after discovery. The defendants applied to the Master under Order 19, Rule 7 for an order for particulars of all the persons (other than the person of whom particulars had already been given) to whom the plaintiff alleged cars had been

delivered otherwise than in strict rotation, or, alternatively, for an order that the allegation in the plaintiff's Statement of Claim should be struck out or limited to the single case of which the plaintiff had given particulars. The court concluded that it was impossible to hold that the practice of refusing particulars until after discovery was limited to cases in which a fiduciary relationship existed between the parties. Rather the court would exercise its discretion upon all the circumstances in each case. A very material circumstance for the court to consider, in exercising its discretion, was that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars.

[13] Mr Scott submitted that Order 18, Rule 12(3) provides that:

> "The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, *and the order may be made on such terms as the Court thinks just.*" (Mr Scott's emphasis).

The Rule therefore creates a broad discretion if the Court considers further particulars are required. The only requirement was for the Court to do what it thought just. That plainly depends on all the circumstances in each action.

[14] Mr Scott submitted that there was additional judicial recognition that sometimes discovery must come before properly particularised pleadings in the case of *Sandhu v HMRC* [2017] EWHC 60 (QB) where the plaintiff had brought an action for misfeasance in public office. He referred me to a portion of Lavender J's judgment where the judge stated:

> "… the Claimant has not even identified the individual or individuals whom he alleges had the necessary state of mind. I accept that, in a case where there has been non-disclosure, there are limits on the extent to which the Claimant can be required to give particulars. But the Claimant has known since March 2007 the names of three customs officers …

[15] In respect of the claim for misfeasance in public office Mr Scott argued that at paragraph 16 of the Statement of Claim the plaintiff has pleaded that those who committed misfeasance were RUC officers. As such, they were plainly public officers and were exercising the power of a public officer. Further, the plaintiff specifically pleaded that officers acted maliciously. The plaintiff submits that she does not know which specific officers acted with the requisite state of mind as their identities have not been revealed to her. In support of the argument that a plaintiff need not identify named officers, the plaintiff cites what Lord Hutton said in *Three*

Rivers District Council v. Governor and Company of The Bank of England [2001] UKHL 16 at paragraph 126:

> "It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry (see *Dunlop v Woollahra Municipal Council* [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716). Therefore, I consider that the plaintiffs are entitled in their pleadings to allege in the manner they have done misfeasance in public office against the Bank without having to give particulars of the individual officials whose decisions and actions they claim combined to bring about the misfeasance alleged."

Conclusions

The general approach to pleadings

[16] Mrs Justice Cockerill's judgment in *King v Stiefel* was written in a context where she was criticising overly long pleadings. For instance she refers to what Christopher Clarke LJ said (in a judgment with which Sharp LJ agreed) in *Hague Plant v Hague* [2014] EWCA Civ 1609:

> "Pleadings are intended to help the Court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision, which are often destined never to be referred to at the trial, absent some dispute as to whether a claim or defence is open to a party, being overtaken by the opening submissions. It is time, in this field, to get back to basics."

Despite the different context of *King v Stiefel*, however, the judge's statement of the principles in relation to the purpose of pleadings is, in my view, entirely correct.

[17] Furthermore, in *NEC Semi-Conductors Ltd v IRC* [2006] EWCA Civ 25 Mummery LJ made the following relevant observations at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant

> documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action."

[18] In overall terms, the plaintiff's pleadings in this action are, in my view, clearly inadequate. When one reads the Statement of Claim, it contains merely an outline of a valid civil action in the event that certain facts which are currently not pleaded prove to be true. It contains gaps and conjecture in place of necessary facts. Mr Scott came very close to conceding this point on behalf of the plaintiff when suggesting that any deficiencies in the pleadings could be rectified by replies once discovery had been completed.

But that does not bring an end to the matter. As Lord Hope said in *Three Rivers District Council v Governor and Company of The Bank of England* [2001] UKHL 16 at paragraph 49, a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other. The question is therefore whether discovery should come before the plaintiff is required to improve her pleadings.

[19] A core element of the allegation made by the plaintiff can be found at 10, 13 and 14 of the plaintiff's Statement of Claim:

> "10. On a Thursday in March 1996 Kevin McAlorum Jr had been warned by a member of the INLA whose name is known to the Defendant but not to the plaintiff that the Gallagher faction planned an imminent attack on him.
> …
>
> 13. One or more of the men involved in the murder of the deceased was a CHIS for the Defendant.
>
> 14. The Plaintiff will rely in proof of the causes of action alleged on such facts as are in the knowledge of the defendants (their servants, agents, or employees) but not the Plaintiff and appear from the evidence of the Defendant and their witnesses at the trial."

[20] If, as stated in paragraph 14 of the Statement of Claim, the facts are not in the knowledge of the plaintiff, then the contents of paragraph 13 of the Statement of Claim can only be speculation, namely a belief or theory without firm evidence. At best it might be suggested that the plaintiff wishes an inference to be drawn from the

evidential facts set out in paragraph 8 of the Statement of Claim. That paragraph stated that, at the Billy Wright Inquiry, a witness who was an agent handler gave oral evidence that one of the agents he ran was an INLA agent who reported on over 50% of the members of the INLA. That information was said to be both strategic and tactical. However, in my view, for the reasons set out below, no such inference can properly be drawn.

[21] 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.

In *Jones v Great Western Railway Company* [1930] 144 LT194 at p 202, Lord Macmillan observed 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."

Accepting the truth of the agent handler's evidence only leads one to the point where one might consider it possible, and indulge in conjecture, that the agent being run within the INLA reported on a member of the INLA who had some information about the murder of Mr McAlorum. Even if that were true, one must then take another unjustifiable leap to come to speculation that it was a member of the INLA who was also an agent of the defendant who had murdered Mr McAlorum.

[22] In relation to paragraphs 6 and 7 of the Statement of Claim, which comes from the HET Report into the murder of Barbara McAlorum, the plaintiff submitted that the allegation came "directly from a factual analysis conducted by the defendant's officers." As a statement, this is, in my view, deficient. It is a fact that paragraphs 6 and 7 are a summary of what is written at pages 6 and 7 of the HET report. Nevertheless, it is not logically true that the summary is proof of the underlying facts. What led the HET to reach those conclusions included witness statements, open source material, and intelligence material. It is not a legitimate approach for the plaintiff essentially to assert: "The HET said it; therefore it is fact."

[23] This difficulty is exemplified by the plaintiff's reply to the question: "Give further and precise particulars of the factual basis for the assertion that an unknown person within the INLA warned the deceased." The reply given by the plaintiff was

"This comes from the HET report into the murder of Barbara McAlorum." Mr Scott's written submission stated:

> "Since it was the deceased who was warned, then the plaintiff is unable to gather that evidence. The evidence is contained in a report received by the defendant. The evidence is therefore in the defendant's knowledge and possession, and not the plaintiff's."

The thinking here is, in my view, incorrect. The HET report represents conclusions not facts. They are the conclusions of the most senior officer who was responsible for the report and they may or may not be correct. The conclusions are based on someone's assessment of the credibility of witnesses (or perhaps it might be more accurate to say someone's assessment of the credibility of material in witness statements) and perhaps taken together with intelligence material. However, courts cannot outsource such credibility assessments to others. At best, reports such as the HET report represent opinion evidence. The difficulty is, of course, that, in order to be admissible, opinion evidence must come from a properly qualified expert in a relevant field of expertise and must be accompanied by an expert witness declaration.

Misfeasance in Public Office

[24] As Chadwick L.J. said in *Marsh v. Chief Constable of Lancashire* [2003] EWCA Civ 284 allegations of misfeasance in public office are amongst the most serious – short of conscious dishonesty – that can be made against police officers, or any public official.

[25] When it comes to the plaintiff's allegations of misfeasance in public office, although the observation cited by Mr Scott from *Sandhu* that there are limits to the extent to which a plaintiff can be required to give particulars is entirely correct, the quotation of this reference demonstrates, however, the danger of counsel cherry-picking a few sentences from a judgment without reference to the broader context of what the court said and decided. *Sandhu* is a decision where the court struck out the particulars of claim in relation to misfeasance in public office and dismissed the action. In his judgment Lavender J made a number of important points. Firstly, he had regard to what was said by Judge L.J. in the related context of actions for malicious prosecution in *Thacker v. Crown Prosecution Service*, The Times, 29 December 1997; Court of Appeal (Civil Division) Transcript No. 2149 of 1997, C.A. There Judge L.J. had said:

> "… it is essential that before such actions are allowed to be pursued through the courts, anxious scrutiny should be made of them to ensure that the immunity against action for negligence … is not circumvented by the pleading device of converting what is in reality no more

> than allegations of negligence into claims for malicious prosecution."

By this reference, Lavender J was suggesting that litigants should not be allowed to convert what are in reality no more than allegations of negligence into claims for misfeasance in public office.

[26] In doing so, Lavender J was following Tugendhat J's approach in *Carter v. Chief Constable of the Cumbria Police* [2008] EWHC 1072 QB where Tugendhat J had similarly relied on the dictum of Judge LJ and applied it to the tort of misfeasance in public office before likewise striking out the plaintiff's claim.

[27] In the case before me, the particulars of misfeasance in public office merely state:

> "The particulars at paragraph 15 above are repeated.
>
> Additionally, or in the alternative, by reason of the matters aforesaid, the plaintiff and/or the deceased was caused injury and/or loss by the negligence of the Defendant and/or its servants and/or agents."

A fundamental issue therefore is whether this claim amounts to a valid allegation of misfeasance in public office or whether it is a negligence claim dressed up as a claim for misfeasance in public office and therefore the claim for misfeasance ought not to be allowed to proceed until further and better particularisation is pleaded.

[28] A second important point made by Lavender J in *Sandhu* is the importance of pleading matters in the Particulars of Claim which are sufficient to support an allegation of malice. Lavender J referred to what May LJ said in *London Borough of Southwark v. Dennett* [2007] EWCA Civ 1091, at [21]:

> "… In *Society of Lloyds v Henderson* [2007] WL 2817792 , Buxton LJ emphasised that for misfeasance in public office the public officer must act dishonestly or in bad faith in relation to the legality of his actions. The whole thrust of the Three Rivers case was that knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established.

To that end, they need to be identified. As Buxton LJ said at paragraph 49:

> 'In this analysis I leave aside the further difficulty that if a case of subjectively reckless failure to act were to be made good, it would have to be demonstrated who took the decisions not to act and with what knowledge. Nothing in those terms has been demonstrated, or sought to be demonstrated, even with the assistance of the proposed fresh evidence. That is no doubt why the case falls back on objective recklessness, which could be demonstrated by inference: but such demonstration is not enough for the tort of Misfeasance in Public Office.'"

[29] Lavender J concluded that the matters alleged in the Particulars of Claim were insufficient to support an allegation of malice. He observed that as May LJ had said in *London Borough of Southwark v. Dennett* [2007] EWCA Civ 1091, at [22]:

> "… Subjective reckless indifference is a possibility but not a necessary inference. There are other possibilities of which the strain of overwork or incompetence are two. …"

Lavender J therefore noted that this was in itself sufficient reason for striking out the action in *Sandhu*. A broader reading therefore of the decision in *Sandhu* suggests that, even though the principle may be accepted that in a case where there has been non-disclosure, there are limits on the extent to which the claimant can be required to give particulars, the courts will nevertheless strike out actions for insufficiently well pleaded claims of misfeasance in public office.

[30] I take note that the Law Commission for England and Wales reported on the subject of "Misconduct in Public Office" (Law Comm No 397) in December 2020. Although the Law Commission's focus was on criminal law offences, one of its background papers considered the related tort of misfeasance in public office. Appendix B to the Commission's "Issues Paper 1", entitled "Misfeasance in Public Office", highlighted the difficulties with this tort:

> "Pleading bad faith is difficult, because the pleading rules require details, and professional conduct rules forbid practitioners supporting obviously baseless allegations. Proving bad faith is even more difficult. Where they have a choice, the courts are strongly disposed to believing that bureaucratic error was caused by genuine mistake, even incompetence, rather than by bad faith. The result is that

> of the hundreds of misfeasance claims that are actually filed, very few make it to trial. Most are filtered out for inadequate pleading of bad faith, or because an allegation of bad faith has no real prospect of success. … Misfeasance in public office is an oddity in several respects. Not allowed to trespass on better established torts, it occupies a tiny niche reserved, in essence, for redressing harms caused by public officers who knew or suspected that they were abusing their public power or position to the detriment of the individual."

The Law Commission's background paper went on to explain that the great bulk of misfeasance cases decided have concerned defence applications either to strike out the claimant's pleadings for failure to pinpoint the alleged bad faith, or even for summary judgment because of the sheer improbability of ever proving bad faith. In practical terms, strike-outs and summary judgments are serving as judicially administered filters, weeding out a very large number of claimants who will never be able to prove bad faith with hard evidence, even where their suspicions are reasonable.

[31] As Megaw LJ said in *Cannock Chase DC v Kelly* [1978] 1 WLR 1, at p6:

> "… bad faith, or, as it is sometimes put, "lack of good faith," means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad faith is made against a local authority, they are entitled, just as is an individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out."

[32] Hence, if the plaintiff is making the allegation that a CHIS was involved in carrying out the murder of Mr McAlorum, and that a police officer maliciously ignored information that that murder was going to take place, then that police officer requires to be identified in the pleadings.

The Balance of Fairness

[33] Having concluded that further particulars are required from the plaintiff, the question then arises as to the application of the principle enunciated in *Ross v Blakes Motors Ltd*. The defendant has significant reservations about the principle enunciated in *Ross*. Mr Rafferty argued that the case of *Ross* is a Court of Appeal

case from England and Wales and submitted, therefore, that the decision in question can only, at its height, have the force of persuasive precedent. In other words, he argued that this court is not bound by any finding or principle in *Ross*. Furthermore, he submitted that the defendant is not aware of any authority in this jurisdiction or any other which discusses or affirms the case of *Ross*. Mr Rafferty submitted that it ought therefore to be regarded carefully and that, given the nature of the factual and legal allegations which arose in that case as opposed to the context of this case, the weight which it might attract should be considered negligible.

[34] I do not agree with Mr Rafferty's argument on this point. As a matter of general principle, discovery comes after the pleadings have closed. That is quite clear. However, the Rules are also clear that there are exceptions to this approach. Firstly, the Rules explicitly provide for pre-proceedings discovery. Secondly the Rules allow for an order for specific discovery to be made by the court "at any time". Furthermore, although it did not exist in 1951 when the decision in *Ross* was made, the Rules now contain an overriding objective which provides the courts with a flexibility in order to be fair and just that was not previously explicit in them. It would be surprising therefore if the court did not have the ability to do what the court in *Ross* did. Nevertheless, that is not to say that it is the norm. The norm continues to be that discovery comes after the close of pleadings.

[35] How then should the balance of fairness be struck in this case between requiring the plaintiff to particularise her pleadings and requiring the defendant to make discovery? In my view the balance of fairness clearly requires the court to order that the plaintiff particularises her pleadings before the obligation of discovery is complied with.

[36] The term "fishing expedition", although commonly used by lawyers, is not a particularly informative expression. Rather it is an ill-defined metaphor. In *In re State of Norway's Application* [1987] Q.B. 433 Kerr LJ remarked:

> "The Solicitor-General stated:
>
> > 'Although Freshfields have attempted to explain to me the distinction between a request for evidence which amounts to a 'fishing expedition' and one which does not, I confess to having had some difficulty in grasping the concept.'
>
> This is readily understandable; although "fishing" has become a term of art for the purposes of many of our procedural rules dealing with applications for particulars of pleadings, interrogatories and discovery, illustrations of the concept are more easily recognised than defined. It arises in cases where what is sought is not evidence as

> such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact, which have been raised bona fide with adequate particularisation."

In the Irish High Court decision of *Walsh v The Health Service Executive and others* [2017] IEHC 394 Barrett J, after quoting Kerr LJ in *In re State of Norway's Application*, summarised the meaning of "fishing expedition" this way:

> "In short, the phrase seems to anticipate a speculative exercise whereby, under the guise of discovery, a party seeks to elicit potential information of potential relevance on which a case might potentially be constructed or by reference to which it might potentially be buttressed; this form of discovery is not permitted."

[37] The courts have been consistent in not permitting fishing expeditions by litigants or potential litigants. For example, in Shaw v Vauxhall Motors Ltd [1974] 1 WLR 1035, which concerned an application for pre-proceedings discovery, Buckley LJ said:

> "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."

[38] In my view the case before me is not a case similar to *Ross v Blakes Motors Ltd* where the plaintiff was able to plead facts initially supporting his claim and where the court then held that the defendant knew further facts but the plaintiff did not. Rather it is a case such as *In re State of Norway* where Kerr LJ recognised a fishing expedition for what it was, namely a speculative exercise where the plaintiff seeks to elicit potential information of potential relevance on which a case might potentially be constructed.

[39] For these reasons I order that the plaintiff shall within 28 days provide further and better particulars to the replies. I adjourn the plaintiff's summons generally to allow the replies to be served. I shall hear counsel regarding the costs of the applications at their convenience.