Neutral Citation No: [2025] NIMaster 14	*Ref*: **[2025]NIMaster 14**
	ICOS No:
Judgment: approved by the court for handing down (subject to editorial corrections)	*Delivered:* **08/09/2025**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Martin Carey as personal representative of the estate of Malachy Carey (Deceased)

Plaintiff

and

Chief Constable of the Police Service of Northern Ireland

First Defendant

And

Ministry of Defence

Second Defendant

_____

Mr Bassett (instructed by KRW Law, Solicitors) for the Plaintiff

Mr Rafferty (instructed by The Crown Solicitor's Office) for the Defendants

_____

Master Bell

Introduction

[1] On 12 December 1992 Malachy Carey was murdered in Victoria Street, Ballymoney. He had been shot in the abdomen by someone using a Star .22 pistol. The plaintiff's statement of claim asserts that the gunman ran from the scene to where an accomplice, Gary Archibald Blair, was waiting in a car. The plaintiff asserts that Mr Blair was arrested on 13 December 1992 and charged with aiding, abetting, counselling and procuring the gunman to commit the murder of Mr Carey.

[2] The plaintiff alleges that, prior to his murder, Mr Carey had been subjected to a sustained campaign of intimidation and threats after his release from Magilligan Prison on 24 October 1986. These threats are alleged to have come from members of the Royal Ulster Constabulary and the Ulster Defence Regiment.

[3] The history of the pleadings is as follows. The plaintiff issued a writ dated 31 August 2016 and a memorandum of appearance was filed by the defendants on 9 September 2016. A statement of claim was served on 25 June 2018 setting out a number of causes of action including negligence, trespass to the person, assault, battery, misfeasance in public office and conspiracy by unlawful means. A defence and a Notice for Further and Better Particulars were filed on 5 December 2019. Replies to the defendant's Notice were served on 8 June 2021. The plaintiff subsequently served an amended statement of claim on 26 September 2022.

[4] Two applications have been filed by the parties in respect of this action. The plaintiff filed an application on 14 March 2022 for a list of documents and for specific discovery. The defendants then filed an application dated 28 September 2023 seeking firstly, further and better replies to the defendant's Notice for Further and Better Particulars dated 5 December 2019; secondly, an application for a portion of the plaintiff's statement of claim to be struck out on the ground that it failed to disclose a reasonable cause of action; and, thirdly, a split trial application for the issue of limitation to be treated as a preliminary issue.

Defendants' Submissions

The Strike Out Application

[5] Mr Rafferty began by emphasising that his application to strike out the plaintiff's claim in its entirety was not currently proceeding. It was his view that a plaintiff who filed inadequate pleadings should in the first instance be challenged to improve them and, only if he failed to do so, should an application to strike out the claim be made.

[6] Mr Rafferty observed that the plaintiff had now amended para 38 of his statement of claim. This was a major amendment which deleted 15 separate particulars of negligence. These were all alleged failings or omissions by the defendants. Essentially this was a recognition by the plaintiff that, in the light of recent decisions by the Supreme Court, omissions cases cannot generally succeed against the police. It was in the light of the plaintiff's amendment that Mr. Rafferty informed the court that the application to strike out portions of the plaintiff's statement of claim would not currently be proceeded with. However, the application for further and better particulars and for a split trial were continuing.

The Further and Better Replies Application

[7] Mr Rafferty referred to para 18/12/2 of The White Book on Supreme Court Practice (1999) which states that particulars reflect the overriding principle that litigation between the parties should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs. This view was approved in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611 per Edmond Davies LJ at 620. The White Book states that the purposes of particulars are as follows:

a. To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved.

b. To prevent the other side from being taken by surprise at the trial.

c. To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.

d. To limit the generality of the pleadings.

e. To limit and define the issues to be tried, and as to which discovery is required.

f. To tie the hands of the other party so that he cannot without leave go into any matters not included.

[8] Mr Rafferty cited two additional authorities. Firstly, he referred me to a quotation from Lord Hope in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 at para 49 where his Lordship stated:

> "In my judgment 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 second authority cited by counsel was the decision by Cockerill J in *King v Steifel* [2021] EWHC 1045 (Comm). Cockerill J explained that a pleading serves three purposes. The first is the best known. It enables the other side to know the case it has to meet. The second purpose is to ensure that the parties can properly prepare for trial and that unnecessary costs are not expended nor is court time squandered on chasing points which are not in issue or which lead nowhere. The third purpose 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 his legal team that it has a complete cause of action or defence.

[9] The defendants' Notice for Further and Better Particulars is extensive, with 225 questions having been posed to the plaintiff. I propose simply to give examples of the criticisms that the defendants made of the plaintiff's replies.

[10] Mr Rafferty noted that the replies furnished by the plaintiff began with a "preamble" which provides:

> "Where possible, the Plaintiff has pleaded the full facts as they are presently known through his research of publicly available material. The material facts, dates and times and respective roles

played by the Defendants, their servants and agents are within the particular knowledge of the Defendants, their servants and agents. The Plaintiff is therefore unable to provide fuller details for many of the requests until discovery has been provided."

[11] In question 4, the defendant requires the plaintiff to distinguish the claim against the first defendant from the claim against the second defendant. The defendants submit that the plaintiff has failed to answer the question asked.

[12] In question 5, the defendants asked the plaintiff to give full and precise particulars of the alleged sustained campaign of intimidation and threats since the plaintiff's release from prison in 1986. The defendants stated that the only particular provided in respect of this allegation was that, on one occasion in the late 1980s, he was threatened by members of the RUC Special Branch that he was going to be killed. The defendants argued that this reply is inadequate as, other than the single reference to being threatened that he was going to be killed, the plaintiff has provided no other particulars or reference to:

(i) Who was responsible for any intimidation, threat or harassment

(ii) The nature of the treatment

(iii) When it occurred

(iv) Where it occurred

[13] In question 8, the plaintiff was asked to provide full and precise particulars of the factual basis on which it was alleged that Mr Carey's personal details were allegedly passed to loyalist paramilitaries with the intention that he would be assassinated. The reply is criticised by the defendants on the basis that it does not answer the question, except to assert that Mr Carey was warned that loyalist paramilitaries were in possession of his personal details.

[14] In question 11, the defendant refers to the following portion of the statement of claim:

"The following suspects are linked to the murder of the Deceased and many other murders, which also bear the hallmarks of collusion with the Security Forces:

[Named individual 1]

[Named individual 2]

[Named individual 3]"

The defendants asked for full and precise particulars of the factual basis on how those individuals were linked to "many other murders". The relevant part of the plaintiff's answer is that the full and precise particulars are known to the defendants and are a matter of evidence. This response is characteristic of the plaintiff's general approach to answering the questions contained in the defendants' Notice. In respect of the 225 questions in the defendants' Notice for Further and

Better Particulars, the plaintiff's utilises the response, "The full and precise particulars are known to the defendants and are a matter of evidence" in respect of 190 of those questions.

[15] In question 108 of the Notice, the defendants asked the plaintiff, with respect to the first defendant, to give full and precise particulars of the alleged collusion with terrorists in relation to the death of Mr Carey. The plaintiff's reply to this question was:

> "See 19 & 50 above. The full and precise particulars are a matter of evidence and known to the Defendants."

To understand the plaintiff's approach, the answer to question 19 was as follows:

> "The RUC Special Brach had primacy within the RUC from the running of informants to arrests and raid operations or even surveillance with RUC CID needing Special Branch authority to conduct the arrest of suspects. The RUC Special Branch curtailed investigations, hampered operations and denied colleagues crucial information that could lead to arrests and prosecution. The full and precise particulars are a matter of evidence and known to the defendants."

The answer to question 50 was as follows:

> "The full and precise particulars are a matter of evidence and known to the Defendants. The reports of the Stevens investigation, led by Sir John Stevens, comprised a review into how Northern Irish law enforcement agencies handled their informants, including what informants were permitted, encouraged or incited to do by their handlers. At para 1.3 of the Stevens 3 report dated 17 April 2003 Sir John Stevens stated that:
>
> > 'My enquiries have highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured.
>
> And at paragraph 4.9:
>
> > 'My three Enquiries have found all these elements of collusion to be present. The coordination of, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected. Crucial information was

withheld from Senior Investigating Officers. Important evidence was neither explained not preserved.' "

[16] Mr Rafferty emphasised that these generalised replies setting out the opinion of Sir John Stevens as to what had happened in *other* cases were inadequate as they were entirely silent as to what had happened in respect of Mr Carey's death.

[17] Mr Rafferty argued that the defendants were entitled to know the material facts which underlie the action. He noted that this was a claim where the plaintiff alleged collusion by the defendants. But simply stating that collusion has occurred does not explain to the court or the defendants what is being alleged. He submitted that the defendants could not raise a full defence when they did not know what was being alleged. The amended statement of claim alleges that the defendants are vicariously liable. Mr Rafferty argued that the plaintiff needs to identify *whose* actions it is that the defendants are liable for; *what* those persons have done; and *how* it is that the defendants are liable for the said actions.

[18] Mr Rafferty observed that this was a civil action and not a public enquiry or an inquest. The rules of law which apply were therefore different. In a civil action the plaintiff is required to plead the material facts which were being alleged.

The Split Trial Application

[19] The defendants also make an application under Order 33 rule 3 that the issue of limitation ought to be tried as a preliminary issue.

[20] Mr Rafferty submitted that Mr Carey died on 13 December 1992 and suggested that the plaintiff's replies to the questions in the Notice for Further and Better Particulars assert that the pleaded causes of action accrued on a date which at the latest was 13 December 1992. The writ in these proceedings is dated 31 August 2016. Hence Mr Rafferty submits that the proceedings are statute barred by reason of limitation.

[21] Counsel argued that the prosecution, preparation and defence of this action would be expensive in respect of gathering non-sensitive and sensitive discovery, instructing expert witnesses, consulting, sharing reports, attending joint expert meetings and attending at trial. Such expense would be avoided by a determination in favour of the defendants on a preliminary issue as to whether the plaintiff is entitled to pursue his claim so long after the expiration of any potential limitation periods.

Plaintiff's Submissions

The Further and Better Particulars Application

[22] The plaintiff's position is simple to articulate. In the "preamble" to his replies, the plaintiff essentially takes the opportunity to explain why he should not have to furnish full and proper replies. The plaintiff states his argument thus:

> "In addition, as the Defendants have not provided a proper defence to this matter it would be inappropriate for the High Court to order better particulars (per *Ross v Blake Motors Ltd* [1951] 2 All ER 6. The point is further strengthened by the fact that this is an allegation of wrongdoing by state agents which by its very nature results in the Defendants holding information that has not yet been made available to the Plaintiff by means of discovery; in these circumstances "it is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars" (per Bowen LJ in *Miller v Harper* 38 Ch D at page 112). This approach is fair and makes sense where the state holds secrets and doesn't make them public. Conversely, where the state then asks questions through a notice for particulars about matters such as recruitment dates for agents, the names of handlers or matters that are exclusively within their knowledge, it makes a mockery out of the process whereby genuine requests for particulars are advanced and answered to the best of a plaintiff's ability. Despite the foregoing legal position with regards to the provisions of particulars, the plaintiff will attempt to answer the questions contained within the notice where possible in order to progress this litigation."

[23] Mr Bassett therefore argued that the replies which had been served were adequate in circumstances where the matters sought were known, or should be known, to the defendants and not yet known to the plaintiff or his legal representatives. He submitted that the defendants know they are faced with a claim of collusion. On receipt of adequate discovery of non-sensitive and sensitive discovery, the Statement of Claim and replies could be, and should be, revised at that stage.

[24] Mr Bassett submitted that the Court had before it a situation comparable to that faced by the Master in *Askin, White & Byrne v MOD and PSNI* [2024] NI Master *7* and that the approach adopted in that case ought also to be adopted here. The allegations made by the plaintiff in this case were grave and should be permitted to be improved after adequate discovery by the defendants. The matter was one which required determination at trial.

[25] Mr Bassett contended that for decades the State had operated and concealed a system of collusion between loyalist paramilitaries and security forces. The ostensible purpose was to collect intelligence to combat paramilitaries. The effect, however, was a significant undermining of the rule of law and the deaths of individuals to protect and promote the position of its agents and informers. That system, and its relevance to the murder of Mr Carey, was examined by the Police

Ombudsman in her report entitled "Investigation into Police Handling of Certain Loyalist Paramilitary Murders and Attempted Murders in the North-West of Northern Ireland during the Period 1989-1993". Mr Bassett argued that the Ombudsman made a number of general findings which are now properly characterised by the plaintiff as collusion in his pleadings. There is, in the view of the PONI, evidence demonstrating the "wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder." Mr Bassett submitted that the description of "collusive activity" and "collusive behaviour" in this context amounted, in the different context of civil proceedings, to liability in trespass, negligence, misfeasance and breach of the HRA. Mr Bassett also noted that the Ombudsman reviewed the conduct of police in relation to the murder of Mr Carey in chapter 17 of that report. Mr Bassett asserted that the report records that Mr Carey's personal details were found in a loyalist intelligence cache in November 1989; the weapon used to shoot him was one issued to UDR member but reported as stolen; no arrest was made of suspect Person K in relation to the murder; and the Ombudsman was unable to establish the reason for no arrest notwithstanding his implication in the murder by Gary Archibald Blair. (Person R).

The Split Trial Application

[26] Mr Bassett agreed that the legal basis for the application was Order 33 rule 3 which provides:

> "The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

[27] Counsel noted that the legal principles which guided judicial discretion in the exercise of this power had been set out in the judgment of Master Harvey in *English v Braniff* [2022] NI Master 6. The leading authority in relation to the question as to whether there should be a split trial was the decision of the Northern Ireland Court of Appeal in *Millar (a minor) v. Peeples and another* [1995] NI 5. In addition to those cases, counsel referred me to the decisions in *Mohan v. Graham and others* [2005] NIQB 8, *Glen Water Limited v Northern Ireland Water Limited* [2016] NIQB, *Gibney v MP Coleman Ltd* [2020] NIQB 68 and *McClean v McLarnon* [2007] NIQB 9.

[28] Mr Bassett also referred me to the decision of McAlinden J in *Carberry v MOD* [2023] NIKB 54, which dealt with the issue of limitation in the context of legacy actions. McAlinden J stated:

> "[180] Finally, although guidance contained in the caselaw steers the court towards addressing the issue of limitation and to reaching a decision on this issue before going on (in an appropriate case) to make a determination on the substance of the dispute between the parties; in

> order to properly come to a determination on the limitation issue, it is usually appropriate and, in a good number of cases, it may be necessary, to hear all the available evidence prior to determining the limitation issue. By adopting such a course, the court gains a clear insight into the evidence that is now available, and the quality and cogency of that evidence and it also gains an appreciation of the nature and extent of the evidence which previously would have been available but is no longer available due to the passage of time. The evidence is carefully examined at that stage not for the purpose of making a determination on the substance of the dispute between the parties but rather it is examined in order to ascertain whether such a fair determination can be made on the basis of both parties being able to present relevant, cogent, and reliable evidence to the court."

[29] Mr Bassett therefore argued that I should dismiss the defendant's application for a split trial.

Discussion

The Law on Pleadings

[30] Master Harvey recently made important observations on the subject of pleadings and material facts in *Askin and others v Chief Constable of the Police Service of Northern Ireland and others* [2024] NIMaster 7:

> "It is insufficient to make bare assertions, rather it is necessary to plead the facts which it is intended to prove to support the claim, with sufficient particularity."

and

> "Since only material facts may be included, Order 18 rule 7 also precludes the inclusion of statements of belief. Beliefs do not constitute facts which a plaintiff proposes to prove. The minimum requirements in each case will inevitably depend upon the context, nature of the claim and the complexity of the facts upon which it is founded, however the pleading must contain "the necessary particulars of any claim." The court has power to order particulars of the claim (Order 18, Rule 12(3)) on such terms as it thinks just. This would be futile in this case given the plaintiffs all but concede the current statement of claim and replies to particulars are the best they can muster."

Unfortunately, the case before Master Harvey is not an isolated example of when litigants and their counsel have had to be reminded of these fundamental points. Although it may seem surprising that they need to be addressed, this is a common judicial experience. For example, prior to the 1999 civil procedure reforms in

England and Wales, Lord Woolf felt it necessary to say in "Access to Justice: Interim Report" (London: HMSO, 1995):

> "… essentially, the problem is that the basic function of pleadings—to state succinctly the facts relied on—has been lost sight of. The primacy of this requirement needs to be clearly restated."

[31] Indeed, as Phipson on Evidence expresses it in paragraph 2-02 of the 20th edition, any claim form (ie any Statement of Claim) which fails to provide a concise statement of facts relied upon is likely to be struck out. Similarly, Bullen & Leake & Jacobs in paragraph 1-18 of their "Precedents and Pleadings" (19th edition) concisely express the principle involved and the likely consequence of failure to comply:

> "The statement of case must state facts which, if correct, give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out."

[32] The law reports are replete with explanations as to how pleadings must be drafted. The material facts are all those facts necessary for the purpose of formulating a complete cause of action: *Bruce v Odhams Press Ltd* [1936] 1 K.B.697 at p.712; It is not sufficient that a statement of claim simply expresses a conclusion drawn from facts which are not stated: *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 F.C.R. 109 at p.114. Not only must all material facts be pleaded, but they must be pleaded with a sufficient degree of specificity, having regard to the general subject-matter, to convey to the opposite party the case that party has to meet: *Ratcliffe v. Evans* [1892] 2 Q.B. 524 at p.532. The absence of material facts in a party's pleadings is a fundamental stumbling block in litigation.

[33] In their decision in *Michael O'Higgins v Barclays Bank plc* [2022] CAT 16 Marcus Smith J and Anthony Neuberger commented,

> "Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all the material facts on which a party relies for his or her claim or defence."

Likewise, Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] that a pleading must be supported by evidence which establishes a factual basis for an allegation. It is not sufficient simply to plead allegations which, if true, would establish a claim. There must be evidential material which establishes a sufficiently arguable case which undergirds it.

[34] In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J said:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they

serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

[35] The approach in *Tchenguiz* has been approved in many subsequent authorities, including by Stuart-Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) where, under the heading "The proper function of pleadings", he stated (the emphasis being in the original):

> "30. It should not need repeating that Particulars of Claim *must* include a *concise* statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim … The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise as possible and confined to setting out the bald facts and not the evidence of them": see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.
>
> 31. Where statements of case do not comply with these basic principles, the court may require the claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see *Tchenguiz v Grant Thornton* [2015] EWHC 405 (Comm) and *Brown v AB* [2018] EWHC 623 (QB). It has always been within the power of the court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."

[36] The concept of "material facts" is described in *The Supreme Court Practice* (1999 edition), at para 18/7/11:

> "It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139). "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is

> not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v R* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193)."

[37] A court must, of course, bear in mind that not all facts are proved directly. Some facts are proved by inference. 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.

[38] However counsel sometimes confuse the concept of "inference" with mere speculation and suspicion. 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."

Collins Rice J similarly said in *Sivananthan v Vasikaran* [2023] EMLR 7 at [53]:

> "There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden".

[39] The proper pleading of facts is a fundamental aspect of litigation practice. In *NEC Semi-Conductors Ltd v* IRC [2006] STC 606 Mummery LJ made the following observations:

> "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."

[40] These authorities from England and Wales on the subject of pleading also represent the position which applies in this jurisdiction. The importance of pleading material facts to undergird assertions in a statement of claim was referred to in *Re Rooney's Application* [1995] NI 398 where Hutton LCJ referred to the judgment of Sir Thomas Bingham MR in *R v Secretary of State for Health, ex p Hackney London Borough* [1994] CA Transcript 1037. In that judgment the Master of the Rolls had stated:

> "In the ordinary inter-partes civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are usually sufficiently plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an applicant for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as "fishing": the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

The Lord Chief Justice, with whom Carswell LJ and Nicholson LJ both concurred, endorsed the position that the pleadings in civil actions should contains a series of factual averments alleging acts or omissions by the defendant.

[41] An application of the foregoing principles can be seen in *Media Entertainment NV v Karyagdyyev and another* [2020] EWHC 1138 (QB) where Master Dagnall concluded:

> "It is now six years since the accident. It is four years since proceedings were commenced. It is three and a half years since the original particulars of claim were served. In this procedural context, the claimant has been given ample opportunity to amend and to seek directions to enable him to clarify his case, but he has failed to do that. In those circumstances, there being no factual basis pleaded on which the bare assertions of employment and occupation are made, I am afraid I cannot conclude that the grounds for bringing the claim which are pleaded are reasonably pleaded or are reasonable."

[42] These principles governing pleadings are applied across the full range of civil litigation in Northern Ireland and England and Wales. Hence the principles outlined above apply, for example, to clinical negligence cases, commercial litigation and legacy cases. It should be noted that neither has Parliament passed legislation, nor have the courts developed the Common Law, in such a way as to apply different rules on pleadings to those actions which are usually referred to as "legacy cases".

The Adequacy of Plaintiff's Replies

[43] As an introductory observation in relation to the plaintiff's Replies, the use of Replies as a vehicle for furnishing legal arguments is not one which the court finds appropriate but rather wishes to discourage. Preambles such as were used in this reply should not be furnished. Such arguments should be placed in correspondence between the parties or, if the matter is before the court, in a skeleton argument.

[44] Three flaws in the general approach adopted in the plaintiff's Replies are particularly apparent. Firstly, the plaintiff's has adopted what is sometimes described as a "Micawber approach". This references the expression famously associated with the character Wilkins Micawber in Dickens' novel "David Copperfield" that "something will turn up." Courts have frequently criticised the Micawber approach (whether resorted to by a plaintiff or a defendant). The approach has been criticised at the highest judicial level, for example, by Lord Leggatt and Lord Burrows in their decision in *Tindall v Chief Constable of Thames Valley Police* [2024] UKSC 33; and by Lord Briggs in *Lungowe and others v Vedanta Resources plc and another (International Commission of Jurists and others intervening)* [2019] UKSC 20. Essentially the approach adopted by the courts is that a party must lay a sufficient factual foundation and that it is not sufficient to express an unparticularised hope that something may "turn up."

[45] Secondly, conclusions as to specific instances of collusion in other investigations are utilised by the plaintiff in a general way despite the absence of any direct linkage between what has been found in those other cases and the specific circumstances of the murder of Mr Carey. For example, the plaintiff's answer to question 108 (set out in para 15 of this judgment) is a perfect example of this flaw. The most obvious difficulty with this answer by the plaintiff is that it does not answer the question which was posed, which was in relation to the death of Mr Carey. Essentially the plaintiff's underlying argument is that, given that collusion is said to have occurred in other cases, it probably happened in respect of Mr Carey's death. However there are no facts alleged which point to this being true. Currently what is pleaded on behalf of the plaintiff is a combination of suspicion and speculation together with an application for all relevant documents to see if that suspicion and speculation might possibly be correct.

[46] Thirdly, the replies by the plaintiff offer, as facts, conclusions from sources such as reports by Sir John Stevens and Desmond de Silva. However, what led those authors to reach particular conclusions included an assessment of the credibility of witnesses, witness statements, open source material, and intelligence material of various and unknown (to this court) grades. It is not a legitimate approach for the plaintiff to assert that conclusions reached in a particular report can be offered as facts in this action. The plaintiff's thinking here is, in my view, incorrect. To accept such conclusions as facts would be to outsource the function of determining credibility which is the province of the trial judge alone. The conclusions of the most senior officer who was responsible for the report may, or may not, be correct. At

best, such reports represent opinion evidence. A further difficulty for the plaintiff in making such an argument 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.

[47] Other difficulties also exist in respect of the plaintiff's statement of claim. The plaintiff relies greatly upon the concept of vicarious liability, stating in para 5 of his statement of claim:

> "Both Defendants are vicariously liable for the acts and omissions of their agents referred to below, whether specifically by name or not, whether or not they were acting under their direction and control in the performance or purported performance of their duties at all material times."

[48] The concept of vicarious liability was recently explained by Lord Burrows in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15:

> "Vicarious liability in tort is an unusual form of liability. This is because the vicariously liable defendant is held liable (and treated as a joint tortfeasor) not because it has itself committed a tort against the claimant but because a third party has committed a tort against the claimant. Vicarious liability has often been treated as imposing strict liability because it is not dependent on proving the fault of the defendant. But it differs from strict liability torts. They impose personal liability on a defendant irrespective of fault whereas vicarious liability is precisely not a personal liability. Vicarious liability therefore does not rest on the defendant having owed a duty, whether strict or of reasonable care, to the claimant. It was the third party (who I shall refer to as the tortfeasor) who owed that duty to the claimant."

[49] Lord Burrows went on to explain that there are two stages of the inquiry into vicarious liability. Stage 1 looks at the relationship between the defendant and the tortfeasor and asks whether the relationship was "akin to employment". Stage 2 looks at the connection between that relationship and the commission of the tort by the tortfeasor. The wrongful conduct must be so closely connected with acts the employee was authorised to do that it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.

[50] In *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12 Lord Reed gave the leading judgment and clarified that, at stage 2, where one was dealing with an employee, the appropriate test was that set out by Lord Nicholls in *Dubai Aluminium*:

> "… the wrongful conduct must be so closely connected with acts the employee was authorised to do that … it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment."

[51] Lord Reed then added the following:

> "The general principle set out by Lord Nicholls in *Dubai Aluminium*, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent."

[52] Yet, as Master Harvey explained in *Askin*:

> "The case is founded upon vicarious liability for individuals who are not defendants. It is a minimum requirement that the defendant know the identity of the individuals, the conduct for which it is alleged they are vicariously liable and the relationship which provides the basis for the claim of vicarious liability."

The difficulty for the plaintiff, highlighted by the defendants' Notice for Further and Better Particulars, is that no individual has been identified in the pleadings as having been an informer acting on behalf of the defendants. Nor has any employee of the police or the Ministry of Defence been identified as having committed any act which would justify the court imposing legal liability upon either of the defendants.

[53] As a matter of general principle, it is not proper for a plaintiff to assert that a tort has been committed but provide almost no facts in relation to it and say the facts are known to the defendant's witnesses. This is so for three reasons. Firstly, at the stage of the issue of such a statement of claim, all that exists is mere speculation and conjecture. The plaintiff does not allege that Gary Archibald Blair, who was charged in relation to the murder of Mr Carey, was a police or army agent. Nor does he allege that [Named individual 1], [Named individual 2] or [Named individual 3], whom he alleges "are linked to the murder" of Mr Carey were police or army agents. Nor can it be argued by the plaintiff that there is an inference which can be drawn that such is a fact because there are no underlying facts which have been pleaded from which such an inference can be drawn. In paras 17-35 of the plaintiff's statement of claim entitled "Agent Involvement and Collusion", various persons are indicated as having been members of loyalist terrorist organisations or having assisted such organisations. However, there is no claim by the plaintiff that any of those persons was involved in the murder of Mr Carey. Secondly, there are few facts for a defendant to accept or deny. One of the crucial functions of pleadings is therefore undermined. Thirdly, it creates a situation where the defendants have to assume responsibility for making the plaintiff's case. They have to go and question

all possible witnesses and then, if they do find material which might assist the plaintiff, they are then responsible to disclose it. The result would be that the defendants would be being saddled with the task of investigating their own actions and inactions.

[54] To make matters even more onerous for the defendants, the plaintiff refers to ten additional cases of murder or attempted murder which the plaintiff alleges "are linked to the murder" of Mr Carey. The inclusion of these ten cases in the statement of claim monumentally increases the defendants' discovery task. The plaintiff's statement of claim alleges:

> "The Plaintiff places reliance upon the following *cases* that are linked to the murder of the Deceased, which also bear the hallmarks of collusion with the Security Forces:
>
> Gerard Casey - Rasharkin, County Antrim - 4'""" April 1989;
>
> Eddie Fullerton - Buncrana, County Donegal – 25th May 1991;
>
> Patrick Shanaghan - Castlederg, County Tyrone -12th August 1991;
>
> Thomas Donaghy - Portna, Kilrea, County Derry – 16th August 1991;
>
> Bernard O'Hagan - Magherafelt. County Derry – 16th September 1991;
>
> James McCorriston - attempted murder – 14th February 1992;
>
> Danny Cassidy - Kilrea, County Derry – 2nd April 1992;
>
> Patrick McErlean - attempted murder – 26th August 1992;
>
> Castlerock killings (four people killed) – 25th March 1993;
>
> Greysteel killings (eight people killed) – 30th October 1993.

Mr Bassett submitted that the plaintiff's claim in misfeasance is that the defendants operated a *system* of collusion with the UDA/UFF which extended to the sectarian murder of Mr Carey. That *system* included recruitment, direction, assistance and protection of members of the UDA/UFF. However there are no facts pleaded which link such a system, if that is what it was, with the murder of Mr Carey.

[55] In this para, as with a number of other paras in the plaintiff's statement of claim, there is significant emphasis on the "system" which the defendant is alleged to have developed. The conclusions which the plaintiff wishes the court to draw from this para are clear. Firstly, there was a "system" whereby the police tried to recruit informers in the UVF. Secondly, the police should bear civil liability for every murder carried out by the UVF. As I have indicated, however, at no point in the statement of claim is it ever alleged that any named individual was an informer acting on behalf of the police. This is a crucial missing link in the plaintiff's attempt to bring the concept of vicarious liability into play.

[56] The essence of the plaintiff's case is: Mr Carey must have been killed by someone who was a member of the UDA/UFF; the police had informers in the

UDA/UFF; therefore the defendant is vicariously liable for his murder. If this is the legal theory of the case, then the police and the Ministry of Defence are civilly liable for every murder carried out by every proscribed organisation in which they had informers.

[57] Where what is pleaded is that the defendants or one of their servants has colluded with terrorists, this is not the pleading of a material fact. It is the presentation of an overarching factual conclusion. Where it is correct, there must be material facts from which that overarching factual conclusion can be drawn. If there are no such material facts pleaded, or which can be pleaded, then the overarching conclusion is at risk of being struck out.

[58] I cannot accept the plaintiff's argument that this application is similar to that in *Askin*. I consider that *Askin* was a fundamentally different case. As Master Harvey stated:

> "At the heart of this case is an allegation that serving soldiers, policemen and informants were part of the Glenanne Gang which carried out these bombings (along with a huge string of other crimes). The plaintiffs have pieced together material in the public domain to set out the facts as far as possible that support such allegations, providing names of several soldiers or policemen who were in the Gang."

In particular, Master Harvey found in *Askin* (at para 34) that a former police officer had sworn an affidavit in which he had made admissions concerning membership of the "Glenanne Gang". By comparison, the only core facts which the plaintiff has alleged in this case is that Mr Carey was tragically murdered and Gary Archibald Blair was charged with his murder. (The plaintiff does not even indicate whether he was tried on these charges or whether they were subsequently withdrawn). The rest of the pleading appears to be material which is not specifically linked to the murder of Mr Carey and is, at best, speculation, conjecture and suspicion.

[59] Indeed, although Mr Bassett referred the court to the Police Ombudsman's report entitled "Investigation into Police Handling of Certain Loyalist Paramilitary Murders and Attempted Murders in the North-West of Northern Ireland during the Period 1989-1993" which contains a chapter in relation to the death of Mr Carey, Mr Bassett did not refer me to the conclusion by the Ombudsman contained in para17.20:

> "I am of the view, given the available intelligence, that police could not have prevented, or forewarned of, Mr Carey's murder."

Furthermore, in para 17.31 of her report the Ombudsman also concluded:

> "Persons B and S were both arrested but denied being involved in the murder. Police did not charge either of them due to lack of evidence. The reluctance of a number of witnesses to participate in Identification Parades did not assist the RUC investigation."

In addition, Mr Bassett did not seek to draw my attention to any material facts pleaded which would tend to suggest that the Ombudsman's conclusions were mistaken. Such selective quotations from the Ombudsman's report together with the omissions of her important conclusions only serves to reinforce the view that the statement of claim consists of bare assertions devoid of material facts and based on suspicion and speculation. Indeed those conclusions of the Ombudsman which I have referred to might be argued as undermining the main thrust of Mr Basset's argument that Mr Carey's murder was the result of the defendants' collusion with terrorists.

[60] In the light of the authorities on the necessity of pleadings containing material facts, not only is the amended statement of claim in this action clearly inadequate and suffering from fundamental defects, but the replies furnished by the plaintiff are similarly inadequate and defective. I therefore conclude that the plaintiff must provide full and proper replies to the defendants' Notice. Given that there were 225 questions and 190 responses of "The full and precise particulars are known to the defendants and are a matter of evidence", I propose simply to order that the plaintiff shall review his answers and furnish a revised set of replies. These may or may not be sufficient to fend off a further application by the defendants under Order 18 rule 12 or indeed an application under Order 18 rule 19.

[61] I must also mention that I did not find the decision of *Miller v Harper* cited by the plaintiff to be of assistance in this application. In this 1888 decision, the plaintiffs were the executors of Julia Harper, the deceased wife of the defendant. The statement of claim alleged that when Mrs. Harper married the defendant she was entitled to various chattels which, under the settlement then made, remained her separate estate; that during her coverture she was entitled to a considerable income for her separate use, and bought by means of it various other chattels which remained her separate estate; that she brought all the chattels into the house where she resided, and to which she was entitled to her separate use; that she died, leaving a will, of which the plaintiffs were the executors, by which she disposed of her separate estate; and that the defendant wrongfully retained the chattels and refused to give them up. The plaintiffs claimed a declaration that the furniture, pictures, horse, carriages, and other effects in the possession of the defendant comprised in the settlement or purchased by Mrs Harper with her separate estate belonged to her for her separate use, and now formed part of her estate; a declaration that the plaintiffs as her executors were entitled to them; damages; a receiver; and further relief. The defendant took out a summons requiring the plaintiffs to deliver to the defendant's solicitors full particulars showing the nature and description of the several articles of furniture and other effects, and also the name and description of the horse respectively mentioned or referred to in the statement of claim, together with other details such as dates and prices of the purchases. The position in *Miller v Harper* was very different from the facts in this case. In *Miller v Harper* the plaintiff had adequately pleaded his statement of claim, clearly identifying the furniture, pictures, horse, carriages, and other effects they were entitled to and why they were so entitled. That application bears the hallmarks of a tactical decision to seek information which was both difficult and unnecessary to provide. The defendant

clearly knew the case which was being made by the plaintiff and the material facts which were being alleged.

[62] The decision in *Ross v Blake Motors Ltd* was similarly not of assistance. In the 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.

[63] *Ross v Blake Motors Ltd* was therefore an entirely different case from the one before the court. In that case there had been an entirely adequate statement of claim. The plaintiff had claimed breached of contract in relation to the sale of a car. In his statement of claim he 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 defendant had delivered cars to persons who had placed their orders after the plaintiff had placed his order. Before filing their defence, the defence the defendant asked for particulars of this allegation. The defendants made an application for particulars of all the persons (other than the person of whom particulars had already been given) to whom cars had been delivered otherwise than in strict rotation. The court exercised its discretion and refused to order particulars until after discovery.

[64] In the case before me, 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 were proved to be true. The plaintiff's argument is that since informers committed criminal acts in relation to other murders, he is entitled to sue on the basis that they must have done so in this instance. He therefore looks for facts through the discovery process to justify such an allegation even though he currently

has none. It is obvious that, if the plaintiff's submissions were to be adopted by the court and the discovery process turned up nothing of any assistance to him, that his action would be doomed to failure.

[65] As I recently observed in *Doherty v Chief Constable of the Police Service of Northern Ireland* [2025] NIMaster 13:

> "Legacy cases provide great difficulty for both parties. There are plaintiffs who wonder if, given the number of informers operated by state agencies, their loved one's murder could have been prevented or, even worse, whether the murder was perpetrated by one of those informers. But the plaintiffs may not have enough facts to initiate a valid civil action. However, if a civil action is launched with only bare assertions and without any underlying basis of facts, being pleaded, then the task of defendants in defending such actions is immensely difficult because bare assertions are impossible to rebut whereas, if facts are asserted, they can be demonstrated to be either true or false (as per Lord Hoffman's famous dictum in *Re B (Children)* [2008] UKHL35). This is why facts are so important to the legal process. Often, what plaintiffs in legacy litigation hope to engage in is a truth-seeking process. Another description of such a process is a public inquiry. There are cases where the courts recognise the claimants would like there to have been a public inquiry and that they hope that a civil action will to some extent fill the gap (*Ashley v Chief Constable of Sussex Police* (CA) [2007] 1WLR per Sir Anthony Clarke MR). However, the civil justice system does not offer what a public inquiry does. It offers a forum in which parties allege facts, which they will seek to prove by the calling of witnesses and production of documents, and so demonstrate to the court that they are entitled to be granted relief of a particular kind."

The Split Trial Application

[66] After the hearing in this application was made, the Court of Appeal delivered its judgment in *McFerran v O'Connor, The Chief Constable Of The Police Service Of Northern Ireland and The Northern Ireland Ambulance Service* [2025] NICA 35. I did not consider that the decision in McFerran changed the law in any significant way and there was therefore no need for me to invite counsel to make further submissions on the split trial application.

[67] The decision in *McFerran* refers to the previous decisions in this field of procedure which counsel outlined to me in their submissions. Nonetheless, the court's emphasis on the factors to be taken into account is helpful. The court noted that, in *Mohan v Graham and others*, Deeny J having examined the authorities, also raised the issue of a resolution of proceedings as a relevant factor to weigh in the balance. It also noted that in *McClean v McLarnon*, Stephens J stated that if a split trial

adversely affects the prospects of a settlement then it is a factor that should be taken into account in the balancing exercise. However, Stephens J emphasised that, under the rubric of "what is just and convenient in the interests of all parties and in the public interest," other factors should be taken into account in the exercise of the court's discretion. The factors include, the avoidance of unnecessary expense, the efficient use of court time, the potential prejudice caused by delay in the case, saving expense and costs and the prospect of witnesses having to give evidence twice at separate trials. Another important factor raised by Stephens J in *McClean v McLarnon* for a court to take into consideration in the overall balancing exercise is whether the defendant can establish that there is a substantial prospect that the issue of liability will dispose of the whole case. However, there is no closed list of factors that a judge must consider given the fact-sensitive nature of cases. After reviewing these matters the Court of Appeal stated:

> "The legal question for a court in the exercise of its discretion under Order 33 rule 3 is simply whether, on the facts of a particular case, it is just and convenient to order a split trial taking a broad and realistic view. The factors highlighted in the stated cases above constitute relevant and proper criteria in the determination of what is just and convenient in the interests of all the parties and in the public interest. Clearly, in our view, a consideration of the liability issues and whether they could substantially dispose of the case is a relevant factor."

[68] Taking into account the full range of factors identified by counsel in their submissions, and in particular the views of McAlinden J in *Carberry v MOD* I consider that it would not be just and convenient to order a split trial. I therefore dismiss the defendants' application for such relief.

Conclusion

[69] I adjourn the plaintiff's application for discovery. Until the pleadings have reached a point where the defendants know what facts they must attempt to rebut, it is not reasonable to order them to make discovery.

[70] I grant the defendant's application under Order 18 rule 12 for further and better particulars. Given the extensive number of questions posed in the defendants' Notice, I will allow 12 weeks for the filing of the replies.

[71] I adjourn the defendant's application under Order 18 rule 18 for the striking out of the plaintiff's statement of claim. In the event that the plaintiff is not able to furnish material facts to support his claim, it appears likely that the defendants will renew this application.

[72] I dismiss the defendant's application for a split trial.

[73] It would appear from the submissions made by the plaintiff's counsel that the current version of the amended statement of claim represents the height at which the plaintiff's allegations can be pleaded. I do not know whether or not this plaintiff is

legally aided. However, if legal aid has been granted for this action, this should be a matter of concern given the pressures on the legal aid budget in this jurisdiction. Civil actions which plaintiffs wish to bring on a basis where few material facts are alleged and that "something may turn up" during discovery would not seem to pass the merits test for the granting of legal aid. This is a matter which the Legal Services Agency Northern Ireland may wish to consider.