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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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JOHN FLYNN

-v-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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Before: Morgan LCJ, Sir John Gillen and Sir Paul Girvan

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MORGAN LCJ (delivering the judgment of the court)

[1] On 8 March 2017 Stephens J ordered the defendant to provide specific discovery of documents in 13 specified categories by 13 June 2017. By summons dated 12 June 2017 the applicant applied to Stephens J pursuant to Order 3 Rule 5 of the Rules of the Court of Judicature ("RCJ") for an extension of time within which to comply with the said Order. The respondent consented to an extension of time for compliance until 1 October 2017. Stephens J refused the application for any further extension of time and would have refused any extension at all had it not been for the consent of the respondent. In order to emphasise the urgency of compliance with the timescale he made an Unless Order on 21 July 2017 providing that "unless the defendant provides discovery by noon on 1 October 2017 the defendant's defence is struck out with judgment being entered for the plaintiff on the basis of all the allegations contained in the statement of claim and with damages to be assessed on the same basis". An application for leave to appeal that Order was refused by the learned trial judge on 23 August 2017 and the applicant now renews his application for leave to appeal and if successful applies to extend time for compliance with the Order.

The proceedings

[2] In January 2007 the Police Ombudsman for Northern Ireland ("PONI") published the Ballast Report. This report was the result of an investigation into the police handling and management of identified informants in the early 1990s and thereafter. One such informant was "Informant 1". The report concluded that police officers colluded with Informant 1 in the full knowledge that he was a UVF terrorist with an extensive criminal record and an ongoing involvement in murders, attempted murders and other serious criminal activity. Rather than investigate these crimes police officers in effect protected Informant 1, paid him money, protected him from prosecution, destroyed records, compiled misleading records, avoided compiling proper records, withheld information from the DPP and the court and failed to bring him to justice despite his criminal activities being known to them. In short the Ballast Report concluded that RUC/PSNI Special Branch officers colluded with terrorists by facilitating the situation in which informants were able to continue to engage in paramilitary activity, some of them holding senior positions in the UVF, despite the availability of extensive information as to their alleged involvement in crime.

[3] Among the matters disclosed by the Ballast Report was that on 12 March 1992 Informant 1 pointed a gun at the respondent ("Flynn") and tried to shoot him. The weapon failed to discharge. Informant 1 then made a physical attack on Flynn who managed to fight him off. On 6 May 1997 an improvised explosive device was placed underneath Flynn's motor vehicle by Informant 1 or persons acting on his behalf. The device did not detonate.

[4] On 3 March 2008 Flynn issued proceedings claiming damages, including aggravated and exemplary damages, for personal injuries, loss and damage sustained by him by reason of the negligence, assault, battery, trespass to the person, conspiracy to commit trespass to the person, conspiracy to injure and misfeasance in public office of the applicant, his servants and agents arising out of these incidents. An appearance was entered on behalf of the respondent on 10 March 2008. A statement of claim was not served until 24 November 2011. On 17 January 2012 a defence denying liability and pleading a limitation defence was served and the respondent replied on 19 January 2012. This is a legacy case. We have been informed in the course of this appeal that there are several hundred legacy cases already issued and several hundred more letters of claim many of them involving sensitive information

The history of discovery in this case

[5] The process of discovery has still not been completed nearly 6 years after the service of the defence. In order to understand how this has happened and deal with the issues in this appeal it is necessary to set out the relevant events.

(i) By virtue of Order 18 Rule 20(1)(a) RCJ the pleadings in the action were deemed closed on 10 February 2012. Order 24 Rule 2(1) RCJ required each party, within 14 days after the pleadings in the action were deemed to be closed, to make and serve on the other party a list of the documents which were or had been in their possession, custody or power relating to any matter in question between them in the action. The applicant did not comply with that Order and on 2 March 2012 the Master made an Order requiring the applicant to provide the list. The applicant failed to do so and on 21 June 2013 the Master made an Order that the applicant's defence should be struck out and the respondent have judgement against the applicant unless he served a list of documents verified by affidavit within 21 days from service of the Order. It is accepted that there has been no explanation for the failure to comply with the requirements of the Rules and Orders between February 2012 and June 2013.

(ii) Thereafter further extensions of the time for compliance with the Unless Order were made by agreement. Both parties agreed that there was a period of approximately one year between June 2013 and October 2014 when extensions were agreed in order to facilitate negotiations between the parties and to await the outcome of investigations by PONI regarding potential charges against PSNI officers. The respondents also contend that the stated complexity of the discovery process was one of the reasons for granting the extensions.

(iii) In or about October 2014 PONI indicated that it was not going to pursue criminal proceedings against the relevant PSNI officers. That led to a change of pace in the litigation. On 11 November 2014 the applicant obtained permission to amend its defence and on 17 November 2014 served an amended defence in which it admitted:

(a) that Informant 1 was at all material times acting as a covert human intelligence source providing information to the applicant;

(b) that the respondent was assaulted by Informant 1 on or about 12 March 1992 as alleged;

(c) that a person acting on behalf of and at the behest of Informant 1 placed an improvised explosive device underneath the respondent's motor vehicle as alleged; and

(d) that the applicant admitted that the police officers under his direction and control and for whose conduct he was legally responsible were guilty of misfeasance in public office within

the second limb of Lord Steyn's definition of that tort in Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1.

On 13 November 2014 the applicant served a list of documents containing the pleadings and open correspondence on the basis that the admissions meant that there was no longer a liability issue in the action.

(iv) The applicant submitted that he had complied with the obligation under Order 24 Rule 2 RCJ. That issue came before the Master on 11 March 2015. He rejected the applicant's submission and made an Order that the applicant should make discovery of 94 categories of documents as sought by the respondent. An appeal was lodged in accordance with the Rules and in light of the application for specific categories of documents Stephens J directed that the application should be pursued pursuant to Order 24 Rule 7 which enables the court to order discovery of specific documents where it is contended that they relate to one or more of the matters in question in the action.

(v) A summons was duly issued on 21 August 2015 and heard by Colton J. He stated that the test of relevance was that any document which it is reasonable to suppose contains information which may enable a party either to advance his own case or to damage that of his adversary, if it is a document which may lead to a train of enquiry which may have either of those two consequences, must be disclosed (see Peruvian Guano [1882] 11 QBD 55). He was satisfied that notwithstanding the admissions that had been made there remained a number of significant matters in issue between the parties:

> "(a) Was "Informant 1" acting as a servant or agent of the defendant in relation to the attacks on the plaintiff and in particular is the defendant vicariously liable for the assaults committed by a person identified as Informant 1 or on his behalf on the plaintiff?
>
> (b) Is the defendant liable in negligence to the plaintiff?
>
> (c) Did the defendant conspire to assault and injure the plaintiff?
>
> (d) What was the extent of the misfeasance in public office committed by the defendant its servants and agents? In particular is it limited

to "untargeted malice" which has been admitted?

(e) What is the measure of compensatory damages to which the plaintiff is entitled?

(f) What is the measure of exemplary damages to which the plaintiff is entitled?"

Those issues required determination of a number of factual matters some of which were also identified by the judge:

How often did Informant 1 meet or talk with police officers?
How much was he paid and when?

What did police officers know about the extent of his activities?

Did the police officers know the plaintiff was or remained a target?

What steps did police officers take to protect Informant 1 from being either apprehended or prosecuted?

What was the degree of control exercised over Informant 1?

Did police officers approve or instigate any of Informant 1's activities and in particular the assaults on the plaintiff?

(vi) Colton J expressed himself satisfied that at some stage there had been in the possession, custody or power of the applicant documents which were material to the outstanding issues in the case. He noted that an affidavit had been filed by Supt Middleton on 5 November 2015 stating that no relevant documentation existed in respect of whether there had been any pre-emptive intelligence available to the RUC relating to either of the two assaults on the respondent. It was asserted that this involved taking a cursory look at more than 4500 documents in an exercise which comprised more than 200 hours by those doing so. Subsequently however, it was accepted in a skeleton argument submitted on 26 January 2016 that there had in fact been information received by police on 20 April 1987 of a non-specific threat from one identified loyalist paramilitary group to a number of named individuals, one of whom was the respondent. This had already been disclosed in the Ballast Report. The judge concluded that this was evidence that the applicant had not taken the obligation to provide discovery seriously.

(vii) The judge then turned to the question of proportionality. The affidavits lodged on behalf of the applicant indicated that extensive work would be required with significant resource implications in order to complete discovery. The identification of the material was only the beginning. Because of the sensitivity associated with the material each document would have to be examined to identify material requiring consideration for PII. This required a detailed assessment of each document and the involvement of authorising officers. Consideration would have to be given to the protection of life and protection of methodology. In addition questions would arise in relation to ongoing investigations by the PSNI and the DPP may also have to be involved in the exercise. At that stage consultation with counsel would be required in order to pursue the PII claim by way of submission of the documentation to the Chief Constable. Thereafter the PII submission would have to be examined in relation to each document. It was estimated that this process in this instance could take of the order of two years.

(viii) Colton J accepted that an Order for specific discovery in the action may well be laborious and time-consuming. He considered, however, that much of the relevant discovery should be capable of being readily identified as it was provided to PONI for the Ballast Report. He considered that resources arguments were unattractive where grave allegations had been made against agents of the state. He accepted that when the documentation was identified PII considerations would need to be investigated. He noted that the Master's Order referred to 94 categories of documents and as a result of a further hearing he concluded on 16 June 2016 that the Order should issue in respect of 13 categories of documents. To that extent, therefore, the applicant's appeal was successful.

(ix) The trial judge gave leave to appeal to the Court of Appeal but that appeal was dismissed in 24 February 2017. The court took the view that the applicant's actions in relation to discovery had not been prompt. The court considered that discovery in this case may be a complicated process and that there would be expense involved but concluded that the benefit of providing the discovery outweighed the burden. In the course of that appeal it was accepted on behalf of the respondent that there would be delay in the discovery process.

(x) On 8 March 2017 the discovery application was relisted before Stephens J and he directed that the applicant should comply with the Order by 13 June 2017. Following the application to extend time he gave the ruling on 21 July 2017 which is the subject of this appeal.

The trial judge's analysis

[6] Stephens J noted that the applicant's case was based upon the affidavit of Superintendent Middleton who indicated that the timeframe for compliance with the discovery order would have to be extended to a very considerable degree. Her conservative estimate was that it would take approximately 2 years to reach the point, following completion of the entire process, including all of the PII stages, at which it *might be possible* to serve a list of documents. She estimated that the cost of completing the PII process alone to the point of serving a list of documents would be in excess of £300,000.

[7] One of the issues which arose in the hearing was the extent to which the applicant would have to start from scratch in identifying all the relevant documents in a vast archive of historic documents. The respondent argued that the relevant material had already been produced to the Ombudsman for the Ballast Report. There were a number of adjournments to enable affidavit material to be produced in relation to this as the argument advanced by the applicant was that it would be necessary to start from scratch because there was no list or inventory of the documents that had been made available by PSNI to PONI.

[8] The affidavit evidence indicated that there had been no attempt by PSNI to retrieve any of the documentation which had been forwarded to PONI since the publication of its report in 2007 until the Order made by Stephens J in March 2017. In an affidavit sworn on 29 June 2017 ACC Hamilton stated that the practice followed in the Operation Ballast investigation was that PONI would request access to various categories of documents and the Chief Constable would then produce the files and folders so that PONI could remove and retain all documentation which they considered relevant. ACC Hamilton asserted that he was advised and verily believed that PSNI did not record or retain a list or inventory of documents removed by PONI. Since he did not record the source of his belief Stephens J required a further affidavit which was produced on 20 July 2017. That affidavit referred to 2 folders which were *recently* located which contained a number of receipts relating to documents requested for the purposes of Operation Ballast between July 2003 and March 2005. Some, but not all, of those receipts were quite detailed and represented a record of documents removed. A further folder had been located containing written requests from PONI for information/documentation made between August 2005 and 28 March 2006. There were some receipts in that folder. Stephens J noted that the Court of Appeal in its judgment given on 24 February 2017 said that it appeared clear that the discovery exercise in this case was not one which was starting from scratch because considerable work had already been undertaken to compile material for the Ballast Report.

[9] The learned trial judge concluded that:

(i) the discovery process is complex for the applicant;

(ii) there is a resource implication for the applicant though not to the extent suggested. The judge did not indicate what element of the resource implication he did not accept.

(iii) the identification of relevant documents did not present the difficulty suggested by the applicant and in any event the failure of the applicant to do anything useful about discovery over many years is unacceptable;

(vi) years have passed without compliance;

(v) there was no clear, acceptable plan for future compliance; and

(vi) all of this had to be seen in the context that there was no evidence of any attempt by the applicant to comply with its initial obligation under the rules to serve a list of documents or to comply with all the orders made by the Master over many years.

[10] The learned trial judge noted that the rules and orders of the court were there to be observed (Davis v Northern Ireland Carriers [1979] NI 19). He indicated that he would have refused the applicant's application had it not been for the respondent's agreement to an extension until noon on 1 October 2017.

The submissions on appeal

[11] Mr Hanna first took issue with the judge's conclusion that there had been no attempt to comply with all of the orders made by the Master over many years. He accepted that there had been delay in the pursuit of the action. There had been a delay of 3 years and 8 months between the entry of an appearance by the applicant and the delivery of the statement of claim by the respondent. He accepted that there had been unexplained delay on the part of the applicant in complying with the Master's Order made in March 2012 until the Unless Order made in June 2013. Thereafter he maintained that both parties had agreed to extend time for discovery until October 2014 and the Master had extended the time for compliance accordingly. There was, therefore, no failure by the applicant to comply with any Order of the Master during this period as extensions to the period for compliance were made. Any suggestion of delay had, in any event, to be shared between the applicant and the respondent and had been approved by Order of the Master.

[12] Once it became clear that negotiations were not going to be successful and that there was unlikely to be any prosecution of police officers arising from the Ombudsman's Report the applicant expeditiously served an amended defence and, Mr Hanna submitted, complied with Order 24 Rule 2. Indeed he found some support for that position in the direction by Stephens J that the respondent should

pursue its application by virtue of Order 24 Rule 7 in respect of particular documents which it did not in fact do until August 2015. The Master's Order which was the subject of the appeal to the High Court and eventually dealt with by Colton J was made on the basis of Order 24 Rule 2 in March 2015 and directed discovery of 94 categories of documents. Although the applicant did not fully succeed in the appeal from that Order the number of categories of documents was reduced from 94 to 13 in June 2016.

[13] Finally, on this element of delay, it was submitted that the applicant was pursuing a *bona fide* appeal on the basis of the advice of counsel. Support for that proposition was gained from the grant by Colton J of leave to appeal his decision in June 2016 which appeal was subsequently dismissed in February 2017. Colton J expressly accepted in his judgment that an order for specific discovery may well be laborious and time-consuming and the Court of Appeal in February 2017 accepted that discovery may be a complicated process and that there would be expense involved.

[14] Stephens J was particularly critical of the failure by the applicant to identify and recover from the Ombudsman the potentially relevant material. The failure to identify the material was also criticised by the Court of Appeal in February 2017. It was submitted, however, that the learned trial judge failed to identify any basis upon which to criticise the detailed analysis by ACC Kerr of the steps which would have to be taken in order to carry out the PII process once the materials had been recovered from the Ombudsman. In his judgment dealing with leave to appeal to this court the learned trial judge indicated that he found the evidence about what resources were needed, what resources had been sought and what resources would be deployed inadequate.

[15] Mr Hanna criticised the indication by the learned trial judge that he was also influenced by the fact that there was no clear acceptable plan for future compliance. He contended that it was difficult to see how the process described in the affidavit of ACC Kerr could be circumvented in light of the decision of the Supreme Court in Al Rawi v Security Service 1 [2012] AC 531. He also contended that an Unless Order was inappropriate in this case where there had been no failure to comply with the Order of Colton J but rather the pursuit of entirely legitimate appeals.

[16] Mr Fee reminded the court that it should respect any discretionary judgement made by the learned trial judge. He noted that there was an extensive period of non-compliance after February 2012. He maintained that the adjournment of the application to strike out the defence for failure to comply with discovery between 21 June 2013 and October 2014 did not absolve the applicant from complying with the Rules. The service of the list in November 2014 was not compliance with Order 24 Rule 2 RCJ. Both Colton J and the Court of Appeal criticised the applicant for failure to take his discovery obligations seriously. Apart from a scoping exercise involving

207 hours work and six police officers the applicant did nothing to comply with this discovery obligation between November 2014 and March 2017.

[17] The respondent accepted that Colton J and Stephens J recognised that discovery would be burdensome in terms of resources and have an attendant degree of complexity. Although an analysis of the process was provided by ACC Kerr and an affidavit on the resources available to PSNI was provided by Mr Harris it was submitted that these were inadequate to identify the financial or other resources required to deal with discovery in this case, what resources had been sought, how they had been sought and when they had been sought. It was submitted that the applicant had failed to provide an accurate picture of the extent of the burden involved with the task. That was related to the fact that the applicant had no suggestion to make that might reduce the time for discovery below two years.

[18] The respondent submitted that lengthy periods for discovery were allowed in the course of this litigation and latitude was granted on the basis that the facts of the case rendered the discovery obligation burdensome. In light of the time which has passed the respondent submitted that the applicant was simply determined not to provide discovery. There had been ample time to deal with PII.

Leave to appeal

[19] We accept that leave to appeal should only be granted in a case where the applicant demonstrates an arguable case with a reasonable prospect of success that the trial judge had gone plainly wrong. The first ground pursued by the applicant was that the learned trial judge had been wrong to conclude that there had been no attempt to comply with the orders made by the Master over many years. This is a submission which challenges an inference of fact made by the learned trial judge on the basis of the evidence as a whole. The issue for this court is whether it was permissible for the learned trial judge to reach that conclusion. There is no dispute about the fact that the conclusion was material to his decision to refuse to extend time for compliance with the discovery order.

[20] In order to succeed in that submission the applicant had to identify a mistake in the judge's evaluation of the evidence that was sufficiently material to undermine the conclusion (see Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21). Reticence on the part of an appellate court is appropriate even in those cases where the issue has been determined on the affidavits rather than oral evidence (see DB v Chief Constable of PSNI [2017] UKSC 7).

[21] We entirely accept that the learned trial judge was entitled to make his trenchant criticisms of the failure of the applicant to gather in the relevant documentation which had been largely in the possession of PONI. The availability of the documentation had been noted by Colton J in 2016 and the Court of Appeal in

February 2017. It was not until April or May 2017 that the applicant had sought and recovered the documentation.

[22] Although it is perfectly clear that there was a failure to comply with the Master's Order between February 2012 and June 2013 we do not accept that it can be said that there was no evidence of any attempt by the applicant to comply with orders of the Master over many years. It is clear from the e-mail correspondence between the parties that during this period and thereafter consideration was being given by PONI to the prosecution of a number of police officers. That explains why the documents were retained by PONI and not returned to PSNI. The rejuvenation of the litigation in late 2014 was as a result of an e-mail exchange between the parties noting that a decision had been made not to prosecute.

[23] That decision prompted the admission defence lodged by the applicant and the list of documents pursuant to Order 24 Rule 2 submitted on the basis that liability did not now remain in issue. As Stephens J noted the correct approach of the respondents at that stage should have been to pursue an application for specific discovery under Order 24 Rule 7. Despite that the Master made an Order in March 2015 requiring disclosure of 94 categories of documents. Stephens J was not prepared to deal with the matter other than under Order 24 Rule 7 and it was that application made in August 2015 under that Rule which by virtue of the appeal reduced the categories of documents to 13 in June 2016.

[24] The point is that it was the Master who extended time in respect of the Unless Order obtained in June 2013 until the end of 2014. One can well understand the basis for such extensions since consideration of prosecution was still active during that period and disclosure of the documents at that stage may have given rise to difficulties in pursuing that prosecution. The Order made by the Master in March 2015 was appealed and thereafter fell into abeyance as a result of the fresh application made under Order 24 Rule 7 for specific documents. In our view this cannot be characterised as non-compliance with the orders of the Master over many years and the judge was wrong to so conclude. We accordingly grant leave to appeal. Since this matter was material to the exercise of his discretionary judgment we must address the application for an extension of time for compliance with the Order afresh.

Discovery principles

[25] Discovery has been the subject of careful consideration in the Civil Justice Reports carried out under the chairmanship of Sir Anthony Campbell in 2000 and more recently by Sir John Gillen in 2017. The Gillen Report describes disclosure or discovery as the process by which parties to proceedings disclose to each other by list the existence of relevant documents and, colloquially, is used to describe not only the disclosure but also the production and inspection of the documents. That report

notes that Order 24 RCJ makes provision for automatic disclosure by list after proceedings are closed and for discovery of particular documents.

[26] The test for disclosure in this jurisdiction is that set out in the Peruvian Guano case and referred to at paragraph [5] (v) above. Concerns have been raised about the volume of materials generated as a result of this test in both larger clinical negligence and commercial type actions. The no stone unturned approach often resulted in an expensive and largely wasteful exercise. The Gillen Report at paragraph 10.13 suggested that greater regard might be had to issues of proportionality for individual cases rather than the current same-size-fits-all approach.

[27] At paragraph 10.38 the Gillen Report recommended an approach based on the principles of standard disclosure and reasonable search that apply in England and Wales with the safeguard of an application for specific discovery on Peruvian Guano lines, if appropriate. Standard disclosure requires a party to disclose only the documents on which he relies and those which adversely affect his own case, adversely affect another party's case or supports another party's case.

[28] The most significant change in the Rules of the Court of Judicature since the publication of the Campbell Report is the introduction of the overriding objective in Order 1 Rule 1A to enable the court to deal with cases justly. That requires the court to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule. The Gillen Report recognised that in some cases ever increasing searches for any document that might be relevant to the issues can place an inordinate and disproportionate burden in terms of time and cost. We consider, therefore, that in any case where the existing approach to discovery or disclosure may give rise to onerous obligations or would prevent a case being dealt with expeditiously and fairly the court should intervene with a view to finding a proportionate response, saving expense and ensuring that the parties are on an equal footing. The nature of that intervention will respond to the particular circumstances of the case and may require some greater case management but the court should be careful to ensure that any increase in case management is appropriate.

[29] Although these principles have been developed in the context of voluminous and complex clinical negligence and commercial cases their application is clearly appropriate in any case in which the Peruvian Guano approach together with strict application of Order 24 is likely to prevent the case being dealt with expeditiously and fairly. This is plainly such a case. The proceedings were issued nearly 10 years ago. Issues of disclosure have been live between the parties for nearly 6 years. Not every legacy case will require detailed case management but cases such as this which involve applications for disclosure of material quantities of sensitive information are likely to require a tailored approach.

[30] Proportionality will first affect the extent of the search for documents. In this case that ought not to present material difficulties. The relevant material has been recovered from PONI and is now available for interrogation. The helpful identification by Colton J of the outstanding legal issues and factual matters enables the applicant to focus its search.

[31] The approach to redaction presently employed by PSNI appears extremely wasteful and inevitably will add considerable time to the disclosure process. As explained by ACC Kerr the documents are first examined by those carrying out the redaction process before being made available for disclosure. There is no indication within the process that there is any examination of the unredacted documents before the redaction process commences by the lawyers representing the Chief Constable to establish which documents actually need to be disclosed and what means could be adopted in order to ensure that all relevant information is disclosed to the respondent without having to undergo a lengthy redaction process.

[32] We consider that it is essential that the material gathered in by the PSNI as potentially relevant to the issues and facts identified by Colton J should be provided initially in unredacted form to the lawyers representing the Chief Constable so that an informed independent approach can be taken to the documents that actually need to be disclosed. Initially disclosure should be on the basis of standard disclosure as discussed above.

[33] That will not, of course, obviate the need for appropriate redaction of the identified documents. Such redaction will also need to be assessed for its proportionality. There are likely to be considerable opportunities to avoid laborious and time-consuming redaction by providing a gist of the relevant information or alternatively making formal admissions in relation to the effective content of the documents. Gisting can be applied in a number of ways. It can, for instance, be used to give a sense of the information that has been redacted from documents. Gisting may also be used to summarise material that is peripheral to the case or which duplicates other documents. Where gisting is used to summarise information, the gist would be considered for redaction rather than the individual documents. This should ensure a substantial reduction in the burden of work for the redaction team in the larger cases. Some of the key documents may require disclosure and redaction but that should be part of the case management discussion. Since the documents are in the custody, power or possession of the applicant the onus to ensure a proportionate approach to disclosure rests primarily with those representing the Chief Constable.

[34] The identification of a proportionate approach in each of these cases will be fact sensitive. Any judge dealing with such a case will have to make appropriate discretionary judgements as to the extent of search, the degree of appropriate redaction and the opportunity for dealing with issues by way of gisting or formal

admissions. Any appellate court will be very slow to interfere with such discretionary fact specific decisions.

[35] Although the principal object of this approach is to ensure that there is a proportionate approach which ensures the cases are dealt with expeditiously and fairly it is also intended to significantly reduce any requirement to use the closed material procedure provisions in the Justice and Security Act 2013. The experience of those provisions is that they are likely to add considerably to delay and in cases such as this where considerable time has already elapsed we consider that such a course should be avoided if at all possible.

[36] There is, therefore, a pressing obligation on the parties in this and similar litigation to work co-operatively with a view to progressing the litigation expeditiously. Where difficulties arise the parties should be alert to the possibility of mediation as a means of resolution. It should be made clear, however, that the purpose of this approach is to bring this and other cases to trial expeditiously and any failure to co-operate in that exercise is likely to lead to adverse consequences for the party concerned.

Conclusion

[37] We consider that this represents a plan for the future. We agree with Stephens J that such a plan is required if this litigation is to be allowed to proceed by extending the time for compliance with the discovery order. We accept that the applicant has been at fault in failing to comply with Orders in 2012/13 and particularly in failing to recover the relevant files shortly after being encouraged to do so by Colton J in January 2016. We agree that the affidavit evidence lodged by the applicant about the availability of records identifying the documentation sent to the Ombudsman was contradictory and unsatisfactory.

[38] Despite these failures we consider that a fair trial of the issues in this case is still possible if the parties positively and willingly embrace the approach that we have outlined above. We consider, therefore:

(i) that the documents relevant to the issues and facts identified by Colton J should be provided forthwith in unredacted form to the lawyers representing the applicant;

(ii) that those documents should be considered by the legal representatives in order to determine the most effective way in which to make disclosure;

(iii) that the parties should meet within 4 weeks of the delivery of this judgment to prepare a timeframe for the completion of the disclosure process; and

(iv) that this case should be listed before the Queen's Bench Judge 5 weeks from today in order to determine whether any further extension of time for compliance should be given.

[39] In order to facilitate the matters set out above we extend time for compliance by 5 weeks from today. Whether any further time should be allowed will depend upon the applicant demonstrating its commitment to facilitate an expeditious and fair trial. Given the time which has passed since these proceedings were commenced and the period already spent on disclosure this case requires a degree of priority but the process that we have outlined above seems appropriate for other similar cases and appropriate steps should now also be taken in all such cases.

[40] We wish to make it clear if there is further delay caused by lack of application by the applicant the Order made by Stephens J is likely to be the only appropriate consequence.