

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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AIDAN McKEEVER

Plaintiff;

v.

MINISTRY OF DEFENCE

Defendant.

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**STEPHENS J**

**The factual background**

[1] The plaintiff, Aidan McKeever, was shot by one or more members of a special army unit on 16 February 1992 in a car park at Clonoe, Coalisland, County Tyrone. The plaintiff survived but the same incident also resulted in the fatal shooting of four men, Daniel Vincent, Kevin O'Donnell, Sean O'Farrell and Peter Clancy.

[2] The operation that occurred on 16 February 1992 was mounted as a result of intelligence as to a possible attack by members of a terrorist organisation on Coalisland police station. This attack in the event involved the use by terrorists of a heavy duty machine gun mounted on the back of a stolen lorry. It was believed that the terrorists would form up in the car park prior to the attack but it was after the attack that the persons perpetrating it drove the lorry to the car park at Clonoe where they intended to leave it and to disband in cars. Members of the special army unit were waiting at the car park and the shooting incident then took place.

[3] After the incident the soldiers involved in the car park were interviewed by the police. The statement of Soldier A is to the effect that on Sunday 16

February 1992 he was made aware of information that terrorists were to form up in the car park of the church at Coalisland prior to a possible terrorist attack at the RUC station in Coalisland. This information was given to him by Captain A. Soldier A was given an outline plan to arrest the terrorists in the car park prior to their attack. Soldier A then briefed all the members of his patrol as to the outline plan to arrest the terrorists. His statement then continues:-

“At about 6.30 pm on 16 February 1992 I deployed two members of my patrol to the area of a car park prior to the rest of the patrol joining them. They were to secure the area. In around 7.30 pm I took up a position on the southern edge of the car park behind the hedge. The hedge was very sparse and offered little cover from view and certainly no hard cover from fire. I was positioned to the right of the gap in the hedge. I was lying down in my position at the rear of the hedge and the rest of my patrol was to my left and right. When in this position I could see all of the car park except the extreme right and the left hand corners. It was a clear cold night with nearly a full moon. There was plenty of light on the main road at the front of the church and in the area of the garage which was over to my left. The light from that area offered me a good view of most of the car park and the Cloghog Road and the graveyard. There may well have been lighting on the Cloghog road but I can't be certain but I could see that road. The dark area of the chapel the extreme right I could see with the use of my night sight. I was dressed in full British army uniform and armed with a Heckler and Kock rifle. I think I had 100 rounds of ammunition in 5 magazines.”

[4] The statement then continues with various observations made by Soldier A as to car movements in the car park. It is apparent that the terrorists did not form up in the car park but instead the attack took place on the police station in Coalisland. Soldier A's statement continues:-

“I then heard shooting from the direction of Coalisland and I saw the tracer in the sky. I could hear the crack of rifle fire and the thud from a heavy calibre weapon. All this gun fire was fully automatic. At this point both the red and dark blue Cavalier in the car park made their way speedily towards the rear entrance to the car park stopping just short of the rear exit. At this stage the blue Astra entered the car park, did a loop around the car park at speed and stopped to the side of the

Cavalier nearest the exit. I think this was the red Cavalier. It stopped for a split second before speeding away out of the car park via the rear exit towards Stewartstown. As the Astra went out of my view towards Stewartstown I heard the engine roar of a truck coming from the direction of Coalisland and I saw a car approaching at speed from the direction of Coalisland which was to my left. As this car came into the Cloghog Road I saw a lorry approaching the crossroads. There was still a roar from the lorry. This car then turned into the car park via the rear entrance, did a loop in the car park at speed and then came to a halt in front of the first vehicle which I think was the red Cavalier. At this stage there were three cars nose to tail in the car park facing the rear exit. The first car was a blue Cavalier which I had earlier thought was a Japanese type car. Then there was the red Cavalier and then the dark blue Cavalier which had moved from the right hand corner of the car park. By this time the lorry had entered the car park and I saw what appeared to be a heavy machine gun mounted on the tailgate of the truck. I could see a person holding onto the handles of the gun and there were also a number of other persons in the rear of the truck with him. At least one of these persons was holding a rifle in the air with the barrel pointing upwards. I then realised that these vehicles were part of a terrorist group and had no doubt that they were involved in the attack that I had heard coming from the direction of Coalisland. I then stood up and started to move through the gap in the hedge towards the car park. I was satisfied that the gunmen in the back of the lorry presented a very serious threat to my life and that of the rest of my patrol. Bearing in mind the weapon I saw and the lack of any hard cover and on hearing gunfire I engaged the man on the back of the lorry who was holding the machine gun . . .”

Soldier A then continues with a description of what subsequently occurred in the car park, the engagement of other “gunmen” and those whom Soldier A asserts that he believed presented a threat to his life and that of the rest of his patrol. It was during these engagements that the plaintiff was shot and wounded.

[5] Statements were made by the twelve members of the patrol which was in position in the car park. That is from Soldiers A to L inclusive. Statements were also taken from Soldiers M, S and Q who had been in a civilianised

military vehicle, N, O and P who had been in a military vehicle, R, T and U, members of a mobile support unit, V, X and Y, members of a mobile support unit, W and Z, members of a mobile support unit and Z1 and Z2.

### **The criminal proceedings**

[6] The plaintiff, who had played a part in the events in the car park, was subsequently prosecuted for attempted murder. However the prosecution case at the criminal trial was that the plaintiff was in the car park with his car to enable the persons in the lorry to escape had there not been intervention by the army. The prosecution accepted that the plaintiff was not at the heart of the plan and indeed that it was conceivable that he did not know specifically the nature of the attack that was to be launched in Coalisland or indeed that an attack was to be launched at Coalisland police station itself. On 26 February 1995 the plaintiff pleaded guilty to and was convicted of the offence of, assisting offenders contrary to Section 4 of the Criminal Law Act (Northern Ireland) 1967, for which he was sentenced to 3 years imprisonment suspended for 3 years. It is accepted for the purposes of these proceedings that he played a role assisting terrorists.

### **The civil proceedings**

[7] On 31 January 1995 the plaintiff commenced an action against the Ministry of Defence claiming damages for the personal injuries that he sustained in the incident. There has been considerable delay in bringing the plaintiff's action to trial. The Statement of Claim was not served until 25 November 1997 and since then over a decade has elapsed.

### **The applications in the civil proceedings**

[8] Applications have been made by the defendant for a number of orders. The first application is for an order directing that Captain A and soldiers E, A and K be granted anonymity so that:-

- (1) They are referred to in court and in any court documents by those letters.
- (2) That no question may be put to any witness by counsel, solicitor or the plaintiff that may have the effect of revealing or enabling anyone to ascertain their identity.
- (3) Counsel and/or solicitor and/or the plaintiff may not at any time reveal or describe to any person the physical appearance of the witnesses.

- (4) No inquiry or investigation may be made at any time to ascertain their identity, whether by counsel, solicitor, the plaintiff or any third party.

[9] The second application is for an order that Captain A and soldiers E, A and K, whilst in court, be screened from the press and public. The order applied for would not prevent them from being seen by the plaintiff or by solicitors and counsel for both the plaintiff and the defendant or by the trial judge. Furthermore if the order was made they would be heard by everyone in court and there is no application for any voice modulation.

[10] The third application is for an order upholding a Public Interest Immunity Certificate in so far as it authorises the redaction by the defendant of two radio logs and a patrol report. The radio logs are handwritten logs dated 16 February 1992 in respect of radio communications that occurred on that date between army personnel involved in the operation. The logs record the date and time of a communication, and who it was to and from. There is an entry under the heading "Text" which is either a record of or a summary of the communication. This log has been redacted not only to maintain anonymity but also to prevent disclosure of certain other matters such as anything which would disclose the planning of the operation, the tasking of the personnel from the special army unit, the exact numbers of such personnel and their exact locations at any given time together with any information in relation to the command structure. By the nature of what took place there was no radio traffic during the course of the actual engagement.

[11] The parties agreed that the first application for an order directing that Captain A and Soldiers E, A and K be granted anonymity and the second application for an order that Captain A and Soldiers, E, A and K whilst in court be screened from the press and public were matters for the trial judge. The sole matter for my determination relates to the application for an order upholding a public interest immunity certificate in so far as it authorises the redaction by the defendant of two radio logs and the patrol report.

### **Sequence in relation to the Public Interest Immunity application**

[12] The Public Interest Immunity Certificate states at paragraph 19 that:-

"The information to be withheld which is described in paragraph 3(c) relates to sensitive material the disclosure of which would cause real harm to national security for the reasons given in the certificate *and in the attached confidential schedule*. Against this consideration I have weighed the relevance and importance of the information having regard to advice from Counsel that the material is relevant, and

withholding it could adversely affect the plaintiff's case. After due consideration of the issues in the light of that advice, and applying the principles referred to above, I am satisfied that the balance of public interests requires that the information in question should be withheld." (emphasis added).

[13] As can be seen from the italicised section of paragraph 19 of the certificate it purported to incorporate a confidential schedule. That schedule had not been made available to the plaintiffs' legal representatives. At the outset of the application Mr Ferris Q.C., who appeared with Mr Duffy on behalf of the plaintiff, objected to the court seeing the confidential schedule but withdrew that objection when it was explained on behalf of the defendant that it was an aid to the understanding of the radio logs and the patrol report. That it amounted to an explanation of the various entries in the documents. For instance the logs contain call signs and abbreviations the meaning of which would not be readily apparent. That thereafter the confidential schedule contained reasons as to how that information related back to the public interest claims that appeared in the public interest immunity certificate which had been seen by the plaintiff's legal representatives. That the confidential schedule was providing the sort of explanations that could legitimately be provided to assist a judge when considering the unredacted documents. That consideration by a judge of the unredacted documents can as a matter of practice be during an ex parte hearing with defence counsel and solicitor present so that a judge can be assisted in his understanding of the documents and how those documents relate back to the public interest claim in the certificate. Mr Ferris accepted such an ex parte hearing could take place and in view of the explanation afforded by the defendants as to the contents of the confidential schedule he withdrew his objection to the court seeing that schedule.

[14] In order to determine the application for public interest immunity it is first necessary to identify the issues as contained in the pleadings. The plaintiff's causes of action are based on assault and battery and negligence. The particulars of negligence contained in the Statement of Claim were in the following terms:-

- “(a) Shooting the plaintiff when he was unarmed.
- (b) Failing to give any or any adequate warning.
- (c) Failing to ascertain whether or not the plaintiff was armed or posed a threat to the defendants before opening fire on him.
- (d) Failing to observe the plaintiff adequately or at all before opening fire on him.

- (e) Failing to exercise any or adequate supervision or control.
- (f) Striking the plaintiff with an excessive amount of fire.
- (g) Failing to permit the plaintiff to subject himself to a lawful arrest."

[15] None of those particulars, except possibly particulars (e) and (g) make any allegation in relation to any stage of the operation prior to what occurred in the car park at Clonoe, see *Farrell (formerly McLaughlin) v. Secretary of State for Northern Ireland* [1980] NI 55. However it was apparent from the submissions made by Mr Ferris that the plaintiff was intending to make the case at trial that the defendant was negligent in the conception and planning of the operation and in the preparatory steps which were taken prior to the stage at which the final decisive acts were performed in the car park at Clonoe. Furthermore Mr Montague QC, who appeared on behalf of the defendant, did not take any point that such a case had not been pleaded. Accordingly the initial application proceeded on the basis that negligence was being alleged in relation to all stages of the operation. I considered that the pleadings were inadequate to cover the case that the plaintiff wished to advance at trial. Accordingly I ruled that if the plaintiff wished to make such a case then there should be an application to amend the particulars of negligence. The plaintiff made an application to amend the Particulars of Negligence so that they encompassed all stages of the operation prior to the decisive acts in the car park at Clonoe. The defendant did not oppose that application and I granted leave to amend the statement of claim so that particulars (e) and (g) of the statement of claim were in the following terms:-

- (e) failing to exercise any or adequate supervision or control in or about,
  - (i) the planning, preparation, instructions, co-ordination and conduct of military operations at Clonoe Chapel car park on 16<sup>th</sup> February 1992;
  - (ii) ensuring that it's servants and agents restricted the use of potentially lethal force to a level no more than absolutely necessary in order to prevent crime or to effect the lawful arrest of suspected offenders;
  - (iii) ensuring that all reasonable precautions were in place to prevent crime and to apprehend

suspected offenders without having to resort to the use of firearms unless absolutely necessary;

- (iv) the failure to arrest the Plaintiff prior to the commencement of shooting at the said location;
  - (v) the response of it's servants or agents as a result of the information being conveyed by soldiers on the ground at Clonoe and members of the security forces stationed at Coalisland;
  - (vi) the restriction, by instruction or otherwise, of the use of excessive force by it's servants and agents.
- (g) failing to permit the Plaintiff to subject himself to a lawful arrest, either,
- (i) upon receipt of intelligence concerning the Plaintiff's suspected involvement in this incident;
  - (ii) upon the Plaintiff's initial arrival at Clonoe Chapel car park;
  - (iii) at any stage during which the Plaintiff was present at Clonoe Chapel car park prior to the commencement of the shooting;
  - (iv) during the period when it's servants and agents were engaged in the shooting of the persons at or about the lorry;
  - (v) subsequent to the shooting of the persons at or about the lorry.

The defendant did not take any point that these amended particulars were inadequate.

[16] As appears from the Defence the Defendant makes the case that the shooting occurred –

“. . . in circumstances where the presence, activities and movements of terrorists (including the Plaintiff) all of whom were armed or reasonably believed to be armed put the personal safety and lives of servants and agents of the Defendant at risk at [the location] ...



The Defendant's servants and agents reasonably believed that the Plaintiff and the other aforementioned terrorists intended to kill or seriously injure them ...

In the foregoing circumstances, it was necessary to open fire in order to prevent the commission of the said unlawful acts and to protect the safety and lives of the individuals concerned and the Defendant says that in the circumstances the force used was reasonable in self-defence and in defence of others ...

Further, the Defendant says that by virtue of Section 3 of the Criminal Law Act (Northern Ireland) 1967 the force used was reasonable in the prevention of crime and/or in effecting or attempting to effect the lawful arrest of the authors of serious terrorist crime and was authorised by statute ...

Further, or alternatively, the Defendant relies upon the defences of *volenti non fit injuria* and *ex turpi causa non oritur actio*."

The defendant denies negligence and liability.

[17] The test to be applied as to the use of force in prevention of crime was set out by the Court of Appeal in *Kelly & others v Ministry of Defence* [1989] NI 341.

[18] I should also record that there had been an earlier application before Mr Justice Treacy in relation to the two radio logs. That application related to the question as to whether the redacted log entries were relevant to the matters in issue in these proceedings. At that stage the redactions were more extensive than when the matter came before me. Mr Justice Treacy considered all of the entries that had been redacted and ruled that they were all relevant to the matters in issue. He also expressed, obiter, his view that there had been over redaction. In light of his observations the defendants reduced the amount of redaction. Mr Justice Treacy was not asked to nor did he consider whether production of the redacted material was necessary within the meaning of Order 24, Rule 15(1) of the Rules of the Supreme Court (Northern Ireland) 1980. Furthermore he did not deal with any issue in relation to public interest immunity.

[19] At the first hearing of the public interest immunity application I enquired as to whether the degree of redaction proposed was consistent with redactions that must have previously taken place for the purposes of the criminal trial of the plaintiff. The defendant had not made discovery of and no

longer had the redacted documents disclosed in the criminal trial. The matter was adjourned and Mr Duffy on behalf of the plaintiff then subsequently made available to the court the redacted version of the two radio logs (“the 1994 redactions”) that had been disclosed during the trial of the plaintiff and two other accused, including Mr Woods. These documents had come from the solicitors who had represented Mr Woods in the criminal trial. It was immediately apparent that in 1994 for the purposes of the criminal prosecution the two radio logs had been subjected to far fewer redactions prior to disclosure. For instance in the criminal trial call signs had not been redacted whereas they had been in these proceedings. By way of contrast the Public Interest Immunity certificate upon which the defendant relies in this case certified that the disclosure of the call signs could act as a signature for UK special forces and undermine their activities in other sensitive and covert operations.

[20] The fact that a lesser degree of redaction had occurred in 1994 is not determinative of the present claim for public interest immunity for a greater degree of redaction. It is however a factor to be taken into account. It calls into question the existence and if it exists, the strength of, the public interest in withholding anything more than the 1994 redactions. The radio logs as disclosed in 1994 were not referred to in court and were subject to an implied undertaking that they would not be used for any other purpose than those proceedings, see *Taylor & others v Serious Fraud Office and others* [1998] 4 All ER 801. However it must have been contemplated by the defendant in 1994 that all the material in the radio logs which was not then redacted could have entered the public domain during the course of the anticipated criminal trial.

[21] The explanation given by the Minister of State for the armed forces for the different redactions in 1994 as opposed to the proposed redactions was set out in a further public interest immunity certificate as follows:-

“14. It has been brought to my attention that when the plaintiff was prosecuted in connection with terrorist offences in 1994 a version of the unit’s operational log and incident report was disclosed to the three firms of solicitors representing the plaintiff and his two co-defendants from which a smaller quantity of sensitive material was redacted than is proposed in the current claim for PII. There are two points I should like to make. First the material for which redactions are proposed in the current claim remains sensitive and I have no doubt that if it were disclosed it would cause real harm to national security for the reasons which are stated in this certificate. Secondly, in 1994 the more lightly redacted logs/reports did not enter the public domain because they were not “communicated to the public in open court” pursuant to Section 17 (3) of the Criminal Investigations and

Procedure Act 1996. Although the Criminal Investigation and Procedure Act 1996 was not in force at the time of the criminal trial, this section is a codification of the common law and its principle is therefore applicable to the material in question.

15. My officials have examined the papers from 1994 to try and establish why fewer redactions were made. It appears from contemporaneous correspondence that *R v McKeever, Coney and Woods* was the first prosecution in which operational records from the unit in question had been disclosed. As always, the amount of material deleted from the records was kept to the minimum. There is no reason to doubt that the redactions were made conscientiously and in good faith at a time when public knowledge of the unit was extremely limited. However, from 1995 a number of books appeared by former special forces' soldiers in which they described some operational techniques which were used in Northern Ireland. Although the most sensitive details were generally redacted prior to publication, the books nevertheless disclosed information which made it easier for terrorists to build up a picture of how the unit operated. As a consequence, and in order to maintain the operational capabilities of special units, rather more information has had to be redacted since than was the case prior to the publication of the books. Since 1995 the disclosure of information piecemeal - the jigsaw effect - has been a major cause of concern. I appreciate that some of the details which have been redacted may in themselves appear innocuous, but they are necessary to prevent the cumulative damage which I have described. I am particularly concerned that information should not be disclosed that would reveal to terrorists how the component parts of a special forces operation interrelate with each other, since that would enable terrorists to devise countermeasures and that would be manifestly contrary to the public interest.

16. I hope that this explanation assists the court. The most crucial point is that the material for which immunity from disclosure is sought in this certificate remains sensitive and would cause real harm to national security if it were disclosed."

[22] I accept that explanation which I have borne in mind when considering the questions as to whether all the present redactions do fall within a category of public interest immunity and the relative strength of that public interest, if it exists, against the strength of the public interest in the administration of justice.

[23] I also add that the 1994 redactions also redacted some minor matters that should not have been redacted. Those redactions are not now a part of the proposed redactions before me.

## **Conclusion**

[24] Mr Justice Treacy has held that the redacted material is relevant applying the test set out by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at 62-63.

[25] The next test is whether it is necessary to order production for inspection under Order 24 Rule 15(1) Rules of the Supreme Court (Northern Ireland) 1980 and in that respect I apply the test propounded by Bingham J and approved in the speech of Lord Scarman in the House of Lords in *Air Canada v. Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 445:

“In my judgment documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts on which the decision in the cause will depend.”

[26] In broad terms I consider that it is necessary to order production for inspection under Order 24, Rule 15(1) of the Rules of the Supreme Court (Northern Ireland) 1980. I say in broad terms because some of the information that is redacted will give no assistance to the court in determining the facts on which the decision in the cause will depend. An example of that is the exact location at which Soldiers A-L made their police statements save to say that it was at the same location.

[27] I consider that the redactions do fall within a category of public interest immunity namely damage to the public interest of protection from terrorist attack.

[28] I then considered each of the redactions carrying out a balancing exercise weighing in the one scale the public interest in the proper administration of justice against the public interest in withholding from disclosure documents whose release could be harmful to the nation or to the public service under one of the heads recognised by the law. In carrying out that balancing exercise I sought to apply the test set out in *McCorley v. Northern Ireland Office and Governor of HMP Maghaberry* [2000] NICA 23. In performing that exercise I considered each of the redactions individually and also cumulatively. Individually they might not appear to be significant but cumulatively they could have a considerable adverse impact on one or other or both of the public interests which I have to weigh.

[29] In respect of the proper administration of justice I also considered whether the unredacted entries might disclose to the plaintiff whether discovery provided by the defendant was incomplete where that would not otherwise be reasonably apparent to him or to his legal advisors. In an adversarial system it is not for the judge to take on the task of directing proofs for one or other party but where redactions would prevent a party from following a line of enquiry which would not otherwise be reasonably apparent then that is an additional factor to be taken into account and weighed in the balance if the defendant does not agree to remedy the matter.

[30] Also in respect of the proper administration of justice I consider in the circumstances of this case that it is preferable if the entire radio logs were available to the plaintiff so that he or his legal advisors could scrutinise them to determine whether the proposed redacted material is inconsistent with the statements of the soldiers and therefore could be used to undermine the credibility of the defendant's witnesses. Whilst it is preferable for that task to be carried out by the plaintiff or his legal advisors I have examined the statements of the soldiers against the redactions to ensure that there is no inconsistency. I do not consider that the redacted material is inconsistent with the statements of the soldiers. In addition during the ex parte hearing at which I inspected the unredacted documents there is an obligation on the defendant to make full and frank disclosure to the court. During the course of the ex parte hearing senior counsel for the defendant gave the court an assurance that there was no inconsistency between the redacted material and the statements of the soldiers.

[31] I consider that withholding the redacted information will adversely effect the administration of justice in so far as it relates to the planning of the events leading up to the final decisive act in the car park. I was informed that there are no documents relating to the planning of this covert operation. The unredacted radio logs and the patrol report provide a record as to how the plan was in fact implemented. This in turn establishes the equipment available to the special forces unit, its methods of organisation, and its chain of command. The redacted information would give the plaintiff material upon which he would be able to identify on a timed basis the deployment and capabilities of the various aspects of the covert operation. The plaintiff would then be able to subject that deployment and capabilities to independent scrutiny. In considering the degree of adverse impact on the presentation of the plaintiff's case I have taken into account the other sources of information available to him such as the police statements, the police investigations and the unredacted discovery. I consider that there is an adverse impact in so far as the presentation of the plaintiff's case is concerned but I consider that the major adverse impact is on the presentation of the defendant's case. The defendant will be unable at trial to counter any suggestion from, for instance, an expert witness on behalf of the plaintiff as to how the operation could have been planned and executed in a manner which minimised the potential for or did

not involve the use of lethal force. The defendant is deprived of proving any planning apart from what is apparent from the police statements and the unredacted documents. Subject to that limitation the defendant is deprived of explaining what it considers ought to have taken place within its capabilities. It is also subject to the same limitation deprived of carrying out any contrast between what it is suggested ought to have taken place with what actually did take place.

[32] I next consider the public interest in withholding from disclosure the redacted parts of the documents. I was informed that there are no documents relating to the planning of this covert operation. The unredacted radio logs and the patrol report provide a record as to how the plan was in fact implemented. As I have indicated this in turn establishes the equipment available to the special forces unit, its methods of organisation, and its chain of command. Cumulatively, if it was not for the redactions, an assessment could be made of the capabilities of the unit and I accept that this in turn would enable counter measures to be undertaken by terrorist organisations. Those counter measures would seriously reduce the ability of security forces to acquire intelligence, carry out arrests, prevent attacks leading to loss of life. There is an enduring terrorist threat not only in this jurisdiction but in other countries in which this special army unit operates. It is of crucial importance to any terrorist organisation in the planning of its own operations to have detailed knowledge of the capabilities of the unit. There is a very considerable public interest in withholding the redacted material.

[33] I consider that the reasons advanced by the Minister have substantial weight. I consider that the redactions are justified by the risk of serious harm to the public interest and that this risk outweighs on the facts of this case the adverse effect on the administration of justice. I rule in favour of immunity subject to some points of detail which emerged during the ex parte hearing.