Neutral Citation No: [2019] NIMaster 9 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **[2019] NIMaster 9** ***Delivered:*** *06.09.2019*

No.14/050985/04

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEENS BENCH DIVISION

Between:

ISOBEL COPELAND suing as widow and personal representative of the estate of JOHN THOMAS COPELAND DECEASED

Plaintiff;

AND

THE MINISTRY OF DEFENCE

Defendant.

Master McCorry

[1] By summons issued 22 February 2018 the defendant applies for orders striking out portions of the plaintiff's statement of claim: 1. Pursuant to Order 18, rule 19 as disclosing no reasonable cause of action, as frivolous and vexatious and an abuse of the process of the court; 2. Contrary to Order 18, rule 15(2) as not referred to in the writ of summons; 3. striking out the claim for aggravated and exemplary damages as contrary to section 14(2) of the law Reform (Miscellaneous Provisions) (Northern Ireland) Act 1937 and Article 5 of the Fatal Accidents (Northern Ireland) Order 1977, and for orders pursuant to Order 18, rule 12 requiring the plaintiff to provide full and proper replies to the defendant's notice for further and better particulars dated 29 December 2015, and Order 24, rule 3 requiring the plaintiff to serve a list of documents. Subsequent to the issue of the summons the plaintiff amended her

pleadings and replies to the notice for particulars, and at the multiple and protracted hearings before this court the focus was on relief pursuant to Order 18, rule 19(1).

The Plaintiff's Claim

[2] By writ of summons issued 15 May 2014 the plaintiff sued as a dependant widow under the 1977 Order and as personal representative of the deceased (the 1937 Act claim). She claims damages, including aggravated and exemplary damages, in respect of the death of the Deceased on or about 28 October 1971, caused by reason of the negligence, including negligence in the conduct of military operations, assault, battery, trespass to person, conspiracy to commit trespass to person, conspiracy to injure and misfeasance in public office of the defendant, its servants and agents. On 28 October 1971 the Deceased, aged 23 years, was shot by soldiers of the Green Howard Regiment, at Ladbrook Drive, Ardoyne, Belfast. He died from his wound two days later. The plaintiff also claims damages in her personal capacity and on behalf of the estate of the deceased, by reason of the negligence, assault, battery, trespass to person, conspiracy to commit trespass to person, conspiracy to injure and misfeasance in public office of the defendant, its servants and agents. She also claims damages (bereavement) pursuant to the Law Reform (Miscellaneous Provisions) Act (N.I.) 1937 and the Fatal Accidents (N.I.) Order 1977 on behalf of the estate and dependants of the deceased.

[3] The Coroner, at an inquest on 2 November 1972, recorded the cause of death as a bullet wound of the chest and abdomen and returned an open verdict. In a statement of claim delivered 23 April 2015 the plaintiff appeared to widen the scope of the action from that indorsed on the writ of summons to include: a claim in respect of mental distress (para.6), and claims in negligence and breach of statutory duty by the defendant in failing to provide disclosure of its records in relation to the shooting which would assist the plaintiff in an application for a fresh inquest (para.7), in violation of domestic law including the Freedom of Information Act 2000 ("FOIA") and the Public Records Act 1958. This related to a belief raised by the plaintiff's solicitors in correspondence to the defendant of 7 October 2013 of the existence of a secret archive maintained at a TNT Archive in Swadlincote Derbyshire, which it was argued the defendant was obliged to declassify and transfer to the National Archive at Kew.

[4] The statement of claim also pleaded (para.8) violation of Articles 2 and 6 of the European Convention on Human Rights ("ECHR") in respect of the death and the failure to conduct an effective and adequate investigation into the circumstances of the shooting; Article 8, right to private and family life; Article 10, right to receive information without interference by the defendant, and Article 13, the right to an

effective remedy before a national authority (para 9). At para 10 the plaintiff pleaded that the failure to disclose the documents caused further mental distress to the plaintiff and dependants. The plaintiff enlarged upon the particulars pleaded in the statement of claim to some extent in her Replies (dated 28 February 2017) to the defendant's notice for particulars dated 28 December 2015.

[5] The plaintiff served an amended statement of claim and amended replies to the defendant's notice for particulars on 16 November 2018, after an initial hearing of the summons on 11 June 2018. The defendant however maintained its challenge in respect of portions of the un-amended pleading as well as some of the proposed amendments, including the claims at para.7 that the plaintiff had suffered loss and damage by failure to make disclosure of material which would assist in the request for a fresh inquest or that this caused mental distress (para. 10). The first significant amendment was deletion of the claim pursuant to the Freedom of Information Act 2000 (para 8) although the plaintiff maintained the claim under the Public Information Act 1958. The plaintiff added factual assertions in relation to the circumstances of the shooting (paras. 13 to 16) and at para 19 (i) and ii) references to articles about storage of certain files by TNT, to which the defendant took no specific objection. Amendments to the particulars of negligence, dealing with the investigation of the shooting by the army at the time, are also objected to. The amendments under the heading 'Particulars of breach of Statutory Duty' maintained the claim pursuant to the Public Records Act 1958 and replaced the claim pursuant to Article 13 ECHR with a claim under Article 1 of Protocol 1 (the right to property). The amendments to the particulars of misfeasance in public office were apparently sufficient to assuage the defendant's concerns or objection as these were not addressed at hearings. At the final hearings of the application on 13 February 2019 (defendant's submissions) and 22 May 2019 (plaintiff's submissions) the parties focused on the amended statement of claim and replies.

[6] I propose to deal with the defendant's application in respect to each area of contention; which by this stage were largely on the ground that the impugned pleading disclosed no reasonable cause of action, pursuant to Order 18, rule 19(1)(a); and the plaintiff's counter submissions, in turn. For this purpose no evidence was considered and the facts were taken as pleaded by the plaintiff. Order 18, rule 19(1)(a) and (2) provide:

> *"(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything and any pleading or the endorsement, on the ground that –*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*

…

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a)."

Strike out pursuant to Order 18, rule 19(1)(a).

[7] The approach to applications under Order 18, rule 19 was considered by Gillen J in Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland [2011] NIQB 28. He summarised the principles as follows:

"[7] For the purposes of the application, all the averments in the Statement of Claim must be assumed to be true. (See O'Dwyer v Chief Constable of the RUC (1997) NI 403 at p. 406C).

[8] O'Dwyer's case is authority also for the proposition that it is a "well settled principle that the summary procedure for striking out pleadings is to be used in plain and obvious cases." The matter must be unarguable or almost incontestably bad (see Lonrho plc v Fayed (1990) 2 QBD 479).

[9] In approaching such applications, the court should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. Thus in Lonrho plc v Tebbit (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that it raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

"In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim.

(See also E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694).

[10] Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[8] In E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694) Sir Thomas Bingham said:

"I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[9] This means that so far as this application pursuant to Order 18, rule 19(1)(a), to strike out pleadings as disclosing no reasonable cause of action is concerned, the court must deal with it on the face of the pleadings alone and without any reference to affidavit or other evidence.

The Plaintiff's claim in Negligence

[10] The defendant's application was directed to Paras 25 (n) - (q) of the particulars of negligence, which relate to the alleged actions of the defendant's servants and agents after the shooting, including control of the scene, interviews and other issues relating to investigation, and therefore, the defendant says, could not have caused the deceased's death. Consequently they could not form the basis of a claim under the Law Reform Act or Fatal Accidents Order. In response the plaintiff asserts that this fails to address their causative connection to the investigation. The plaintiff can of course plead a claim in respect of negligence in the investigation in her own right but the defendant's point is well made in respect of claims under the Law Reform Act or Fatal Accidents Order. It may be that this could be more closely pleaded by the plaintiff to make clear that the impugned particulars do not relate to that part of the

plaintiff's claim. The defendant also asserts that, as recognised by the Historical Enquiries Team's (HET) Report, the defendant and its police arm the Royal Military Police, had no authority to conduct investigations. HET criticism of the investigation related only to the police investigation. The extent to which the army carried out investigations of shootings at the time is a question of fact, which requires an examination of the evidence which it would be inappropriate for this court to attempt irrespective of the strength or weakness of the evidence either way. Therefore, subject to clarification by the plaintiff that the particulars at 25 (n) - (q) do not relate to the claims under the Law Reform Act and Fatal Accidents Order, they should not be struck out as disclosing no reasonable cause of action at this stage.

The claim under the Public Records Act 1958

[11] As the parties' differing views as to the system created by sections 2 to 5 of the Act goes to the core of the defendant's application to strike out this claim as disclosing no reasonable cause of action, it is necessary to set out the more salient provisions herein.

Section 2 provides:

> *"(1) The Secretary of State may appoint a Keeper of Public records to take charge under his direction of the Public Records Office and of the records therein….. "*

Section 3 provides:

> *"(1) It shall be the duty of every person responsible for public records of any description which are not in the Public Records Office or a place of deposit appointed by the Secretary of State under this Act to make arrangements for the selection of those records which ought to be permanently preserved and for their safe keeping.*
>
> *(2) Every person shall perform his duties under this section under the guidance of the Keeper of Public Records and the said Keeper shall be responsible for co-ordinating and supervising all action taken under this section.*
>
> *(4) Public records selected for permanent preservation under this section shall be transferred not later than 20 years after their creation either to the Public Record Office or to such other place of deposit appointed by the Secretary of State under this Act as the Secretary of State may direct.*
>
> *(5) The Secretary of State may, if it appears to him in the interests of the proper administration of the Public Records Office, direct that the transfer of any class of*

records under this section shall be suspended until arrangements for their proper reception have been completed.

(6) Public records which, following the arrangements made in pursuance of this section, have been rejected as not required for permanent preservation shall be destroyed or, subject in the case of records for which some person other than the Secretary of State is responsible, to the approval of the Secretary of State, disposed of in any other way."

Section 4 provides:

"(3) The Secretary of State may at any time direct that public records shall be transferred from the Public Record Office to a place of deposit appointed under this section or from such a place of deposit to the Public Records Office or another place of deposit.

(5) Public records in the Public Records Office shall be in the custody of the Keeper of Public Records and public records in a place of deposit appointed under this Act shall be in the custody of such officer as the Secretary of State may appoint."

Section 5 provides:

"(3) It shall be the duty of the Keeper of Public Records to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of those public records in the Public Records Office which fall to be disclosed in accordance with the Freedom of Information Act 2000.

(5) The Secretary of State shall, as respects all public records in places of deposit appointed by him under this Act outside the Public Records Office, require arrangements to be made for their inspection by the public comparable to those made for public records in the Public Records Office."

[12] Thus it appears that the 1958 Act, at sections 2 and 3, provide for a system for management of public records with the Secretary of State at the top providing political direction to the main officer appointed by him, the Keeper of Public Records, the custodian of public records who also co-ordinates the selection process by giving direction and supervision to the persons making the selection of documents to be preserved. This, the defendant submits, provides for the public interest in the selection of, and retention of, records for preservation under political direction, in other words a public interest not amenable to a private law cause of

action but to a remedy under public law. Significantly, on my reading of section 3(1), it does not creates a duty to select or transfer to the Public Records Office particular records, such as those sought by the plaintiff, the duty is stated rather "to make arrangements" for the selection of records for permanent preservation and safe keeping. Enforcement of the section 3(1) duty is provided for in section 3(2), which requires the Keeper of Public Records to give "guidance" and "co-ordinates and supervises all actions taken under the section", with the Secretary of State also giving directions for transfer of documents (section 3 (5)). There is no duty to transfer all public records after 30 years because section 3(4) makes provision for destruction of records not selected for preservation, or for their disposal "in any other way". Some documents may therefore be lawfully retained by a government department in "an approved facility".

[13] The factual basis for the plaintiff's claim under the Public Records Act 1958 is pleaded at Paras 19 to 22 of the amended statement of claim. It begins with the plaintiff's solicitor's letter of 7 October 2013 alleging the existence of a "secret archive" held in a TNT facility at Swadlincote in Derbyshire, which the defendant was required to transfer to the National Archive at Kew. The letter referred to newspaper articles about the existence of such an archive and requested confirmation that it did not include documents touching on the deceased's shooting. It alleges at paragraph 21 that in November 2013 the Crown Solicitor refused to provide such an undertaking or disclosure until obliged to do so under the normal discovery process after proceedings issued. Paragraph 22 then asserts that this failure to provide the documents, which could assist in the request for a second inquest, was in breach of the defendant's statutory duty, presumably under the 1958 Act although that is not specified at that point. Then at paragraph 28 (I), The Particulars of Breach of Statutory Duty, there is express reference to the defendant's duty to make arrangements for the review and selection of materials in section 3(1). Other than the reference to making arrangements the precise breaches of sections 3 to 6 alleged are not pleaded.

[14] Turning then to the pre-proceedings correspondence passing between the parties in late October 2013, beginning with the letter of 7 October 2013. The plaintiff sought 3 things: (a) preservation of documents and compliance with all protocols in respect of oversight, retention and collation of relevant materials in the secret archive, (b) a check to see that the archive did not contain documents which should be transferred to the National Archive and (c) confirmation of documents relating to the plaintiff's death. The defendant replied the same day confirming that all documents would be held in accordance with its legal obligations but that searches would not be conducted unless required for the purposes of an inquest or civil proceedings. On 18 November 2013 the plaintiff threatened judicial review proceedings unless it received an undertaking that there would be "no ongoing

interference" with the archive whether by way of destruction of materials, "weeding or otherwise". On 2 December 2013 the defendant confirmed that all legacy papers relating to army operations for which it had responsibility would be held in current form and that "weeding" was not permitted. The writ was served on 9 July 2014 and the plaintiff in late 2014 issued a third party disclosure application against TNT and the defendant made disclosure of documents relating to the death of the deceased, including written statements by the soldiers in the patrol involved as part of the usual discovery process.

[15] The principles for determining whether a piece of legislation creates an actionable duty were set out in a unanimous decision of the House of Lords in X (Minors) v Bedfordshire County Council [1995] 3 WLR 152, where Lord Browne Wilkinson observed:

> *"… The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; Lonrho Ltd. V, Shell Petroleum Co. Ltd. (No.2)[1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v. Wimborne (Lord) [1898] 2 Q.B. 402.*
>
> *Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breaches of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that*

activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general …" per Lord Browne Wilkinson, at p17)

[16] These principles have been confirmed and applied by the Supreme Court in Morrison Sports v Scottish Power [2010] UKSC 37, where the Supreme Court construed regulations made under the Electricity Act 1989, which created a criminal offence for breach but which expressly recognised that this did not affect "… any liability of that person to pay compensation in respect of any damage or injury caused by the contravention …". Construing the legislative scheme as a whole, the Court applied the principles in the X case and found that it did not create an actionable statutory duty. (See paragraphs 16-29). Then in Campbell v Peter Gordon Joiners [2016] UKSC 38; [2017] 2 All ER 161, the Supreme Court was unanimous as to the applicability of the principles, but decided by a 3 – 2 majority that a breach of the obligation upon an employer under the Employers Liability (Compulsory Insurance) Act 1969 to have in place employer's liability insurance, did not give rise to a claim against the directors of the corporate employer.

[17] On the basis of the foregoing the defendant asserts, firstly that the 1958 Act, specifically at sections 3 to 6, does not create an actionable statutory duty. Secondly, on the facts pleaded, the plaintiff sought preservation of relevant materials, preservation was confirmed in correspondence and documents subsequently disclosed as part of normal disclosure. Thirdly, with respect to the claim that the plaintiff has suffered mental distress, there is nothing in the medical report by Dr Mangan to causally link the plaintiff's psychiatric difficulties with a failure by the defendant to make disclosure. The latter submission steps outside the permissible boundaries of Order 18, rule 19(1)(a) because it requires an assessment of evidence, although that would be possible if for example the court were to approach this element of the application as being strike out as an abuse of process. It seems to me that in any event, mental distress caused by a failure to disclose documents would fall foul of the public policy justified control mechanism on psychiatric claims in the Alcock v West Yorkshire Police through to White v South Yorkshire Police (discussed in my own recent judgment in O'Halloran v Chief Constable et al (10.05.2019)). However, this was not raised by the defendant in the present application.

[18] In response the plaintiff submits that the purpose of the Public Records Act 1958 is to ensure public access to public documents, without need for disclosure applications. The documents sought in this case are not covered by the 30 year rule as that time has long since expired and in this case the public does not have access because it is not clear where the records are held. It notes that in the affidavit verifying its list of documents sworn 19 May 2016 the defendant, through its officer Brian Woolsey, refers at paragraph 3 to a "TNT pan government archive", one of a number of sources searched for relevant material. It is there that the plaintiff believes

that undisclosed relevant material is held. The affidavit was sworn in respect of the plaintiff's application for third party discovery because the documents were held by TNT who is not a party to the action. However, if the plaintiff does not accept that the list of documents is complete, or that the defendant itself has undisclosed documents in its own custody, possession or control then this should be pursued in an application under Order 24 rule 7. The plaintiff submits that the holding of relevant undisclosed material in such an archive, is incompatible with the plaintiff's Article 6 rights. In answer to the defendant's assertion that there is no on-going investigation of the shooting of the deceased, such as an inquest, the plaintiff argues that murder investigations are never closed and therefore there is a continuing investigation.

[19] However, what the plaintiff fails to do is rebut the defendant's submission that the Public Records Act 1958 does not create a statutory duty breach of which is actionable as a matter of private law. The purpose of the Act is the preservation and safe keeping of public records in an archive to which the public have access as a matter of right, under the supervision of the Keeper of Public Records with political control by the Secretary of State. Applying the principles enunciated by Lord Browne Wilkinson in X (Minors) v Bedfordshire County Council, as approved and applied by the Supreme Court; it is difficult to see how the 1958 Act could give rise to a private cause of action for breach of a statutory duty created by the Act. In this case the facts pleaded could not in my view possibly give rise to a breach of any duty created by the Act. Any remedy there might be would be a public law remedy, i.e judicial review, and not by private civil action. Those portions of the plaintiff's amended statement of claim which plead a claim under the 1958 Act (paras 8, 19 -22 and 28) do not disclose a reasonable cause of action and must be struck out, or if they are pleaded for the first time in the amended statement of claim, the amendment disallowed.

The claims under the European Convention on Human Rights

[20] In the amended statement of claim the plaintiff discontinues the claim under the Freedom of Information Act 2000, but at paragraph 9 pleads breaches of: Article 6 of ECHR by reference to alleged breach of other rights, including: Article 2 in respect of the failure to conduct an effective and adequate investigation into the circumstances of the shooting; Article 8, right to private and family life; and Article 10, right to receive information without interference by the defendant. Her previous claim pursuant to Article 13 (right to an effective remedy before a national authority) is deleted and substituted by a claim that the plaintiff's property rights under Article 1, Protocol 1 have been violated by the defendant's unlawfully depriving her of the equity in her claim for damages. This is further pleaded as particulars of breach of

statutory duty at paragraphs 29 to 34, with paras 30 to 34 being amended entirely. Particulars of Damages under ECHR are pleaded at paras 43 to 49. The defendant contends that these portions of the amended statement of claim should be struck out, or where they are new claims disallowed, as disclosing no reasonable cause of action.

[21] The plaintiff's claim pursuant to Article 2 is based on alleged interference with her right to investigate the death, which the defendant challenges as being untenable because there is no on-going investigation and even if there was the obligation to investigate is on the state and not the plaintiff. The complaint is not therefore that the defendant has failed to respond to the coroner or other state investigating body, but simply that the plaintiff seeks disclosure of documents. The plaintiff counters this, firstly by saying that as the file in a murder case is never closed there is a continuing investigation, and secondly by reliance on the right of the next of kin to participate in the investigation, citing Lord Bingham's analysis in R (Amin) v Home Secretary [2004] 1 A.C. 653 at [31] of the purposes behind the duty to investigate:

> "*The purposes of such an investigation are clear; to ensure as far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.*"

However, it seems to me that it is excessively stretching these comments to interpret them as authority for the proposition that alleged failure to disclose documents to next of kin, as opposed to the state body conducting an investigation, constitutes a breach of the Article 2 obligation to investigate a death.

[22] The plaintiff correctly cites the principles set out by the European Court of Human Rights in Jordan v United Kingdom (2003) 37 EHRR 2 at [103], that in the case of a controversial killing with an allegation of state involvement the burden of proof rests on the state to provide a "satisfactory and convincing explanation", following an "effective investigation" in the sense that it is "capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances". Her counsel submits that the original investigation was ineffective in part because of the criticism by the HET in its report that the practice at the time, whereby interviews of the soldiers involved and recording of their statements was carried out not by the police but by the Royal Military Police. This lack of access to the soldiers by the families was, according to the HET, "a major inhibitor" to providing "a full and comprehensive review of all the circumstances".

[23] The difficulty with this argument is firstly, that it is one thing to say that a file in a murder case is never closed and another to say that there is therefore an on-

going investigation. I do not accept that the one equates with the other. Secondly, there is no on-going state investigation of the deceased's shooting. There was the investigation at the time, which has been criticised by the HET in its report, and a coroner's inquest on 2 November 1972 which the plaintiff criticises and seeks a new one. But at the moment it seems to me that there is no on-going state investigation of the circumstances of the shooting, no failure to hand over documents in relation to such an investigation and therefore no arguable breach of Article 6(1) by way of a breach of the Article 2 obligation on the state to carry out an effective investigation. The claim under Article 2 is therefore inarguable.

[24] With respect to breach of Article 8 (paras 29(b) and 31 of the amended statement of claim) the plaintiff relies on the same facts and failure to provide documents as demonstrating a breach of the plaintiff's right to private and family life. The defendant submits that the plaintiff's actual complaint is unclear. It reasserts that all documents have been disclosed under the normal process, and even if that were not the case, the documents concerned are about the deceased and not the plaintiff in this action. Whether or not all documents have been disclosed is of course a factual issue which the court will not decide at this stage, and therefore for the purpose of the application the facts are deemed to be as pleaded by the plaintiff. The defendant does not dispute that retention of personal records, in retrievable format, amounts to an interference with a person's private life but argues that the right is personal to the individual which in this case is the deceased not the plaintiff. The plaintiff's response is that failure to disclose public records can interfere with Article 8 family and private life rights and cites Soderman v Sweden, Application No. 5786/08. She also relies upon Jankovic v Croatia Application No. 38478/05 as authority for the proposition that interference with a right to access to public information, and retention of the information to prevent such right of access, infringes Article 8.

[25] In Soderman the Court stated:

> *"78. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, inter alia, Airey v. Ireland, 9 October 1979, S32, Series A no. 32).*"

However, that statement by the Court of Human Rights does not go so far as to say, and indeed stops well short of saying, that failure by the State to disclose documents

relating to the killing of a deceased many years ago, obviously not to the deceased, but to his family, constitutes a breach of Article 8.

[26] The plaintiff also refers to para 80 of the judgment of the court in Soderman where it observed:

> *"Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see, inter alia, Osman v. the United Kingdom, 28 October 1998, S128-30, Reports of Judgments and Decisions 1998-VIII, S 128-30; Bevacqua and S. v Bulgaria, no. 71127/01, S65, 12 June 2008; Sandra Jankovic v. Croatia, no 38478/05, S45, 5 March 2009; A v. Croatia, no. 55164/08, S60, 14 October 2010; and Dordevic v, Croatia, no. 41526/10, S 141-43, ECHR 2012)."*

[27] The plaintiff's claim in this case of course includes a claim for psychiatric injury on the basis that the unresolved issues surrounding her husband's death have impacted on her mental health, as is evidenced by the report of Dr Mangan, who examined her on 20 April 2017. He concluded that: "… the plaintiff developed permanent disabling psychological injuries as a consequence of the killing of her husband in October 1971. Further traumatic life events have also contributed in a significant deterioration in her mental health. In my opinion, the plaintiff will have permanent disabling psychological injuries as a consequence of the traumatic death of her husband, John. She continues to experience unresolved anger in relation to the individual who killed her husband". The plaintiff reminds me that Article 8 harm alleged in this case is a separate and distinct category of damages from her personal injury claim, although the facts overlap. The difficulty is that Dr Mangan talks about the permanent disabling psychological impact as a result of the killing of her husband, and her unresolved anger at the killer. At no point does he attribute psychological injury to issues with the defendant about the disclosure of documents relevant to the killing, and it is that alleged disclosure which forms the basis of the Article 8 claim as presently pleaded. A further consideration is whether or not the plaintiff has sustained any recognisable psychiatric injury, a necessary pre-requisite for an award of compensation. This was mentioned in brief by the defendant's counsel in his skeleton argument but not developed at hearing by either party. Dr Sharkey for the defendant is in broad agreement with Dr Mangan about the serious psychological impact of the shooting on the plaintiff, but neither expert suggests any recognisable psychiatric injury as a result of the disclosure issues.

[28] The plaintiff further submits that the Court of Human Rights has held that the State has an affirmative responsibility to protect individuals from violence by third parties which she says applies a fortiori where the violence emanates from an agent of the State. I am not sure that the latter assumption is correct because in the case of violence emanating from a state agent the state is vicariously liable in a way which it obviously is not in the case of violence emanating from third parties. The plaintiff is seeking to equate two concepts which are not the same. However, setting that aside for the moment, the plaintiff argues that where there is a violation of Article 2 and/or 3 ECHR, Article 8 ECHR applies where such violence threatens bodily integrity and the right to a private life. States have a positive duty under Article 8 ECHR to protect the physical and moral integrity of an individual from other persons, and to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals. That may be so, but it seems to me, as already argued by the defendant, that the Article 2 and 3 breaches (aside from the investigatory duty), and indeed Article 8, all relate to infringement of the rights of the person who is the victim of the violence, in other words the deceased, and not a relative subsequently suing, inter alia, in respect of disclosure of documents, where the impugned pleading is that relating to disclosure rather than the original shooting. The plaintiff cites Jankovic v. Croatia, which involved failures in the prosecutorial process which the court held implicated Article 8 ECHR:

> *"57. The above analysis shows firstly that the relevant State authorities decided not to prosecute the alleged perpetrators of an act of violence against the applicant. Furthermore, the relevant authorities did not allow the applicant's attempts at a private prosecution. Lastly, as to the Government's contention that adequate protection was given to the applicant in the minor-offences proceedings, the Court notes that those proceedings were terminated owing to statutory limitation and were thus concluded without any final decision on the attackers' guilt. In view of these findings, the Court holds the view that the decisions of the national authorities in this case reveal inefficiency and a failure to act on the part of the Croatian judicial authorities.*
>
> *58. In the Court's view the impugned practices in the circumstances of the present case did not provide adequate protection to the applicant against an attack on her physical integrity and showed that the manner in which the criminal-law mechanisms were implemented in the instant case were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention.*

But once again there appears to be an un-bridgeable chasm to be crossed between a case by a victim of attack where there was no prosecution, and the present case involving a claim by a relative killed many years before who seeks disclosure of documents.

29. The plaintiff further submits that the Defendant cannot meet its positive obligations under Article 8 ECHR, including disclosure obligations, by simply relying on the Freedom of Information Act 2000. As above, the plaintiff is entitled to access historical records as of right without having to pursue the additional and more burdensome requirements of a subject access request under the Freedom of Information Act 2000 ("FOIA"). Indeed, the information which the plaintiff argues should be publicly available might then be subject to an exemption under section 21(1) of FOIA: "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information".

[30] Doing the best I can with this somewhat labyrinthine argument, and mindful that the impugned parts of the plaintiff's pleading relate to an alleged failure to make disclosure, and without forming any view in relation to the factual issue as to whether or not there has been a failure to make disclosure (in other words accepting the facts as pleaded as the court must do at this stage), it seems that the plaintiff's argument may be summarized as follows. Firstly, the failure to disclose documents infringes the plaintiff's right to private and family life. Article 8 not only compels governments from interference but imposes positive obligations inherent in an effective respect for private or family life (Soderman). The Article 8 harm alleged in this case includes the plaintiff's psychological damage but this is a separate and distinct category of damages from her personal injury claim, although the facts overlap. The defendant cannot meet its positive obligations under Article 8 ECHR, including disclosure obligations by simply relying on the Freedom of Information Act 2000. The State has an affirmative responsibility to protect individuals from violence by third parties which, she says, applies a fortiori where the violence emanates from an agent of the State (Jankovic).

[31] However, in each of these strands the authority relied upon by the plaintiff does not go so far as to provide authority for the plaintiff's proposition. To put it another way, this line of argument seeks to link a series of propositions which do not logically fit together, leaving gaps which require assumptions to be made, and most importantly are simply not reflective of the case pleaded. The case pursuant to Article 8 pleaded is about failure of disclosure of documents and records. It is not about the state's obligation to protect persons from violence or a failure to prosecute individuals, these latter elements only appearing first in counsel's written and oral submissions. I specifically queried at hearing whether further amendment was envisaged and was assured that the plaintiff intended to proceed with the case as pleaded in the amended statement of claim. I must conclude that although the various propositions might provide fertile material for a hypothetical discussion about the extent of Article 8's ambit, that is different from putting forward an arguable case in law on the basis of the facts pleaded, and therefore falls short of

disclosing a reasonable cause of action, and the amendment should not therefore be allowed to stand.

[32] With respect to the plaintiff's claim pursuant to Article 10 (freedom of expression), (paras 29 (c) and 32 of the amended statement of claim), the defendant submits that this relates to the dissemination of documents and information between individuals but it does not create a right to access to documents held by the state. In other words it is simply not an Article 10 issue. In Leander v Sweden (1987) ECHR 9248/81 the Court held that Article 10 did not confer a right of access to information held in public records. It observed:

> *" …that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in the circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."*

[33] Nevertheless the plaintiff maintains that Article 10 is engaged in the present case because on her interpretation of Leander, her counsel submits that Article 10 is not just about freedom of expression but extends to the right to receive information including from the State. He cites Segerstedt v-Wiberg and others v Sweden Application ECHR [2005] No. 62332/00 where the Court ruled admissible an application about storage of personal information and refusal of access to all the Swedish secret police records concerning the applicants. In relation to one of the applicants regarding his participation in a political meeting in Warsaw in 1967, taking into account the age and nature of the information, the Court did not find its continued retention to be supported by reasons of national security and held that its storage was in breach of Articles 8 and 10. It also held that the applicants were all entitled to an effective remedy to enable them to prosecute their rights:

> *"The Court sees no reason to doubt that the applicants' complaint is under Article 8 of the Convention about the storage of information and refusal to advise them of the full extent to which information on them was being kept could, in accordance with its consistent case-law …be regards as "arguable" grievances attracting the application of Article 13. They were therefore entitled to an effective domestic remedy within the meaning of this provision.*

However, this is clearly of little assistance to the plaintiff contending that Article 10 is engaged in the present case because: firstly it refers only to Article 8 not 10; secondly, the plaintiff in the amended statement of claim dropped any claim pursuant to Article 13 and thirdly, clearly domestic law does provide effective remedies but simply, in this case, not pursuant to Article 10. In my view any attempt to pursue a

claim under Article 10 is inarguable because Article 10 does not concern the issues in this case as pleaded.

[34] The plaintiff at hearing referred to an additional authority, Kenedi v Hungary (application No. 31475/05, judgment dated 26 May 2009). The applicant in that case was a historian who sought unrestricted access to records authorised by an order of the Budapest Regional Court (affirmed on Appeal), which prevented him from completing a study about the operations of the Hungarian State Security Service in the 1960s. The government sought to impose a condition of confidentiality, which the Regional Court said it was not entitled to do. Further proceedings ensued to prevent enforcement of the granting access. Before the Court of Human Rights the Government conceded that there had been infringement with the applicant's freedom of expression and the Court emphasised that unrestricted access was an essential element of the applicant's right to freedom of expression and the Government's obstinacy was contrary to domestic law and tantamount to arbitrariness. However, I must agree with the defendant's submission that the facts of the Kenedi are different from the present case which is much more akin to Leander than to Kenedi. In Kenedi the Court was impressed by the arbitrary nature of the government's conduct which was in face of a court order and despite repeated rejection of the government's position by domestic courts, which factors do not arise in this present case. The Article 10 claim in the amended statement of claim is therefore inarguable and the amendment should be disallowed.

[35] That leaves the plaintiff's claim, in the amended statement of claim, pursuant to Article 1, Protocol 1 of the ECHR where at para. 33 she pleads: "The Defendant has interfered with the Plaintiff's property rights contrary to Article 1, Protocol 1 of the Human Rights Act 1998, in that the Defendant by its actions and omissions has unlawfully deprived the Plaintiff of the remedy of compensation for the unlawful killing of her husband". The plaintiff concedes that there is little jurisprudence on this point. The authority cited (Beyeler v Italy Application 33202/96) is a case of an entirely different nature, involving an application by a Swiss national who sought to purchase a painting by Van Gogh which the relevant Italian ministry had declared to be a work of cultural or artistic interest the sale of which had to be declared to the Ministry of Cultural Heritage, which had power of pre-emption. The Ministry was slow to act but eventually decided that it would not purchase the painting as it was not of sufficient interest. Nevertheless the vendor's application for an export licence was refused on the ground that the sale would be detrimental to the national cultural heritage. Protracted proceedings ensued with the Ministry of Culture eventually acquiring the painting 11 years after the initial proposed sale, which the Court of Human Rights held constituted unjust enrichment which was incompatible with the "fair balance" requirement in Article 1 of Protocol 1, and was a violation of the provision.

[36] I find it difficult to draw any analogy between the facts and circumstances of the Beyeler case and the present case. Perhaps more fundamentally, it is difficult to see how the defendant can be said to have interfered with the plaintiff's right to compensation for the killing of her husband, other than to defend the plaintiff's claim which it is obviously entitled to do. It has made disclosure in the course of the proceedings and whether or not that disclosure is complete is an issue to be dealt with in the course of the case as it proceeds. It cannot be said to interfere with the plaintiff's property rights and interference with Article 1, Protocol 1 is simply not arguable, and the amendment pleading the claim should not be allowed.

[37] Therefore, those parts of the plaintiff's proposed amended statement of claim which plead breaches of Articles 6 by breaches of Articles 2, 8, 10 and Article 1 of Protocol 1 must be struck out as disclosing no reasonable cause of action, or if pleaded by amendment, the amendment disallowed.

[38] In summary, the following portions of the plaintiff's amended statement of claim are struck out, or where they have been amended, the amendment is disallowed:

Paragraph 8 is struck out.

Paragraph 19 is struck out and amendments at 19 (i) and (ii) disallowed.

Paragraphs 28 and amendments at 29 (d) and (e) are disallowed.

Paragraphs 30 to 34 are disallowed.

Paragraph 44, so far as it refers to Articles 8, 10 and Article 1 of Protocol 1, are disallowed.

Paragraphs 46 - 49 are disallowed.

I will hear counsel on the issue of costs at their convenience.