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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

Michael Gallagher

Plaintiff

and

Chief Constable of the Police Service of Northern Ireland

Defendant

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Mr Southey KC and Mr Foster BL (instructed by Fox Law, Solicitors) for the Plaintiff
Mr Lunny KC (instructed by The Crown Solicitor) for the Defendant

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MASTER BELL

Introduction

[1] Michael Gallagher has long campaigned in respect of the Omagh bombing which occurred on 15 August 1998 and in which his son Aiden was killed. One aspect of that campaign was that he launched a civil action against the Chief Constable claiming that, although article 2 of the European Convention on Human Rights ("ECHR") obliged that the Chief Constable conduct an effective investigation into the many deaths which occurred as a result of the explosion, the investigation which was carried out was ineffective. Mr Gallagher also brought an application for judicial review which was heard by Horner J (*Re Gallagher* [2021] NIQB 85), the outcome of which led to the establishment of a statutory public inquiry ("the Inquiry") into whether the Omagh bombing was preventable by state authorities. The work of that Inquiry commenced in February 2024 under Lord Turnbull.

[2] In this application before me, the Chief Constable asks the court to place a stay on Mr Gallagher's civil proceedings because of the likely overlap between those civil proceedings and the work of the Inquiry.

[3] Before the hearing I received a skeleton argument on behalf of the Chief Constable prepared by Mr Lunny KC, Miss Fee KC and Mr McKibben BL. I also

received a skeleton argument on behalf of Mr Gallagher from Mr Southey KC and Mr Foster BL. At the hearing I received oral submissions from Mr Lunny and Mr Southey. I am grateful to counsel for their helpful written and oral submissions.

Defendant's Submissions

[4] The defendant began by submitting that the court has a jurisdiction to stay the civil proceedings under section 86(3) of the Judicature (Northern Ireland) Act 1978, the inherent jurisdiction of the Court, and the overriding objective set out in Order 1 Rule 1A of the Rules of the Court of Judicature. This was an uncontroversial submission, agreed to by the plaintiff.

[5] Mr Lunny referred me to the decision of Lord Bingham in *Reichhold Norway ASA and another v Goldman Sachs International* [1992] 2 All ER (Comm) 174. In that case the defendant had succeeded in having English proceedings stayed pending the outcome of arbitration proceedings which had been initiated in Norway. Mr Lunny submitted that the power to stay was unfettered and depended only on the exercise of the court's discretion in the interests of justice. He also submitted that the benefits likely to result from imposing a stay should clearly outweigh any likely disadvantage to the plaintiff.

[6] The defendant acknowledged that the focus of the Inquiry is upon the preventability of the Omagh atrocity whereas the focus of the civil action is upon the adequacy of the post-atrocity police investigation. Nevertheless, counsel contended that there would be a significant overlap between the ground that the Inquiry would cover and the ground that the civil action would cover.

[7] Mr Lunny referred me to the Inquiry's Terms of Reference which indicated that the Inquiry would consider issues such as the sharing of intelligence, access to intelligence materials, and information sharing. He then opened to me the Provisional List of Issues document which was published by the Inquiry in July 2024 and which went into significantly more detail on such topics. He submitted that the Inquiry would consider a whole range of matters such as police efforts to apprehend dissident Republicans; intelligence handling, sharing and analysis; information obtained regarding mobile phone monitoring and tracking and the analysis and handling of such information; and information obtained regarding vehicle tracking and the analysis and handling of such material. Mr Lunny submitted that much of this evidence was likely to be relevant both to the issue of whether the bomb could reasonably have been prevented and also to the issue of the adequacy of the post-bomb activities undertaken to identify and bring to justice those responsible for the explosion.

[8] Mr Lunny further proposed that public inquiries enjoy very broad powers and courts show significant deference to them in this regard. He illustrated this point by reference to *R (the Cabinet Office) v The Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 which emphasised that inquiries had to "follow leads" and that courts would be very slow to restrain them unless they were satisfied, in effect, that

an inquiry was "going off on a frolic of its own". Therefore, he argued, if the Inquiry considered, for example, that there were issues regarding the adequacy of sharing of information before the bombing occurred and that those issues were suspected of having continued after the bombing, the Inquiry would not necessarily restrict itself solely to considering the pre-bombing period.

[9] An important indication of this potential overlap between the civil proceedings and the work of the Inquiry was, the defendant argued, demonstrated by the desire for discovery. In the civil proceedings Mr Gallagher has served an application for specific discovery of unredacted versions of six reports. These reports are:

(i) The McVicker Review Report (2000);
(ii) The Police Ombudsman's report concerning the Omagh bombing (2001);
(iii) The Tonge and Jones Report (2003);
(iv) The Crompton Report (2008);
(v) The Gibson Report (2009); and
(vi) The Police Ombudsman's Report arising out of the *R v Hoey* trial (2009).

It is evident from the transcript of the first public hearing of the Inquiry that each of these reports has also already been sought by the Inquiry. Mr Lunny submitted that it appears to be the position that the Inquiry has committed to providing a gist of any evidence received in closed hearings and that the plaintiff will seek to be represented by a special advocate in those closed hearings. He considered that it was likely that the Inquiry would make findings on some of the issues which are referred to in the pleadings of Mr Gallagher's civil action, such as information and intelligence sharing. Indeed, Mr Lunny argued that there was a realistic prospect that the Inquiry's findings would therefore have the effect of narrowing some of the issues that exist in the civil action.

[10] Mr Lunny emphasised that both saving money and saving court time was an important element of dealing with cases justly. In particular, saving court time played a role in assisting other litigants to gain access to justice. The outcome which Mr Lunny anticipates arising is as follows. Without a stay in the civil action, there would need to be a Closed Material Proceeding ("CMP") under the Justice and Security Act 2013 in respect of the six reports referred to above, along with multiple other sensitive documents. If the judicial review proceedings before Horner J in relation to the Omagh bombing provide any guide as to what might occur, the CMP exercise is likely to be enormously time-consuming and enormously expensive. Beyond the Chief Constable deploying the same counsel in each, there is likely to be very limited additional scope for synchronising any CMP in the civil action with the parallel CMP exercise which will likely take place before the Inquiry. What the defendant's stay application is aiming to save, therefore, are considerable legal costs which may be expended on behalf of the PSNI, and the resource of court time which

might otherwise be taken up in the civil proceedings. It could not be assumed that the same special advocate team could be deployed, given that the Inquiry appears to be contemplating the approach adopted by other public inquiries, namely not engaging special advocates for core participants on the basis that counsel for the Inquiry will arguably be performing an analogous role. Therefore, Mr Lunny submitted, the enormous additional expenditure of time and money associated with a CMP in the civil action would be disproportionate in a case where, if the plaintiff was to succeed, any award of damages was likely to be very modest.

[11] Mr Lunny also asked me to take into account the delay caused by Mr Gallagher. He noted that Mr Gallagher only commenced his action almost 19 years after the Omagh bomb and then delayed a further 4 years after serving his writ before issuing a statement of claim.

Plaintiff's Submissions

[12] On behalf of the plaintiff, Mr Southey's submissions focussed on article 6 of the ECHR which provides that there is a right to a fair trial "within a reasonable time". He referred me to the authorities of *Bhandari v United Kingdom* (Application No 42341/04) and *Allenet de Ribemont v France* (1995) 20 EHRR 557, asserting that the obligation to ensure that there is a trial within a reasonable time means that delay must be avoided at the various discrete stages of litigation and that the factors which determine whether delay is compatible with article 6 include the importance of the issues at stake. In cases where the state is alleged to have been involved in serious human rights abuses, it is obviously particularly important that justice is delivered in a manner which has credibility. The plaintiff emphasised that the basis of the right to a fair trial within a reasonable time was a concern that delays might jeopardise the effectiveness and credibility of any justice ultimately delivered (*H v France* (1990) 12 EHRR 74).

[13] In the view of Mr Southey, the starting point for the determination of this application should be that the plaintiff seeks an expeditious determination of his claim. Both article 6 and the common law entitle him to that. Counsel argued that there were three factors which in particular demonstrated a need for this. Firstly, the delay which would be caused by staying the proceedings until the Inquiry had reported is of uncertain length but is unlikely to be short. Mr Southey noted that factors which are relevant when determining what is a reasonable time include the age of a plaintiff and the length of any stay (*Re Jordan* [2020] NI 570.) Given the age of the plaintiff, such a delay might prevent him from obtaining justice. Secondly, any delay which had occurred so far which might be laid at the plaintiff's door was irrelevant as the court had to ensure promptness of disposal at all stages. Thirdly, these proceedings raised particularly important issues in that the plaintiff's allegation was that the state failed to comply with its duties to investigate serious criminality effectively. Delay in these circumstances might jeopardise the credibility of the justice system by failing to hold the state properly to account. The delay caused by the imposition of a stay might also undermine the effectiveness of the

investigation if witnesses were no longer available when the claim actually came to be decided upon.

[14] In terms of the power to stay, Mr Southey referred the court to the decision of *R(AM and OA) v Secretary of State for the Home Department* [2017] UKUT 00168 (IAC) where McCloskey J observed that the most important factors influencing the exercise of the discretion to stay would normally, though not invariably, be found in the multi-faceted overriding objective found in Order 1 Rule 1A of the Rules of the Court of Judicature.

[15] The plaintiff acknowledged that factors of time and other valuable resources had to be taken into account in applications for stays of civil proceedings. In *AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 921 the Court of Appeal for England and Wales dealt with a refusal to grant a stay of judicial review proceedings, pending an appeal to the Supreme Court in a related action. In rejecting the appeal, Jackson LJ noted that, in relation to stays of proceedings, a judge is making a case management decision and agreed with the principles governing the grant of a stay which had been articulated by the trial judge:

> "A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown."

[16] Another instance of a stay offered on behalf of the plaintiff arose in the decision of *Akciné Bendrové Bankas Snoras v Antonov & Another* [2013] EWHC 131 (Comm) where Mr Antonov sought a stay of the underlying civil proceedings brought by the Bank until after the final determination of certain extradition

proceedings then pending against Mr Antonov. In her consideration of the relevant principles applicable to the grant of a stay of civil proceedings, Gloster J emphasised:

> (i) The court has a discretion to stay civil proceedings until related criminal proceedings have been determined, but it was a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice.
> (ii) The discretion has to be exercised by reference to the competing considerations between the parties; the court has to balance justice as between the two parties; a claimant has a right to have its civil claim decided; the burden lies on a defendant to show why that right should be delayed.
> (iii) A defendant must point to a real, and not merely notional, risk of injustice.

Gloster J also took into account a range of other factors dealing with whether the continuance of the civil proceedings generally would cause a risk of serious prejudice to the defendant. Mr Southey acknowledged that this decision was concerned with concurrent civil and criminal proceedings. However, he submitted that there was no reason why the court should be any more willing to stay proceedings in the context of a public inquiry. Unlike a situation involving criminal proceedings, there was no suggestion by the defendant that the Omagh Inquiry would be prejudiced by the ongoing civil proceedings. In particular, he considered that it was significant that the decisions would be made by a judge sitting alone who would be able to ignore any media coverage of the civil claim. This is not therefore comparable to a situation where there are parallel criminal proceedings and a jury might be influenced by media coverage generated by the civil proceedings.

[17] Mr Southey also submitted that the overlap between the Inquiry and the civil proceedings would be very limited. The Inquiry is prohibited under section 2 of the Inquiries Act 2005 from ruling on, or determining, any person's civil or criminal liability. He emphasised that the Inquiry's terms of reference were to investigate whether the Omagh bomb "could have been prevented by UK state authorities" and pointed out that, under section 5(5) of the Act, the Inquiry's functions were exercisable only within its terms of reference. The civil proceedings, on the other hand, will focus on whether the investigative errors amounted to breaches of the investigative obligation contained in article 2 of the ECHR.

[18] Mr Southey suggested that the practical concerns raised by the defendant were overstated. Firstly, although the judicial review proceedings before Horner J had been lengthy and complex, they involved detailed consideration of material suggesting that the Omagh bombing could have been prevented. This is not material which will feature in the civil proceedings which will focus on the effectiveness of the post-bomb investigation. Secondly, if there is a CMP, there is no reason why the plaintiff's Special Advocate from the judicial review cannot be instructed. That

would both speed matters up and keep costs down. Thirdly, Mr Southey argued that there is every reason to believe that the six reports at issue in the plaintiff's specific discovery application will need to be disclosed at some stage and so it is inevitable that the costs associated with that discovery will be incurred.

[19] Mr Southey also drew my attention to the decision of Briggs J in *Financial Services Authority v Anderson & Ors* [2010] EWHC 308 (Ch) where the judge seems to have taken into account the issue of the discovery burden:

> "It is not enough, for example, that both the civil and criminal proceedings arise from the same facts, or that the defence of the civil proceedings may involve the defendants in taking procedural steps such as exchanging witness statements and providing disclosure of documents which might not be imposed upon them in the criminal proceedings."

Discussion

Principles to be applied

[20] Applications to stay civil proceedings are relatively common in both Northern Ireland and in England and Wales. As the case law recognises, the circumstances in which such applications arise are "almost infinitely variable" (*Reichhold Norway ASA & Anor v Goldman Sachs International)*. In some instances, a stay application may, in effect, amount to a discontinuance of the proceedings. At the other end of the spectrum, a stay application is merely a procedural device to force a party to do something which they have previously failed to do, for example submit to a medical examination by a doctor acting for the other party (*Jackson v Mirror Group Newspapers*, The Times, 29 March 1994). The jurisdiction of the court to stay proceedings may also be engaged in circumstances where the court wishes to prevent an abuse of its processes (*Ebert v Venvil* [2000] Ch. 484), where in the opinion of the court the litigation ought to take place in another jurisdiction, or where there are concurrent civil and criminal proceedings and where the civil proceedings require to be paused in case they prejudice what occurs in the criminal proceedings where the liberty of one of the parties may be at stake. In *Reichhold Norway ASA & Anor v Goldman Sachs International* Bingham CJ therefore agreed that the power to stay is exercised under a wide range of circumstances to achieve a wide variety of ends. As a result, some of the factors which have been taken into account in other cases, for example where a stay is sought pending the disposal of criminal proceedings, may not be applicable in this case.

[21] Not all applications for stays of civil proceedings are granted even in the face of possible criminal proceedings. In *Keeley & Ors Re Scappaticci* [2021] NIQB 81 Horner J had been asked to stay a number of civil proceedings pending a criminal investigation conducted in Operation Kenova and any subsequent criminal proceedings. In his decision Horner J set out a number of legal principles:

"[23] The overriding objective of the Rules of the Court of Judicature is to enable the court to deal justly and fairly with each case. This means, *inter alia*, ensuring that any case is dealt with expeditiously and fairly: see Order 1 Rule 1A. By the same token Article 6 of the European Convention on Human Rights ("ECHR") provides that:

> "in the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time."

see Article 6(1) and also *R(McAuley) v Coventry Crown Court* [2012] 1 WLR 2766 at [25].

[24] There is no dispute that justice delayed is justice denied and the court should strive mightily to ensure that both civil claims and criminal prosecutions are dealt with as expeditiously as possible. Delay has to be avoided at the various separate stages of the litigation: see *Bhandari v United Kingdom* (App 42341/04) at [18]. This is especially so when there are allegations of unlawful conduct by public officials: see *Kaloc v France* (App No.33951/96) at [120]. In this case it is especially important as there are core human rights at stake. It also assists in maintaining public confidence in the rule of law and in banishing any hint of collusion by the State in unlawful acts: see *Re Jordan* [2014] NIQB 11 at [78]. The public does have a right to know what actually happened in cases such as these: see *Al-Nashiri v Poland* [2015] 60 EHRR 16 at [491].

[25] In this case the court has the unenviable task of balancing the civil rights of those who seek to have long outstanding civil claims tried and determined against the rights of those facing criminal charges where the trial of those civil actions risks prejudicing the defendants' right to a fair trial. If the criminal trials proceed first, and the civil trials do not proceed until after the criminal trials conclude, then I find that serious and irreparable delay is inevitable with the likelihood of the evidence of the civil trials being compromised, and in some cases, fatally compromised. Indeed, I am of the view that even if the civil proceedings are delayed only until after Operation Kenova finally reports, it is likely that at least some of the plaintiffs' prospects of a fair and just trial will be irreparably damaged.

[26] In the present case the parties have shifted their positions in attempts to ensure that what they see as fairness for their client is achieved. However, ultimately it is the task of the court to take an

> objective view of all the respective interests and to try and fairly balance those interests and thus ensure that those with civil claims are dealt with fairly and justly while at the same time ensuring that those facing potential criminal prosecutions receive a fair and public hearing within a reasonable time. It can be a task fraught with difficulty. The court has an inherent jurisdiction and a statutory jurisdiction under section 86(3) of the Judicature Act (NI) 1978 to stay both civil and criminal proceedings. The court can hear concurrent criminal and civil cases which deal with the same subject matter and it should be reluctant to stay the civil proceedings, it is submitted, because of their potential adverse impact on the concurrent criminal proceedings unless satisfied that to refuse to do so would risk a fair trial. But, of course, a court will act as best it can to prevent a real risk of serious injustice if the civil proceedings proceed first."

[22] Neither Mr Lunny nor Mr Southey could, however, cite any previous authority of where a defendant wished to stay a plaintiff's civil action in order to permit a public inquiry to conclude its work. This is therefore an unusual application. However, there are a number of authorities in relation to stays from which useful principles may be derived.

[23] Firstly, it is important to note that the burden of proof in an application for a stay is upon the party who makes the application. In *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 in a context of a stay application of civil proceedings pending resolution of related criminal proceedings, where both sets of proceedings concerned five misappropriated cheques, Megaw LJ observed:

> "In my judgment, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that it is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with."

[24] Secondly, as Horner J observed in *Keely ad Others Re Scapatticci* and McCloskey J observed in *R(AM & OA) v Secretary of State for the Home Department*, a stay application must take into account the factors set out in the overriding objective which provides:

> 1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to –
> (i) the amount of money involved;
> (ii) the importance of the case;

(iv) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
(3) The Court must seek to give effect to the overriding objective when it - (a) exercises any power given to it by the Rules; or
(b) interprets any rule.

[25] Thirdly, in weighing and balancing the factors being advanced as supporting the argument for the imposition of a stay, I must have regard to whether these possess genuine substance. This was emphasised by Gloster J in *Akciné Bendrové Bankas Snoras v Antonov & Another* and also by Megaw LJ in *Jefferson Ltd v Bhetcha* when she considered whether "there was some real, not merely notional danger" that the disclosure of the defence in the civil action would or might lead to a potential miscarriage of justice in the criminal proceedings.

[26] Fourthly, the power to grant a stay of proceedings should be exercised with great care. *R v Panel on Take-overs and Mergers, ex parte Fayed and others* [1992] BCLC 938 was a decision concerning a successful take-over bid for House of Fraser Ltd by the three Al Fayed brothers through Holdings, a company owned and controlled by them. Subsequently, DTI inspectors, who had been appointed to investigate Holdings and the circumstances surrounding the bid, published their report in which they concluded that the applicants had dishonestly misrepresented their origins, their wealth, their business interests and their resources to the Secretary of State, the shareholders of House of Fraser, and others. The executive of the Panel on Take-overs and Mergers sought to bring disciplinary proceedings against the Fayed brothers on the grounds that they had, at the time of the bid, made misleading statements in breach of general principle 12 of the City Code. The Al Fayed brothers applied for judicial review of the Take-over Panel's decision not to adjourn the disciplinary proceedings until after the conclusion of civil proceedings by the Secretary of State in connection will allegedly false and fraudulent representations made by them to the Secretary of State. Neill LJ, giving the principal judgement of the Court of Appeal, observed that it was clear that the court had power to intervene to prevent injustice where the continuation of one set of proceedings might prejudice the fairness of the trial of other proceedings. However, he stated that it was a power which had to be exercised "with great care" and only where there was "a real risk" of serious prejudice which may lead to injustice.

[27] One factor which is often mentioned in the caselaw on stay applications is the risk of injustice. For example, a court may well take into account that publicity in relation to civil proceedings might be expected to reach and influence persons who might be jurors in related criminal proceedings. In the factual circumstances of this application, there is no risk of injustice occurring at the Inquiry if the civil proceedings continue. This is so, firstly, because of the different foci of the civil

proceedings and the Inquiry and, secondly, because the decision makers in both the Inquiry and the civil proceedings are judges rather than juries.

[28] In summary, the principles which I intend to apply in deciding this application are therefore as follows:

(i) The power to stay an action is an aspect of the inherent jurisdiction of the High Court.
(ii) This power is unfettered and depends only on the exercise of the court's discretion in the interests of justice.
(iii) It is not enough that overlapping proceedings arise from the same factual matrix.
(iv) The factors for and against granting a stay must be weighed against each other and the burden of proof is upon the defendant to satisfy the court that the ends of justice would be better served by granting a stay.
(v) The factors set out in the Overriding Objective must be firmly borne in mind.
(vi) The court should not lightly interfere with the exercise by the plaintiff of his right to pursue proceedings.
(vii) The staying of proceedings will be unlawful if it results in a breach of the reasonable time requirement of article 6 of the ECHR.

The issue of overlap

[29] In *R (Cabinet Office) v Chair of the UK COVID-19 Inquiry* [2023] EWHC 1702 (Admin) Dinglemans LJ and Garnham J considered how far a public inquiry may stray from its terms of reference. They noted that public inquiries are convened to address matters of public concern which are identified in their terms of reference and the powers of the inquiry can only be exercised within those terms of reference. However, they recognised that it was well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry therefore had to follow leads and it was not bound by the rules of evidence. If an inquiry was bona fide seeking to establish a relevant connection between certain facts and the subject matter of the inquiry, it would not be regarded as acting outside its terms of reference if it does so. In *Douglas v Pindling* [1996] AC 890 Lord Keith considered that a court should be very slow to restrain an inquiry from pursuing a particular line of questioning and should not do so unless it was satisfied, in effect, that the inquiry was going off on a frolic of its own. If there was a real, as distinct from a fanciful, possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the inquiry is required to investigate under its letters patent, such a line of questioning should be treated as relevant to the inquiry. Lord Keith also approved dicta from Henry JA that, because an inquiry was an investigative body, it

must necessarily embark on what might otherwise be described as a "fishing expedition."

[30] It was on this basis that Mr Lunny suggested that I could have little confidence in the plaintiff's argument that there would be little overlap between the plaintiff's civil proceedings and the Omagh Inquiry, one being focused on the post-bomb events and one being focused on the pre-bomb events. I do not consider that this authority or argument assists the defendant's application. At the time when the government decided to respond to the judicial review decision of Horner J by establishing the Inquiry, it knew that the plaintiff had launched civil proceedings in 2017. It must have been fully aware that there was a potential for overlap between the civil proceedings and the work of the Inquiry. However, on the basis of the submissions made before me at this stage, the degree of overlap can only be speculative, and speculation is not a legitimate form of judicial fact-finding.

The issue of delay

[31] I enquired of counsel whether they had any estimates as to how long the Omagh Inquiry would last. Mr Southey, who represents Mr Gallagher at the Inquiry, indicated that an estimate of between two to five years was the best that he could provide. It is usually the case when a stay is sought that the length of the stay is difficult to estimate. But, as Mr Southey indicated, there is every reason to believe that the delay caused by a stay would be significant. One must also observe that, while Lord Turnbull will obviously wish to conclude the Inquiry as soon as is possible, public inquiries do not have a reputation for brevity.

[32] One of the most important domestic authorities in relation to the imposition of stays is *Re Jordan's Application for Judicial Review* [2019] UKSC 9. In that case a claim for damages had been stayed by the Court of Appeal for Northern Ireland until an inquest had concluded. In his judgment on behalf of the Supreme Court, Lord Reed observed that while the case management powers of the court can include ordering a stay of proceedings in appropriate circumstances, three important aspects of Convention rights must be borne in mind. Lord Reed said:

> "First, the European Court has emphasised many times that Convention rights must be applied in a way which renders them practical and effective, not theoretical and illusory: see, for example, *Airey v Ireland* (1979) 2 EHRR 305, para 24.

Next, Lord Reed stated:

> "Secondly, since the right conferred by section 7(1)(a) of the Human Rights Act is a civil right within the meaning of article 6 of the Convention, a claimant is entitled under that article to have his claim determined within a reasonable time. That right under article 6 is distinct from the article 2 right on which the

> proceedings are based. A breach of the article 6 right is itself actionable under section 7(1)(a)."

Lord Reed then observed:

> "Thirdly, since a stay of proceedings prevents a claim from being pursued so long as it remains in place, it engages another aspect of article 6 of the Convention, namely the guarantee of an effective right of access to a court: see, for example, *Woodhouse v Consignia plc* [2002] EWCA Civ 275; [2002] 1 WLR 2558. It must therefore pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved: see *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, para 72. It follows that even in a case where a stay would not render the article 2 right ineffective or breach the "reasonable time" guarantee in article 6, it is nevertheless necessary to consider whether it would be a proportionate restriction of the right of access to a court. As will be explained, that exercise requires consideration of the circumstances of the individual case before the court."

[33] In respect of this third point made by Lord Reed, Potter LJ forcibly stated in *Abraham v Thompson* [1997] 4 All E.R. 363, CA:

> "In my view, the starting point in any case where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point is the fundamental rule that an individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action … This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious, oppressive or otherwise an abuse of process, then the court may dismiss the action or impose a stay whether under the specific provisions of the RSC or the inherent jurisdiction of the court.".

[34] Life expectancy of a litigant facing a stay application is a factor which must be taken into consideration in this regard. In *Re Jordan's Application for Judicial Review* [2019] UKSC 9 Lord Reid commented on age in the context of legacy litigation:

> "In most cases the claimant is likely to be the widow, parent or child of the deceased, and may suffer anguish as decades pass without any adequate inquiry into the circumstances of the death, particularly where there are allegations of state

> involvement in the death (as in the present case), and of collusion and cover-up. The imposition of delay in the determination of their claim for damages may cause additional distress. There may be other factors in individual cases which make the expeditious determination of the claim particularly important. The present case, for example, illustrates the importance of expedition where proceedings are brought by claimants who are elderly or infirm. In striking an appropriate balance between the different interests at stake, the length of any stay will be of considerable importance."

Similarly, Horner J noted in the stay application in *Keeley & Ors Re Scappaticci* [2021] NIQB 81:

> "A complete stay of the civil proceedings will be a total abnegation of justice for those litigants who do not survive what is likely to be the considerable delay before the civil proceedings recommence after the criminal trials are concluded and the Operation Kenova report is completed."

I am informed by counsel that Mr Gallagher is aged 75. Mr Southey did not offer any evidence about the state of Mr Gallagher's health. He did, however, argue that the family members of other victims of the Omagh bomb were older and possibly more infirm than Mr Gallagher, Mr Lunny responded, in my view correctly, that I could not take into account the age and health of anyone other than Mr Gallagher who had brought these proceedings.

The issue of expense

[35] The argument advanced on behalf of the defendant is essentially an economic one rather than, is often the case in stay applications, a risk of injustice argument. Although it was not mentioned by counsel for the defendant, I take judicial notice of the facts that these are difficult financial times for public sector organisations generally who are expected to operate within tight budgets and that a £750,000 penalty was imposed earlier this year on the PSNI by the Information Commissioner in connection with a major data breach. Inevitably, therefore, the PSNI budget must be under strain as it seeks to fulfil its responsibilities.

[36] The issue of unnecessary costs is clearly a matter which the court can take into account when considering the grant of a stay. That this is so, is clear from both the Overriding Objective and earlier case law. In *The Eschersheim Erkowit (Owners) and Others v Salus (Owners) and Others* [1975] 1 W.L.R. 83, which concerned a collision at sea between the *Erkowit* and the *Dortmund*, the court was asked to grant a stay on the basis that, under the salvage agreement, the claims were to be referred to arbitration. Brandon J was referred to a number of authorities in which the court had considered to what extent the avoidance of multiplicity of proceedings may justify the refusal of a stay. Brandon J came to the conclusion that the decisive factor in that

case was the need to avoid duplication of proceedings in England with all the consequences with regard to delay, additional costs and the risk of conflicting decisions which such duplication would involve. In respect of the Omagh bombing, there will inevitably be some degree of duplication between the plaintiff's civil action and the Inquiry and the potential costs are clearly one of the relevant factors to be weighed in the overall balance as to whether a stay ought to be granted.

Weighing factors together

[37] Whether a stay is a proportionate case management response to the circumstances depends on an assessment of the weight of the competing interests at stake in those particular case circumstances.

[38] When it comes to weighing factors, not all factors are of equal importance. Certain factors will have more importance than others. How does one balance the issues of cost and fairness? Are they equal or is one more important than the other? I note, for example, that in *R v Panel on Take-overs and Mergers, ex-parte Fayed and others*, Neill LJ accepted that there was a significant overlap between the disciplinary proceedings but considered this in the context of a risk of prejudice and not in the context of expense to be saved. Clearly both factors are significant, but the former is the more important factor. In *D v D and B Ltd* [2007] EWHC 278 (Fam) Charles J referred to a wide statutory discretion which was:

> "… to be conducted having regard to all the relevant circumstances to achieve fairness without disproportionate expense …"

Nevertheless, while the goal is fairness without disproportionate expense, if the only choice is between a fair outcome and a high cost to the litigation or low cost litigation and an unfair outcome, then the former must obviously be chosen.

[39] In *J. Bollinger S.A. and Another v Goldwell Limited* [1971] F.S.R. 405 Megarry J was asked to stay one action and allow another to proceed. He concluded that the principle to be applied must essentially be one of justice and convenience. It was plain that there was a considerable degree of common ground between the two actions. He recognised that it was likely to conduce to the saving of time and money if the same judge heard both actions. However, he considered that a litigant was entitled not to be delayed in the determination of his dispute without good cause. On the particular facts of that case, the court did not consider that there was much in it one way or the other; and a good deal was likely to depend upon what delay, if any, would be occasioned to the Bollinger action. In view of the uncertainty as to delay, Megarry J did not think that a sufficient case had been made out for disturbing the natural course of events. Later, when discovery had taken place and the cases were nearing trial, the element of possible delay could be better estimated, and it might be that a further application might be justified and might succeed.

Conclusion

[40] The burden of proof in this application is on the defendant who seeks the grant of a stay of Mr Gallagher's civil proceedings. The principal argument which the defendant seeks to rely upon as a justification for the grant of a stay is the saving of costs. Nevertheless unlike, for example, in applications for a split trial under Order 33 Rule 3, where estimates of the costs of the liability and quantum elements of a trial are frequently attempted by an applicant, Mr Lunny was not able to provide me with any estimate of how much public money might be saved if a stay was to be granted at this stage.

In weighing the relevant factors I also take into account that there is no risk of prejudice to the Chief Constable's legal position if Mr Gallagher's civil action continues. Nor has there been any submission that the Inquiry's position will be compromised in any way.

The factor which bears the heaviest weight in this application is, however, the issue of time and delay. *Re Jordan's Application for Judicial Review* clearly held that the staying of proceedings would be unlawful if it resulted in a breach of the "reasonable time" guarantee contained in article 6. The House of Lords Statutory Inquiries Committee in its September 2024 report entitled "Public Inquiries: Enhancing Public Trust" noted that it had received evidence from senior counsel with experience of public enquiries that such inquiries took "far too long" (paragraph 56). In the light of the history of these proceedings so far and the inevitable vagaries of the indications as to how long a delay any stay might occasion, I cannot be satisfied that the balance of competing interests in this case fall in favour of a stay of the civil proceedings pending the conclusion of the Inquiry proceedings. In my view a stay is not an option consistent with either Article 6 of the ECHR or the overriding objective of the Rules. I therefore dismiss the application.