Neutral Citation No: [2017] NIQB 8 | *Ref:* **STE10171**

Judgment: approved by the Court for handing down | *Delivered:* **24/01/17**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

EILISH MORLEY

Plaintiff:

and

MINISTRY OF DEFENCE, PETER KEELEY AND THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendants:

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STEPHENS J

Introduction

[1] These are applications by the first defendant, the Ministry of Defence, and the third defendant, the Chief Constable of the PSNI, for a declaration pursuant to section 6 of the Justice and Security Act 2013 ("the 2013 Act") and Order 126 Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that these proceedings are proceedings in which a closed material application may be made to the court. The proceedings in question are a claim by the plaintiff, Eilish Morley, that on 19 April 1990 the second defendant, Peter Keeley, whilst an agent of the Forces Research Unit of the MOD, murdered her son Eoin Morley ("the deceased") at Iveagh Crescent, Newry, County Down. The Plaintiff alleges that the MOD caused or permitted or instructed the second defendant to murder the deceased or with knowledge or means of acquiring knowledge that he intended to murder or seriously injure the deceased, the MOD failed to take any or adequate or timeous steps to prevent the murder. The plaintiff also alleges that the RUC, to whose liabilities the third defendant has succeeded, failed to carry out a proper

investigation into the murder and that the Special Branch of the RUC withheld from CID Officers intelligence which would have been of use in the prevention and detection of crime.

[2] The applications for a declaration by the MOD and the Chief Constable involved both open statements of reasons dated respectively 7 December 2015 and 30 November 2015 and closed statements of reasons. In such circumstances the Advocate General for Northern Ireland pursuant to section 9 of the 2013 Act appointed Special Advocates to represent the interests of the plaintiff in that part of the application from which the plaintiff and her legal representatives is excluded.

[3] In this open judgment I give reasons for my decision. In the event it is unnecessary to produce a closed judgment in addition to this open judgment, see *McGartland & Another v Secretary of State for the Home Department and XH v Secretary of State for the Home Department*.

[4] Dr McGleenan QC and Mr Coll QC appeared on behalf of the MOD and the Chief Constable. Mr Friedman QC and Mr Magowan appeared on behalf of the plaintiff. Mr McCullough QC and Ms Murnaghan QC were the Special Advocates appointed by the Advocate General for Northern Ireland to represent the interest of the plaintiff in those parts of the application which were closed. I am grateful to all Counsel for their assistance.

The position adopted by the Special Advocates

[5] In a statement dated 2 August 2016 the Special Advocates for the plaintiff. having carefully reviewed the closed statements, the closed materials produced by the first and third defendants in support of their application for a declaration, together with the first and third defendant's open skeleton argument and the plaintiff's open skeleton argument stated that they had concluded that there was no realistic basis to resist the application for a declaration under section 6. In arriving at that conclusion the Special Advocates bore in mind the submissions made on behalf of the plaintiff and the contents of the affidavit of Claire McKeegan. They also noted the suggestion made by the plaintiff's solicitors that the application for a section 6 declaration had been made prematurely and required additional directions before it could be determined. The Special Advocates respectfully did not support that analysis.

[6] As I stated at paragraph [6] in *McCafferty v The Secretary of State for Northern Ireland* [2016] NIQB 47, the Special Advocates have no authority to make concessions on behalf of the plaintiff. The court remains bound to consider the application in full.

The Pleadings

[7] It is acknowledged on behalf of both the plaintiff and the first and third defendants that the pleadings require to be amended. In the introduction to this

judgment I have set out in summary form the nature of the plaintiff's claim. I will give some further details of the allegations that are made.

[8] The plaintiff's case against the MOD is that the second defendant was its agent on 19 April 1990 when he murdered the deceased. In addition to the allegation that the first defendant caused or permitted or instructed the second defendant to murder the deceased, there are a number of other allegations of negligence, including failing to warn the deceased that his life was in danger, failing to carry out any adequate assessment of the second defendant's suitability as an employee, colluding with terrorists and failing to devise a system for monitoring agents. The plaintiff also alleges that the first defendant was guilty of assault, battery, trespass to the person, conspiring to perform an unlawful act, conspiracy to injure the deceased and misfeasance in public office.

[9] The plaintiff's case against the second defendant is based on a number of different causes of action but, in short form, it is that he murdered the deceased.

[10] The plaintiff's case against the third defendant is that there was a failure to conduct a proper and thorough investigation into the deceased's murder. There are further particulars of negligence including protecting the second defendant from a proper criminal investigation and potential prosecution. The plaintiff also relies against the third defendant, but not the first defendant, on Article 2 ECHR but does not specify in what respects she does so.

[11] The allegations in the statement of claim lack particularity, for instance, it is not specifically alleged that the second defendant was an agent of the first defendant and, if so, when he became an agent, nor is it alleged that he was "run" by the Forces Research Unit. Also, it is not specified who instructed the second defendant to murder the deceased or how the first defendant knew that the second defendant intended to murder the deceased. The clandestine nature of what the plaintiff alleges may make it difficult for her to give those particulars but that is not the reason why the particulars are not contained in the statement of claim. The plaintiff does have access to considerably more detail which is set out in the affidavit of Claire McKeegan sworn on 7 January 2016. The particulars of the claim, insofar as they are known to the plaintiff, should be in the statement of claim, which plainly requires to be amended. Instances of further details in the affidavit of Ms McKeegan are that she refers to a book entitled "Unsung Hero" authored by Kevin Fulton in which the author described in detail his participation in the murder of the deceased, including a debrief with his handlers in the aftermath of which they welcomed the news of the murder and expressed the view "let's hope they carry on killing their own." The author also describes his recruitment for Army intelligence and his insertion into the Provisional IRA in order to work for Army Intelligence. Ms McKeegan states that there is compelling evidence that Kevin Fulton and the second defendant, Peter Keeley, are one and the same person and in that respect she refers to the Police Ombudsman's investigation into the Omagh bomb, the report of Judge Cory, the

report of and the evidence given to the Smithwick Tribunal and various media reports.

[12] The first defendant's defence admits that the deceased was shot twice on 19 April 1990 and died from his injuries sustained in the shooting. It does not admit that the second defendant was an employee of the first defendant but puts the plaintiff to strict proof of same. It denies negligence, assault, battery and all the other of the plaintiff's causes of action. Furthermore it pleads that the plaintiff's action is barred by the provisions of the Limitation Northern Ireland Order 1989 and the Human Rights Act 1998. There is an aspect of the open defence to which I will return which requires amendment.

The Legal Principles

[13] I set out the legal principles at paragraphs [16] to [31] of my judgment in *McCafferty v Secretary of State for Northern Ireland*. I will seek to apply those principles in determining this application. I expressly repeat that the court is given discretion to make a declaration if it considers that the two statutory conditions are met. It follows that both conditions have to be established on the balance of probability but even if they are the court retains discretion to refuse to make a declaration. The first condition is set out in section 6(4) of the 2013 Act and in order to satisfy the condition there is a requirement of a finding on the balance of probabilities, either that a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person whether or not another party to the proceedings or as far as this case is concerned that a party to the proceedings would be required to make such a disclosure were it not for the possibility of a claim for public interest immunity in relation to the material.

[14] The second statutory condition contained in section 6(5) is that it is in the interest of the fair and effective administration of justice in the proceedings to make a declaration. The fairness of the defendant's decision not to make a PII application is a factor to be taken into account under the second statutory condition, see paragraph [27] of *McCafferty*.

[15] The nature of these applications is that the court in closed session will be provided with more information about the content of the defendant's defence. I consider that the court can require either prior to or as a condition of granting a section 6 declaration, that a responsible officer on behalf of the first and third defendants provide a statement of truth. An analogous situation arose in *Jordan's applications* [2014] NIQB 11 at paragraphs [19] to [26]. If I grant a section 6 declaration then I will attach a condition that affidavits be sworn by responsible officers on behalf of the first and third defendants that they believe that the facts stated in the closed defence are true. Another way of articulating the jurisdiction to impose such a condition is that the second statutory condition requires the first and third defendants to establish that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration. That condition

could not be met if the responsible officers in the first and third defendants did not believe that the facts stated in the closed defence are true.

Open submissions on behalf of the Plaintiff

[16] In their careful and thorough written submission Mr Friedman and Mr Magowan made a number of points which were ably illustrated in Mr Friedman's oral submissions. I will now address those points.

[17] It was submitted that revealing obsolete historical operational methods could not damage National Security so that the court in closed session should be astute to distinguish between contemporary and obsolete historical methods. In support of this contention it was submitted that the methods used by the Forces Research Unit, which is no longer in existence, are all historical and obsolete. I consider that the court should be astute when considering the closed material for all aspects of damage to National Security and to bear in mind the distinction between contemporary and obsolete historical methods. It may be that even if certain operational methods are obsolete that there are other aspects of the same material which would be damaging to the interests of National Security. In short the plaintiff's representatives exhort both this court and the plaintiff's Special Advocates to bear in mind, amongst other factors, the question as to whether the operational methods are obsolete. I agree that this aspect should be given careful consideration in closed when reviewing the material which is asserted by the applicants to be sensitive.

[18] It was submitted that if certain aspects of the material which were asserted by the applicant to be sensitive did concern contemporary operational methods that consideration should be given to "ring fence any sensitivity attaching to (irrelevant) contemporary operational methods through the making of a PII application." It can be seen that the plaintiff's submission was restricted to "irrelevant" contemporary methods without seeking to bring definition to what contemporary methods would be irrelevant. This case involves an allegation that the second defendant was an agent of the first defendant but that his "handlers" either participated in the murder of the deceased by proxy or that they were negligent in the way in which they ran the second defendant. If the second defendant was an agent, which is not admitted by the first defendant, then contemporary methods of handling agents, including modern day techniques and training, might inform as to whether the first defendant was negligent. The question as to what is and is not irrelevant contemporary material might require a degree of analysis in the course of a closed material procedure. Furthermore if in fact the contemporary operational methods were irrelevant then they are not subject to the requirement of disclosure and a PII application would be unnecessary.

[19] The plaintiff also submitted that the identity status and handling of the second defendant, as an agent of the first defendant, is already widely in the public domain and it is amenable to open pleading without damaging National Security.

This submission is made in the context that the plaintiff contends that the first defendant's defence when combined with first defendant's skeleton argument appears to positively deny that the second defendant was a state agent and that this stance constitutes a waiver of the neither confirm nor deny policy ("NCND"). A precedent for a NCND defence is set out in *McGartland v Secretary of State* [2015] EWCA civ 686 at paragraphs [25] and [26]. I do not consider that there has been a waiver of the NCND policy but rather that the exact wording of the defence, when taken in conjunction with the first defendant's skeleton argument should be reconsidered as should aspects of the plaintiff's statement of claim. In *Higgins & Another v Chief Constable of the PSNI* [2016] NIQB 21 at paragraphs [12] to [14] I set out the reasons for the NCND policy. In some cases the only reason why it is suggested that there would be damage to National Security is that the status of an individual as an agent might be either confirmed or denied. In such cases it would be necessary at this stage of a decision under section 6 to carefully analyse whether the status of the individual was already widely known. In other cases where it is suggested that there is another way or that there are other ways in which the closed material would damage National Security then the question as to the status of the individual should be left to the section 8 stage of the procedure. It is at that stage when the court is fully sighted with full consideration of all the material for which protection is sought that a decision can be taken as to how much could or should be put into open or dealt with in private and how best to achieve a fair trial of the substantive claim. I do not consider it appropriate in the circumstances of this case to determine at this stage whether the status of the second defendant is or is not already in the public domain.

[20] In the alternative the plaintiff's open representatives submitted that if a section 6 declaration is made then the court in discharge of its duties under Order 126 Rule 25 should give clear directions for the future disposal of the action. Furthermore, it was submitted on behalf of the plaintiff and I accept that, in determining this application, the court should give consideration to the fairness of the defendant's decision not to make an application for a public interest immunity certificate. I will give consideration to that when viewing the sensitive material.

The First Statutory Condition

[21] I have set out the nature of the plaintiff's claim which revolves around the allegation that the second defendant was the agent of the first defendant and the manner in which he was controlled and/or protected. I have considered the closed material which I consider to be sensitive. I have no doubt that its disclosure would be required in the course of the proceeding were it not for the possibility of a PII claim. In my judgment the first condition is met.

The Second Statutory Condition

[22] I consider that it is only if the closed material is considered in the course of section 6 proceedings that the court will be able to conclude whether the plaintiff's

allegations are correct. I consider that the details contained in the sensitive material are essential to an evaluation of the substantive issues in these civil proceedings. I have weighed in the balance the public interests in play and also the difficulties faced by the Special Advocates. I have considered the fairness of the defendant's decision not to make a PII application. On the basis of the present information I consider that there is no practical alternative to section 6 proceedings if these civil proceedings are to be fairly tried. I consider that the second condition is met.

Discretion

[23] I have considered the exercise of discretion and given that I have concluded that it is in the interests of the fair and effective administration of the justice in the proceedings to make a declaration, I exercise discretion in favour of making a declaration.

Conclusion

[24] I make a declaration pursuant to Section 6 of the Justice and Security Act 2013 ("the 2013 Act") and Order 126, Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that these proceedings are proceedings in which a closed material application may be made to the court and that the parties to the proceedings who would be required to disclose the sensitive material are the first and third defendants.

Directions

[25] I give the following directions:

(a) An application to amend the open statement of claim is to be made on or before noon on Monday 13 February 2017.

(b) An application to amend the open defence is to be made on or before noon on Monday 27 February 2017.

(c) Open lists of documents are to be served on or before noon on 13 March 2017.

(d) The closed defence is to be served by noon on 3 March 2017 and it is to be accompanied by affidavits sworn by responsible officers in the first and third defendants as to truth.

(e) The defendant is to serve on the Special Advocates a closed list of documents by noon on 13 March 2017.

(f) The defendants are to serve on the Special Advocates by noon on 13 March 2017 a bundle of all the sensitive material which will be discloseable, indicating which, if any, of the document should be disclosed to the plaintiff.

(g) I will fix 27 April 2017 as the date of the hearing of the application by the defendants to determine whether permission should be granted not to disclose certain material and, if so, to determine whether a summary of the sensitive material should be made to the plaintiff and her open representatives and to review the section 6 declaration.

(h) The first and third defendants by noon on 13 March 2017 to serve submissions concerning the following:

(i) Closed and open applications to withhold material from open (section 8 JSA in Order 126 Rules 12 and 13). Those submissions should include:

- An indication of whether any of the subject matter of the application is capable of open summary/gist.

(ii) A response to the affidavit of Claire McKeegan dated 7 January 2016 and the exhibits attached thereto insofar as this is relevant.

(iii) Arguments as to the principles to be applied under Article 6 ECHR and the common law with regard to the fair trial of the proceedings.

(j) The plaintiff is to serve open submissions by noon on 6 April 2017 dealing with and in response to the matters outlined in the previous paragraph.

(k) The Special Advocates to serve closed submissions by 24 April 2017 dealing with and otherwise in response to the matters outlined in the previous paragraph.

(l) Liberty to apply.