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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **23/09/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTERS INVOLVING FREDERICK SCAPPATICCI

IN CLAIMS BROUGHT BY:

MARGARET KEELEY; GERARD HODGINS; VERONICA RYAN (1); VERONICA RYAN (2); JAMES MARTIN; LIAM MARTIN, FRANK MULHERN (OBO JOE MULHERN); RYAN HEGARTY (OBO FRANK HEGARTY); PATRICK McDADE; MARY BRANNIFF (OBO ANTHONY BRANNIFF); EILEEN ROBINSON (OBO VINCENT ROBINSON); CLAIRE DIGNAM (OBO JOHN DIGNAM); MARC MORELAND (OBO CAROLINE MORELAND); JIM McGILVARY (OBO MAURICE McGILVARY); ELIZABETH FLOOD (OBO PATRICK FLOOD); NUALA HAYES; EILEEN HUGHES (OBO PATRICK TRAINOR); MARIA McHUGH (OBO ANTHONY McKIERNAN); ANNE GORMAN; JOHN MURRAY; MICHAEL HARTE (OBO CHRISTOPHER HARTE); JAMES O'CARROLL AND PATRICK McNALLY (OBO PATRICK SCOTT)

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Brett Lockhart QC with Helena Wilson BL (instructed by Phoenix Law Solicitors)
Angus McCullough QC, Neasa Murnaghan QC, Special Advocates, for Margaret Keeley
Hugh Southey QC with David Heraghty BL (instructed by KRW Law Solicitors) for Gerard Hodgins
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Hugh Southey QC with Donal Flanagan BL (instructed by KRW Law Solicitors) for Veronica Ryan (1) and (2)
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Hugh Southey QC with Eugene McKenna BL (instructed by KRW Law Solicitors) for Liam Martin
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Sean Devine BL (instructed by Breen Rankin Lenzi, Solicitors) for Michael Harte
Ronan Lavery QC with Donal Sayers QC (instructed by McNamee McDonnell, Solicitors) for James O'Carroll
Des Fahy QC with Sean Devine BL (instructed by O'Muirigh Solicitors) for Patricia McNally
Mr Hanna QC with Mr McEvoy BL (instructed by the Crown Solicitor) for the 1st Defendant
Mr O'Donoghue QC with Mr Cleland (instructed by Johnsons Solicitors) for the 2nd Defendant
Mr McGleenan QC and Mr Coll QC with Joseph McEvoy BL (instructed by the Crown Solicitor) for CCPSNI, MOD, SoSNI, SoS for Defence
Mr Aiken QC Special Advocate for Scappaticci

HORNER J

INTRODUCTION

[1] All the plaintiffs have brought proceedings either on their own behalf or in a representative capacity seeking civil compensation for personal injuries, loss and damage which they each claim to have suffered as a consequence of the acts of Frederick Scappaticci ("FS"), a prominent and important member of the Provisional IRA ("PIRA"), acting, it is alleged, as a double agent of the Chief Constable of the Police Service of Northern Ireland or the RUC ("PSNI") or the Ministry of Defence ("MOD") and who was known, it is claimed, as Stakeknife. There are various sets of civil proceedings which have all reached different stages. However, they have all been stalled because of an inquiry being carried out by Jon Boutcher ("JB"), the former Chief Constable of Bedfordshire. JB's investigation is known as Operation Kenova. His task is to investigate the actions of FS and his relationship with the security forces in respect of a number of heinous crimes committed in the 1980s and 1990s in Northern Ireland.

[2] Operation Kenova can briefly be described as an independent investigation into the alleged activities of a person referred to as Stakeknife and whether there is evidence of the commission of related criminal offences by:

(a) The alleged agent, including murders, attempted murders and false imprisonments attributed to the Provisional IRA;

(b) Government, intelligence services, military or police personnel; or

(c) Any other person, whether inside or outside the Provisional IRA.

Operation Kenova, according to JB, has concentrated on three types of interconnected cases in which Stakeknife, it is alleged, had some involvement. They are:

(i) Provisional IRA murders and abductions and related attempts and conspiracies;

(ii) State misconduct, collusion or conspiracy to pervert the course of justice connected with matters falling within (i) above;

(iii) Perjury, perverting the course of justice in a public office connected with events in 2003-2007.

[3] The documents which Operation Kenova has generated can be divided into three separate categories:

(i) Material which Operation Kenova inherited from the PSNI and MOD ("the inherited material").

(ii) Further materials – which were produced or received by the government, police, military and intelligence services prior to 10 June 2016 (whether or not included within the inherited material);

(iii) Working papers of the Operation Kenova investigative team ("the working papers") comprising both primary and secondary materials.

[4] Originally JB only sought protection of category (iii). However, he claims that because of the inter-connection affecting all three categories, his position has changed. There is no application for ring-fenced disclosure. The only application which has been pursued is an application for the civil proceedings to be stayed pending the outcome of the criminal proceedings and any investigation relating to Operation Kenova. JB maintains that the final report of his investigations will greatly assist the resolution of the civil claims. This is supported by the PSNI. Further, JB was also firmly of the view that disclosure of many of the materials

sought would present a misleading picture "unless and until supplemented and read together with materials from the working papers." Obviously, the consequences of not being able to make disclosure of relevant documents may have serious consequences for the plaintiffs and their prosecution of the civil claims and/or the manner in which those civil claims are prosecuted. In truth, it may mean that at least some of the elderly and infirm plaintiffs would be denied the opportunity to pursue their claims fairly and obtain justice. I will return to this issue later on in the judgment.

[5] JB has also commenced a number of other investigations and reviews unrelated to Stakeknife which should not concern us. The dispute before this court centres on the conduct of the claims by the various plaintiffs against the defendants while Operation Kenova continues to gather information, and in particular, whether those civil claims should be stayed. If they are stayed, then the question for this court is how can they be progressed in accordance with Order 1 Rule 1A and the overriding objective of the court which is to do justice? JB claims that at the very least access to the relevant documents should be severely limited.

[6] Any consideration of these issues has to be seen against a background where the offences under consideration took place primarily between 1986 and 1994, that is some 27-35 years ago. Memories inevitably are fading with the passage of time, but more importantly some of those involved in the litigation or those who will be important witnesses have died and some are not in good health as the passing years take their toll. The witnesses' ability to give cogent testimony will continue to diminish with the passage of time. Further substantial delay will affect both the nature of the testimony which is available to the court and the quality of such testimony. JB himself is concerned about the effects of delay. He said in his final affidavit:

> "I have become increasingly concerned that the final Operation Kenova report is liable to be excessively delayed. Indeed, I am very concerned that it may come too late for many frail and elderly family members who have already waited decades to learn the truth about what happened to their loved ones; I have already met with and briefed family members who have since died. I am increasingly aware of and concerned about the scope for and likelihood of satellite litigation around prosecution decisions and even the security checking and Maxwellisation of my reports. The latter process may be particularly contentious bearing in mind that our final reports will need to address some challenging issues."

The assessment made by the Special Advocate for Gerard Hodgins and Ryan Hegarty is that it will be late 2023 before it will be possible to lift the stay. This does not seem to me to be an unreasonable assessment.

It is against such a background that the present application to stay the civil proceedings is made.

[7] At this stage I should record my gratitude to all the teams of counsel and solicitors for the submissions made to the court. They have provided me with considerable food for thought. I have carefully considered them all in some detail. I must emphasise that the reason why I have not referenced all the relevant facts, authorities and arguments which have been put forward is that to do so would have made this judgment unnecessarily long and prolix. But I must emphasise that I have taken them all into account in reaching my conclusion.

THE BACKGROUND TO THE APPLICATION

[8] The formal establishment and launch of Operation Kenova was confirmed to the Northern Ireland Policing Board on 9 June 2016 and was announced publicly and took effect on 10 June 2016. It is described as an independent investigation into the alleged activities of the person known as Stakeknife. The investigation, as I have noted, was to focus on various criminal offences carried out by Stakeknife:

(i) Including murders, attempted murders and false imprisonment attributed to the Provisional IRA;

(ii) The government, intelligence service or police personnel; or

(iii) Any other person, whether inside or outside the Provisional IRA.

Operation Kenova is external to and operationally independent of the PSNI or any other party to the civil claims.

[9] FS maintains his innocence and denies both that he has been guilty of any wrongdoing and/or that he has acted on behalf of any State Agencies and/or that he is Stakeknife.

[10] Operation Kenova has been considerably restricted over the last year by the effects of the COVID pandemic. But there has been a substantial capital investment in staff and facilities to date. The annual budget in 2021 was £6.5m and involved over 87 individuals. It has generated a huge amount of paperwork and has endeavoured through its commitment to win the confidence of those best able to shed light on the events of more than 27 years ago, many of whom harbour an innate distrust of those in authority and/or are in fear for their own personal safety and/or are in failing health.

[11] Some appreciation of the scale of Operation Kenova can be obtained from the extent of the written submissions and position papers and the summaries of the facts and the law received by this court. The evidence and legal authorities which have

been produced to the court alone amount to thousands of pages. I understand that the papers generated by Operation Kenova exceed one million pages.

[12] There was a previous application for the stay of the civil claims arising out of Stakeknife's conduct and collusion with the security services. This was made in 2017. However, no judgment was given. The application was renewed again in 2020. The COVID pandemic then struck. In the intervening period JB's Operation Kenova team has made it clear that they do not want disclosure being given in the civil claims, of which there are more than 30 cases, while Operation Kenova continues to gather evidence, to make enquiries and carry out investigations. As I have recorded Operation Kenova wants the civil claims stayed until at the very least it has reported.

[13] The documents in the possession, custody or control of Operation Kenova fall into three distinct categories as I have outlined above. JB is especially concerned that the disclosure of such materials in the context of the civil claims would "radically undermine the effectiveness of our investigation."

[14] JB's objection to disclosing the working papers (which is supported by PSNI, MOD and PPS) included the following reasons:

(a) Once news escaped that victims and witnesses had engaged with Operation Kenova this was likely to lead to unnecessary and unfair alarm, distress and fear about the reaction of others, and more importantly, it might also lead to actual intimidation, threats or attacks.

(b) It will have a chilling effect on victims and witnesses and deter engagement and co-operation. Many of those who have engaged with Operation Kenova did so only on the basis that it was carrying out a criminal investigation and was doing so independently of the PSNI. Once it is seen or thought that Operation Kenova is gathering information that is liable to be disclosed to PSNI, then this will deter and encourage many of the victims and witnesses from further co-operation.

(c) Further, such disclosure could also forewarn individuals about the evidence against them, other people's recollections and versions of events and possible lines of police questioning and inquiry. This would in turn allow suspects and their associates to destroy evidence and to pre-empt and prepare for points that may be put to them. This is particularly so in relation to secondary materials relating to the forensic analysis of documents and other exhibits and samples obtained by Operation Kenova.

(d) Of secondary importance is the huge administrative and logistical burden that such disclosure would place on Operation Kenova's team. It would compromise their agility, flexibility and capacity to respond to changing

priorities according to JB. In effect it would operate as a millstone and hamper and hinder Operation Kenova's ability to produce a final report.

[15] The plaintiffs with civil claims intend to press on with those claims for compensation arising out of the alleged historic wrongs allegedly committed more than 27 years ago by FS and/or the PSNI and/or MOD and/or the government. JB states, *inter alia*, that two batches of files had been submitted and further batches of files will be submitted in the not too distant future. His hope is that Operation Kenova will have submitted all files by the end of the year. He considers a stay of the civil proceedings is necessary and that incremental disclosure does not provide an answer to the difficulties to which he has drawn attention, because:

(a) assessment of the sensitivity of particular documents whether from a perspective of Closed Material Procedure (CMP) or Public Interest Immunity (PII) would require the engagement of Operation Kenova personnel and external third party access to its working papers;

(b) the impact of the "triple complexity at the heart of Operation Kenova" on the inevitable speculative and unsafe assessment of the materials that might flow from disclosure of the inherited and further official materials;

(c) the likelihood that external third party access to the working papers to allow such an assessment would (rightly or wrongly) damage the subjective perceptions and beliefs and (therefore) the trust, confidence, co-operation of witnesses, victims and families and (therefore) fulfilment of Operation Kenova's Terms of Reference.

[16] He fears that the release of Operation Kenova's inherited papers would only serve to confuse and mislead unless and until they were supplemented by Operation Kenova's working papers.

[17] The triple complexity referred to above has been explained by JB as:

(i) Many of the offences in the course of the Troubles were committed by terrorist organisations against members or supporters suspected of breaking some internal rule and/or acting as an informant. The mere fact that someone might be suspected of being an informant could give rise to a real and immediate risk to that person's life.

(ii) The original investigators of these offences were monitored by the terrorist organisations to see whether members and supporters were co-operating with the investigating authorities. Co-operation with the authorities will be inevitably confirmed in inherited and further official materials and such information will necessarily be sensitive and could also give rise to a real and immediate risk to the life of any person who was thought to have co-operated.

(iii) The terrorist organisations are still trying to prevent their members and supporters being prosecuted and to identify and punish those who co-operated with the authorities. The mere fact that someone has co-operated with Operation Kenova could therefore be sensitive and give rise to a real and immediate risk to that person.

[18] Therefore, JB claims that disclosure of inherited and further official materials could, when taken in conjunction with other knowledge, place certain persons who informed or who co-operated with the authorities at risk. The task of collecting materials would be immensely time consuming and would prejudice the prospects of co-operation from victims, witnesses and families. JB is dead set against disclosure in the civil claims and consequently he wants the stay of all civil proceedings in place until Operation Kenova has completed its investigations and published its report. With the best will in the world that is not going to happen anytime soon.

[19] I am satisfied that the only sensible conclusion that can be reached from considering all the papers and the various claims and counterclaims made by the different parties is that there is bound to be a further substantial delay before a line in the sand is drawn under Operation Kenova, never mind the criminal prosecutions which are likely to result. This is not a criticism of Operation Kenova or JB or the Public Prosecution Service. JB has tried to introduce measures to speed matters along. But these matters under consideration are ones of both byzantine proportion and complexity. This further anticipated delay has to be seen in the context of the years of delay that have preceded it.

[20] Furthermore, this application *per se* has also been seen against a background where the government proposes through a Command Paper entitled "Addressing the Legacy of Northern Ireland's Past" ("the Paper") to put an end to criminal and civil cases arising out of the Troubles. It is expected that there will be legislation to implement this before the end of the Autumn. It is claimed that the Paper is relevant to the issue of whether a stay should be granted and, if so, for how long.

[21] The court notes the potential legislative background against which this application is made and acknowledges that there has been delay, which is not altogether unsurprising, given how finely balanced many of the issues are. I intend to press on with my judgment in accordance with the requirements of Article 6 and the overriding objective and not to be swayed by the possible changes that may or may not be introduced as a consequence of the Command Paper's publication. Indeed, it would be wrong for me to anticipate legislation that has not been enacted and indeed may never be enacted. If it is, then fresh consideration should be given to what is the appropriate way to proceed in the light of such a change of circumstances introduced by new legislation.

ISSUES IN DISPUTE

[22] The core issue in this interlocutory application is whether the civil actions should be stayed pending the investigation conducted by Operation Kenova and any related criminal proceedings. Allied to that core issue is the important issue of disclosure in relation to the issues in dispute in the civil claims if they are permitted to continue to trial. Obviously, as I have noted, if the actions are stayed there will be no disclosure. However, one possible alternative to a complete stay of the civil proceedings is to agree that there should be a stay but to permit staged disclosure and/or restricted disclosure in the interim so that at least some progress could be made in the prosecution of the civil claims or alternatively the court could refuse to order a stay but only permit staged and/or restricted disclosure to take place in the interim.

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.

[27] The right to receive disclosure of documents is not an absolute right and a balance has to be struck between the various rights and interests of the parties and the public interest. In *Davies (Joy Rosalie) v Eli Lilly & Co (No.1)* [1987] 1 WLR 28 (CA), the court observed, *per* Lord Donaldson MR at pp 431H-432B and *per* Bingham LJ at page 445B-D respectively:

> "Let me emphasise that the plaintiffs' right to discovery of all relevant documents, saving all just exceptions, is not in issue. This right is peculiar to the common law jurisdictions. In plain language, they ask, **should I be expected to provide my opponent with the means of defeating me?** In plain language, litigation in this country is conducted **cards face up on the table**. Some people from other lands regard this as incomprehensible. **Why**, they ask, **should I be expected to provide my opponent with the means of defeating me?** The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have **all** the relevant information, it cannot achieve this object. But that said, there have to be safeguards. The party who is required to place all or most of his cards face up on the table is entitled to say, **'Some of these cards are highly confidential. You may see them for the purpose of this litigation but, unless their contents are disclosed to all**

> **the world as part of the evidence given in open court, their contents must be used for no other purpose.'** This is only fair, because, as has been well said, discovery of documents involves a serious invasion of privacy which can be justified only insofar as it is absolutely necessary for the achievement of justice between the parties.
>
> …
>
> Few, if any, common law lawyers would doubt the importance of documentary discovery in achieving the fair disposal and trial of civil actions. A requirement that a party to civil litigation should disclose private papers for inspection by his opponent in a litigation does nonetheless involve a very serious invasion of the privacy and confidentiality of his affairs. This has been recognised in a number of cases … A number of strict safeguards have accordingly been developed over the years to preserve a party's privacy so far as possible consistent with the administration of justice. This is done by controlling the documents which are required to be disclosed, the conditions upon which the inspection is to be made and copies taken, and the persons by whom inspection may be made."

[28] While disclosure of documents is certainly an important part of the common law litigation and trial process, it is not a fundamental right in the way that the principles of open justice and natural justice require the proceedings to take place and judgments to be given in public and that the parties know and can respond to the case against them and can call and cross-examine those witnesses *e.g.* see *Al Rawi v Security Services* [2011] UKSC 34.

[29] In *R v Chief Constable of West Midlands Police ex parte Wylie* [1995] 1 AC 274 (HL) Lord Woolf at page 288D-8 said:

> "In civil proceedings questions as to public interest immunity usually arise in discovery, where even if documents are strictly speaking relevant, the court can exercise considerable control over whether to require the documents to be delivered up for inspection to another party in the proceedings."

[30] He then went on to discuss the fact that while the obligation to make discovery is a wide one that general obligation is subject to the important proviso in Order 24 Rule 8 that the court should refuse to make an order for discovery if it is

not necessary either for disposing fairly of the cause or matter or for saving costs. He also pointed to similar restrictions contained in Order 24 Rule 13.

[31] Closed Material Procedure ("CMP") can be used in cases where the disclosure of information or evidence would be contrary to the public interest. In a CMP "sensitive" information which would be withheld from the plaintiffs and FS can be considered at a closed hearing where they would not be present but they would be represented by Special Advocates: *e.g.* see *Judicial Review Principles and Procedure* by Auburn, Moffett and Sharland at 5.97.

[32] A CMP can be used to help overcome any problem that might arise from disclosure of material which might prejudice any criminal trial.

[33] In a CMP an individual must have "the possibility to effectively challenge the allegations" which are being made against him: see *A v UK* [2009] 49 EHRR 29 at [218]. In the CMP, FS will be represented by Special Advocates.

[34] Finally, the courts can and have approached discovery on a staged basis if that is in the interests of justice. In *Baldock v Addison* [1995] 1 WLR 158 Lightman J decided that there should be no discovery of quantum documents where he had ordered a split trial and the issue of liability had not been determined. Again, the court would be guided by the overriding objective, namely to achieve a just and fair trial.

DISCUSSION – THE STAY

The Position of the Parties

[35] The extensive arguments which have been addressed to me both in writing and orally have required careful consideration. The justice of allowing the plaintiffs to prove their civil claims has to be balanced against, *inter alia*, the need to ensure that those such as FS who are at jeopardy in the criminal process in respect of charges arising from the same facts and circumstances, receive fair trials. The court is acutely conscious that it has to carry out a careful balancing exercise of the various circumstances under consideration to ensure that those involved in both the criminal and civil proceedings are treated fairly and justly. I intend to briefly set out the positions of the various parties, and I must stress that these are necessarily brief and imperfect summaries of detailed and nuanced arguments.

[36] Operation Kenova is concerned, *inter alia*, that the co-operation and engagement of victims and witnesses will be fatally compromised if the civil proceedings go on and full disclosure is made of documents and papers obtained from the inquiry. Operation Kenova considers that there are, *inter alia*:

(a) Increased risks to victims and witnesses;

(b) A chilling effect which will deter engagement and co-operation of witnesses;

(c) The evidence will be compromised; and

(d) The adverse impact on the efficiency of Operation Kenova if there is disclosure of its working papers.

[37] Operation Kenova wants the civil proceedings stayed until it has reported and the criminal process has been exhausted. JB has set out the reasons for this in Part 5 of his second affidavit and emphasised these in Part 4 of his third affidavit.

[38] The position of the PSNI and MOD, supported by the PPS, the independent prosecutor, is that progress of the civil claims will risk imperilling the criminal prosecutions. There cannot be incremental disclosure because of the need to consider all matters together, given their inter-related nature. They want the civil proceedings stayed.

[39] There appears to be little difference between FS's counsel and his Special Advocates. Their submission is:

(a) They should not be required to go into CLOSED on some claims when there are further linked claims which can be brought because this would prejudice the ability of the court to maintain a fair process and might have undesirable consequences from the perspective of national security;

(b) The ring fencing of documents was wholly objectionable and inimical to the fairness of the proceedings;

(c) FS is clearly at risk given the claims against him and the court should not proceed by way of any "pragmatic" solution which prioritises speed and expediency over justice and security.

[40] The plaintiffs' representatives, that is their legal teams and those appointed as Special Advocates, recognise the risks in pursuing the civil claims against the background of impending prosecutions.

[41] The plaintiffs' counsel propose to guard against these risks by:

(a) The establishment of a CMP process which would mean that material which is not sensitive will only be put into OPEN and can be done without the risk of disclosure of sensitive material to third parties.

(b) The CMP will allow the court to review in greater detail the justification for the delay to date.

(c) The Special Advocates appointed in respect of Gerard Hodgins and Ryan Hegarty propose that disclosure of the inherited material can take place into CLOSED and that this would, they claim, facilitate discussion among counsel and the possibility of applications in respect of material in CLOSED and for the Special Advocates to look and consider the potential for disclosure into OPEN. However, no such application can take place until a further review of the stay has taken place.

THE WAY FORWARD

[42] I agree that there is no detriment free route open to the court to take. Each proposed solution carries with it risks and dangers. The court has to try and balance these to achieve an overall just and fair result for the different proceedings, both criminal and civil.

[43] I do not consider a "do nothing approach" to be consistent with the overriding objective of achieving justice and fairness. 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. It will also be unfair and unjust to those that do survive because a substantial delay will have significantly compromised the evidence available to the court and is likely to make it increasingly difficult for the court to reach a just and fair decision. There are risks involved in proceeding in a limited way with the civil claims, but those risks can be managed by the use of CMP, I find.

[44] As I have said, a realistic appraisal suggests that the conclusion of Operation Kenova and the publication of its findings and the conclusions of the resulting criminal trials will be many months hence. It seems to me that the suggestions as to how to progress these claims put forward by the Special Advocates for Gerard Hodgins and Ryan Hegarty provide a framework for progress given the difficult circumstances both the plaintiffs and defendants find themselves in. I agree with the Special Advocates that the use of CMP and ring-fencing effectively precludes any prejudice to Operation Kenova, because the material being considered in the CMP, will not be placed in the public domain either at or prior to the in depth consideration of the material by the court. This will include a further stage, should this be required, once it is known that material should be disclosed into OPEN. The threat of CLOSED material being leaked is always present but it cannot be a good reason not to have a CMP. Rather, it highlights the need for eternal vigilance.

[45] I also note that the Special Advocates Support Office has agreed in principle that they be appointed in the remaining claims involving FS where KRW Law are the instructing solicitor.

[46] In the circumstances I give the following general directions for the future conduct of the civil claims:

(i) Firstly, it is important that Statements of Claim are served in respect of all the claims. It is also equally important that defences are served in respect of those statements of claim which have been served (or to be served) as this will bring definition to each set of proceedings.

(ii) Secondly, PSNI or MOD should make section 6 applications promptly in respect of all those claims where such application has not been made.

(iii) Thirdly, PSNI and/or MOD should provide copies of the inherited material to the Special Advocates in CLOSED. This will be better done in tranches. This is a matter for the PSNI and/or MOD and not Operation Kenova. As the Special Advocates observe, it is an exercise that PSNI and/or MOD have had significant time to prepare for and in any event is likely to be some months distant.

(iv) Fourthly, the CLOSED material should be provided to the Special Advocates in tranches which are manageable. I appreciate consideration of all this material is likely to take some time and will have to remain in CLOSED while it is considered.

(v) Fifthly, there should be provision made for further applications if it is considered that not all the inherited material has been disclosed. I will deal with such applications although I will not be hearing the trial(s).

(vi) Sixthly, Operation Kenova's working papers will remain ring-fenced in the meantime (but see below).

(vii) Seventhly, it seems to make sense to split the claims up into two different lists to make them more manageable. There will be a List A and a List B to reflect the different stages reached in respect of the different claims.

(viii) Eighthly, the defendants should consider what, if any, working papers can be provided in discovery at this stage. In the meantime, all other working papers remain ring-fenced until either the court is informed by the PSNI and/or Operation Kenova that they do not object to the "working papers being disclosed."

(ix) Finally, the parties and their representatives shall meet in the next two weeks and try and agree detailed court directions, such as a time for performing each of these tasks. If directions can be agreed, then they should be submitted to the court two weeks from now. Regardless of whether agreement has been reached the case will be listed for case management within approximately four weeks from the date hereof. I stress that it is preferable for the parties to agree a timetable for what has to be done rather than the court having to impose a timetable unilaterally. It would also be better if the parties were

able to agree as to which cases should be in which list. However, if agreement cannot be achieved on any of these issues, I will provide the necessary orders to implement these directions. There will be a case management hearing in the week commencing 11 October. A position paper is to be filed by each party by 4 October (if required). If agreement cannot be achieved, I will provide dates for the steps that have to be taken at the case management hearing so as to allow reasonable progress to be made in respect of these claims. I stress that given the time that has passed, stagnation is not an option and it is in the interests of justice that reasonable progress be made, but without prejudicing either the work of Operation Kenova or any criminal trials.

CONCLUSION

[47] Given the delay to date of the civil claims, the likely further delay and the effect that that delay has had and will have on the parties and their witnesses and the evidence, it is imperative that some progress be made in all of the civil claims. I do not consider that a stay is an option consistent with either Article 6 of the ECHR or the overriding objective of the Rules. I have set out how I see the way forward. It would be better if the parties could meet and agree dates and directions consistent with the judgment I have given. Accordingly, I will fix a case management hearing in the week of 11 October and direct that in the interim parties meet remotely and try and reach agreement. In the absence of any agreement they should lodge their own proposed directions for the progress of these claims on the basis of this judgment on or before 4 October 2021 and try and agree a mutually convenient date for the case management hearing with the court office. At the case management hearing in October I will give further directions for the management of these civil claims in the absence of an agreed way forward.

[48] For the record all these claims will be case managed by me until they are allocated to the other judge(s) who will be charged with hearing the civil claims.