

Judicial Communications Office

23 September 2021

COURT DECIDES NOT TO STAY CIVIL PROCEEDINGS PENDING OUTCOME OF CRIMINAL PROCEEDINGS RELATING TO FREDERICK SCAPPATICCI

Summary of Judgment

Mr Justice Horner, sitting today in the High Court in Belfast, decided not to stay the civil claims arising out of historic wrongs allegedly committed by Frederick Scappaticci (“FS”) pending the outcome of the investigation conducted by Operation Kenova and any related criminal proceedings.

Mr Justice Horner found that a stay of the civil claims was not consistent with either Article 6 of the European Convention on Human Rights (“ECHR”) which sets out the entitlement to a fair and public hearing within a reasonable time or with the overriding objective of the Rules of the Court of Judicature (Northern Ireland 1980 (“the Rules”) to enable the court to deal justly and fairly with each case. The overriding objective means, *inter alia*, ensuring that any case is dealt with expeditiously and fairly.

Given the delay to date of the civil claims, the likely further delay and the effect of same, Mr Justice Horner stated it was imperative that some progress be made in all of the civil claims and he set out the way forward, directing, *inter alia*, that a case management hearing be fixed in the week commencing 11 October 2021 and that, in the interim, parties should try and reach agreement on how to progress the claims.

Introduction

All the plaintiffs have brought proceedings seeking civil compensation for personal injuries, loss and damage which they each claim to have suffered as a consequence of the acts of FS, a prominent and important member of the Provisional IRA (and who was known, it is claimed, as Stakeknife) 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”).

These civil proceedings have been stalled because of an inquiry known as Operation Kenova which is being carried out by Jon Butcher (“JB”), the former Chief Constable of Bedfordshire. JB’s 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. According to JB, Operation Kenova has concentrated on three types of interconnected cases in which, it is alleged, Stakeknife had some involvement: (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

Judicial Communications Office

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

The only application pursued before the court was an application for the civil proceedings to be stayed pending the outcome of any investigation relating to Operation Kenova and any related criminal proceedings. If the civil proceedings were stayed, Mr Justice Horner said that the question for the court would be how they could be progressed in accordance with the overriding objective to do justice?

Mr Justice Horner stated that any consideration of the issues had to be seen against a background where the offences under consideration took place primarily between 1986 and 1994, some 27 - 35 years ago. Therefore, memories inevitably were fading, some of those involved in the litigation or those who will be important witnesses have died and some were not in good health. Further substantial delay would affect both the nature of the witness testimonies available to the court and the quality of such testimony.

Background to the application

Operation Kenova is an independent investigation into the alleged criminal activities of FS. 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. Some appreciation of the scale of Operation Kenova can be obtained from the fact that, to date, there has been substantial capital investment in staff and facilities and a huge amount of paperwork has been generated.

A previous application for the stay of the civil claims arising out of Stakeknife's conduct and collusion was made in 2017. However, no judgment was given. The application was renewed again in 2020 but then the COVID pandemic struck, considerably restricting the progress of Operation Kenova.

Operation Kenova does not want disclosure being given in the civil claims while it continues to gather evidence, make enquiries and carry out investigations. The concern is that the disclosure of such materials in the context of the civil claims would "radically undermine the effectiveness of our investigation." It is claimed that collecting materials would be immensely time consuming and would prejudice the prospects of co-operation from victims, witnesses and families. Also, the disclosure of Operation Kenova's 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. Therefore, JB objects to disclosure in the civil claims and he wants the stay of all civil proceedings in place until Operation Kenova has completed its investigations and published its report.

Mr Justice Horner said he was satisfied there was bound to be further substantial delay before a line in the sand was drawn under Operation Kenova, never mind the criminal prosecutions which were likely to result and such further anticipated delay had to be seen in the context of the years of delay preceding it. The court noted the realistic assessment made

Judicial Communications Office

by the Special Advocate for Hodgins that, if a stay of the civil proceedings was granted, it would be late 2023 before it would be possible to lift the stay.

The court referred to the Government's proposals in a Command Paper entitled "Addressing the Legacy of Northern Ireland's Past" ("the Command Paper") to put an end to criminal and civil cases arising out of the Troubles and it noted the expectation that there would be legislation to implement this before the end of Autumn. Mr Justice Horner considered it would be wrong for him to anticipate legislation that had not yet been enacted and, indeed, may never be enacted. Therefore, he expressed the intention to proceed with his judgment in accordance with the requirements of Article 6 of the ECHR and the overriding objective in the Rules 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. He added that if new legislation was enacted, fresh consideration should be given to what was the appropriate way to proceed in the light of such a change of circumstances introduced by the new legislation.

Issues in dispute

The core issue was whether the civil actions should be stayed pending the investigation conducted by Operation Kenova and any related criminal proceedings. Allied to the core issue was the important matter of disclosure in relation to the issues in dispute in the civil claims if they were permitted to continue to trial.

Mr Justice Horner stated that if the actions were stayed there would be no disclosure. He referred to a possible alternative to a complete stay of the civil proceedings being agreement that there should be a stay but permitting staged disclosure and/or restricted disclosure in the interim. He added that, 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

The overriding objective of the Rules 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 (Order 1 Rule 1A).

Article 6 of the 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" (Article 6(1) and *R(McAuley) v Coventry Crown Court* [2012] 1 WLR 2766).

Delay has to be avoided at the various separate stages of litigation (*Bhandari v United Kingdom* (App 42341/04)) especially when there are allegations of unlawful conduct by public officials (*Kaloc v France* (App No.33951/96)). This, also, assists in maintaining public confidence in the rule of law and in banishing any hint of collusion by the State in unlawful acts (*Re Jordan* [2014] NIQB 11). The public has a right to know what actually happened in cases such as these (*Al-Nashiri v Poland* [2015] 60 EHRR 16).

Judicial Communications Office

Mr Justice Horner stated it was the task of the court to take an objective view of all the respective interests and to try and fairly balance those interests. If the civil trials did not proceed until after the criminal trials concluded, he found that serious and irreparable delay was inevitable with the likelihood of the evidence in the civil trials being compromised, and in some cases, fatally compromised. He stated that it was likely that, at least, some of the plaintiffs' prospects of a fair and just trial would be irreparably damaged even if the civil proceedings were only delayed until after Operation Kenova finally reported.

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.

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. There have to be safeguards as discovery of documents involves a serious invasion of privacy and confidentiality which can be justified only insofar as it is absolutely necessary for the achievement of justice between the parties. 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 (*Davies (Joy Rosalie) v Eli Lilly & Co (No.1)* [1987] 1 WLR 428 (CA)).

Disclosure of documents 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 (*Al Rawi v Security Services* [2011] UKSC 34).

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. 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 (*R v Chief Constable of West Midlands Police ex parte Wylie* [1995] 1 AC 274 (HL)).

Closed Material Procedure ("CMP") can be used in cases where the disclosure of information or evidence would be contrary to the public interest. Mr Justice Horner stated that, 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 (Judicial Review Principles and Procedure by Auburn, Moffett and Sharland).

A CMP can be used to help overcome any problem that might arise from disclosure of material which might prejudice any criminal trial. In a CMP, an individual must have "the

Judicial Communications Office

possibility to effectively challenge the allegations” which are being made against him (*A v UK* [2009] 49 EHRR 29).

The courts can and have approached discovery on a staged basis if that is in the interests of justice (*Baldock v Addison* [1995] 1 WLR 158) where the court would be guided by the overriding objective, namely to achieve a just and fair trial.

The parties’ arguments

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. Therefore, it wants the civil proceedings stayed until it has reported and the criminal process has been exhausted.

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

FS’s counsel and his Special Advocates submit: (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) ring fencing of documents was wholly objectionable and inimical to the fairness of the proceedings; and (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.

The plaintiffs’ representatives recognise the risks in pursuing the civil claims against the background of impending prosecution and propose to guard against these risks by the establishment of a CMP process and the disclosure of the inherited material into CLOSED which, it is claimed, would, facilitate discussion among counsel and the possibility of applications in respect of material in CLOSED and for the Special Advocates to consider the potential for disclosure into OPEN.

The way forward

Mr Justice Horner agreed that there was no detriment free route open to the court and each proposed solution carried risks and dangers. The court had to try and balance these to achieve an overall just and fair result for the different proceedings, both criminal and civil.

Mr Justice Horner did not consider a “do nothing approach” to be consistent with the overriding objective of achieving justice and fairness. He stated that a complete stay of the civil proceedings would be a total abnegation of justice for those litigants who do not survive what is likely to be the considerable delay of proceedings recommenced after the criminal trials are concluded. It would, also, be unfair and unjust to those that survive

Judicial Communications Office

because a substantial delay will have significantly compromised the evidence available to the court and it was likely to make it increasingly difficult for the court to reach a just and fair decision. Mr Justice Horner said that, realistically, the conclusion of Operation Kenova and the publication of its findings should not be expected any time soon and the conclusions of the resulting criminal trials would probably be years hence. He added that there were risks involved in proceeding with the civil claims in a limited way, but those risks could be managed by the use of a CMP.

Mr Justice Horner was of the view that the suggestions for progressing the claims as put forward by the Special Advocates for Hodgins and Hegarty provided a framework for progress. He agreed with the Special Advocates that the use of CMP and ring-fencing, effectively, precluded any prejudice to Operation Kenova because the material being considered in the CMP would not be placed in the public domain either at or prior to the in-depth consideration of the material by the court. If required, there would be a further stage, once it was known that material should be disclosed into OPEN. Mr Justice Horner stated that the threat of CLOSED material being leaked cannot be a good reason not to have a CMP - rather, it highlighted the need for eternal vigilance.

Mr Justice Horner then proceeded to make a number of general directions in relation to various steps required in order to progress the claims and in relation to the discovery of documents (paragraph [46]).

Conclusion

The court found that a stay of the civil claims was not consistent with either Article 6 of the EHCR or the overriding objective of the Rules.

Given the delay to date in relation to the civil claims, the likely further delay and the effect that that delay has had and will have on the parties and their witnesses, the court determined it was imperative that some progress be made in all of the civil claims.

Mr Justice Horner set out the way forward:

- A case management hearing will be fixed in the week commencing 11 October and, in the interim, parties should try and reach agreement.
- In the absence of any agreement, the parties should lodge their proposed directions for the progress of these claims on the basis of this judgment on or before 4 October 2021 and try to agree a mutually convenient date for the case management hearing with the court office.
- In the absence of an agreed way forward, further directions for the management of these civil claims will be given at the case management hearing.

Judicial Communications Office

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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