

Neutral Citation : [2021] NIMaster 8

Ref:	2021 NIMaster8
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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered:	30/07/21
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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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**BETWEEN:**

**Patrick Frizzell**  
**as personal representative of Brian Frizzell (deceased)**  
**Plaintiff**

**and**

**(1) The Chief Constable of the Police Service of Northern Ireland**  
**(2) The Ministry of Defence**  
**(3) Secretary of State for Defence**  
**(4) Alan Oliver**  
**(5) Anthony McNeill**  
**(6) Thomas Harper**

**Defendants**

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**Master Bell**

[1] Brian Frizzell was murdered on 28 March 1991. The plaintiff has instituted civil proceedings against various defendants in connection with his brother's death. The action falls into a category often described as "legacy litigation".

[2] The fourth, fifth, and sixth defendants did not enter an appearance to these proceedings and default judgment was entered against them on 26 April 2021, ordering that they should pay damages to be assessed together with costs. The proceedings against the first, second and third defendants are continuing.

[3] Order 37 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides:

“Where any such judgment as is mentioned in rule 1 is given in default of appearance of defence, and the action proceeds against other defendants, the damages under the judgment shall be assessed at the trial unless the Court otherwise orders.”

[4] The Plaintiff has issued an *ex parte* application inviting the court to exercise its discretion under Order 37 Rule 3 to permit the assessment of damages payable by the fourth, fifth and sixth defendants prior to the trial of the first, second and third defendants.

[5] The application is supported by a grounding affidavit from Kevin Winters who represents the plaintiff. The basis on which Mr Winters invites the court to exercise its discretion is helpfully set out in his affidavit:

“6. On 14 July 2021 the Secretary of State for Northern Ireland, being the Third Defendant herein, presented a Command Paper titled “Addressing the Legacy of Northern Ireland’s Past” (“the Command Paper”). On the same day the Secretary of State for Northern Ireland made an oral statement to the House of Commons. The Command Paper makes several proposals. The sole purpose of this position paper is to address the impact of the Command Paper on civil actions. The Court’s attention is drawn to paragraph 38 of the Command Paper which sets out the intention to “end ... current and future civil cases”. The intended implementation of this policy is imminent. In response to one of the questions that followed the oral statement on 14 July 2021 the Secretary of State for Northern Ireland said that Members of Parliament “will see legislation before the end of the autumn” (Hansard HC Deb, 14 July 2021, vol 699, col 399). It is my understanding that the Third Defendant intends that this legislation be enacted before this time in 2022.

7. The Plaintiff’s concern is that the Third Defendant intends that primary legislation is enacted to terminate civil actions relating to the Troubles. That would plainly include the current action brought by the Plaintiff. Given that discovery in this action is nowhere near complete and the First, Second, and Third Defendants have indicated that it will not be completed anytime soon, then it is highly improbable that there will be a trial by this time in 2022.

8. It is therefore entirely realistic that legislation will be passed concluding this civil action before a trial involving the First,

Second and Third Defendants can be heard. Accordingly, if the Court maintains the default position contained in Order 37 Rule 3 and damages under the judgment in default against the Fourth, Fifth and Sixth Defendants are assessed at trial then the Plaintiff may never be able to have damages assessed against the Fourth, Fifth and Sixth Defendants. That would plainly be unfair on the Plaintiff.

9. The Plaintiff therefore respectfully invites the Court to exercise the discretion provided by Order 37 Rule 3 and "*otherwise order*" so that damages against the Fourth, Fifth and Sixth Defendants are not assessed at trial but are assessed now. The exercise of the discretion would be in response to the unique set of circumstances created by the Command Paper. No other type of civil action faces being terminated by statute rather than by judicial decision."

[6] The terms of the proposed draft legislation have not yet been published. The Command Paper exhibited to Mr Winters' affidavit states that the Government is committed to working collaboratively with the Irish Government, the Northern Ireland political parties and the victims sector to develop the proposals. If draft legislation emerges from those discussions, the Government's legislative proposals may, or may not, find acceptance in Parliament.

[7] For the court to exercise its discretion, and take an unusual procedural approach to litigation, based on no other factor than protecting the litigation from action which Parliament might take, would amount to an undermining of the rule of law.

[8] The power to make, amend or revoke the Rules of the Court of Judicature is granted to the Court of Judicature Rules Committee by section 55 of the Judicature (Northern Ireland) Act 1978. The power to grant the discretion under Order 37 Rule 3 so as to "*otherwise order*" was undoubtedly not granted by Parliament so that the court could use it to thwart the implementation of proposals under discussion between the government and its citizens or to frustrate the possible future will of Parliament.

[9] It is not therefore for this court to exercise its discretion for the purpose of frustrating and thwarting the possible will of Parliament. The proper venues for current litigants to oppose the Government's proposals are the political and the parliamentary forums. Litigants may not co-opt the courts to fight that battle.

[10] The court therefore declines to exercise its discretion and dismisses the application.