Neutral Citation No: [2024] NIMaster 2 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	*Ref:* **2024NIMaster2** *ICOS No:* **20/0056636** *Delivered:* **18/01/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

MICHAEL MCKEOWN

Plaintiff

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

Mr Rooney (instructed by GR Ingram and Co Solicitors) for the plaintiff.
Mr Joseph Kennedy (instructed by the Crown Solicitor) for the defendant.

Master Harvey

Introduction

[1] This is an application by the plaintiff for an order pursuant to Order 3 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") extending time for serving a notice of appeal following dismissal of the claim in the County Court.

[2] Mr Rooney appeared for the plaintiff, Mr Kennedy appeared for the defendant. Both counsel made helpful written and oral submissions which were of assistance to the court.

Background

[3] The cause of action relates to the alleged false imprisonment, assault, battery, trespass to the person and breach of statutory duty by the defendant in relation to the arrest and detention of the plaintiff who was subjected to a strip search by the police at his home on the 1 September 2017. It transpired the individual the police

were seeking was the plaintiff's father who shares the same name and lived at the same address.

Chronology

[4] A civil bill seeking damages for personal injury was issued on the 27 August 2020. The claim proceeded to hearing in the County Court on the 15 December 2022 and was dismissed by the judge. An appeal was lodged with the High Court on the 22 December 2002 and stamped by the court office on the 29 December 2022. The court office wrote to the defendants on the 3 January 2023 notifying them of a review of the appeal before the High Court judge on the 9 February 2023.

[5] There was various correspondence between the parties, and it became apparent that the plaintiff solicitor had failed to serve the notice of the appeal or the booklet of appeal on the defendant. Although pointing out in these exchanges that they did not have sight of the notice or booklet of appeal, the defendant simultaneously took steps to prepare the appeal by requesting GP notes from the plaintiff and arranged an appointment for the plaintiff to be assessed by a defence medical expert.

[6] On the 8 February 2023 the defendants wrote to the plaintiff to confirm they noted an appeal had been lodged. The plaintiff then purported to serve the notice of appeal by email on the 9 February 2023 and eventually served it in the correct manner by post on the 9 March 2023. This was well beyond the required time limit under the Rules at Order 55 rule 3, which requires service on the respondent (defendant) within 21 days.

[7] The appeal was listed for review before the King's Bench judge on two occasions. It was apparent by then that as the notice of appeal had not been served within the set time limit, and that the defendant would be raising an objection, the plaintiff was required to lodge the current application for an extension of time.

Service of the notice of appeal

[8] There is no question the appeal was lodged with the court on time (seven days after the hearing in the county court) and stamped by the court office a week later. It should also have been served on the defendant within 21 days of the hearing and the plaintiff's solicitor concedes this was not done due to his absence as he was out of the jurisdiction over the Christmas holidays. It was an administrative oversight as his "civil secretary" was not in the office due to a family emergency. The task was carried out by a secretary more experienced in criminal rather than civil procedure, mistakenly believing the court would serve the stamped copy of the notice on the defendant.

Defence submissions

[9] The central issue for the defendant is that the notice and booklet of appeal were not served in accordance with the Rules and I should not exercise my

discretion to extend time. There was a hearing on the merits, there is nothing of general importance or relevance arising from this claim meaning there is no public interest such as might arise in a judicial review. The incident itself had a negligible impact on the plaintiff, he did not mention it to his GP and did not pursue the claim with any alacrity as the civil bill was issued three years after it occurred. The search at the plaintiff's home giving rise to his arrest was a lawful one, the unlawful detention was of short duration and the claim is of modest value.

[10] The preparatory steps taken by the defendant in anticipation of the appeal hearing were a precaution as they were not certain the notice had not actually been served, while seeking confirmation of this from the plaintiff in correspondence. If the action proceeds, there will have been inexcusable delay as the incident was in 2017, there is a risk memories will fade and the defendant will be faced with the additional costs and burden on the witnesses of a further hearing when the matter was heard in the County Court and dismissed. There has also been delay in the submission of this application by the plaintiff and the appeal booklet has still not been served.

[11] The overriding objective seeks to enable the court to deal with cases justly. That includes dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Cases should be dealt with expeditiously and fairly and the allocation of court resources is relevant. The continuation of the claim is not in the interests of the furtherance of the overriding objective as the respondent/defendant will continue to expend irrecoverable resources on the defence of the claim if it is permitted to continue. To allow time to be extended, particularly where the respondent has no prospect of recovering its costs from a legally assisted person, would be unjust.

[12] The defendant points to a number of other issues such as the grounding affidavit to this application having been sworn but not witnessed. This appears to have been an oversight as the exhibits to the affidavit were clearly witnessed by an independent solicitor, but they did not sign the affidavit front page. This was subsequently remedied and while clearly unsatisfactory, the application does not turn on this issue. The defendant also points to the fact that the notice of appeal was signed in the name of the plaintiff's solicitor's firm, however, this is not improper and pleadings are often signed in this manner. They also drew my attention to the fact the notice of appeal indicated on the face of the document that it had been served on the defendant, when clearly it was not. The plaintiff concedes the latter point, explaining that this error was due to the reasons set out above. A further issue was raised that the exhibit to the plaintiff/appellant's grounding affidavit relates to another claim. Again, this was clearly an oversight and yet another error on the part of the plaintiff/appellant's solicitor but in my view not determinative of this application. Finally, the defendant contends that if the court exercises its discretion

to extend time, the plaintiff should be penalised in costs. I will turn to that issue at the end of this judgment.

Plaintiff submissions

[13] The plaintiff argues that the defendant waived the right to raise an objection to late service of the notice as it took proactive steps to defend the appeal and the defendant was aware from the outset that the decision of the county court judge would be appealed.

[14] The appeal booklet will contain the documents already in the defendant's possession, the only reason it was not served was due to the fact the plaintiff was awaiting the outcome of this application and there were no directions following the review before the judge as all parties knew the service issue had to be addressed by an interlocutory application.

[15] There are legal issues in relation to this case regarding the basis for the warrant, the legal authorities are clear in this regard as certain procedural steps are required from the police to make reasonable enquiries to identify the correct suspect. The case has strengthened as a result of the deficiencies in the evidence given in the county court by the arresting officers who conceded they had not considered any alternative to arrest and the arresting officer did not know the "PACE" code setting out the relevant powers. This upsetting incident had a significant impact on the mental health of the plaintiff who was a psychologically vulnerable person, the unlawful arrest was a serious breach of his human rights. He was subjected to a strip search in his own home having just minutes before been working on his homework in his pyjamas unaware the police were about to enter his home. While the Rules are there to be observed in relation to service of the notice, the appeal itself was lodged with the court office promptly and in accordance with the Rules.

[16] The administrative error in not serving the notice was regrettable but understandable. In criminal cases, the court would send the notice to the respondent/defendant and in this case, while it is not an excuse, the member of staff in the office was not averse with civil procedure rules which required direct service by the appellant/plaintiff. No prejudice arises to the defendant in this case as the police notebooks and all other documentation remains available. There were delays in the case arising from the pandemic, discovery issues and a change of counsel but ultimately the plaintiff brought his claim within the time limits and the skeleton arguments demonstrate the complexity of the case and that the appeal has merits.

[17] There was no lack of candour in this case as the plaintiff solicitor admitted the error. The various technical breaches raised by the defendant is akin to "death by paper cuts" as the defendant seeks to defeat the application by raising a serious of minor examples of non-compliance with the court rules. The defendant's conduct of this application demonstrates how innocent mistakes can occur. Their failure to lodge a skeleton argument and authorities in advance meant the hearing was

delayed for a short time to allow me time to read the material submitted by defence counsel at the outset of the hearing, which should have been done in advance. In short, mistakes happen but ultimately, the balance of prejudice should favour the plaintiff in this case.

[18] Finally, the plaintiff should not be penalised in costs as such a sanction should be reserved for the most serious and inexcusable deficiencies rather than the minor error which occurred here.

Legal principles

[19] Order 3 rule 5(1) of the Rules is in the following terms:

> "(1) The Court may on such term as it thinks just, extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction. to do any act in any proceedings.

[20] Order 55 of the Rules states:

> "Appeals to the High Court (other than cases stated)
>
> Lodgment and entry of appeal
>
> 2. - (1) The appellant must lodge two copies of the notice of appeal in Form No.37 in Appendix A in the Central Office within a period of 21 days commencing on the date on which the decree was pronounced in the county court.
>
> …
>
> Service of notice of appeal
>
> 3. The appellant must, within the period of 21 days mentioned in rule 2(1), serve a copy of the notice of appeal on all parties to the proceedings in the court below who are directly affected by the appeal and, subject to rule 4, it shall not be necessary to serve the notice on parties not so affected.
>
> Directions as to service
>
> 4. - (1) A judge may in any case direct that the notice of appeal be served upon any party to the proceedings in the county court on whom it has not been served, or upon any person not a party to those proceedings.
>
> (2) In any case where a direction is given under this rule the judge may-
>
> (a) postpone or adjourn the hearing of the appeal for such period and upon such term as may be just;
>
> (b) give such judgment and make such order on the appeal as might have been given or made if the person served in pursuance of the direction had originally been a party.

…

Striking out an appeal

11. Where an appellant fails to comply with any of the provisions of this part, any other party may apply to a judge to have the appeal struck out."

[21] In line with *Davis* v *Northern Ireland Carriers* [1979] NI 19, when a time limited is imposed by rules of court and the court is asked to exercise its discretion to extend time, it should consider a range of factors. The relevant principles are:

"1. whether the time is already sped: a court will look more favourably on an application made before the time is up;

2. when the time limit has expired, the extent to which the party applying is in default;

3. the effect on the opposite party of granting the application and in particular whether he can be compensated by costs;

4. whether a hearing on the merits has taken place or would be denied by refusing an extension;

5. whether there is a point of substance to be made which could not otherwise be put forward;

6. whether the point is of general, and not merely particular significance; and

7. that the rules of court are there to be observed."

[22] In subsequent authorities, there has been much debate about the application of the *Davis* principles. Gillen J stated in *Benson v Morrow Retail Limited* [2010] NIQB 140 at para 24:

"I have reminded myself, as did the Deputy Master that a court should not determine an appeal to extend time by a numerical account of the principles set out in Davis."

[23] Moreover at para 19, Gillen J stated:

"I respectfully add one footnote to the principles set out in Davis. I do not consider that they should be approached artificially as a series of hurdles to be negotiated in succession by an appellant with loss of the right to obtain an extension if he cannot pass any one or more of them. To do so would be to focus too closely on appearance rather than substance. Courts must not fall into the trap of missing the wood for the trees. The central underlying question is always whether in the particular circumstances and in accordance with an overall desire to achieve justice, the discretion ought to be exercised in favour of the appellant. See also Graham, Corry and Cheevers v Quinn and Others (1997) NI 338 at 355A."

[24] In the case of *Mahmud v Secretary Of State For The Home Department* [2023] NICA 4, in the context of an asylum application, McCloskey LJ also commented on the *Davis* principles, pointing out it should not be seen as an exhaustive code which is applied mechanistically:

> "[11] Many practitioners in this jurisdiction and, one would add, probably every serving member of the Court of Judicature have had occasion to consider the judgment of Lord Lowry LCJ. To embark upon an analysis of how this judgment has been applied in subsequent cases would be inappropriate. However, it is opportune to make clear the following. First, Lord Lowry did not purport to formulate an exhaustive code of principles. The second observation, related to the first, is that in doctrinal terms this is unsurprising – indeed entirely appropriate – given the breadth of the judicial discretion in play in every case where a possible extension of a time limit prescribed by rules of court falls to be considered. The third observation is that the advent of the overriding objective post-dated the decision in Davis. The significance of this is that, per Order 1A, rule 3(a) the court "must" seek to give effect to the overriding objective – namely everything contained in paragraphs (1) and (2) of the Rule – when exercise any power contained in the Rules. The overarching imperative in the overriding objective is the application of the Rules "… to enable the court to deal with cases justly." The outworkings of this overarching requirement are set forth inexhaustively in para (2) of the Rule.
>
> [12] As appears from the immediately preceding analysis, extension of time determinations in any of the judicial organs of the Court of Judicature should not be dictated by the mechanistic application of the Davis code. Rather a somewhat broader and more sophisticated judicial exercise may be required, with alertness to the particular context…
>
> …
>
> [15] As the immediately preceding analysis demonstrates the contemporary application of the Davis code must take into account not only the later advent of the overriding objective but also, and more fundamentally in cases such as the present, the advent of the Human Rights Act."

[25] In *Graffin v Famac Network Ltd* [1997] Lexis Citation 6162 at page 10/11, the court considered a delay in lodging a case stated and whether it should exercise its discretion to extend time, essentially stating that any general rule that time limits for procedural steps should be extended in the absence of irreparable injustice does not apply to instituting an appeal by an appellant who has already had a hearing on the merits:

> "The principles set out in Davis favour the Respondent. The principles set out in Marshall's case and Duke's case and the United Arab Emirates' case also

favour the Respondent. There is no acceptable excuse for the delay in lodging the case stated. That a solicitor is overworked or that a member of his staff has made an error is an explanation for delay in lodging an appeal but is not an acceptable excuse where there has been a hearing on the merits of the case unless there are exceptional circumstances. Whilst the court will exercise its discretion in each case on the facts of that case, the discretion must be based on reason and justice and the court must aim for consistency, so far as is reasonably practicable. Accordingly the application fails."

[26] Keene LJ in *Donovan v. Gwentoys Ltd* [1990] 1WLR 72 at 479-480 (Para 31) referred to the prejudice that may be caused to a defendant where time limits are not adhered to:

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

Consideration

[27] The authorities are clear that lack of prejudice to the respondent/defendant is not sufficient as of itself to allow the plaintiff's application for an extension. Nevertheless, it is something which the court must take into account. On balance, I consider that there is no substantive prejudice to the defendant and counsel for the defendant conceded that this was "more an issue of costs." There is no evidential prejudice as the various documentation, statements and evidence presented to the court at first instance is still available, as are the witnesses. While the date of incident was in 2017, the witnesses gave evidence in court relatively recently and have access to their notebooks and written statements, therefore, I do not conclude that the passage of time means that memories have faded to the extent it would prevent a fair trial or cause prejudice to the defendant.

[28] At the time of the hearing in the county court, defence counsel was advised by his plaintiff counterpart that his client would be lodging an appeal. While I appreciate often counsel for a losing party might indicate an intention to appeal but not follow through for reasons such as a lack of legal aid funding, this is not a case in which the defendant was taken by surprise. The plaintiff's solicitor states in this

affidavit that "both counsel had corresponded during the recess period to discuss the appeal." Moreover, the letter from the court office to the defendant's solicitor on 3 January 2023, only 19 days after the county court hearing, made clear an appeal had been lodged and the case was listed for review before the judge some four weeks later. The defendant took steps to request GP notes and arrange a medical appointment. I note defence counsel stated this was due to the fact the defendant was not yet clear as to whether the notice of appeal had been properly served, however, such actions are, on balance, more indicative of a party readying itself for an appeal hearing rather than holding matters in abeyance on the basis the matter was clearly served out of time and would not proceed. I do not accept plaintiff counsel's assertion the defendant's actions were such as to waive its right to challenge this application. I consider that the interests of justice and weighing up the balance of prejudice is of more importance. This appeal came as no surprise to the defendant and they were not disadvantaged to any significant extent. The defendant could have brought an application to strike out the appeal pursuant to Order 55 rule 11, for the failure of the plaintiff/appellant to comply with the Rules. No such application was ever brought.

[29] Having considered the various authorities, the rules of court and the overriding objective, I do not believe the court should view the principles in *Davis* as a series of obstacles to be navigated in sequence in order for the plaintiff/appellant to be successful in an application of this nature. The *Davis* case predated the advent of the overriding objective and the Human Rights Act and as stated in *Mahmud*, the court should seek to avoid a "mechanistic" application of the *Davis* principles. I consider the extent of the default was relatively minor as is the effect on the respondent/defendant. The witnesses will have to give evidence again and there will be costs implications, however, while the plaintiff already had a hearing on the merits, a right of appeal is an important aspect of civil justice with appeals a common occurrence.

[30] This case is distinguishable from *Benson* in which the delay in service of a notice of appeal arose in circumstances where the plaintiff solicitor had delegated the administrative task of lodging the appeal to counsel, for which he was rightly criticised. The court held that this did not constitute good reason for the failure to comply with the rules. In this case, the Christmas holidays and absence of the solicitor with carriage of the case as well as his legal secretary were mitigating factors.

[31] In *Benson* the case involved a personal injury claim in which the plaintiff tripped on a shopping basket. As a result, the judge considered there was no point of general significance. The current case may not involve a public law issue on a matter of wider importance, however, it does relate to an incident in which, through the use of its powers, the police are alleged to have subjected the wrong person to arrest, detention and strip search. Unlike in *Graffin*, the appeal in this case was lodged in

time, the issue that arises is in relation to service of the notice. The prejudice that was referenced in *Donovan* is not applicable here as there is nothing to suggest any evidential prejudice arises for the defendant and this is far from having become what was described in that case as a "stale claim."

[32] The rules of court provide a disciplinary framework which must be followed, however, the court must give effect to the overriding objective contained in Order 1 Rule 1a of the Rules when exercising any power given to it by the rules or interprets any rule. This includes the desire to achieve justice in all the particular circumstances of the case. I conclude that the greater prejudice or hardship in this case, should I fail to exercise my discretion to extend time, would be to deny the plaintiff the opportunity to appeal.

Conclusion

[33] I grant the plaintiff's application pursuant to Order 3 rule 5 and extend time for lodging the appeal from the county court. I direct that the action shall be referred to the King's Bench judge for review on the next available date.

Costs

[34] Finally, the issue arises as to the costs of this application. When exercising the discretion to extend time, the defendant, in line with the *Davis* principles may be compensated in costs. The plaintiff in this case is a legally assisted person. The court has the power to make what has become known as a *Lockley* or *McWatters* order in line with the English Court of Appeal decision in *Lockley v National Blood Transfusion Service* [1992] 2 All ER 589 and a subsequent case in this jurisdiction *McWatters (a minor) v Belfast Education and Library Board* [1996] Lexis Citation 6632. The defendant sought such an order in this case in the event they were unsuccessful in resisting the plaintiff's application, as has occurred. The effect of such an order would be that the defendant's costs of this application would be set off against any damages awarded to the plaintiff if his claim was successful on appeal.

[35] I consider this is not an appropriate case for such an order. Any damages awarded to the plaintiff, on the basis of the information available to me, would be relatively modest and therefore substantially reduced by such a costs order. I consider in all the circumstances of this case that on balance, it would be unjust to punish the plaintiff for what was an administrative oversight by his solicitor in failing to serve the notice of appeal within time. I consider that the appropriate order in this case is that the question of costs should be reserved to the trial judge.