Neutral Citation No. [2010] NIQB 137 | *Ref:* **GIL8004**

Judgment: approved by the Court for handing down | *Delivered:* **18/11/10**
*(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:

PATRICK FERRAN

Plaintiff/Appellant;

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Respondent.

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GILLEN J

Application

[1] This is an appeal from an order of Master Bell dated 6 May 2010 in which he ruled in the defendant's favour and struck out the plaintiff's actions for want of prosecution. I am indebted to Master Bell for a full and careful written judgment which I have found of considerable assistance. The matter comes to me by way of rehearing ab initio and not as an appeal from the exercise of the Master's discretion (see Neill v Corbett and Others (unreported)) delivered 26 June 1992 by Carswell J.

Background

[2] In this action the plaintiff seeks damages in respect of the alleged unlawful arrest and detention on or about 23 March 1992 at the Rock Bar, Belfast and Castlereagh Holding Centre. Mr Cahill QC, who appeared on behalf of the appellant, argued that there were three issues in the case. First the initial detention which it is alleged was contrary to law. Secondly false imprisonment during the period of illegal questioning. Thirdly overholding of the plaintiff. The plaintiff's case is that the defendant attempted to recruit

the plaintiff as an informer after his period of detention ought to have been terminated.

[3] I adopt the chronology of significant dates set out in this case by Master Bell in his judgment at paragraph 5 as follows:

> "(5) Significant dates in the history of the proceedings are as follows:
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> | (i) | Date of the cause of action | 23 March 1992 |
> | (ii) | Issue of Civil Bill | 2 March 1998 |
> | (iii) | Notice of Intention to Defend | 11 March 1998 |
> | (iv) | Notice for Further and Better Particulars | 16 March 1998 |
> | (v) | Replies | 27 August 1998 |
> | (vi) | Notice for Further and Better Particulars | 18 September 1998 |
> | (vii) | Replies | 27 October 1998 |
> | (viii) | Order for Removal to the High Court | 15 January 1999 |
> | (ix) | Memorandum of Appearance | 18 March 1999 |
> | (x) | Service of Statement of Claim | 13 April 1999 |
> | (xi) | Defence filed | 24 June 1999 |
> | (xii) | Amended Statement of Claim | 19 November 1999 |
> | (xiii) | Notice of Intention to Proceed | 12 May 2006 |
> | (xiv) | Notice of Intention to Proceed | 25 January 2007 |

(xv) Action set down for Trial 29 January 2010

(6) In March 1992 the plaintiff instructed Oliver J Kelly solicitor regarding his arrest and detention. It was Mr Kelly who was responsible for initiating the proceedings on behalf of the plaintiff. In August 2004 Mr McLaughlin took over Mr Kelly's firm. After that date Mr Kelly was an employee of McLaughlin & Company. In May 2006 Mr Kelly left McLaughlin & Company due to ill-health.

(7) The chronology of these proceedings indicates several periods of significant delay:

(i) a delay between 23 March 1992 and 2 March 1998;

(ii) a delay between 19 November 1999 and 12 May 2006;

(iii) a delay between 12 May 2006 and 25 January 2007; and

(iv) a delay between 25 January 2007 and 29 January 2010."

[4] Mr Cahill candidly admitted that Mr Kelly had been insufficiently solicitous with this claim. He did not challenge the assertion that the delay had been inordinate.

[5] I pause to observe that this was a proper concession and, if I may say so, an absolutely inevitable one. Braithwaite and Sons Limited v Anley Maritime Limited (1990) NI 63 is authority for the proposition that whilst time which has elapsed within the limitation period cannot of itself constitute inordinate delay, thereafter a plaintiff who has started late (as clearly was the case in this instance) must recognise that such early delay albeit within the limitation period must serve to generate greater urgency following the commencement of proceedings. That self-evidently did not occur in this instance. The civil bill was issued in March 1998 with various proceedings leading to an amended statement of claim in November 1999. No further step was taken between then and the Notice of Intention to Proceed on 12 May 2006. This action was clearly allowed to go to sleep for almost seven years after the amended statement of claim notwithstanding the passage of delay before the proceedings were even issued.

[6] Mr Cahill submitted that during this period Mr Kelly had been the subject of proceedings before the Law Society which had resulted in him not being allowed to practice unless supervised by another solicitor, that the current solicitor Mr McLaughlin had accommodated him and kept him on in the practice between 2004 and 2006, and that the Certificate of Legal Aid had been to restricted to await full discovery being obtained. It was argued that there had been a number of requests made by the plaintiff to the defendant for fuller discovery during 1999, 2000, 2001. I do not find that any of these matters excused the delay. No credible excuse was made out in front of me to justify or excuse the inordinate delay.

[7] Mr Cahill further submitted that the affidavit of Mrs Meegan, the Assistant Crown Solicitor, dated 21 April 2010 makes clear that it is the defendant's case that the two serving police officers who had been identified relevant to this case cannot recall the briefing received in relation to the arrest of the plaintiff and there is no notebook entry in relation to same. A statement from Constable Rodgers records inter alia:

> "The only documents now available to me are my notebook entry and statement of arrest and it only confirms the arrest of Mr Ferran."

The statement of Constable Foster, who had interviewed the plaintiff records, inter alia, that the notes which he retains of interviewing the plaintiff merely confirmed that he interviewed the plaintiff with Constable Marks but that he has no recollection in relation to specific interviews other than a recollection that from time to time the plaintiff got off his chair and sat on the floor in the corner of the interviewing room without speaking. There is a simple blanket denial on behalf of the defendant that the plaintiff was ever asked to be an informer.

[8] It is Mr Cahill's contention that the passage of time has not had a material effect upon these facts i.e. there are no relevant notes and the denial of the over holding charge has always been a blanket denial which the passage of time cannot change.

[9] The defendant's contention is that the case involves allegations of false imprisonment, wrongful detention and trespass to the person which occurred eighteen years ago. The defendant has identified nineteen witnesses who were involved in the events. Of these individuals, only two, namely Constable Rodgers and Detective Constable Foster remain serving police officers. Neither of these was involved in the latter part of the plaintiff's detention. The second affidavit of Mrs Meegan had indicated that she had rechecked the availability of nineteen witnesses and found that only two were serving police officers. Of the remaining seventeen witnesses, a representative of the Chief Constable had spoke to thirteen of them and all

thirteen had indicated that they had little or no recollection of the events which the proceedings concerned. Three of the thirteen witnesses had health issues and one of them was awaiting surgery. Four witnesses had not replied despite the contact from Mrs Meegan.

Legal principles

[10] The principles in Allen v Sir Alfred McAlpine and Sons Limited (1968) 1 All ER 543 and, in Northern Ireland, Neill v Corbett and Others (supra) still govern these cases. The grounds for dismissing an action for want of prosecution may be summarised as inordinate and inexcusable delay, whereby the defendants are likely to be seriously prejudiced.

[11] Before the Master, and briefly before me, Mr Humphreys on behalf of the defendant sought to rely on Anderson v The United Kingdom (2010) ECHR 19859 where at paragraph 28 the European Court of Human Rights said, inter alia:

> "As the court has frequently stated, the State remains responsible for the efficiency of its system; the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time limits and directions or some other method – is …….. for it to decide. If a State allows proceedings to continue beyond the 'reasonable time' prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay."

Conclusion

[12] I consider that the careful and considered judgment by Master Bell in this instance was correct in every material aspect. I have no doubt that this is a case where there has been inordinate and inexcusable delay for the reasons I have mentioned above.

[13] I also fully endorse the view expressed by Master Bell at paragraph 29 of his judgment where he said:

> "I am satisfied that the outcome of the proceedings will turn upon the reliability of witnesses' recollections of past events. Although there will be notebook entries, interview notes and completed forms in relation to the arrest and detention, it is likely that the disputed matters between the parties will not centre on that material, but will instead turn

> on events and conversations of which there is no documentary record or in respect of which the documentary record is disputed and there is a need for witnesses to have a recollection of. Given the passage of over 18 years since the incidents complained of, the defendant's position will be seriously prejudiced. There is also a real risk that what may occur at a trial is not a genuine recollection but rather reconstruction of memories. I further conclude that, given the total delay in question, some further prejudice more than minimal degree must have occurred since the expiry of the limitation period."

[14] Those comments at paragraph 29 of Master Bell's judgment echo precisely my own view about this case and I therefore have concluded that serious prejudice will occur to the defendant if I permit this matter to proceed.

[15] The question then arises as to whether I should exercise my discretion by assessing whether the balance of justice lies in dismissal or allowing the action to proceed. As did Master Bell, I too consider that guidance for the exercise of my discretion is found in Allen's case in the speech of Diplock LJ at p. 556 when he said of that discretion:

> "It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give a substantial risk that a fair trial of the issues in litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled … Whether the second alternative condition is satisfied will depend on the circumstances of the particular case: but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago."

[16] Adopting this approach I have no doubt that the circumstances of this case and in particular the length of the delay are sufficient to satisfy me that

the recollection of witnesses on these important events will be grossly impaired by the passage of time and will serve to give rise to a substantial risk that a fair trial of the issues in the litigation would not be possible at the earliest date at which this matter could now come to trial.

[17] Turning to the principles set out in Anderson's case I recognise fully that there is an obligation on the domestic court to take an active role in the management of proceedings to ensure that delay is not contributed to by the domestic court itself. (See Laverty v The Department of Environment for Northern Ireland and Another (2010) NICA 10). In this jurisdiction for some years now courts have taken that duty seriously and have actively managed cases in a manner hitherto unknown. One of the primary reasons behind active case management is to ensure that actions are heard expeditiously and efficiently under the spur of Order 1 Rule 1A of the Rules of the Court of Judicature.

[18] Nonetheless I share entirely the view expressed by Master Bell that the test under Article 6(1) of the Convention to hear a case within a reasonable time is still met by declaring that it is not appropriate to stay or dismiss proceedings unless (a) there can no longer be a fair hearing; or (b) it would otherwise be unfair to have the case determined. (See Attorney General's Reference (No. 2 of 2001). For my own part therefore I do not consider that Article 6 of the Convention materially alters the approach that the courts have adopted to applications such as this for dismissal for want of prosecution. Consideration of the earlier principles would inevitably lead to a conclusion as to whether or not there can be a fair hearing of the action because of the impact of the passage of time. In this case I am satisfied that there could no longer be a fair hearing.

[19] In all the circumstances I affirm the decision of Master Bell and order that the plaintiff's action be struck out. I shall invite the parties to address me on the question of costs.