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Judgment: approved by the Court for handing down | *Delivered:* **6/5/10**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Patrick Ferran

Petitioner;

and

Chief Constable of the Police Service of Northern Ireland

Respondent.

Master Bell

[1] The plaintiff's action arises out of his arrest by police outside "Maureen's Florist Shop" on the Falls Road, Belfast on 23 March 1992, in connection with the murder of Roy Butler, and his subsequent detention at Castlereagh Holding Centre. He alleges that he was wrongfully detained and falsely imprisoned. Further, he alleges that, during the course of this detention, the defendant attempted to recruit him as an informer, as a result of which he was extremely distressed and frightened.

[2] In this application the defendant seeks :

(i) the dismissal of the plaintiff's action for want of prosecution under either Order 34 Rule 2 of the Rules of the Court of Judicature or the inherent jurisdiction of the court, pursuant to a summons dated 13 October 2009; or alternatively

(ii) the striking out of the action on the basis that the defendant's right under Article 6 of the European Convention on Human Rights to a trial within a reasonable time have been breached.

[3] The defendant was represented in this application by Mr Michael Humphreys, instructed by the Crown Solicitor with the plaintiff being represented by Mr Niall Hunt, instructed by McLaughlin & Co. The application was grounded on an affidavit sworn on 12 October 2009 by Mrs Majella Meegan, with replying affidavits being sworn on 10 December 2009 and 8 January 2010 by Mr Martin McLaughlin on behalf of the plaintiff. Mr McLaughlin's second affidavit contained both factual material which was not relevant to the application before the court and non-factual material which was in nature of legal submissions. I have disregarded this material.

[4] Following the first listing of the case, I directed additional affidavits by the parties to address what I considered were the core issues in the application. Mrs Meegan accordingly swore her second affidavit on 21 April 2010 and Mr McLaughlin swore his third affidavit on the same date.

CHRONOLOGY

[5] Significant dates in the history of the proceedings are as follows :

(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 & Co. In May 2006 Mr Kelly left McLaughlin & Co 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.

[8] As to the first period of significant delay, the Civil Bill was issued almost 6 years after the actions complained of, albeit within the limitation period. No reason is offered for this delay. In *Braithwaite and Sons Ltd v Anley Maritime Limited* [1990] NI 63 Carswell J, as he then was, stated that time elapsed within the limitation period could not itself constitute inordinate delay but delay before the expiry of the limitation period was not to be altogether disregarded. A plaintiff who starts late must proceed with greater dispatch and delay in proceedings can more readily be regarded as inordinate if it follows earlier delay in commencing proceedings.

[9] As to the explanations offered for other periods of delay, Mr McLaughlin's first affidavit asserts that there were a number of requests made by the plaintiff of the defendant for fuller discovery. The plaintiff's solicitor made requests by correspondence and by telephone calls on 21 October 1999, 4 May 2000, 5 July 2000, 6 July 2000, and 23 October 2001. There is no indication from the parties as to whether I have been provided with the full correspondence between them as to discovery. However there was, at very least, after discovery had been made by the defendant, a formal reply from the Crown Solicitor dated 8 August 2000 which attached further documentation.

[10] Mr McLaughlin's third affidavit also offers "complications with the legal aid position" as an explanation for the delay. He states that a legal aid certificate was granted on 12 February 1998 to institute proceedings in the County Court. Following removal of the action to the High Court in January 1999 the Certificate was amended on 3 July 1999 to carry on the proceedings there. However Mr McLaughlin states that the certificate (which was not exhibited to his affidavit) was limited to full discovery being obtained. In June 2009 (after further discovery was unsuccessfully sought from the defendant) Mr McLaughlin attempted to obtain a full legal aid certificate in order for the case to be set down for trial. The Legal Services Commission issued a further limited Certificate on 13 October 2009 which excluded setting down. A full Certificate was subsequently granted on 26 January 2010 and the case was then able to be set down for trial.

[11] Without sight of the full correspondence on the issue of discovery it is difficult to determine either how necessary for disposing fairly of the action or for saving costs the documentation and other material sought might have been. What is clearly noteworthy, however, is that the plaintiff did not resort to issuing a summons for specific discovery and indeed went on to set down

the action for trial over eight years later without ever seeking the court's assistance to obtain the requested material. In the light of the evidence before me that no application was made to the court for specific discovery and that the plaintiff proceeded to set the action down for trial, it is difficult to draw an inference other than that further discovery was unnecessary for disposing fairly of the action or for saving costs. The only other inference which might be drawn is that of lack of professional diligence but there is insufficient factual material before me to draw such an inference.

[12] Mr McLaughlin effectively lays a period of delay of almost two years at the door of the junior counsel instructed at the time. His first affidavit avers that Mr O'Rouke "was approached on a number of occasions but did not respond to our requests to advise on the completion of pleadings in this case". Mr McLaughlin avers that in May 2006 Mr O'Rourke was contacted to complete the pleadings with a view to the case being set down for trial in June 2006. He averred that after "a considerable time" Mr O'Rouke was again contacted and he informed Mr McLoughlin's office on 3 May 2008 that he was returning all papers in the case and that it would be necessary to instruct alternative counsel. Even then matters would not appear to have been treated with urgency, as Mr McLaughlin avers that it was in "late 2008" that Mr Hunt was then instructed.

WANT OF PROSECUTION

[13] Mr Humphreys submitted that the authorities including *Allen v Sir Alfred McAlpine* (1960) 1 All E R 543 and *Neill v Corbett* [1992] NI 251 lay down the principles in respect of applications for dismissal for want of prosecution. In *Allen v Sir Alfred McAlpine & Sons Ltd* 1968 2 QB 229 at 268E Salmon L J set out that, in order for such an application to succeed, the defendant must show:

> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

[14] Once those three criteria are met, there then exists a judicial discretion to strike out the plaintiff's action.

Inordinate and Inexcusable Delay

[15] It is immediately recognisable from the papers in this case that there has been considerable delay in these proceedings. This is apparent to any reader familiar with the Northern Ireland legal scene over the last twenty or so years. Almost all of the legal professionals involved in the case have in one way or another moved on. The solicitor who commenced the action, is now deceased. The Crown Solicitor for Northern Ireland holding office at the time the action was commenced has now been succeeded in post by three further office holders. Two of the counsel involved in the case on behalf of the defendant now serve as High Court judges. This indicates the passage of a significant amount of time.

[16] Mr Hunt conceded in his submissions that the delay was inordinate. He submitted that he had no instructions which allowed him to concede that the delay was also inexcusable, but that such an argument was hard to resist.

[17] Mr Hunt said that the blame for some of the delay fell on the defendant in that when the plaintiff's solicitors wrote to the defendant in June 2009 offering a date for a hearing there was no positive response, merely an ultimatum that the plaintiff should discontinue the proceedings and bear his own costs.

[18] Mr Humphreys submitted that on any analysis, the delay in this case represented inordinate delay at the worst end of the spectrum. Mr Humphreys submitted that the delay was also inexcusable. I agree.

[19] Many cases come before the High Court which are complex, either legally or factually, and which take a number of years before they are ready for trial. Medical negligence and asbestosis cases are examples. However there is no evidence or satisfactory explanation before me to suggest that this case has any degree of complexity or difficulty which should have caused the

delay which has been demonstrated. I find therefore that there has been both inordinate and inexcusable delay in this case.

Serious Prejudice

[20] As Gibson LJ observed in *McMullan v Wallace* [1977] NI 1 at page 12, whether delay will occasion prejudice must, of course, depend on the nature of the action and the form and content of the evidence proposed or necessary to be given. In some litigation there will contemporaneous documents available to refresh the memory of the witnesses. In other litigation such documents may be absent and memory will be crucial.

[21] The onus of proving prejudice rests on the party who asserts it. Mr Hunt did not concede serious prejudice had been caused by the delay in this case to the position of the defendant.

[22] Mr Humphreys relied on the authority of *Houston v James P Corry* (1972) April NIJB in which McGonigle J stated :

> "It appears to me that where there is a delay of some years the inference of serious prejudice is properly to be drawn from the delay itself."

I take the view that, while it is clearly open to a court to draw an inference of serious prejudice from the passage of time, it is always preferable that a defendant identify specific sources of prejudice if this can be done. In this case the applicant does make specific allegations of prejudice.

[23] The material initially offered by the defendant that serious prejudice exists is set out in paragraph 5 of Mrs Meegan's first affidavit. This identified 16 witnesses whom the defendant would require to call to give evidence at a trial. Each of these had been serving police officers at the date of the incident which gave rise to the plaintiff's proceedings. Of the 16, however, only two remained serving police officers. Two alleged sources of prejudice are then offered to the court. Firstly, Mrs Meegan averred that she had not been able to locate several of the witnesses. Secondly, she averred that it was unrealistic to expect these officers to have any recall of the circumstances surrounding the plaintiff's arrest and detention. It was not clear that the first of these amounts to a source of prejudice. No evidence was given in the affidavit as to how central or, alternatively, how peripheral, the evidence of the missing former officers was. Further, no evidence was offered as to whether the evidence which the former officers would have been asked to give was evidence which other witnesses were capable of giving. Clearly, if there had been three witnesses to an event and one of those was now unavailable, the prejudice to the defendant was less than if there was one witness to an event and that witness was now unavailable. Secondly, Mrs Meegan's averment that it was

unrealistic to expect these officers to have any recall of the circumstances surrounding the plaintiff's arrest and detention, fell more into the category of a legal submission than into the category of evidence of fact.

[24] In her second affidavit Mrs Meegan averred that she had rechecked the availability of 19 witnesses. Of these only two, Constable Rodgers and Detective Constable Foster remain serving police officers. Mrs Meegan had spoken to both. Constable Rodgers was the arresting officer on the date in question. He had provided Mrs Meegan with a written statement had informed Mrs Meegan that he cannot recall the briefing he received in relation to the arrest of the plaintiff. The only documents which were available to him were his notebook entry and a statement regarding the arrest. The statement simply confirms the fact that Mr Ferran was arrested. Constable Rodgers states that he has not arrested many people over the years and that is why he can remember the arrest, albeit with very little detail. Constable Rodgers states that he is aware that Mr Ferran was arrested in relation to the murder of Roy Butler but he cannot confirm whether he knows that from information which is now in the public domain or from what he was told at the time. She averred that in such circumstances he would have difficulty in satisfying a court that he had formed a reasonable suspicion in relation to the arrest of the plaintiff.

[25] Mrs Meegan exhibited to her second affidavit a written statement from Detective Constable Foster. In 1992 Detective Constable Foster was working as an interviewing officer attached to CID in Grosvenor Road Police Station. From time to time this involved him in interviewing at Castlereagh Holding centre. He stated the normal practice in relation to the conduct of interviews was that interviewers were briefed at the outset by a Detective Inspector in change of an investigation. Detective Constable Foster's statement sets out that he had no memory of any briefing in relation to this investigation. He no longer has a notebook in relation to the date in question, a fact which he had advised his superiors of in 1999.

[26] Of the remaining 17 witnesses, a representative of the Chief Constable has spoken to 13 of them. All 13 have indicated that they had little or no recollection of the events which the proceedings concern. Three of the 13 witnesses have indicated that they have health issues. One of these three is awaiting surgery. Mrs Meegan averred that in the time available it had not been possible to take further instructions on the nature of these health issues and whether the witnesses would be in a position to attend court for a trial.

[27] Mrs Meegan also averred that four of the witnesses who had been contacted did not reply. One of the witnesses was the individual who authorised the release of the plaintiff from custody. I have to accept therefore that it is likely that some of the witnesses whom the respondent may have wished to call are not available.

[28] Mr McLaughlin submits in his affidavit that there has been no prejudice to the defendant as the memories of the witnesses will be no worse now than when the proceedings were issued in 1998, some twelve years ago. Mr Hunt expanded this by submitting that the case depends to a large extent on the documentation that exists in relation to the plaintiff's arrest and detention. Certainly it is true that the arrest and detention process provides for a standard set of documentary record keeping. Whether there existed in 1992 a set of documentary processes which required to be completed in respect of individuals who were approached with a view to becoming what is now under the Regulation of Investigatory Powers Act 2000 be known as a covert human intelligence source, was a matter he speculated upon at the hearing and asserted that there was unlikely to be any existing documentation on this issue.

[29] 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 the 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 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.

[30] In an application to dismiss for want of prosecution where all the necessary factors are present - inordinate inexcusable delay and serious prejudice to the defendant - the court then exercises its discretion by assessing whether the balance of justice lies in dismissal or allowing the action to proceed. The court in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. In *Allen's* case, supra, Diplock LJ (as he then was) stated the principles in these terms :

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a draconian order and will not be lightly made. 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 rise to a substantial risk that a fair trial of the issues in the 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. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon 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 upon the recollection of witnesses of events which happened long ago."

These principles were adopted and applied in Northern Ireland by the Court of Appeal in Boyd v Sinnamon [1974] NIJB June.

[31] In the light of my view that the defendant's position is now seriously prejudiced, I must conclude that there is a substantial risk that a fair trial of the issues is no longer possible. In respect of the application under Order 34 Rule 2, I must therefore exercise my discretion and strike out the plaintiff's case for want of prosecution.

BREACH OF ARTICLE 6 OF THE ECHR

[32] Lest I be incorrect in my view of the defendant's application under Order 34 Rule 2, I now continue to consider the second part of his application, namely that I exercise my case management powers and strike out the case on the basis that to do otherwise would allow for a continuing breach of the respondent's Convention rights.

[33] Article 6 of the Convention provides :

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[34] Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) of the Act includes courts and tribunals within the definition of "public authority".

[35] Mr Humphreys argued that the effect of the combination of section 6 of the 1998 Act together with Article 6 of the Convention and the inherent

jurisdiction of the court is that Parliament has imposed a duty on the courts to strike out cases where a party has not obtained a fair and public hearing within a reasonable time.

[36] Mr Humphreys referred me to the decision in *Anderson v United Kingdom*, a judgment of the European Court of Human Rights delivered on 9 February 2010 which reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to three criteria :

(i) the complexity of the case;
(ii) what was at stake for the plaintiff in the dispute; and
(iii) the extent to which any delay was attributed to the conduct of the parties.

[37] As to the first of the *Anderson* criteria, the action cannot be said to be a complex one. It turns on simple facts. The outcome is likely to depend entirely on the veracity of the plaintiff's allegations. There are no novel points of law involved.

[38] As to the second of the *Anderson* criteria, it cannot be concluded that the proceedings were of exceptional significance. The defendant argued that, if the plaintiff were to be successful, only a relatively modest amount of compensation would be at stake.

[39] As to the third of the *Anderson* criteria, the defendant argued that the delay was almost entirely attributable to the conduct of the plaintiff and his legal team.

[40] Mr Humphreys used a transport metaphor to articulate his submission the position that now exists by virtue of the combination of section 6 of the 1998 Act and Article 6 of the Convention. He submitted that, prior to the 1998 Act, a defendant had to argue that the bus was late (the delay factor) and as a result he had missed an important appointment (the prejudice factor). Now, however, following the incorporation of the Convention into domestic law, a defendant can simply argue that the bus was late. There was no need to show that prejudice had occurred. Hence a defendant faced by a plaintiff who did not progress his litigation in a proper manner had access to two remedies : one under Order 34 Rule 2 (which Mr Humphreys described as akin to a private law remedy) and a free-standing remedy under section 6 of the 1998 Act (which Mr Humphreys described as akin to a public law remedy).

[41] As support for his position Mr Humphreys offered the decision in *McKie v McRae* (2005) CSOH 175 where Lord Glennie stated :

> "The right to a hearing within a reasonable time is a stand-alone right. A victim of a breach of that right need not show prejudice. But it is also established by the authorities concerning the Human Rights Act 1998, though a different result is reached by those concerning the Scotland Act 1998, that the remedy for a breach by the state of the convention right to a trial within a reasonable time will not usually be decree of dismissal or absolvitor. If a fair trial is still possible, it will only be in the exceptional case that the court will put a stop to the proceedings on the grounds of such delay beyond a reasonable time. "

Mr Humphreys also drew my attention to the following passage of the judgment which emphasises the unlawfulness of allowing an action to proceed where a fair trial is no longer possible by reason of delay beyond a reasonable time :

> "But the position is different if the delay has put the possibility of a fair trial in danger. The court would then be acting unlawfully if it permitted the trial to proceed. I consider that the passages in the speeches of Lord Nicholls and Lord Hope in *Attorney General's Reference (No. 2 of 2001)* to which I have referred show that the action of the court in permitting a trial, in circumstances where by reason of delay beyond a reasonable time a fair trial is no longer possible, would itself be an unlawful act, separate and distinct from any preceding breach of the reasonable time guarantee by other public authorities which has resulted in those circumstances."

[42] *Anderson* clearly emphasises the important obligation of the Court to take an active role in the management of proceedings, a role of which the court may not absolve itself. This has recently been highlighted by the Court of Appeal in *Patrick Laverty t/a RGC International v Department of the Environment for Northern Ireland and The Environment and Heritage Service Department* [2010] NICA 10 :

> "Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights of the parties. Article 6 entitles the litigants to a fair trial within a reasonable time. A fair trial necessarily involves a determination of the party's rights within a reasonable timeframe otherwise they will not have received their trial within a reasonable time. In Anderson v UK [2010] ECHR 19859/04 the European Court of Human Rights held that notwithstanding that the parties themselves had contributed to delay that was not sufficient to absolve the domestic court of its own obligation to take an active role in the management of the proceedings."

[43] The court in *Anderson* observed that if a State allows proceedings to continue beyond the "reasonable time" prescribed by art 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay.

[44] In *Anderson* the total period of the completed proceedings was six years and eight months. The applicant principally complained to the European Court of Human Rights that the length of the proceedings before the Court of Session was incompatible with the "reasonable time" requirement of article 6 of the Convention. He sought, *inter alia*, damages for non-pecuniary loss pursuant to art 41 of the Convention. Mr Humphreys observed that the facts of Anderson presented a much more difficult factual matrix for a court to find a breach of Article 6 than does the case now before the court.

[45] *Anderson*, however, is a decision of the European Court of Human Rights seeking the remedy of damages after the conclusion of the proceedings rather than a decision seeking the exercise of case management powers to prevent a full hearing of an action.

[46] Much has changed in recent years in the conduct of personal injury litigation and there is far more case management by the courts. Personal injury cases such as this one are now reviewed by the Queen's Bench Masters up to the point of setting down for trial. Parties can request that a case be included in the Masters' review system. Once cases have been set down for trial , they are thereafter case-managed by the Senior Queen's Bench Judge. Cases are no longer permitted "to go to sleep", as this one apparently did. Where the parties do not appear to be managing their litigation efficiently or effectively the court will step in and timetable appropriate steps with a view to getting the case back on track so that the rights and obligations of the parties may be properly determined within a reasonable time. Occasionally, however, the court's ultimate sanction may have to be resorted to and a case struck out where there has been a breach of one party's Article 6 rights.

[47] Mr Hunt for the plaintiff argued that the approach urged upon me by Mr Humphreys should not be adopted. He submitted that delay without explanation and without some type of prejudice was not significant. However he offered no alternative analysis of *Anderson* and no authorities for his proposition.

[48] The crucial question therefore is this : When a court has determined that the proceedings before it are in breach of the reasonable time requirement under Article 6 of the Convention, and is faced with an

interlocutory application by a defendant to strike out the plaintiff's action, does the court act unlawfully if it allows the action to continue ?

[49] The authorities offered by counsel in relation to this important issue were scant. For example, no reference was made to the significant decision by the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 1 All ER 1049 which dealt with a similar argument in the context of criminal proceedings. In that decision the Attorney General had referred two points of law to the Court of Appeal. One of these was :

> "Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998) in circumstances where the accused cannot demonstrate any prejudice arising from the delay ?"

[50] Following the hearing I therefore invited counsel to make written submissions as to the significance of this decision with regard to the application before me.

[51] In *Attorney General's Reference (No 2 of 2001)* Lord Bingham noted a number of fundamental propositions. Firstly, he noted that the Convention also recognised, implicitly and often explicitly, that "No man is an Island". In the exercise of individual human rights due regard must be paid to the rights of others, and the society of which each individual forms part itself has interests deserving of respect. As pointed out in *Brown v Stott* [2003] 1 AC 681, 704 :

> "The [European] court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52."

[52] Secondly, he noted that the core right guaranteed by Article 6 is to a fair trial. Most of the specific aspects singled out for mention relate to the fairness and perceived fairness of the trial process. The article takes a broad view of what fairness requires: in ordinary parlance a trial might be regarded as fair even though judgment was not pronounced in public. But the focus of the article is on achieving a result which is, and is seen to be, fair.

[53] Thirdly, he noted that article 6 applies not only to the determination of criminal charges, which understandably give rise to most of the decided cases, but also to the determination of civil rights and obligations. In a

criminal case the issue usually arises between a prosecutor, who may be taken to represent the public interest, on one side and an individual defendant on the other. In a civil case there may well be individuals, each with rights calling for protection, on both sides. It will only be acts of a public authority incompatible with a Convention right which will give rise to unlawfulness under section 6(1) of the Act. But the Convention cannot, in the civil field, be so interpreted and applied as to protect the Convention right of one party while violating the Convention right of another.

[54] Fourthly, he noted that it is clearly established that article 6(1), in its application to the determination of civil rights and obligations and of criminal charges, creates rights which although related are separate and distinct. Thus there is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same.

[55] In an early portion of his speech Lord Bingham might be perceived as expressing a view which supported the argument raised by Mr Humphreys. Lord Bingham stated at paragraph 16 :

> "In its application to civil proceedings, the rationale of the reasonable time requirement is not in doubt. The state should not subject claimants to prolonged delay in pursuing their claims, whatever the outcome, nor defendants to prolonged uncertainty and anxiety in learning whether their opponents' claims will be established or not. The ill consequences of delay in civil litigation, immortalised in *Bleak House*, need no elaboration. In domestic law, a battery of statutory limitations, procedural rules and equitable doctrines address the problem. Article 6(1) gives a further remedy to those prejudiced, at the hands of the state, by this pernicious evil."

[56] However he went on to say at paragraph 21 of his speech :

> "….as the Court of Appeal recognised, at p 1875, para 19 of its judgment, a rule of automatic termination of proceedings on breach of the reasonable time requirement cannot sensibly be applied in civil proceedings. An unmeritorious defendant might no doubt be very happy to seize on such a breach to escape his liability, but termination of the proceedings would defeat the claimant's right to a hearing altogether and seeking to make good his loss in compensation from the state could well prove a very unsatisfactory alternative."

[57] The passage of the Court of Appeal's judgment which Lord Bingham referred to is expressed in even stronger tones. Lord Woolf stated there :

> "The illogicality of this approach, or the nonsense it produces, is illustrated when the position is looked at where it is not a party to criminal proceedings who is complaining about a contravention of the reasonable time requirement in article 6, but a defendant to civil proceedings. The position of such a defendant was put to Mr Watson. The defendant would say: "Because of the delay my article 6 rights have been infringed. Section 6(1) means that you cannot proceed with the trial of the claim which is brought against me." But what about the claimant? The claimant is also entitled to article 6(1) rights. The claimant says that he is entitled to have his rights determined within reasonable time. If Mr Watson is correct, the court would not be entitled to proceed with the trial because of its effect upon the defendant. With the greatest respect, that approach cannot be right."

[58] If the position is therefore that there is no rule of automatic termination on breach of the reasonable time requirement to be applied in civil proceedings, what then should the court do when faced with such a breach ? Lord Bingham addressed that position in respect of criminal proceedings in paragraph 24 of his speech :

> "If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a

> breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."

[59] In his speech Lord Hope, though dissenting on the first question before the court, agreed with the majority on the issue of the remedy in civil proceedings. At paragraphs 88-89 of his speech he said :

> "Of course, the prospect of an automatic termination for breach of the reasonable time requirement cannot sensibly be applied in civil proceedings… It would hardly ever be thought appropriate for civil proceedings to be terminated under our domestic system because of an unreasonable delay on the part of a public authority in the determination of the parties' civil rights and obligations. In practice an attempt by one party to have the proceedings terminated on this ground would almost always be rejected. The appropriate time to seek a remedy for the delay would be at the end, when the proceedings were all over..."

[60] I conclude therefore that, by analogy, where a civil action has not been brought to a hearing within a reasonable time, I should approach the case in the following way :

(i) If, through the action or inaction of a plaintiff, a civil action is not brought a hearing within a reasonable time, there is necessarily a breach of the respondent's Convention right under article 6(1).

(ii) For such breach there must be afforded such remedy as may (section 8(1) of the 1998 Act) be just and appropriate or (in Convention terms) effective, just and proportionate.

(iii) The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established.

(iv) If the breach is established before a final hearing, the appropriate remedy may be a public acknowledgement of the breach or action to expedite the hearing to the greatest extent practicable.

(v) It will not be appropriate to stay or dismiss the proceedings unless there can no longer be a fair hearing.

(vi) The public interest in the final determination of civil litigation requires that an action should not be stayed or struck out if any lesser remedy will be just and proportionate in all the circumstances.

(vii) The court does not act incompatibly with a respondent's Convention right in continuing to entertain civil proceedings after a breach is established in a case where there can still be a fair hearing, since the breach consists in the delay which has accrued and not in the prospective hearing.

[61] The approach of a court on an application to have a civil action struck out for breach of the reasonable time requirement does not therefore significantly differ from the approach to be adopted on an application for striking out for want of prosecution in that an element of prejudice to a fair hearing must still be demonstrated by an applicant. Applying the principles set out above to the findings of fact which I have reached in the instant case, I must conclude that there can no longer be a fair hearing of the action because of the impact of the passage of over 18 years on the reliability of witnesses' recollections of events.

[62] Accordingly, I order the plaintiff's action struck out under this aspect of the application also.