**Neutral Citation No. [2012] NIQB 118** | *Ref:* **GIL8505**

*Judgment: approved by the Court for handing down* | *Delivered:* **01/06/2012**

*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**BETWEEN:**

**DANIEL PETTICREW**

**Plaintiff;**

**-and-**

**THE CHIEF CONSTABLE OF THE POLICE SERVICE FOR NORTHERN IRELAND**

**Defendant.**

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**GILLEN J**

## Application

[1] This is an appeal against the order of Deputy Master Casey dated 17 November 2011 whereby pursuant to Order 34, Rule 2 of the Rules of the Court of Judicature ("the Rules") and/or the inherent jurisdiction of the court, he refused the defendant's application to dismiss the plaintiff's action for want of prosecution.

## Background

[2] The plaintiff in this action seeks damages inter alia in respect of wrongful detention, false imprisonment, breach of duty and trespass to his person by the defendant, his servants or agents together with damages for infringement and misfeasance of his right of access to a solicitor by the defendant contrary to Section 45 of the Northern Ireland (Emergency Provisions) Act 1991 arising out of an incident which occurred on 2 August 1991.

[3] The plaintiff's writ of summons was issued on 13 February 1998 and the defendant's appearance was served on 23 February 1998. There were no other developments in the proceedings for a further nine years until a notice of intention to proceed was served on 15 June 2007. On 13 August 2007 the plaintiff served a statement of claim apparently in error. A further two years elapsed until another

statement of claim was served followed by the defendant's defence three months later.

[4] Petticrew was one of a number of men charged with serious offences, including attempted murder, arising out of an incident on 2 August 1991 when it is alleged that members of the security forces in a mobile patrol in the vicinity of the Divismore Crescent/Springfield Road junction were subjected to an explosive substances attack. He was arrested on 28 April 1992 in connection with the attack on the security forces, taken and detained at Castlereagh Holding Centre and thereafter charged with these offences. He was jointly charged with six others in what has become known as "the Ballymurphy Seven" case. He remained in custody from 28 April 1992 until he was discharged on 12 September 1994. It is part of his case that his arrest had been deliberately delayed and because of his youth and vulnerability he was not well-placed to withstand the questioning during the several interviews to which he was subjected. At his trial before Kerr J a number of grounds were advanced on his behalf as to why his alleged admission should not be admitted in evidence. Discharging him Kerr J concluded (sic):

> "I cannot dismiss though, with the requisite degree of confidence and assurance that would allow me to rule that his confessions were admissible. I therefore direct that his admissions, allegedly made by him, should not be received in evidence".

[5] It is alleged in the most recent statement of claim that the plaintiff was wrongfully arrested and falsely imprisoned at Castlereagh Holding Centre. The plaintiff further asserts that during interviews he was caused to make false, unreliable and involuntary incriminating statements and that the police knew these statements to be false, unreliable and involuntary. The plaintiff alleges that on the basis of those incriminating statements he was charged and tried on serious criminal matters.

[6] In an affidavit on behalf of the plaintiff by Eugene Burns, a solicitor in the firm of Madden & Finucane who took over carriage of the plaintiff's case in or about 31 August 2008., the deponent acknowledged there was a period of delay between the issuing of proceedings in February 1998 and the service of the Notice of Intention to Proceed in June 2007. He goes on to aver at paragraph 8 that he had made an application for an order of discovery in or about 29 March 2010 and the defendant finally complied with that requirement to furnish a list of documents on 6 May 2010.

**Principles governing this application**

[7] The principles governing applications of this type are now so well-rehearsed in authorities such as Allen v Sir Alfred McAlpine and Sons (1968) 1 All ER 543, Neill v Corbett and Others (unreported) delivered 26 June 1992 by Carswell J and Braithwaite and Sons Limited v Annley Maritime Limited (1990) NI 63 that I find it

unnecessary to burden this judgment by setting out the relevant passages from the judgments in extenso. Suffice to say that the principles are as follows:

- Has there been inordinate delay?
- If so has the delay been inexcusable?
- Are the defendants likely to be prejudiced?
- Whilst time which has elapsed within the limitation period cannot of itself constitute inordinate delay, thereafter a plaintiff who has started late must recognise that such early delay has to generate greater urgency following the commencement of proceedings.
- Should the court exercise its discretion by assessing whether the balance of justice lies in dismissal or allowing the action to proceed?

**Applying the principles to this case**

[8] I am satisfied that there has been inexcusable and inordinate delay in this case for the following reasons:

- I do not accept that a period of detention in custody is any excuse for failing to contact the solicitor. Such delay for this period ought to have engendered greater urgency thereafter

- Mr Fee QC, who appeared on behalf of the plaintiff with Mr Lundy, contended that the delay between 1998 and 2003 was occasioned by the need to await the outcome of Cullen v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 39. This case concerned the rights of the police to delay access of a suspect to a solicitor pursuant to section 15 of the Northern Ireland (Emergency Provisions) Act 1987.Irrespective of whether or not this was with the consent of the defendant – and the defendant Crown solicitor is unable to confirm this and indeed challenges the relevance of Cullen to the instant case – Braithwaite's case makes it absolutely clear that this should once again have engendered greater haste thereafter.Quite plainly this did not happen.

[9] It took another four years i.e. 2007 until a draft statement of claim was sent and even this was in error. Two further years elapsed before a proper statement of claim corrected the defective 2007 version. This demonstrates an all too relaxed attitude to litigation and is the antithesis of the overriding objectives of expedition and efficiency set out in Order 1 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1981. Whether or not the defendant lent itself to this casual approach, the fact of the matter is that the plaintiff's advisors were clearly culpable in permitting further delay to accrue. In short I have no doubt that the delay until 2009 was not only inordinate but inexcusable.

[10] The next issue I must determine is whether or not prejudice has been caused to the defendant. Mr McEvoy, who appeared on behalf of the defendant, relied on

the content of the affidavits of Ms Meegan who is an Assistant Crown Solicitor and had carriage of the matter on behalf of the defendant.

[11] Ms Meegan through Mr McEvoy raised the case of O'Hara v Chief Constable of the Royal Ulster Constabulary [1966] NI 8.This is authority for the proposition that whilst an arresting officer's suspicions need not be based on his own observations and can be based on what he has been told, pursuant to section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984, the mere fact an arresting officer has been instructed by a superior officer to effect the arrest was not capable of amounting to reasonable grounds for the necessary suspicion. Applying that to the instant case, Ms Meegan drew attention to the fact that ex Detective Sgt Houston, the arresting officer, has no memory of the arrest of this accused beyond what is contained in his notebook and statement of arrest. Hence it is argued that the defendant is severely prejudiced in justifying the arrest and defending the plaintiff's claim for wrongful arrest and false imprisonment.

[12] It is 19 years since the plaintiff was interviewed. Although there are interview notes and other forms in relation to the arrest and detention of the plaintiff, it is likely that disputed matters will turn on events and conversations of which there is no documentary record.

[13] The defendant will rely on the custody officers, two reviewing inspectors, interviewing officers and the officer in charge of the investigation. None of these men and women remain serving officers. Sixteen of the main witnesses were written to and only six replied. Of the four interviewing officers – MacChesney, Smith, Kirkpatrick and Gribben - only two are available. One is in ill-health and unable to attend and the fourth gave no response. Of the other 12 witnesses, one is deceased and only three replied.

[14] After his arrest the plaintiff was taken to Castlereagh Holding Centre. Of the reviewing officers, ex Inspector Pentland, who it is alleged must be satisfied there are grounds for the arrested person's detention including the arrest itself, has no recollection of the briefing he received. Ex Inspector Inkpin, a duty Inspector at Castlereagh Detention Centre who carried out a review of the plaintiff's detention on 20 April 1992 having been briefed by Detective Chief Superintendent Branigan regarding the reasons for arrest and detention also has no recollection of the briefing he received. Two other Duty Inspectors at Castlereagh Detention Centre have died.

[15] Ex Detective Inspector Nairn and ex Detective Sgt McAllister were the officers responsible for preparing the crime file for submission to the Director of Public Prosecutions. Their recollection is restricted to what is contained in the crime file report.

[16] Ex Sgt Rainey and ex Sgt Elwood were the custody sergeants on duty during the plaintiff's detention at Castlereagh Detention Centre. They have no memory of the plaintiff's detention and can only rely on what is written in the custody record.

The custody record does not contain any complaint of ill treatment made by the plaintiff.

[17] As I indicated in Ferran v Chief Constable of the Police Service of Northern Ireland [2010] NIQB 137, where there had been a delay of 18 years since the incident, there may well be cases where the outcome of the proceedings will turn upon the reliability of witnesses' recollections of past events 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 it. In that case, given the passage of over 18 years since the incidents complained of, the defendant's position was seriously prejudiced. Mr McEvoy seeks to invoke Ferran as an analogy to the instant case.

[18] I do not agree. A vital difference in this case is that there exists a volume of written material by way of transcript from the trial presided over by Kerr J which deals with the issues at the heart of the civil claim. The presence of that substantial transcript evidence together with written notes of the trial from Madden & Finucane and counsel dealing with the witnesses reveal the examination and cross-examination of Petticrew and most of the witnesses who would be giving evidence in this civil claim. Mr Fee QC reminded me that during the trial in 1994 a number of police officers indicated that they were relying on their notes and did not have the benefit of any independent recollection. He drew my attention to extracts from the transcripts of that trial where a number of police officers referred to the absence of recollection and the fact that they were relying "mostly on notes". Their evidence was punctuated with references such as "other than notes I have no independent recollection", "if I said it, it would have been in my notes" together with references to the practice of police officers to record abuse, verbal or physical, if it had been witnessed.

[19] It comes as no surprise to me with my experience at the Bar and on the Bench in criminal cases that it is a regular occurrence for police officers to indicate that they do not have any independent recollection of events that happened even comparatively recently other than the notes before them usually because of the sheer volume of their caseload. In this case, whilst the notes may be lost, we do have the transcript evidence of what their evidence amounted to. Hence I am not convinced that those defendant witnesses are in a more difficult position now than if the claim had been brought in 1994 or thereabouts

[20] In addition the defendant will be able to invoke the use of subpoena ad testificandum, the provisions of Order 38 of the Rules of the Court of Judicature, the provisions of the Civil Evidence (NI) Order 1989 and evidence on commission to ensure that any remaining prejudice through the absence of witnesses due to illness or death is ameliorated.

[21] There is one exception to my finding in this regard. Mr Fee submitted that the inability of ex Detective Sgt Houston to recall anything about the arrest itself would not occasion any prejudice because in his experience of wrongful arrest cases

the arresting officer simply relies on the instruction which he has been given. I do not share that view in light of the O'Hara decision. I consider that that case has dispelled the myth that a tap on the shoulder of a senior officer was sufficient to found a reasonable suspicion in the opinion of the arresting officer. O'Hara's case makes it clear that the mere fact that an arresting officer has been instructed by a superior officer to effect arrest is not capable of amounting to reasonable grounds for the necessary suspicion. This issue was not raised at the trial and therefore Houston cannot rely on any part of the transcript to assist him in this regard. For that reason I have come to the conclusion that that part of the plaintiff's claim for wrongful arrest which depends on the inability of Detective Sgt Houston to recall the briefing given to him for the grounds of initial arrest will be dismissed and the plaintiff will not be permitted to rely on that aspect of the wrongful arrest allegation. I emphasise however that is the only part of the case where I consider insurmountable prejudice has been occasioned to the defendant.

[22] Insofar as I have refused the defendant's application due to lack of prejudice, I make it clear that even had I considered that there was a measure of prejudice in some aspects of the case, I would have exercised my discretion in favour of the plaintiff in this case. In addition to the factors I have mentioned above which dilute any prejudicial effect, I am conscious that the allegations in this case amount to serious charges against persons and authorities within the State who are bound by laws publicly made and administered in the courts. They amount to an assault on the rule of law if they are true and an affront to public conscience. In those circumstances courts should be particularly cautious before driving from the seat of judgment those who wish to litigate such matters. The balance of justice lies in allowing such matters to proceed to trial if at all possible so long of course as the defendant is not deprived of any realistic chance of defending the allegations due to the delay (See also McCloskey J in Keeley v Chief Constable of the Police Service for Northern Ireland [2011] NIQB 38 at paragraph 31 et seq.)

[23] In all the circumstances therefore I dismiss the defendant's application and affirm the decision of the Deputy Master.