Neutral Citation No: [2019] NICA 4 | *Ref:* **MOR10847**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/01/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF THE DELAY IN HOLDING AN INQUEST INTO THE DEATH OF RAYMOND McCORD (JNR)

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (DELIVERING THE JUDGMENT OF THE COURT)

[1] This is an application for leave to appeal from a case management decision of McCloskey J given on 21 June 2018 when he refused the application for the removal of a stay on the hearing of the applicant's leave application to issue judicial review proceedings against the Police Service of Northern Ireland ("PSNI"), the Department of Justice and the Coroners Service seeking a declaration that the delay in conducting an inquest into the death of his son violated his rights under Article 2 of the ECHR. Mr O'Rourke QC and Mr Moriarty appeared for the applicant, Mr Coll QC appeared with Mr Robinson for the PSNI and Mr McAteer appeared for the Department of Justice. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] On 9 November 1997 the applicant's son was murdered by loyalists. The inquest was listed for a preliminary hearing before the coroner on 4 June 2001. On 2 September 2002 the Police Ombudsman for Northern Ireland ("PONI") advised the applicant's solicitors that he was continuing to investigate complaints about whether a police informer had been involved in the murder but that he was unable to disclose any material under section 63 of the Police (Northern Ireland) Act 1998.

[3] On 22 January 2007 the PONI provided her report. The report stated that police information indicated that the applicant's son had brought cannabis into Northern Ireland on behalf of a person known as Informant 1. On 8 November 1997 the applicant's son went with others to the Maze prison to visit a prisoner. Information gathered by police suggested that the applicant's son was taken away by other men that night and killed. Informant 1 was suspected of ordering his killing following a dispute over the drugs for which the applicant's son had previously been arrested.

[4] On 21 January 2011 the applicant's solicitors received correspondence from the Coroners Service which stated that the coroner was unable to list the matter as a Police Service of Northern Ireland ("PSNI") investigation was ongoing. A preliminary hearing before the senior coroner on 30 April 2012 was adjourned until 5 September 2012 to ascertain what progress had been made in respect of that investigation. On 14 January 2013 the Crown Solicitor's Office indicated that an assisting offender had been entered into bail and that a preliminary enquiry had been set for May 2013. The letter stated that the assisting offender's criminal trial would have to conclude before any further investigative action could be undertaken by the PSNI and that it would be early 2014 before such investigations would be concluded.

[5] On 6 June 2013 the Crown Solicitor's Office wrote to the applicant's solicitor to indicate that the preliminary hearing scheduled for 23 May 2013 had been adjourned by the Public Prosecution Service ("PPS") and would be relisted at some stage in the autumn. On 27 January 2016 this case was reviewed by the Presiding Coroner, Weir LJ, as part of a review of all of the then outstanding legacy inquests. It was noted that no coroner had been allocated to the inquest into the death of the applicant's son and that a criminal investigation into the death was still ongoing.

[6] By letter dated 26 February 2016 the applicant's solicitors wrote to the PSNI requesting that disclosure of non-sensitive material be provided at that stage to the coroner in order to prepare for the inquest. In the absence of any response a pre-action protocol letter was sent to the PSNI on 18 May 2017 and on 6 June 2017 an application for leave to issue judicial review proceedings was made seeking an order requiring the Chief Constable to provide disclosure to the coroner of the non-sensitive investigation materials touching upon the death of his son and a declaration that the failure to provide prompt disclosure of the information to the coroner had occasioned delay which violated his rights under Article 2 of the Convention.

[7] The application for leave commenced before Maguire J on 28 June 2017 but was adjourned. The pursuit of the criminal investigation was concerned with whether to rely on the evidence of an assisting offender, Gary Haggarty, to pursue a prosecution against certain former police officers for their conduct in the period leading up to the murder of the applicant's son. On 12 October 2017 the Director of Public Prosecutions ("DPP") advised the applicant that Haggarty's evidence did not pass the test for prosecution in relation to the activities of former police officers. That

decision has itself been the subject of challenge by the applicant and remains outstanding.

[8] On 24 October 2017 McCloskey J directed that pre-action protocol correspondence should be forwarded to any additional proposed respondents that the applicant wished to join and on 7 November 2017 the applicant amended his Order 53 statement to add claims for delay against the coroner and the Department of Justice. The application was reviewed by McCloskey J on 17 November 2017 when he gave directions for responses to the pre-action protocol letters and the filing of papers. Further amendments to the Order 53 statement were made on 14 December 2017 but no further respondents were added.

[9] McCloskey J gave directions on 8 February 2018 requiring the parties to set out their proposals for progressing the case. On 13 March 2018 he made a case management direction ordering a stay of the proceedings with a review on 21 June 2018. The judge noted that at successive preliminary hearings on 30 April 2012 and 5 September 2012 the applicant adopted the position that the coroner's inquest should not proceed until the police activities had been completed. The inquest was then adjourned *sine die* without opposition from the applicant. The proceedings before Maguire J on 28 June 2017 were concerned with the disclosure of police documents but it was not until 30 October 2017, after the decision of the DPP, that the applicant requested the coroner to revive the inquest proceedings.

[10] Having set out the positions of the various parties the judge then turned to a number of pending cases dealing with legacy. The first was the case of Jordan [2015] NICA 66 dealing with the circumstances in which as a matter of case management the Court of Appeal was entitled to postpone the award of damages for delay in the conduct of an inquest where the inquest proceedings had not been finalised. There were three cases, McQuillan, Barnard and McGuigan and McKenna, dealing with the circumstances in which the Article 2 obligation could be revived on the basis of the principles set out in Brecknell v UK (2008) 46 EHRR 42. The case of Finucane was a further case dealing with retrospectivity. The judge referred to the case of Bell being an Article 2 case on funding of the PONI although the judgment of the Court of Appeal indicates that Article 2 was not relied upon in that appeal. The final case referred to was Hughes which dealt with the issue of funding of the Coroners Service which was completed on 8 February 2018 and in respect of which judgment was in fact given on 8 March 2018. The learned trial judge had noted the judgment as being reserved.

[11] Having reviewed the outstanding cases the learned trial judge concluded that "it would be pointless and disproportionate to adopt a course which would involve any further investment of finite public resources at this stage" (underlining that of judge). A stay was the obvious appropriate course. He required brief updated submissions in writing by June 2018 and adjourned the matter to 21 June 2018 when he continued the Order.

[12] The applicant applied for leave to appeal to this court and in the course of refusing leave the judge set out the consideration upon which he had relied on 21 June 2018:

> "The court made a considered order on 13 March 2018 in which it referred to the broader panorama of other cases proceeding in superior courts which will result in decisions, by well-established principle, binding on this court. Because of that nexus and taking into account all of the ingredients of the overriding objective I just cannot see that anything of any merit or substance will be achieved by investing limited court resources in progressing this case further at this stage. I ruled in March that it would be pointless and disproportionate to adopt a course involving any further investment of the finite public resources by this court or the court administration or any of the proposed public authority respondents. Three months later nothing has changed to alter that assessment."

Consideration

[13] It was agreed by all parties that the Orders made by the judge were case management decisions staying the proceedings and that such decisions are rarely challenged and even more rarely reversed on appeal. The proper approach to case management decisions was considered by Lord Neuberger in Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64 at paragraph [13] dealing with a case management decision made by the trial judge:

> "Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was 'plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree'."

[14] In that passage he was approving the statement of Lewison LJ in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 at [51]:

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come

> to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

[15] It was common case that the reasoning of the judge was based on the proposition that the appellate decisions in respect of the retrospectivity cases and the Jordan case would be material to the arguments advanced in the application for leave in this case. The death which is the subject of these proceedings occurred in 1997 before the Human Rights Act 1998 ("the 1998 Act") came into force on 2 October 2000. That raised an element of retrospectivity. The retrospectivity principle was established in Re McKerr [2014] 1 WLR 807 but moderated by the Supreme Court as a result of subsequent decisions of the European Court of Human Rights in Re McCaughey and Another [2012] 1 AC 725. The effect of that decision is that where a coroner has decided to hold an inquest prior to 2 October 2000 but the inquest has not yet been heard before that date the obligation to conduct the inquest in accordance with Article 2 of the Convention is enforceable in domestic law under the 1998 Act.

[16] It is common case that this case is one which fell squarely within the McCaughey principle. The Brecknell principle is different. In Brecknell v UK the European Court of Human Rights held that the Article 2 obligation as a matter of international law could be revived by the discovery of a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing. The Brecknell retrospectivity cases therefore will have no bearing on the entitlement of the applicant in these proceedings to rely on his Article 2 rights. Consideration of the Finucane case leads to the same conclusion. It is not concerned with the McCaughey principle and has no bearing on the issues in this application.

[17] The Bell and Hughes cases can be dealt with briefly. Bell is not an Article 2 case although the judge seems to have thought that it was. The Court of Appeal decision was given on 7 November 2017 and the case has not proceeded further. Hughes was given on 8 March 2018 and also has not been appealed. These cases do not provide any basis upon which to delay the applicant's leave proceedings.

[18] We consider, therefore, that the only basis supporting the decision of the learned trial judge to stay the proceedings arose from the decision of the Court of Appeal in Hugh Jordan's Application [2015] NICA 66. That was a case in which the court upheld the decision of Stephens J to quash the inquest verdict and direct that a fresh inquest should proceed before a different coroner. An issue arose in respect of the award of damages. The problem was identified at paragraph [24] of the judgment:

> "[24] In light of these issues and the very long delays occurring in legacy cases, those who wish to avoid being captured by the primary limitation period under the 1998 Act may well feel obliged to issue proceedings separately in relation to each and every incident of delay. That may involve separate proceedings against different public authorities allegedly contributing to periods of delay which may or may not overlap. By way of example in respect of this inquest there have been more than 25 judicial review applications. Many of those applications raised issues of delay directly or indirectly. The public authorities allegedly responsible for the delay varied. If each case had to be pursued within one year of the end of each particular element of delay that would have introduced a proliferation of litigation in respect of which periods of delay justified an award of damages against each public authority. Practicality and good case management point towards ensuring that all of those claims against each public authority should be heard at the same time."

[19] The court noted at paragraph [25] that the fresh inquest should take place within a reasonable timeframe and any failure to do so would constitute a fresh breach of the convention for which a remedy, including damages, may be available but it was also noted at the same paragraph that it was when the inquest had been completed that it would be possible to examine all of the circumstances surrounding any claim for delay in the assessment of adequate redress. The court concluded at paragraph [26] that in legacy cases the issue of damages against any public authority for breach of the adjectival obligation in Article 2 ECHR ought to be dealt with once the inquest had finally been determined.

[20] At paragraph 27 of the ruling the court looked at the circumstances surrounding exceptions to this approach.

> "[27] These cases have been characterised by multiple reviews, skeleton arguments, rulings and recordings. All of this material will assist in the determination of any disputed issues of fact. That will moderate considerably any prejudice. We find it difficult to envisage any circumstances in which there should be an exception to the approach set out in the preceding paragraph in such cases. The available materials and the involvement of legal assistance in the preparation of the inquest should ensure an ample basis for consideration at the end of the inquest of the

> responsibility of each public authority for any breaches alleged."

[21] We accept that this passage created the impression that in every legacy case any application to pursue a remedy by way of damages for delay could only be dealt with at the end of the inquest. Indeed it is clear that that was the common understanding of the parties before the learned trial judge as a result of which the applicant decided to abandon the determination of his claim for damages in the proceedings and rely solely upon the claim for a declaration. That, of course, of itself gives rise to an issue about the proliferation of proceedings and was a proper matter of concern for the trial judge.

[22] We consider, however, that this passage of the judgment ought to be interpreted in a rather more qualified manner. First, it has to be borne in mind that the court, having given the judgment in September 2015, decided of its own motion to relist the case for the determination of the damages claim in June 2017 having regard to the fact that the inquest had not yet concluded. Secondly, it needs to be borne in mind that this was a case management decision and was not intended to set forth any rule of law about the entitlement to damages in legacy cases. Thirdly, the case was concerned with circumstances in which there were active and ongoing inquest proceedings but where issues of delay in the course of those active proceedings arose. It was such cases that were being discussed in this passage of the judgment and we consider that the interpretation of paragraph [27] should be confined to cases in which those circumstances are present.

[23] This case is different. The death occurred more than 20 years ago. The obligation deriving from Article 2 of the Convention is that the authorities should act of their own motion and that the investigation should be prompt and proceed with reasonable expedition. The inquest in this case has not taken place. No coroner has been allocated to hear it and no materials have been provided to the Coroners Service by the police. It is impossible to estimate how many years it might take before the inquest might proceed, as was accepted by the parties at the hearing.

Conclusion

[24] We recognise how the relevant passages in the Jordan decision led the parties and the judge to the view that they were material to this application and thereby caused the judge to approach the matter in the manner in which he did. Having taken the opportunity to explain those passages it is clear that there is now no impediment to the hearing of this leave application. In light of our analysis there is no reason why the matter cannot proceed in respect of both the claim for a declaration and the claim for damages.

[25] We explained our analysis of the Jordan decision in the course of the hearing. Having done so we asked the parties to consider whether they felt able to seek instructions to remove the stay by consent. Counsel for the PSNI indicated that he could not seek such instructions. If that indicates an intention to pursue every legal point in these cases to the bitter end the onus on the court to proactively case

manage these matters to a conclusion will unfortunately increase. In our view these difficult cases benefit from the most consensual approach possible by the parties.

[26] For the reasons given we allow the appeal.