

## THE HIGH COURT

Record No. 2014/120JR

BETWEEN:

PÁDRAIG McEVOY

APPLICANT

– AND –

GARDA SÍÓCHÁNA OMBUDSMAN COMMISSION

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

## Part 1

## Overview

1. Garda McEvoy is a member of An Garda Síochána. In these proceedings he seeks, amongst other matters, to prohibit the investigation by the Garda Síochána Ombudsman Commission (GSOC) of a complaint made against him by Ms Mary Lynch. Ms Lynch previously made a complaint concerning the handling of the investigation and the prosecution of a Mr McGrath after he committed an assault upon her. However, for procedural reasons, this complaint was not investigated by GSOC. The subsequent provision to Ms Lynch by Sergeant Maurice McCabe, a Garda whistle-blower, of certain information, has led Ms Lynch to return to GSOC with a fresh complaint. This time she alleges that there was a cover-up within An Garda Síochána regarding the investigation of Mr McGrath's assault upon her. Garda McEvoy contends that this second complaint is in truth but the first complaint in a different guise and that it cannot now be re-investigated. GSOC contends that the new complaint is different in substance to the first complaint, that it is based on fresh information, and that no determination on the substance of the first complaint was ever made. Consequently, the investigation of the second complaint, GSOC maintains, ought not to be prohibited.

## Part 2

## Factual Background to the Proceedings

2. Garda McEvoy was attached to Bailieboro Garda station at the time of the arrest and prosecution of Mr McGrath for an assault on Ms Lynch on 30th April 2007. While on bail in respect of the assault, Mr McGrath went on to commit two further serious crimes, namely the assault and abduction of a minor in Tipperary in October 2007 and, tragically, the murder of Mrs Sylvia Roche Kelly in Limerick in December 2007. The complaints and related events that followed are best described by way of summary chronology:

*12th April, 2011.* Garda McEvoy is formally notified by letter that GSOC has received two complaints, one from Ms Lynch and one from Mr Lorcan Roche Kelly (the husband of Mrs Sylvia Roche Kelly) and that the complaints have been deemed admissible in accordance with the Garda Síochána Act 2005. The letter encloses two notices in accordance with s.95 of the Act of 2005. The two complaints made are in relation to Garda McEvoy's involvement in the investigation of the assault on Ms Lynch on 30th April, 2007.

*25th October, 2011.* Garda McEvoy is notified by GSOC that it had discontinued the investigation into Ms Lynch's complaint. The reason given for the discontinuance of the investigation is that GSOC had failed to give consideration as to whether the time for admitting a complaint should be extended in accordance with s.84 of the Act of 2005. GSOC states in the letter that it "*shall take no further action in relation to the complaint of Ms Lynch.*"

*17th May, 2012.* Garda McEvoy is the subject of a caution from Superintendent Seán Farrell pursuant to reg.10 of the Garda Síochána (Discipline) Regulations 2007 arising out of his involvement in the investigation of the assault on Ms Lynch.

*14th August, 2012.* The complaint of Mr Roche Kelly continued to be investigated by GSOC. On 14th August, 2012, Garda McEvoy is informed that a report pursuant to s.97 of the Act of 2005 has been forwarded to the Assistant Garda Commissioner with responsibility for HR Management. Garda McEvoy is advised that GSOC has formed the view that there may have been a "less serious" breach of discipline and has recommended that the procedure contained in reg.45 of the Garda Síochána (Discipline) Regulations 2007 be followed.

*October 2012.* GSOC is contacted afresh by Ms Lynch. She tells GSOC staff that she has new information indicating that she was lied to by Garda members during the investigation and prosecution of Mr McGrath. In a meeting with GSOC staff, she tells them that she was informed by Sergeant McCabe, a Garda whistle-blower, that he has a recording of Garda McEvoy in which Garda McEvoy states that he had discussed Mr McGrath's release with a named garda inspector, even though that Inspector Cunningham allegedly told Ms Lynch that he was not in Monaghan Station at the time.

In passing, the court notes that there was suggestion at the hearings that Ms Lynch had somehow been coached by GSOC staff and/or that her complaint as made in January 2013 had somehow been crafted or 'shoe-horned' by GSOC so

that it was a new complaint of conspiracy and not a re-opening of her old complaint. There is no evidence of any nature before the court which suggests that any member of GSOC has behaved improperly in any way. Specifically, the court considers that such meetings as took place between GSOC and Ms Lynch around October 2012 involved a proper engagement between GSOC staff and a woman who had contacted GSOC and indicated that she was minded to make a serious complaint concerning one or more members of An Garda Síochána.

*3rd January, 2013.* By letter dated 3rd January, Garda McEvoy is informed by GSOC that that he has been found not to be in breach of the Regulations aforesaid by the member of An Garda Síochána appointed by the Garda Commissioner to investigate same.

*9th January, 2013.* Following her approach to GSOC the previous October, Ms Lynch makes a formal written complaint concerning the cover-up that she alleges to have occurred within An Garda Síochána regarding the investigation of her assault.

*11th January, 2013.* The Garda Commissioner is notified of Ms Lynch's fresh complaint.

*Jan-Sept 2013.* Following receipt, the fresh complaint is considered for admissibility for a strikingly long period between January and September 2013. GSOC maintains that careful deliberation took place during this period; these considerations, per GSOC, were complex because it needed to identify the parameters of the complaint and when the new information became available to Ms Lynch.

*10th September, 2013.* GSOC records an admissibility determination.

*8th November, 2013.* The Garda Commissioner is notified of an admissible complaint by letter of this date.

*28th November 2013.* GSOC records a second admissibility determination.

*29th November, 2013.* Garda McEvoy is notified by a letter of the 29th that GSOC has deemed a complaint made on 11th January, 2013 admissible under s.87 of the Act of 2005 and has decided that the complaint should be investigated in accordance with s.95 of that Act. The existence of the new information is made clear, the recorded conversation being referred to in a manner which makes clear that it is the new evidence.

3. The newly admitted complaint, so far as it concerns Garda McEvoy, appears to be that he lied when he said that he did not know who gave the order to release Mr McGrath, and that this lie was part of a cover-up of mistakes made in the investigation carried out into the assault committed upon Ms Lynch in 2007. GSOC maintains that this allegation of lying and cover-up is a new allegation concerning Garda McEvoy which has not previously been investigated.

### **Part 3**

#### **Reliefs Sought**

4. Garda McEvoy comes to court seeking the following principal reliefs:

- (1) an order restraining GSOC from any further steps in the investigation of Garda McEvoy;
- (2) an order of certiorari quashing the decision of GSOC deeming a complaint made against Garda McEvoy dated 11th January, 2013 (the "Complaint") admissible in accordance with s.87 of the Garda Síochána Act 2005, which decision was communicated to Garda McEvoy on 2nd December, 2013;
- (3) an order of prohibition prohibiting GSOC from taking any further steps in the investigation of the Complaint;
- (4) a declaration that GSOC acted *ultra vires* and in breach of the Act of 2005 in the manner in which the Complaint was deemed admissible and/or notified to Garda McEvoy;
- (5) a declaration that GSOC acted in breach of the requirements of natural and constitutional justice and the principles of *autrefois acquit* and *res judicata* purporting to re-open an investigation into the Complaint where Garda McEvoy has already been investigated and/or been the subject of disciplinary sanction in respect of his handling of the investigation into the assault of Ms Lynch on 30th April, 2007;
- (6) a declaration that GSOC has been guilty of inordinate and inexcusable delay in the admission of the Complaint;
- (7) a declaration that GSOC has been guilty of inordinate and inexcusable delay and in breach of its statutory duty in notifying Garda McEvoy of the Complaint;
- (8) a declaration that GSOC acted *ultra vires* in deeming admissible the Complaint of Ms Lynch;
- (9) a declaration that GSOC has breached Garda McEvoy's right to fair procedures and natural and constitutional justice in extending the time for the admission of the Complaint and/or in deciding to investigate the Complaint when the Complaint was (it is alleged) made on the basis of improper and/or inadmissible evidence [though mentioned in the pleadings as a ground of relief, this relief was not pressed at the hearing of the application, counsel for Garda McEvoy indicating that he thought this more a matter to be raised if and as the GSOC investigation proceeds];
- (10) a declaration that the re-opening of the investigation is oppressive and unfair in all the circumstances;
- (11) a declaration that the decision of GSOC to deem the Complaint against Garda McEvoy admissible was made *ultra vires*;
- (12) a declaration that GSOC is estopped from further investigation of Garda McEvoy or has acted in breach of a legitimate expectation on the part of Garda McEvoy that the said complaint had been disallowed;
- (13) a declaration that GSOC breached the provisions of the Act of 2005 in deeming the Complaint admissible and in the

manner in which GSOC failed to notify Garda McEvoy of the Complaint in accordance with s.88 of the Act of 2005;

(14) a declaration that the evidence relied upon by GSOC to determine that the Complaint was admissible was illegally obtained evidence and, as such, was improperly, incorrectly and illegally relied upon by GSOC [though mentioned in the pleadings as a ground of relief, this relief was not pressed at the hearing of the application]; and

(15) a declaration that GSOC is *functus officio* in respect of the complaint made against Garda McEvoy.

5. Certain other reliefs were also sought.

## **Part 4**

### **Key Provisions of the Act of 2005**

#### **A. Overview.**

6. Part 3 of the Act of 2005 establishes GSOC and confers certain functions upon it. Part 4 of the Act then makes provision as regards complaints against, and investigation(s) of, Garda members, as well as certain other procedures. A few provisions are key; these are identified hereafter.

#### **B. Time Limits for Making Complaints.**

7. Section 84 of the Act of 2005 provides as follows:

*"(1) A complaint must be made within the period of 6 months<sup>[1]</sup> beginning on the date of the conduct<sup>[2]</sup> giving rise to the complaint or within any extension of that period allowed under subsection (2).*

*(2) The Ombudsman Commission may extend the time limit for making a complaint if it considers that there are good reasons for doing so.*

*(3) A complaint is considered to be made as soon as it is received by–*

*(a) the Ombudsman Commission, if made directly to it, or*

*(b) the Garda Commissioner or a member of the Garda Síochána, if made by stating, giving or sending it as described in section 83(2) for forwarding to the Commission.<sup>[3]</sup>"*

*[1] This period was extended by s.4 of the Garda Síochána (Amendment) Act 2015 to 12 months. However, the six month period is relevant to the within proceedings.*

*[2] The term "conduct", per s.82, "includes any act or omission and a reference to the occurrence of any conduct includes the doing of an act or the making of an omission".*

*[3] Section 83(2) allows for a complaint to be made either directly to GSOC or indirectly to GSOC via the making of a complaint to the Garda Commissioner or another member of An Garda Síochána.*

#### **C. Determination of whether Complaint is Admissible.**

8. Section 87(1) of the Act of 2005 provides as follows:

*"On receiving<sup>[1]</sup> a complaint directly from a complainant or receiving a copy or record of a complaint from the Garda Commissioner or a member of the Garda Síochána, the Ombudsman Commission shall determine whether the complaint is admissible."*

*[1] Counsel for Garda McEvoy contended at the hearing of the within application that "On receiving...shall determine" requires if not immediacy – and the court is not certain that immediacy was not contended for – then a real closeness in time between the moment of receipt and the moment of determination. The court respectfully disagrees. The phrase "On receiving...shall determine" cannot require immediacy because to require that could be, and doubtless sometimes would be, to require the impossible. Suppose a complaint was received on a Sunday, suppose a complaint was received in poorly written English, suppose a complaint was received by someone of doubtful mental competence? Any number of instances can be imagined in which a requirement of immediacy, or even near-immediacy, simply could not be attained and the Oireachtas cannot be assumed generally to have required the occasionally unattainable or, alternatively, to have required immediacy only when attainable. Section 87(1) must therefore bear another meaning, viz. that "On receiving a complaint...the Ombudsman Commission shall [thereafter] determine...". The right to fair procedures, natural justice and issues of delay then come into play in gauging the lawfulness of GSOC's actions in this context.*

9. Section 87(2)–(4) makes provision as regards what is an admissible complaint or an inadmissible complaint.

#### **D. Notification of Inadmissibility and Cessation of Action thereafter.**

10. Section 88(1)(a) of the Act requires GSOC to notify the complainant, the affected member of An Garda Síochána and the Garda Commissioner of a determination that a complaint is inadmissible. Section 88(1)(b) requires that GSOC include in such notification the reason for such determination. Notably, s.88(1)(c) requires that upon determining that a complaint is inadmissible, GSOC shall "take no further action in relation to the complaint".

#### **E. Duty to Keep Certain Persons Informed.**

11. Section 103(1) of the Act of 2005 requires that GSOC provide certain persons with sufficient information to keep them informed of the progress and results of an investigation under Part 4 of the Act. In the case of Ms Lynch, as the investigation in relation to her

claims has followed a complaint, the following people fall to be kept informed: the complainant (Ms Lynch), the member of An Garda Síochána whose conduct is the subject of the complaint (Garda McEvoy), the Garda Commissioner, and any other person whom GSOC considers to have a sufficient interest in the matter.

## **Part 5**

### **The Substance of the Two Complaints: Are they Different?**

#### **A. Complaint #1.**

12. On 12th April, 2011, GSOC sent a formal notice to Garda McEvoy indicating that a complaint was being investigated against him. So far as relevant to these proceedings, the notice stated as follows:

*"The following matter is being investigated:*

*Mrs Mary LYNCH has lodged a complaint in relation to the Garda handling of the investigation into the assault of her person, committed by Mr Gerry McGRATH in Cavan on 30/04/2007. Mr McGRATH was charged with an offence contrary to Section 2 of the Non-Fatal Offences Against the Person Act 1997 and granted bail. He subsequently went on to commit further offences whilst on bail, namely*

- 1) Abduction and Burglary and Assault on a child...*
- 2) Murder of Sylvia ROCHE KELLY, Limerick, on 08/12/2007*

*Mrs LYNCH has alleged...[the] following*

- 1) That Gardaí did not carry out the investigation into the assault on her person to the required standard*
- 2) That there was a failure in supervision of the investigation*
- 3) That she was not facilitated to attend and give evidence at Court on the date Mr McGRATH was convicted for the assault.*
- 4) [The court cannot read the entirety of the text in the documentation supplied to it. In essence, the allegation made at point 4) is that all relevant evidence was not placed before the court when Mr McGrath was tried].*
- 5) That she was not kept properly updated.*

*Further to the above, the Garda Ombudsman is also examining whether the PULSE record for the assault on Mary LYNCH...is insufficiently detailed and whether it properly reflects the seriousness of the incident."*

#### **B. End of Investigation #1.**

13. By October of 2011, the investigation pursuant to Ms Lynch's first complaint was over. A letter of 25th October from GSOC to Garda McEvoy explained why matters had come to a sudden end:

*"Initially it was considered that the complaint related to behaviour occurring within the prescribed 6 month period. It is now accepted, however, that the complaint related to behaviour occurring outside this period and consideration should have been given to extending time for good reason in accordance with section 84 of the Garda Síochána Act, 2005. As this was not done GSOC considers that, in the interests of fairness, the GSOC investigation into Ms Lynch's complaint should be discontinued and the matter returned to the Gardaí."*

#### **C. Complaint #2.**

14. On 29th November, 2013, GSOC sent a formal notice to Garda McEvoy indicating that a second complaint was being investigated against him. So far as relevant to these proceedings, the notice stated as follows:

*"The following matter is being investigated:*

##### *Background*

*Mrs Mary Lynch made a complaint relating to certain aspects of the investigation which the gardaí at Bailieboro Garda Station carried out into an assault on her by a man named Jerry McGrath in 2007.*

*In making this complaint, Mrs Lynch states that in or around October 2012, she obtained new information which was not known to her previously. As a result of this new information. Mrs Lynch has now alleged that Garda members attached to Bailieboro Garda Station lied to her to cover up mistakes they made in the investigation. The complainant claims that because her case was treated "so disgracefully, a more serious crime was committed" at a later time by Mr Jerry McGrath.*

*According to Mrs Lynch, Sergeant Maurice McCabe [a Garda whistle-blower] who was stationed at Bailieboro Garda Station at the time, had recorded a conversation he had by telephone with Garda Padraic McEvoy and which he says contains evidence against Inspector Cunningham and Garda McEvoy in relation to this complaint. Mrs Lynch stated that she did not have a copy of the telephone recording and has only heard part of the recording which Sergeant McCabe played to her. As far as she is aware, Sergeant McCabe retains possession of the telephone recording concerned.*

*It is alleged that during the course of the Garda Investigation into her assault (which occurred in 2007) the following occurred...*

*[Various detailed allegations against certain senior Garda officers follow. One paragraph (no.4) refers expressly to Garda McEvoy and another (no.6) appears also to embrace him, though not by name].*

*4. Garda Padraic McEvoy 'lied' when he said he did not know who gave the order to release Jerry McGrath. Mrs Lynch now believes it was Garda McEvoy who went to Inspector –'s office (now Superintendent) to get permission to release McGrath....*

*6. Mrs Lynch is alleging that Garda members then attached to Bailieboro Garda Station lied to her to cover up mistakes they made in the investigation they carried out into an assault on her in 2007 by a man named Jerry McGrath. Mrs Lynch alleges that because her case was treated 'so disgracefully, a more serious crime was committed' at a later time by Jerry McGrath."*

#### **D. Are the Complaints Different?**

15. An analysis of the text quoted above at Sections A. and C. reveals that the two complaints made by Ms Lynch are entirely different. The first complaint alleges that certain Gardaí conducted a flawed criminal investigation. The second complaint, based as it happens on new information, alleges that certain Gardaí conspired to conceal that they had conducted a flawed criminal investigation. The two complaints are 'chalk and cheese'. There is no masquerade in which the second complaint is but the first in costume. And on that simple fact, as will be seen later below, much of what Garda McEvoy contends must founder.

### **Part 6**

#### **The Two Admissibility Determinations**

##### **A. What Does an Admissibility Determination Involve?**

16. The court has rejected elsewhere above the notion that s.87 of the Act of 2005 connotes any sense of immediacy when it states that "*On receiving a complaint...[GSOC] shall determine whether the complaint is admissible or inadmissible*". Any number of instances can be imagined in which a requirement of immediacy, or even near-immediacy, simply could not be satisfied, and the Oireachtas must therefore be assumed not to have required such hurry. Even so, does a legal problem arise for GSOC by virtue of (a) the eight-month delay between receipt of Ms Lynch's second complaint in January 2013 and the first admissibility decision in September 2013, and (b) the ten-month delay before the second admissibility decision was made in November 2013?

17. Determining admissibility or inadmissibility requires GSOC to answer but seven questions:

##### **I. Questions as to Admissibility**

(The answer to each of these questions needs to be 'Yes'

if a complaint is to be determined admissible)

1. Is the complaint made a complaint concerning the conduct of a member of An Garda Síochána? [s.87(2)].

2. Is the complaint made by or on behalf of a member of the public authorised under s.83 of the Act of 2005 to make the complaint?[1] [s.87(2)(a)].

*[1] Under s.83 a complaint may be made by (i) a member of the public who is directly affected by the conduct of which complaint is made, (ii) a member of the public who witnesses the conduct of which complaint is made, and (iii) by certain duly authorised or interested persons acting on behalf of a person referred to in (i) or (ii).*

3. Would the alleged conduct, if substantiated, constitute misbehaviour by the member of An Garda Síochána? [s.87(2)(b)].

4. Has the complaint been made within a timeframe allowed under s.84, noting in particular the power of GSOC under s.84(2) to extend the standard timeframe for making a complaint "*if it considers that there are good reasons for doing so*"? [s.87(2)(c)].

5. Is the complaint other than frivolous or vexatious?[2] [s.87(2)(d)].

*[2] The ordinary meaning of the terms "frivolous" and "vexatious" applies. A Google search of each word coupled with the word "definition" yields the following results: (1) the term "frivolous" connotes that a complaint has no serious purpose or value; (2) the term "vexatious" connotes the bringing of a complaint purely to cause annoyance.*

6. *[Only to be answered if the complaint is about the conduct of a member of An Garda Síochána while not on duty].*

Would the conduct complained of (if proved) be likely to bring discredit on An Garda Síochána? [s.87(3)(b)].

##### **II. Questions as to Inadmissibility**

(The answer to this question needs to be 'No'

if a complaint is to be determined admissible)

7. Is the complaint one that relates to the general direction and control of the Garda Síochána by the Garda Commissioner? [s.87(3)(a)].

18. To answer the seven questions referred to above, at least by reference to the information before the court, is a straightforward matter. So, as to 1. 'Yes', 2. 'Yes', 3. 'Yes', 4. 'Yes', 5. 'Yes', 6. 'Not Applicable' and 7. 'No'. Hence Ms Lynch's second complaint is admissible.

19. It is surprising that GSOC should have taken eight to ten months to comprehensively address to its satisfaction the seven questions above. The court accepts that even after Ms Lynch made her second complaint GSOC did not have all the information that is now before the court, that it took a few telephone conversations with Ms Lynch to get to the bottom of precisely what she was alleging, and that there were discussions within GSOC as to whether questions of timing presented. But eight to ten months to answer seven simple questions? That is a surprisingly long time. But is such delay as presents a ground for invalidity in and of itself?

## **Part 7**

### **Delay as a Basis for Permanent Restraint?**

#### **A. Overview.**

20. By itself, does delay on the part of a public body suffice as a basis on which the court may permanently restrain proceedings such as the GSOC investigation of Ms Lynch's second complaint? The court has been referred to a number of cases in this regard, including *McGowan v. Wren* [1988] ILRM 744, *Gallagher v. Revenue Commissioners* (No.1) [1991] 2 I.R. 70, *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469, *McCarthy v. An Garda Síochána* [2002] 2 ILRM 341, *Ryan v. Law Society of Ireland* [2002] 4 I.R. 21, *Kenny v. Garda Síochána Complaints Board and ors* [2006] IEHC 224, *Gibbons v. The Commissioner of An Garda Síochána* [2007] IEHC 266 and *Gillen v. Commissioner of An Garda Síochána* [2012] 1 I.R. 574. Some analogy was also made with the extensive body of jurisprudence in cases of prosecutorial delay; however, it seems to the court that there is enough in the substance of the foregoing cases without need for recourse to analogy. It appears to the court that the following key principles of relevance to the within proceedings can be discerned from the just-mentioned cases:

### **I**

#### **Delay per se**

[1] Delay is always undesirable. Delay *per se* is not a ground for the court to restrain the holding of an oral hearing. Delay is a relevant consideration (a) when it comes to assessing a plaintiff's answer to charges, and (b) if charges are established, for a wrongdoer's superiors in deciding what disciplinary measures should be imposed. (*Gallagher, McNeill*).

[2] The party bringing a matter to the court must expect that the court requires evidence which will substantiate the matters alleged and to show if they can that some form of procedure would be unfair or oppressive, or so unreasonable as to yield an unfair procedure. (*McGowan, McNeill, Ryan, Kenny*).

[3] Examples of concerns that delay may present are that the applicants are (a) in doubt about the nature of the evidence to be offered to substantiate the complaints, (b) are lacking in an opportunity to challenge that evidence, or (c) are failing in recollection since the alleged events occurred. (*McGowan*).

### **II**

#### **Nature of Garda Disciplinary Proceedings**

[4] When it comes to Garda disciplinary proceedings, the court is not really concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings. This is because the proceedings are neither civil nor criminal. They are in respect of breaches of discipline alleged to have been committed by a member of An Garda Síochána as a member of An Garda Síochána and must be dealt with in accordance with the applicable regulations. If the procedures set forth in such disciplinary regulations are followed and the principle of fair procedures applied, the court should not intervene. (*McNeill, Gibbons*).

### **III**

#### **Need for Reasonable Expedition**

[5] Whereas the bulk of the case law on delay relates to 'due process' and is pertinent to criminal trials and Article 38.1 of the Constitution, there is also a constitutional tenet of 'reasonable expedition' in relation to other proceedings. (*McNeill, Haughey*)

[6] In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, person, property, or any personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights. (*Haughey*).

[7] Members of An Garda Síochána have special privileges as well as special responsibilities not shared by the ordinary citizens. If suspicion descends on a member of An Garda Síochána it is important from a public policy point of view that

the matter should be investigated and dealt with quickly. From the perspective of members of the Garda Síochána, they are entitled to expect that if a charge is contemplated it will be brought forward with a degree of expedition and they should be given a chance to meet it. (*McNeill, McCarthy*).

#### IV

##### Assessment of Delay Presenting

[8] Delay may be envisaged from several aspects, including (a) delay causing specific prejudice, (b) delay arising by reason of the conduct of the party, and (c) unconstitutional delay. When it comes to (c), the following matters are of relevance in tribunal proceedings: (1) an applicant's entitlement to constitutionally fair procedures; (2) that the burden is on the applicant to show that he is or will suffer from unfair procedures; and (3) when assessing the reasonableness or otherwise of any delay presenting, the following factors: (i) the type of hearing; (ii) the reasons offered for the delay; (iii) the nature of the wrong; (iv) the question of surprise; (v) any suffering of the applicant; (vi) the effect of the inquiry; (vii) the community interest presenting; (viii) the complexity of the issues presenting; (ix) any impairment envisaged in the putative proceedings; (x) any unfair factors presenting; (xi) the applicant's actions; and (xii) the length of the delay. (*McNeill*).

[9] When it comes to Garda disciplinary regulations, the court must have regard to the interest of the person who is the subject matter of the process, though principally to the extent that her or his interests are compatible with the broader public interest arising. Absent a strict time limit for each stage of the disciplinary proceedings, it is not the case that a failure to proceed with expedition will necessarily result in disciplinary proceedings becoming void. Each case will turn on its own particular circumstances. (*Gillen*).

[10] The court will have regard to all the circumstances in determining whether or not the failure to progress the disciplinary proceedings has been such that to allow them to continue would be to disregard the legislative intention. (*Gillen*).

[11] Where the complaint of misconduct is subsequently found to be unsubstantiated this will result in hardship. But it is hardship which is an unavoidable consequence of the complaint. The court must balance the public interest in a disciplinary process proceeding against the prejudice to the individual concerned. (*Gillen*).

#### V

##### Consequences of Delay

[12] It could never have been intended that if there was some small delay in the procedures and possibly indeed delay engineered by the garda authorities themselves, the matter could never be processed further as this would be grossly unfair to a complainant not in any way responsible for the delay. (*McCarthy*).

#### VI

##### Disciplinary Proceedings versus Public Complaints Process

[13] The procedures under the Garda disciplinary regulations do not arise out of a complaint by the public. In the latter form of case, so far as the court has to consider the unreasonable delay from the point of view of the party seeking to conduct an inquiry, *McNeill* is relevant, but in balancing that against the reasonable rights and expectations of the complainant from the public different considerations apply. Nevertheless while there is an undoubted public interest in complaints against police officers being fully investigated and adjudicated, such investigation and adjudication must be done speedily. (*McCarthy*).

#### VII

##### Peril of Premature End to Proceedings

[14] Premature determination of a disciplinary process on technical grounds, e.g., lapse of time, not only fails to achieve the statutory purpose, but positively undermines it: if the process does not proceed to adjudication, the member affected will not have his name cleared, if he is innocent of the charges, and An Garda Síochána, as a police force, will suffer reputational damage (*Gillen, Ryan*).

[15] It is difficult to imagine anything more corrosive of the internal discipline and external respect for the gardaí than a situation where a member who is guilty of serious disciplinary breaches remains in the force with impunity, by reason of a failure to investigate with sufficient speed. To interpret the disciplinary regulations as requiring invalidity as a consequence of such failure would run counter to their acknowledged purpose. (*Gillen*).

[16] It may be that delay is the friend of the person who is guilty of a breach of discipline. However, the Regulations cannot be understood as showing any solicitude for that person's position. (*Gillen*).

##### B. Application of Principle to Facts at Hand.

21. Applying the above-identified principles to the facts at hand, the court would make the following observations:

Re. [1]. Noted.

Re.[2]-[3]. Garda McEvoy has failed to discharge the burden on him of demonstrating specific prejudice in this case. He cites frailty of human memory, availability of witnesses and 'general prejudice'. However, he has not elaborated on these and has not engaged with the facts. Moreover, an odd result of the fact that this matter has been ongoing for some time means that the usual deadening of memory over time seems unlikely to have occurred.

Re.[4]. Noted. The court is not considering an internal Garda disciplinary process.

Re.[5]-[11], [13]. The court considers that GSOC has come close to failing to meet the need for reasonable expedition in the amount of time it spent on the issue of admissibility. However, in the absence of proof of specific prejudice to Garda McEvoy, in particular as regards the vindication of his rights, the court does not consider – especially when it has regard to the broader public interest in the investigation of alleged Garda misbehaviour – that GSOC's slowness in this regard entitles Garda McEvoy to any of the reliefs that he now seeks.

Re.[12]. Through strictly a point regarding the pace of internal Garda disciplinary proceedings, the court considers that the point applies with equal vigour to GSOC investigations; this buttresses the court's sense that it is correct as a matter of law to deny the reliefs now sought by Garda McEvoy.

Re.[14]-[16]. Noted, and each of these observations buttresses the court in its conclusion re.[5]-[11] and [13].

## Part 8

### Two Admissibility Determinations; One Complaint

22. Counsel for Garda McEvoy has contended that Ms Lynch made her second complaint when she approached GSOC in October 2012. The court respectfully does not accept this contention. In October 2012, Ms Lynch advised GSOC of what she had learned from Sergeant McCabe and thereafter met with GSOC staff with a view to determining whether this meant she could have her complaint looked at afresh. Had Ms Lynch chosen to do nothing further at this time, nothing further would likely have been done by GSOC. What 'kick-started' the GSOC investigation process was Ms Lynch's making a formal, written complaint on 9h January, 2013. To a certain extent, matters were out of her hands from that moment on. Having received the complaint, GSOC had then to commence the determination of admissibility process and, once admissibility was determined, to commence the investigation process. So, to the court's mind, the January 2013 date is the date on which the complaint was made; what preceded was prelude.

23. Following its receipt of the complaint on 9th January, GSOC took eight months to determine admissibility. Then something additional occurred. Following the determination of admissibility on 10th September, concerns were raised internally within GSOC that the officer who made the determination had not captured the allegation of cover-up in this first admissibility determination. An additional admissibility decision was then recorded in November 2012<sup>3</sup> which captured the 'cover-up' dimension of Ms Lynch's complaints. As this cover-up, if proved, was considered to be on-going, no issue as to the timing of the complaint arose. Thereafter, by letter of 29th November, 2013, Garda McEvoy was advised that GSOC had deemed a complaint made on 11th January, 2013, and this complaint had been determined to be admissible.

24. Much ado has been made by counsel for Garda McEvoy as to the making of the second determination. But, to the court's mind, a complaint is either admissible or it is not. In this case, Ms Lynch's second complaint is patently admissible for the reasons identified by the court previously above. If GSOC had found her second complaint to be inadmissible, it would have been wrong. There was some suggestion within GSOC before it contacted Garda McEvoy that the determination of admissibility was not broad enough. In this respect, the court considers that GSOC was getting 'hung up' on a formality that is not required by the Act of 2005. All GSOC is required to do by the Act of 2005 is look at the complaint it receives, ask itself the seven questions concerning admissibility referred to above, then arrive at a simple 'yes' or 'no' as to admissibility, and thereafter proceed in accordance with, inter alia, s.88. of the Act of 2005. Section 88 provides as follows:

*"(1) On determining under section 87 that a complaint is inadmissible, the Ombudsman Commission shall –*

*(a) notify in writing, the complainant, the member of the Garda Síochána whose conduct is the subject of the complaint, and the Garda Commissioner of its determination,*

*(b) include in the notification the reason for the determination, and*

*(c) take no further action in relation to the complaint.*

*(2) On determining under section 87 that a complaint is admissible, the Ombudsman Commission shall as soon as practicable –*

*(a) notify, in writing, the complainant and the Garda Commissioner of its determination, and*

*(b) where the complaint was made directly to the Commission, send the Garda Commissioner a copy of the complaint or, if the complaint was not made in writing, a copy of the record of the complaint.*

*(3) On being notified of an admissible complaint concerning the conduct of a member of the Garda Síochána, the Garda Commissioner shall, subject to section 89(1)(b), notify the member that a complaint has been made and specify the nature of the complaint and the name of the complainant."*

25. There is no requirement in the foregoing that GSOC at any point needs to write an exhaustive memorandum on what it thinks a complaint covers. It may if it wants, but this is not required. If it decides that a complaint is admissible and it later decides in the course of the ensuing investigation that it is entering upon a consideration of matters that were fully and finally considered at some earlier stage, then it can narrow the scope of its investigation if and as appropriate. There is nothing in s.87 that requires it to identify what elements of a complaint GSOC considers that it ought correctly to focus upon. It must take the complaint as it finds it, determine admissibility by reference to the seven questions identified above, and proceed to an investigation if the complaint is admissible.

26. In the present case, GSOC was presented with a complaint (Ms Lynch's second complaint, based on new information) that



concerned an alleged conspiracy to cover up an allegedly flawed investigation. This second complaint was entirely different from Ms Lynch's first complaint alleging that the investigation was flawed. GSOC was correct in September 2013 that the complaint made by Ms Lynch was admissible; and it was correct in November 2013 that the complaint made by Ms Lynch was admissible. Two rights do not make a wrong. That GSOC was correct twice does not amount to a procedural error nor give rise to some legal deficiency on the facts presenting. The court notes in passing that once the determinations as to admissibility were made, notification was sent to Garda McEvoy in accordance with s.88.

## Part 9

### No Extension of Time Pursuant to S.84(2)?

27. It will be recalled that s.84(2) of the Act of 2005 provides that:

*"The Ombudsman Commission may extend the time limit for making a complaint if it considers that there are good reasons for doing so."*

28. It is important that a discretion which the Oireachtas has established to benefit complainants should not be operated as a vehicle to obstruct complaints. In enacting s.84(2), the Oireachtas was clearly aware of the potential for time limits to work an injustice and so conferred a discretion on GSOC to allow a complaint to be made outside time *"if it considers that there are good reasons for doing so"*. So if Ms Lynch's second complaint was out of time, and the court for the reasons set out hereafter does not consider that it was, there was nothing to stop GSOC from admitting that complaint out of time if it considered that there were good reasons for doing so. There is no peculiar magic to the operation of s.84(2) that has been missed by GSOC to this time. And the discovery by Ms Lynch, via a Garda whistle-blower, of new information previously unknown to her, as well as her relatively swift action thereafter, would appear to have afforded a sound basis on which to justify an extension, were such an extension necessary (and again, for reasons identified hereafter, the court does not consider that there was in any event a need to extend the applicable timeframe).

29. Given the relative freedom of action that GSOC enjoys under s.84(2), the court does not consider that references to cases such as *Monaghan UDC v. Alf-A-Bet Promotions Ltd* [1980] ILRM 64, *Walsh v. An Garda Síochána Complaints Board* [2010] IESC 2, or *MM (Georgia) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 529, would be of avail to Garda McEvoy had it been necessary for GSOC to rely on s.84(2) to admit Ms Lynch's second complaint (and it was not). Those cases rightly point to the importance of adhering to procedural requirements in cases with implications for personal rights. But when it comes to s.84(2) the only procedural requirement is that GSOC may only allow a complaint to be made outside time *"if it considers that there are good reasons for doing so"*, nothing more. Here, the reason for the decision to extend time is evident from the face of the notification that was sent to Garda McEvoy. And proof, if proof is needed, that Garda McEvoy understood the rationale for the extension is to be found in the fact that he has been able to formulate a complaint in relation to the legality of tape recording containing the new evidence on which the extension of time was founded.

30. Much of the foregoing is, however, *obiter*. This is because the court does not consider that Ms Lynch's second complaint was out of time and thus that any extension was necessary. She alleges, rightly or wrongly, that there has been a cover-up within the Gardaí to conceal what she claims was a flawed investigation. The nature of any conspiracy to cover-up (even if only alleged) is that it continues; if it did not, the (alleged) conspiracy would have failed. So Ms Lynch's complaint is about alleged ongoing behaviour. Therefore her complaint just cannot be out of time. The conduct which she alleged of certain Gardaí, if proven, was ongoing as late as January 2013 and indeed would be continuing today.

31. On a related note, if the conspiracy is continuing, it follows that there can be no issue as regards the elapse of time following what, for Ms Lynch, was her unhappy encounter with the Gardaí after her assault by Mr McGrath and the making of her complaint in January 2013. The only delay that could arise in this regard is if Ms Lynch had delayed following the discovery of information from Sergeant McCabe. However, in her written complaint of January 2013, she indicates that she had received the new information "[a]bout three months ago". As Ms Lynch engaged with GSOC almost immediately, doubtless gave some thought to matters over the end-of-year holidays, and made her formal written complaint on 9th January, it cannot reasonably be contended that there was any delay on her part in this regard, and, were this contended, it would not be accepted by the court.

## Part 10

### Res Judicata, Section 88 and Legitimate Expectation

#### A. Key Principles.

32. A central contention of Garda McEvoy is that the notification that was given to him by GSOC, pursuant to s.88(1)(c) of the Act of 2005, that it would *take no further action in relation to Ms Lynch's first complaint* brings *res judicata* into play, such that Ms Lynch's second claim cannot now be progressed by GSOC. An array of cases have been referred to in this regard, including *Workington Harbour & Dock Board v. Trade Indemnity Co. Ltd.* (No. 2) [1938] 2 All E.R. 101, *Thoday v. Thoday* [1964] A.C. (P) 181, *Thrasyvoulou v. Secretary of State for the Environment* [1990] 2 A.C. 273, *McGrath v. Commissioner of An Garda Síochána* [1991] 1 I.R. 69, *McCauley v. McDermott* [1997] 2 ILRM 486, *Garvey v. Minister for Justice, Equality and Law Reform* [2006] 1 I.R. 548, *Murray v. The Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, *Hutchison 3G UK Ltd. v. Francois* [2009] ICR 1323, *Walsh v. Commissioner of An Garda Síochána and ors* [2010] IEHC 257, *O'Hara & Gallagher v. ACC Bank* (No. 1) [2011] IEHC 367, *R. (Coke-Wallis) v. Institute of Chartered Accountants* [2011] 2 A.C. 146, and *Burke v. Independent Police Complaints Commission v. Commissioner of Police for the Metropolis* [2013] EWHC 4119 (Admin.). It appears to the court that the following key principles of relevance to the within proceedings can be discerned from those cases:

#### I

#### Res Judicata (general)

[1] *Res judicata* is a doctrine which prevents a party from re-litigating an issue or defence which has already been determined (cause of action estoppel or issue estoppel) or – not the focus of the within proceedings – which could have previously been litigated (the principle in *Henderson v. Henderson* (1843) 3 Hare 100). (Coke-Wallis).

[2] *Res judicata* rests on the twin principles that 'in the interest of society as a whole, litigation must come to an end' (*interest*

*reipublicae ut sit finis litium*) and 'nobody should be vexed twice in respect of one and the same cause' (*nemo debet bis vexari pro una et eadem causa*). (Coke-Wallis, McCauley)

[3] *Res judicata* occupies the same place in the civil law as the doctrine of *autrefois acquit* or *convict* in the criminal law. (Coke-Wallis).

[4] A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of *res judicata* where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which s/he had no control. *Res judicata* must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a law-suit which has already been decided. (McCauley).

## II

### Cause of Action Estoppel

[5] Cause of action estoppel prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause, the action of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. (Coke-Wallis).

[6] There are a number of constituent elements in a case based on a cause of action estoppel: (i) the decision, whether domestic, or foreign must have been judicial in the relevant sense; (ii) the decision must have been pronounced; (iii) the 'tribunal' must have had jurisdiction over the parties and the subject-matter; (iv) the decision must have been (a) final, and (b) on the merits, (v) the decision must have determined a question raised in the later litigation; (vi) the parties must be the same or their privies, or the earlier decision must have been *in rem*. (Coke-Wallis).

[7] It is a moot point whether there is a public interest exception to the strict application of the doctrine of cause of action estoppel in disciplinary-style hearings that is absent in the case of conventional civil litigation; this may more properly be a matter for the Legislature. (Coke-Wallis).

[8] The distinction between cause of action estoppel and issue estoppel is important. Cause of action estoppel creates an absolute bar with no exception for special instances. There is potentially an exception in cases of issue estoppel (see *Arnold v. National Westminster Bank plc* [1991] 2 AC 93, 104). (Coke-Wallis).

## III

### Issue Estoppel

[9] Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issue.

[10] The requirements of issue estoppel are (1) that the same question has been decided, (2) that the judicial decision which is said to create the estoppel was final, and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. (McCauley).

[11] Issue estoppel may arise where a tribunal or judge makes a finding of fact on a contested issue of fact when determining an application concerning, e.g., the non-acceptance of a claim or an application for an extension of time. (Hutchison).

## IV

### Whose Decisions May Yield Res Judicata?

[12] In general, every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order or statute, is a 'judicial tribunal' for the purposes of the application of the doctrine of *res judicata*. (Coke-Wallis).

[13] More particularly, in relation to adjudications subject to a comprehensive self-contained statutory code, the presumption must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination, unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions. (Coke-Wallis).

33. The court has concluded elsewhere above that the two complaints made by Ms Lynch are entirely different. An allegation that certain Gardaí have conspired to conceal a flawed investigation is radically different from an allegation that certain Gardaí have conducted a flawed investigation. It is not even focused on the same facts: the facts that allegedly rendered the investigation flawed are not the facts that underpin an alleged conspiracy to conceal that flawed investigation, albeit that they may overlap to some extent. And in any event, no issue has been determined, no final decision on the merits has previously been taken. All that has happened is that for procedural reasons a previous complaint into a different allegation did not proceed. There is nothing in any of this that offers a basis for a finding of *res judicata*, whether in the form of cause of action estoppel or issue estoppel.

34. The foregoing also has the effect that the allegation that GSOC is proceeding in breach of s.88(1) of the Act of 2005 by proceeding to take further action in relation to a complaint that it has previously held to be inadmissible: the two complaints are not the same; they are in fact radically different; consequently, this line of contention must fail. And, for the avoidance of doubt, there is nothing in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IEHC 356 that would require the court to require the court to reach any contrary conclusion. That was a case in which an out-of-time complaint that had been found inadmissible was in effect being re-investigated pursuant to a different provision of the Act of 2005. As Hedigan J. notes, at para. 6.5, "[I]t is first of all common case that no further evidence was relied upon when GSOC made the decision...to launch [the second]...investigation. The matters to be investigated were those already raised in the [first] complaint". Here a different matter falls to be investigated: a

complaint that an investigation is flawed is simply not the same as a complaint that there has been a conspiracy to conceal such flaws as are alleged to have occurred in that investigation.

#### **B. Legitimate Expectation.**

35. For the sake of completeness, the court notes that it cannot be that Garda McEvoy had any legitimate expectation, following the closure of the GSOC investigation into Ms Lynch's first complaint, that there would be no investigation of a different complaint on new evidence (albeit arising from overlapping factual matrices). Nothing in the terms communicated by GSOC, as referred to in Part 5 above, could properly ground an expectation on the part of Garda McEvoy that if – as happened – a different complaint on new evidence was to arise that it would not be investigated. Why, a casual observer might ask, would GSOC seek to create such an expectation? The reality is that it would not – and, on the facts presenting, it did not. And, in any event, even if there was some basis for confusion in what GSOC communicated following its closure of the first investigation (and there was no basis for confusion), it has been clear since at least the time of the decision of McCracken J. in *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403 that the doctrine of legitimate expectation cannot be relied upon to give effect to an assurance which the authority could not lawfully have given – and there is no basis in the Act of 2005 upon which GSOC could have given an assurance that it would not investigate some future admissible complaint unknown to it at the time of the assurance.

### **Part 11**

#### **Conclusion**

36. One does not have to look far to find evidence of the great public service that Gardaí past and present have rendered to our republic. It is not for nothing that serving and retired members of An Garda Síochána so often enjoy such real esteem in communities around the country. But proper respect for An Garda Síochána is only properly sustainable for so long as admissible public complaints are duly investigated. This process of investigation is undoubtedly difficult for members of An Garda Síochána; but it is a necessary price for the great power with which they have been entrusted, and a pre-requisite to the enduring respect that An Garda Síochána as a whole continues generally to enjoy. As O'Donnell J. notes in *Keegan v. Garda Síochána Ombudsman Commission* [2015] IESC 68, para. 31, "[A] public complaint process is an important component in generating public confidence not just in the process but through it, in a force which members of the public can believe is subject to effective scrutiny." Mindful of this observation, and for all of the reasons stated above, the court is coerced by law into declining to grant any of the reliefs sought by Garda McEvoy at this time.