

9/2018

O.58, rule 15

SUPREME COURT
Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal		S;AP:IE:2018:000082
Subject matter for indexing		

Leave is sought to appeal from		
<input checked="" type="checkbox"/>	The Court of Appeal	<input type="checkbox"/> The High Court

Ian Bailey	v.	The Commissioner of an Garda Síochána, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General
2007 No. 3432P (High Court) 2015 No. 503 (Court of Appeal)		

Date of filing	21.06.2018	
Name(s) of Applicant(s)/Appellant(s)	The Commissioner of an Garda Síochána, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General	
Solicitors for Applicant(s)/Appellants(s)	The Chief State Solicitor	
Name of Respondent(s)	Ian Bailey	
Respondent's solicitors	Frank Buttimer & Company	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	
If yes, give Supreme Court record number(s)	AGENT PLEASE INSERT S:AP:IE2018:000082	
Are you applying for an extension of time to apply for leave to appeal?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If Yes, please explain why:		
The within Application for Leave and Notice of Appeal is a cross-appeal relating to a decision of the Court of Appeal perfected on the 9 th May 2018. The Plaintiff and Respondent to this cross-appeal filed his substantive Application for Leave and Notice of		

Appeal on the 5th June 2018, the day before the expiry of the 28-day appeal period. The Applicants had been satisfied not to appeal in circumstances where, notwithstanding the decision in respect of which the cross-appeal is brought, the case was ultimately decided (by a jury) in favour of the Defendants and Applicants herein. However, given that the Plaintiff/Respondent herein has sought to bring an appeal in respect of a range of matters, the Defendants/Applicants are of the view that their own cross-appeal is now warranted, albeit that the outcome of the case will not be altered if they are successful (and if the Plaintiff/Respondent herein is not successful in his appeal).

1. Decision that is sought to appeal

Name(s) of Judge(s)	The Honourable Ms. Justice Finlay Geoghegan The Honourable Mr. Justice Birmingham The Honourable Mr. Justice Hogan
Date of order / judgment	26/07/2017 18/04/2018

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	The Commissioner of an Garda Síochána, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General
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Original status	Plaintiff	✓	Defendant
	Applicant		Respondent
	Prosecutor		Notice Party
	Petitioner		

Solicitor	Frédérique Duchêne		
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		Document Exchange no.	186-001
Postcode	D08 V8C5	Ref.	FD/2007/01043
How would you prefer us to	<input checked="" type="checkbox"/> Document Exchange <input type="checkbox"/> Post		<input checked="" type="checkbox"/> Email <input type="checkbox"/> Other (please specify)

communicate with you?		
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Counsel			
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If the Applicant / Appellant is not legally represented please complete the following

The judgment of the Court of Appeal dated the 26th of July 2017, made the following (contested) finding of law:

- That, if the Plaintiff/Respondent's fundamental contention was correct and there had been a conspiracy on the part of the Gardaí to suborn Marie Farrell as a witness, this constituted a continuing conspiracy which operated *die in diem*.
- That, in such circumstances, the Plaintiff/Respondent's claim, insofar as it related to the alleged subornment of Marie Farrell, was not statute barred.

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

N/A

3. The relevant orders and findings made in the High Court and/or in the Court of Appeal

By ruling dated the 26th March 2015, the High Court (Hedigan J.) determined that the claim in respect of Marie Farrell's statements constituted a continuing cause of action (elsewhere described as a "*continuing trespass*") giving rise to a fresh cause of action *die in diem*. As such, the learned trial judge determined that the claim in respect of Marie Farrell's statements was not liable to be dismissed by reason of the operation of the Statutes of Limitations.

By Order dated the 26th July 2017, the Court of Appeal (Birmingham J. and Hogan J.) dismissed the Applicants' (the respondents before the Court of Appeal) cross-appeal.

By *ex tempore* Order dated the 26th July 2017, the Court of Appeal (Finlay Geoghegan J., Birmingham J. and Hogan J.) granted the Respondent herein (the Appellant before that court) the costs of the Applicant's cross-appeal.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3 ° of the Constitution applies (i.e. where it is sought to leave from the Court of Appeal)—

Please list (as 1,2,3, etc.) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and/or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

- (1) It is respectfully submitted that the question sought to be determined in this appeal involves a matter of general public importance. It is conceded that, in circumstances where the jury ultimately rejected the Respondent's claim, the question does not require consideration in the interests of justice unless this Honourable Court finds in favour of the Plaintiff/Respondent in respect of a part of his appeal, which would make it relevant.
- (2) The ruling of the High Court as affirmed by the Court of Appeal has far-reaching implications. The ruling sets a precedent that, when suing in conspiracy, one can claim a continuing conspiracy, notwithstanding that the actual conduct with which issue is taken occurred outside of the statutory period.
- (3) In this case, proceedings issued on the 1st May 2007 in which it was alleged, *inter alia*, that certain named members of An Garda Síochána conspired to suborn Marie Farrell to swear bogus statements. These statements were all made prior to 2nd May 2001 and thus, all allegations that members of the Gardaí conspired to suborn the statements also related to impugned conduct on the part of the Gardaí prior to 2nd May 2001, outside of the statutory period.
- (4) Notwithstanding that the impugned conduct unquestionably fell outside of the statutory period, the learned High Court judge (with whom the Court of Appeal agreed) determined that owing to the fact that the allegedly false and suborned statements would remain extant (even though retracted) and remain on file, the "*statements remain lying heavily upon the reputation of the Plaintiff*". On this basis the learned High Court judge concluded that the "*alleged conspiracy, if it existed, is alive and continuing today*". Accordingly, the application for a non-suit based on the Statutes of Limitation was declined insofar as it applied to the claim in respect of Marie Farrell's statements, albeit that the jury was ultimately satisfied that no such conspiracy as alleged had in fact taken place.

- (5) It is submitted that the ramifications of this ruling are that plaintiffs will seek to frame their complaints against, in particular, State defendants as claims in conspiracy in an effort to obviate the operation of the Statutes of Limitations, thereby undermining the principles of finality of litigation and causes of action. This may also lead to an undesirable situation whereby plaintiffs seek to plead their cases in conspiracy notwithstanding that other more appropriate nominate torts are available to them.
- (6) The Defendants/Applicants submit (as expounded below) that the correct point in time to have selected as the start point for the running of the limitation period was the moment when the conspiring between the named individuals was said to have occurred or achieved its goal.
- (7) In all the circumstances, the Defendants/Applicants respectfully submit that the issue sought to be opened before this Honourable Court involves a matter of general public importance.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2 , 3, etc) concisely:

- 1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground**
- 2. the legal principles related to each numbered ground and confirmation as to how that/those legal principles apply to the facts or to the relevant inference(s) drawn therefrom**
- 3. the specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely**
- 4. the issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal**

1. The Defendants/Applicants submit that the Court of Appeal erred in law in affirming the High Court ruling and in failing to allow the Defendants/Applicants'

cross-appeal in respect of the High Court's refusal to grant the Defendants/Applicants' application to dismiss the Plaintiff/Respondent's claim by reason of the operation of the Statutes of Limitation insofar as same related to the claim made in conspiracy by the Plaintiff/Respondent.

2. A continuing tort is one where a fresh cause of action accrues every day (albeit that the right of action is restricted to that part of the wrong that is committed in the past 6 years¹). An example of a continuing tort is a trespass to land (*Clarke v MGWR*²) or a continuing breach of statutory duty (*Phonographic Performance Ltd v Department of Trade and Industry*). On the other hand, single torts may be actionable *per se* (e.g. defamation or false imprisonment), in which case the cause of action accrues upon the commission of the wrong, or may require proof of damage (e.g. negligence or misfeasance in a public office) in which case the cause of action accrues upon the plaintiff suffering damage.

The position is explained in the following terms by McMahon and Binchy *Law of Torts*³:

Where there is a continuing trespass or nuisance, as where a heap of stones is placed and left upon the plaintiff's land, or where the plaintiff is falsely imprisoned for a number of days, a fresh cause of action arises die in diem.

It is submitted that the key factor in distinguishing a continuing tort from a single tort is that the cause of action, as opposed to the damage flowing therefrom, can be understood to be recurring afresh each day. Thus, in the case of the heap of stones, the heap remains in situ *die in diem* thereby giving rise to a new cause of action in trespass to land *die in diem*. Similarly, where one is falsely imprisoned, one remains falsely imprisoned each day that one is detained thus giving rise to a new cause of action *die in diem*. It is submitted that it is the physical act, or the failure to act, that

¹ This speaks to the second ground of cross—appeal advanced by the Applicants before the Court of Appeal but which that court did not address in its judgement.

² [1985] 2 IR 294

³ 4ed (2013) at para 46.07

makes up the element of the tort that must be examined as opposed to the effect that may flow therefrom. As such, there are many torts in respect of which damage can be understood to continue for a significant period, but which one cannot define as continuing torts owing to the finality (the lack of a continuing quality) of the physical action giving rise to the cause of action. In other words, in traditional terms, where that which actionably causes the damage, and the primary damage itself, are synonymous, a cause of action *die in diem* arises for its duration. Otherwise, the cause of action arises conventionally and expires at the end of the limitation period.

For example, though the effect of a battery may be longstanding, there is no question but that the cause of action accrues on a single occasion only, at the end of the battery. No doubt the injury suffered by a lengthy period of false imprisonment will subsist long after liberty is achieved, but the time within which to sue for the first day of the imprisonment will run from that day, as will the time within which to sue for the second day run from that second day, and so on until the last day. Similar issues arise with regard to trespass to land. The large heap of stones may sit on one's land, doing damage to the crop beneath. The mark and indentation of the stones may subsist after the stones are gone. That, however, is damage done by the trespass and not the trespass itself.

In the event that the foregoing reasoning is accepted, the identification of the constituent parts of the tort is vital to any analysis of the crystallisation point of the cause of action for the purposes of the Statutes of Limitation.

The relevant part of the Plaintiff/Respondent's claim (that which survived the non-suit application) is characterised as an "*unlawful means conspiracy*". The "*unlawful means conspiracy*" which survived the non-suit application was the alleged conspiracy "*to implicate Ian Bailey in the murder of Sophie Toscan du Plantier by obtaining statements from Marie Farrell by threats, inducement or intimidation*"⁴ knowing those statements to be false. The "*unlawful means*" are clearly identified as the suborning of Marie Farrell to provide a bogus identification of the Plaintiff/Respondent as the man at Kealfadda Bridge and to falsely state him to have

⁴ Drawn from the Issue Paper left to the jury

intimidated her, such suborning itself being a tortious wrong (which the jury ultimately found not to have occurred in this case).

As it was put in the Statement of Claim, the Plaintiff/Respondent's case was that Marie Farrell's identification of him and her allegations of intimidation against him were "*bogus*".

It is clear that the conspiracy alleged was complete upon the making by Marie Farrell of her statements and that time began to run from the dates thereof. All of the statements at issue were made long before the 1st May 2001 and therefore fall foul of the limitation period of six years provided by the Statutes of Limitation.

Even if one takes the operative dates as being the date of damage done to the Plaintiff/Respondent, it is notable that in his Statement of Claim the Plaintiff/Respondent identified that damage, contending that his first arrest, in February 1997, was procured on foot of the allegedly bogus identification by Marie Farrell of him as the man at Kealfadda Bridge and that his second arrest, in January 1998, was procured on foot of the allegedly bogus complaints of intimidation made by her against him. Each fall foul of the Statutes of Limitation.

Section 11(6) of the Civil Liability Act 1961 provides that:

For the purpose of any enactment referring to a specific tort, an action for a conspiracy to commit that tort shall be deemed to be an action for that tort.

It follows that the limitation period of tort applies to the claim of conspiracy in the instant case. It also follows that, for the purposes of analysing the crystallisation point of any cause of action, the limitation period for the conspiracy to commit any tort runs from the same point in time as the statute runs for the tort itself.

In this case, the tort was the actual (alleged) subornment – the very action of eliciting false statements by way of coercion or inducement. It is the generation of the statements rather than their continued existence on file that was the relevant act. As

such, the cause of action crystallises on the occasion of any such subornment and the Statutes of Limitation period runs from that act.

Finally, it may be useful to highlight once again that the claims advanced by the Plaintiff/Respondent were not claims to which a “*date of knowledge*” exception applied pursuant to the Statute of Limitations (Amendment) Act 1991. Counsel for the Plaintiff/Respondent accepted this⁵. In any event, as is apparent from a statement he made on the 27th January 1998, it is clear that the Plaintiff/Respondent had, on his own account, the requisite “*knowledge*” by 1997 or 1998.

The Defendants/Applicants dispute that the case as pleaded by the Plaintiff/Respondent and as supported by evidence called on his behalf is capable of comprising of a continuing trespass (or indeed any continuing tort) as concluded by the learned trial judge and as affirmed by the Court of Appeal. Accordingly, in circumstances where the latest allegation made by Marie Farrell to the effect that the Defendants/Applicants elicited bogus or false statements from her related to dates long prior to 1st May 2001, it is submitted that the case in conspiracy that was in fact left to the jury should have been dismissed as statute-barred on the application of the Defendants/Applicants.

By way of general comment, the Defendants/Applicants accept that attendant to allegations of the nature advanced by the Plaintiff/Respondent, there may frequently, though not in this case, exist evidence of concealment from the litigant of the cause of action. It is perhaps an inevitable feature of any claim alleging the perversion of the course of justice. The fact that no date of knowledge exception exists might be felt to lead to perceived injustice. However, it is submitted that the correct manner, procedurally and legally, to tackle any such obstacle is to engage Section 71 of the Statute of Limitations Act 1957. In the instant case, however, on the Respondent’s own evidence, his cause of action was known to him no later than June 1997 and, as such, Section 71 did not arise. He did not, in any event, plead Section 71 in his aid

⁵ Day 61 Page 58

in his Reply to Defence and any facts that might have been relevant to such a plea were not established by him in the course of his case.⁶

3. The Applicants rely on:

- Section 11 Statute of Limitations, 1957
- Section 11(6) of the Civil Liability Act 1961

4. The Applicants rely on the matters set out in part 2 of this section above.

Name of solicitor or (if counsel retained) counsel or applicant / appellant in person:

David Lennon BL
Luán ó Braonáin SC
Paul O’Higgins SC

7. Other relevant information

Neutral citation of the judgment appealed against
[2017] IECA 220, [2018] IECA 63

References to Law Report in which any relevant judgment is reported

N/A

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

1. An Order allowing the within appeal insofar as same relates to the cross-appeal brought before the Court of Appeal (as set out at paragraph 118 of the Order of the Court of Appeal of the 26th of July 2017);
2. An Order setting aside the ruling of the High Court of 26th March 2015 insofar as same determined that the claim in respect of Marie Farrell’s statements constituted a continuing trespass giving rise to a fresh cause of action *die in diem*;
3. An Order varying the Order of the Court of Appeal dated the 26th of July 2017 to allow the cross-appeal brought before that court and reflecting that the High Court was incorrect in allowing that part of the claim which was left to the jury to be so

⁶ It is noted that in cases involving the invocation of Section 71 there is a difference between ignorance of an essential element of the cause of action borne of actual concealment, in which case time will not run, and difficulty in proving an essential element of the cause of action, in which case time runs from the date of the accrual of the cause of action. See *McDonald v McBain* [1991] 1 IR 284

left in circumstances where the claims of alleged suborning of Marie Farrell should also have been deemed statute barred.

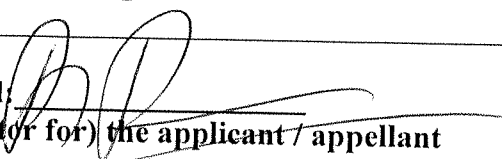
4. Costs (including the costs of the Court of Appeal and Supreme Court)

What order are you seeking if successful?						
Order being appealed:	set aside		vary/substitute	✓		
Original order:	set aside	✓ (Ruling of High Court, Hedigan J.)	restore		vary/substitute	

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution
N/A
If a declaration of incompatibility with the European Convention on Human rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention
N/A

Are you asking the Supreme Court to:		
Depart from (or distinguish) one of its own decisions?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please give details below:		
N/A		
Make a reference to the Court of Justice of the European Union?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Will you request a priority hearing?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please give reasons below		
N/A		

Signed: 
(Solicitor for) the applicant / appellant

Please submit your completed form to:
Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay

Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.