

82/2018

SUPREME COURT
Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	82/2018
Subject matter for indexing	

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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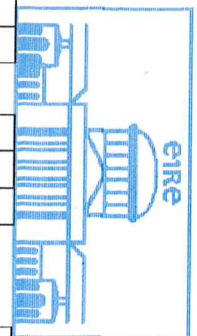
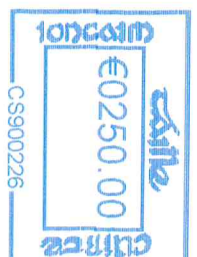
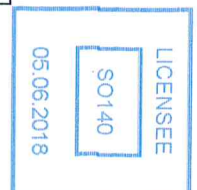
[Title and record number as per the High Court proceedings]

Ian Bailey v The Commissioner of An Garda Siochana, The Minister for Justice Equality and Law Reform, Ireland and the Attorney-General			
High Court Record Nr	2007/ 3424P	Court of Appeal Record Nr	2015/503
Date of filing	5/6/18		
Name(s) of Applicant(s)/Appellant(s)	Ian Bailey		
Solicitors for Applicant(s)/Appellant(s)	Frank Buttimer and Company		
Name of Respondent(s)	Commissioner of An Garda Siochana, The Minister for Justice and Equality, Ireland and the Attorney General		
Respondent's solicitors	The Chief State Solicitors Office		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)			

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Ms. Justice Finlay Geoghegan, Mr. Justice Birmingham, Mr. Justice Hogan.
Date of order/ Judgment	26 th July 2017, 14 th March 2018, 18 th April 2018

152291975
1708025

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	Ian Bailey
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Original status	<input checked="" type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party
	<input type="checkbox"/> Petitioner	

Solicitor			
Name of firm	Frank Buttimer and Company		
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		Document Exchange no.	2523
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
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Counsel			
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		Document Exchange no.	814172

Postcode	
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If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Commissioner of An Garda Siochana, The Minister for Justice and Equality, Ireland and the Attorney General
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Original status	<input type="checkbox"/>	Plaintiff	<input checked="" type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant		Respondent	
	<input type="checkbox"/>	Prosecutor		Notice Party	
	<input type="checkbox"/>	Petitioner			
	Yes	<input checked="" type="checkbox"/>	No		

Solicitor			
Name of firm	Chief State Solicitors Office		
Email	contact@csso.gov.ie		
Address	Chief State Solicitor's Office	Telephone no.	(+353) 1 417 6100
	Osmond House	Document	DUBLIN 186
	Little Ship Street	Exchange no.	
	Dublin D08 V8C5	Ref.	
Ireland			
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
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If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Nature of Proposed Appeal

- a) The Appellant, Ian Bailey, seeks to appeal from the decision of the Court of Appeal of the 26th July 2017, rejecting his Appeal against the ruling of the High Court to the effect that the bulk of his case, aside from two distinct issues, was statute barred. These issues are: firstly to allow the Respondents to bring a non-suit application at the close of their own case and to raise the issue of the statute of limitations at this stage for the first time and secondly to withdraw all aspects of his claim based on an over-arching conspiracy from the jury, save two specific issues.
- b) Furthermore he seeks to appeal from the decision of the Court of Appeal of the 14th March 2018, to the effect that the Court of Appeal was entitled to re-visit and reverse that part its previous final judgment, which had been decided in his favour.
- c) In addition he seeks to appeal from the decision of the Court of Appeal of the 18th April 2018 to award to the Respondents the entire costs of the trial in the High Court and its consequent refusal to award him his costs of the action. This is notwithstanding that by reason of a tactical decision made by the Respondents, a jury trial was allowed to run to some 64 days.

Summary of Relevant facts

- a) The Appellant brought a civil action against the Respondents in the High Court seeking damages for unlawful arrest, false imprisonment, conspiracy, unlawful means conspiracy, assault, battery, trespass to the person, intentional infliction of emotional and psychological harm, harassment, intimidation, terrorising and oppressive behaviour and breach of his constitutional rights, the trial of which came on for hearing on the 4th November 2014 before Mr. Justice Hedigan and a jury.
- b) The Appellant alleged *inter alia* that the Defendants, their servant and/or agents had conspired to wrongfully implicate him in the murder of Sophie Toscan du Plantier in West Cork in 1997, in the course of which endeavor they had among other things, wrongfully arrested him on two occasions, subjected him to unlawful searches and surveillance, spread false information about him both within the community and to media sources, placed improper pressure on the Prosecutorial authorities to have him charged, provided local persons with cannabis as a means of befriending him and extracting false confessions from him and suborning false statements from one Marie Farrell to the effect that she had seen the Appellant in the vicinity of the murder scene shortly after its commission and to the effect that the Appellant had used intimidation to induce her to retract such statements, when they knew such material to be false and untrue.
- c) The trial lasted for 64 days and involved some 79 witnesses. On day 60 of the trial and having gone into evidence and following the close of their case, the Respondents brought an application for a non-suit, largely on the basis that the entirety of the Appellant's claim was statute barred.
- d) Having heard submissions, Mr. Justice Hedigan withdrew the majority of the case from the jury save two specific issues being in effect, whether certain named members of an Garda Siochana had extracted false statements from Marie Farrell. The jury returned verdicts on both of these specific questions which were unfavorable to the Appellant.
- e) The Appellant appealed this ruling to the Court of Appeal on a number of grounds *inter alia*, that
 - (i) the Learned High Court Judge had permitted an abuse of process, and/or erred in law in permitting the Respondents to bring an application for a non-suit at the close of the defence case; at this point the application only added to the length of the trial, and served no purpose. Further it usurped the role of the jury.
 - (ii) that he had erred in deeming all but two aspects of the Appellant's claim in respect of an over-arching conspiracy to be statute-barred and
 - (iii) that he had erred in awarding the costs of the trial to the Respondents and refusing to award the Appellant his own costs, in circumstances in which the case had been greatly elongated by reason of the fact that the Respondents had chosen not to raise the issue of the statute of limitations at the outset of the trial and had not sought to make their non-suit application at the close of the Appellant's case but after the entirety of the evidence had been heard.
- f) The Court of Appeal in a judgment delivered on the 26th July 2017 dismissed the Appellants appeal on all grounds save one, being that the Learned Trial Judge had been incorrect to withdraw that part of the Appellant's case, which involved certain

alleged wrongful disclosures being made by the Respondents their servants and/or agents to members of the media in 2003. This specific and discrete issue was accordingly to be remitted to the High Court and a retrial ordered.

- g) Prior to the issue of costs being determined and final orders being drawn up, the Respondents applied to the Court of Appeal by letter, alleging that its judgement of the 26th July 2017 had been based on a factual error and requesting that the Court revisit the matter.
- h) Following the filing of written submissions and an oral hearing, the Court of Appeal in a judgement delivered on the 14th March 2018, held that it had in the circumstances jurisdiction to revisit its judgement and further held that it would accede to the request of the Respondents to dismiss the Appellant's Appeal in its entirety.
- i) Finally in an *ex tempore* judgement delivered on the 18th April 2018, the Court of Appeal dismissed the Appellant's appeal in respect of the Learned Trial Judges decision to award the full costs of the trial to the Respondents, notwithstanding their decision to bring their non-suit application at the end of the case and to argue the statute of limitations point for the first time at this stage. The Court of Appeal in addition awarded the Respondents the costs of the substantive appeal, to be off set against the costs of an unsuccessful cross appeal brought by them against the decision of the Learned Trial Judge to leave those two specific issues which survived the application for a non-suit, to the jury. The Court of Appeal also awarded the Appellant the costs of the days hearing necessitated by the Respondents' request that it should re-visit that aspect of its judgment in which it had found in favour of the Appellant.

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

1. It is submitted that leave ought to be granted to take such an appeal on the basis that: (i) the decision of the Court of Appeal in respect of the each of the aforementioned issues involves a point of law of general public importance and (ii) allowing an appeal in respect of each such issue is in the interests of justice in this case

Point of law of general public importance

Whether deferring an application for a nonsuit (which included invoking the statute of limitations) until the close of the defence evidence can constitute an abuse of process

2. The High Court judge ruled on this issue by saying that arguments for and against the proposition were both fair and reasonable and then simply declared he was supporting the State's claim to invoke the statute of limitations and apply for a nonsuit. The Court of Appeal noted the statute of limitations was pleaded in the defence and so distinguished it from case-law precedent, and then noted that it might be more satisfactory to do it earlier, depending on the circumstances. However, there is no authority directly on the point.
3. It was argued before the Court of Appeal and is once more here submitted, that to allow the Respondents to raise the issue of the statute of limitations by way of an application for a non-suit at a point in time at which the entirety of the evidence had been heard, amounted to an abuse of process and furthermore

rendered the statute itself and the purpose for which it provides, entirely meaningless. It is submitted that there are strong public policy grounds in ensuring that litigation, particularly where a jury is involved, be conducted as efficiently and as expeditiously as possible. By waiting until the close of the case to first argue the issue, it is submitted that the Respondents not only rendered the vast majority of the evidence in the case unnecessary but deprived the statute of the fundamental purpose it is designed to serve. i.e to obviate the need for Defendants to meet stale claims, which by reason of their antiquity it would be unfair to require them to attempt to rebut. It is noteworthy that the Respondents' stated reasons for not bringing a non-suit application and raising the statute, at the latest by the close of the Appellant's case, was that they wished to go into evidence to attempt to vindicate the reputations of individual members of an Garda Siochana none of whom were parties to the proceedings. At no stage were they heard to complain that their ability to give evidence or to meet the claim was, due to the passage of time, hampered.

4. In addition it is submitted that by bringing the application for a non-suit and raising the statute at a time when their own evidence had been heard in full, the Respondents created a situation whereby the accepted principles to be applied in such an application became unworkable. In particular, as the evidence of the Defendants had been heard in addition to that of the Plaintiff, the Learned Trial Judge had the benefit of same when attempting to assess the Appellant's case, He was obliged according to the existing law to consider whether a *prima facie* case had been made out, taking the Appellants case at its height and irrespective of its cogency or relative strength; *O'Toole v Heavy* [1993] 2 IR 535, *Murphy v Callanan* [2013] IESC 30. In circumstances in which he had heard the entirety of the Respondents' evidence, his ability to apply these principles at that point in the trial, was doubtful if not impossible.
5. There are no reported cases in which the question of whether a plea that a claim is statute barred, though pleaded by way of defence, can be raised for the first time after all of the evidence in the case has been heard and the statute has in effect become useless as a procedural bar, has been decided. Nor are there any cases in which the issue of estoppel by conduct has been considered in such circumstances. Both of these issues were argued on appeal and it is submitted that in light of the far reaching public policy considerations involved, particularly in the context of complex litigation involving juries, the general public interest would be served by having a definitive ruling from this Honourable Court delivered on the subject.
6. In addition it is submitted that in the absence of any definitive authority dealing with the extent to which, if at all, a non-suit application in a jury trial can or should be entertained at the close of of the Defendants' rather than the Plaintiff's case, the general public interest would further be served by this Honourable Court issuing guidance on the principles appropriate to such an application and in particular the standard of proof to be applied and the manner in which a trial judge should carry out his/her assessment of the evidence.
7. Furthermore, it was submitted on appeal and is here again submitted, that even were it permissible as a matter of substantive law to raise the statute of limitations by way of a non-suit application at the close of a jury trial, it does not necessarily follow that such a decision should not in the circumstances of the case have implications in terms of costs, particularly where the trial has

been materially and needlessly prolonged by reason of such conduct. It is submitted that the general public interest would be served by this Court giving definitive guidance as to the how such issues might affect the principles by which costs are awarded, particularly in light of such decisions as *Veolia Water UK plc v Fingal County Council (No 2)* [2007] 2 IR 81 and *M.D v N.D* [2016] 2 IR 438. This is particularly so it is submitted in cases involving juries, where the need for efficiency is all the greater and the justifications for disincentivizing conduct likely to prolong such trials, are all the more pressing.

Relevance of the mode of trial being by judge and jury

8. The extent of the duty to bring an early application to dismiss a claim pursuant to the Statute of Limitations when the mode of trial is by judge and jury is not adequately addressed in the judgments in this case and is clearly a matter of general public importance.
9. In failing to raise the Statute of Limitations point at a timely juncture in the trial, the Defendants/Respondents were responsible for the exposure of the jury members to circa 60 days of complex but, in the event, irrelevant evidence which they were then instructed to, in effect, cleanse from their minds, a task which was an excessive burden to impose upon a jury of untrained laymen. Whilst a Judge would discharge such a burdensome task by reason of knowledge of the rules of evidence and experience of the process of litigation, the unnecessary imposition of this burden was oppressive of the jury and deprived the Plaintiff/ Appellant of a fair trial contrary to the provisions of the Convention and of Bunreacht na hEireann.
10. Aside from the unnecessarily lengthy period of time for which the jury members were removed from their normal lives, contrary to the requirements of public policy, there remains the real risk of prejudice in that the jury may well have reasonably concluded that the Plaintiff/ Appellant was to blame for such extravagant and unnecessary waste of the time of the jury.
11. The reason advanced for the failure to raise the limitations point in a timely manner amounted to an abuse of process.

The central conspiracy claim never went to the jury, both the learned High Court judge and Court of Appeal failed to recognize that the over-arching conspiracy claimed was a conspiracy to implicate the Appellant in murder of Ms du Plantier by unlawful means

12. It was further argued on appeal that the Learned Trial Judge was incorrect on the merits to remove the bulk of the Appellant's claim in conspiracy from the jury. The Appellant had advanced the case that members of An Garda Siochana had by a variety of unlawful means attempted to have him implicated in and charged with, the murder of Sophia Toscan du Plantier. The Learned Trial Judge in his ruling on the non-suit application wrongly summarized the case as being confined to the behavior of gardai towards Marie Farrell. This it was submitted failed to address the true nature of the central overarching conspiracy alleged. It was argued in the Court of Appeal and is submitted here once more, that this overarching conspiracy subsisted in its entirety throughout the statutory

period of six years preceding the institution of proceedings and continues to subsist to the present day, arising *die in diem* or otherwise. It is furthermore submitted, as it was on appeal, that the Appellant continues to suffer loss and damage as a result. It is submitted in the circumstances that the general public interest would be served by a definitive ruling from this Honourable Court on the precise parameters of the tort of conspiracy, the forms of damage which are both necessary for the tort to be made out and which are recoverable thereunder and the manner in which the statute of limitations should operate in the context of a broad overarching conspiracy claim, where certain events may have occurred within the statutory period and others may have occurred outside of it.

The circumstances in which a Court of Appeal judgment may be reconsidered and set aside

13. Furthermore, in light of the finding of the Court of Appeal that it was entitled to re-visit that part of its original judgement in which it had found in the Appellant's favour, it is submitted that the general public interest would be served by this Honourable Court providing definitive guidance on the extent to which the Court of Appeal may reconsider one of its own previously decided judgements, prior to final orders being drawn up. Whilst cases such as *Re Greendale Developments (Ltd)* [2000] 2 IR 514 and *Nash v DPP* [2017] IESC 51 have dealt with the jurisdiction of this Honourable Court to re-visit its own final decisions, no authority other than the judgment in respect of which leave to appeal is now sought, has yet dealt with the equivalent jurisdiction of the Court of Appeal, particularly in light of the provisions of Article 34.4 of the Constitution and the requirement of finality there annunciated.

Interests of Justice

14. It is submitted that for all of the reasons set out at paragraphs 5-13 above, it is in the interests of justice that an appeal be allowed to this Honourable Court.
15. In circumstances in which a great deal of complex litigation regularly takes place in civil actions heard by juries who are otherwise taken away from their daily lives for the duration of what may often be lengthy trials, it is both desirable and in the interests of justice that this Honourable Court should determine the issue of when and to what extent a tactical decision such as that made by the Respondents in this case to raise the issue of the statute of limitations at the close of all of the evidence, can be tolerated. Furthermore, in light of the grave consequences for the Appellant, which resulted from this course of action on the part of the Respondents, it is submitted that the interests of justice in this case require these issues to be considered.
16. Furthermore and in light of those matters set out at paragraph 13 above, it is submitted that it is both desirable and in the interests of justice both generally and in the circumstances of this case, for this Honourable Court to consider to what extent such a tactical decision, which has the effect of grossly elongating a jury trial, should be dis-incentivized by an award of costs against a party in the position of the Respondents. It is further submitted that the interests of justice in this case require detailed further consideration of the extent to which, it at all, it is just and equitable to require to Appellant to effectively pay for the consequences of the Respondents' tactical decision in this regard.

17. It is submitted that the interests of justice both generally and in the particular circumstances of this case require that this Honourable Court should consider the precise ambit of the tort of conspiracy and how it may be affected by the statute of limitations, where that which is pleaded and alleged is an overarching conspiracy spanning many years and a variety of specific acts.
18. It is submitted that the interest of justice of this case require this Honourable Court to consider the extent to which the Court of Appeal was entitled to revisit that part of its own previous judgement which found in favour of the Appellant at the behest of the Respondents on the basis of an alleged factual error, despite the fact that both parties were given every opportunity to fully argue issues before the Court and to make submissions in respect of all aspects of the case. This is particularly so, it is submitted, in circumstances in which the Court of Appeal found that such a course was itself necessitated by the interests of justice and a need to protect the Constitutional rights of the Respondents, without specifying the particular rights involved or how they had been engaged.

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

1. The Court of Appeal erred in holding that it was open to the Respondents to bring a non-suit application at the close of their own case and to raise the issue of the Statute of Limitations for the first time at this stage of the trial.
2. The Court of Appeal erred in holding that the Learned Trial Judge had been correct to withdraw all aspects of the Appellant's overarching conspiracy claim, other than those two issues which he left to the jury.
3. The Court of Appeal erred in holding that it had jurisdiction to re-visit and reverse that part of its substantive judgment in which it had found in the Appellant's favour and/or that it was appropriate in the circumstances to take such a course.
4. The Court of Appeal erred in upholding the decision of the Trial Judge to award the costs of the entire trial to the Respondents and to refuse to award costs to the Appellant, in light of the tactical decision of the Respondents, the effect of which was to greatly elongate the proceedings.

Patrick McCullough BL

Ronan Munro SC

Martin Giblin SC

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2017] IECA 220, [2018] IECA 63

References to Law Report in which any relevant judgment is reported

O'Toole v Heavy [1993] 2 IR 535

Murphy v Callanan [2013] IESC 30

Veolia Water UK plc v Fingal County Council (No 2) [2007] 2 IR 81

M.D v N.D [2016] 2 IR 438

Re Greendale Developments (Ltd) [2000] 2 IR 514

Nash v DPP [2017] IESC 51

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:

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside 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

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

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? Yes No

If Yes, please give details below:

Will you request a priority hearing? Yes No

If Yes, please give reasons below:

Signed: Frank Bultmer & company
(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts