82/2018

AN CHÚIRT UACHTARACH
THE SUPREME COURT

Respondents' Notice

Supreme Court Record Number: S:AP:IE:2018:000082

Court of Appeal Record Number 2015-000503

High Court Record Number 2007/3424P

BETWEEN:

Ian Bailey

APPLICANT / PLAINTIFF

-AND-

The Commissioner of an Garda Síochána, the Minster for Justice Equality and Law Reform, Ireland and the Attorney General

RESPONDENTS / DEFENDANTS

Date of filing:	**21.06.2018**
Name of relevant respondent:	**The Commissioner of an Garda Síochána, the Minster for Justice Equality and Law Reform, Ireland and the Attorney General**
Respondent's solicitors:	**The Chief State Solicitor**
Name of appellant:	**Ian Bailey**
Appellant's solicitors:	**Frank Buttimer & Company**

1. **Respondent Details**

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

This notice is filed on behalf of all of the Respondents hereto

The Respondents were served with the application for leave to appeal and notice of appeal on the 7th day of June 2018

The Respondents intend:

to oppose the application for leave to appeal

to ask the Supreme Court to dismiss the appeal

Respondent's Representation

Solicitor	**Frédérique Duchêne**
Name of firm	**The Chief State Solicitor's Office**
Email	**Frederique_Duchene@csso.gov.ie**
Address	**Osmond House, Little Ship Street, Dublin 8**
Telephone no.	**01 4176229**
DX Number	**186-001**
Postcode	**D08 V8C5**
Ref.	**FD/2007/01043**

How would you prefer us to communicate with you?

Document Exchange	**186-001**
E-mail	**frederique_duchene@csso.gov.ie**

Counsel

Name	**Paul O'Higgins S.C**
Email	**Pohiggins@lawlibrary.ie**
Address	**Law Library Building, 158/159 Church Street, Dublin 7**
Telephone no.	**(01) 817 5087**
DX Number	**DX 815203**
Postcode	**D07WDX8**

Counsel

Name	**Luán ó Braonáin S.C**
Email	**lobraonain@lawlibrary.ie**
Address	**Distillery Building, 145-151 Church Street, Dublin 7.**
Telephone no.	**(01) 817 4555**
DX Number	**DX 816203**
Postcode	**D07WDX8**

Counsel

Name	**David Lennon BL**
Email	**dlennon@lawlibrary.ie**
Address	**Distillery Building, 145-151 Church Street, Dublin 7.**
Telephone no.	**(01) 817 2312**
DX Number	**DX 818116**
Postcode	**D07WDX8**

2. Respondent's reasons for opposing extension of time

Not applicable

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

In addressing this matter (this section only), it is proposed to mirror the lettering and subdivisions employed by the Applicant in his 'Application for Leave and Notice of Appeal':

Nature of Proposed Appeal

a) The Respondents dispute the characterisation of the High Court ruling employed by the Applicant insofar as he suggests that the ruling constituted a determination that the "*bulk*" of his case was statute barred. The Respondents maintain, as they did in the Court of Appeal, and as indeed the learned High Court judge commented in the course of the trial, that the "*central plank or*

core" of the Applicant's case was left to the jury, namely the alleged suborning of Marie Farrell. A review of the Applicant's Statement of Claim fully supports this proposition.

The two "*distinct issues*" referred to by the Applicant are presumably a reference to the two substantive questions left to jury namely:

> *Did Garda Jim Fitzgerald, Kevin Kelleher and Jim Slattery, or any combination of them, conspire together to implicate Ian Bailey in the murder of Sophie Toscan du Plantier by obtaining statements from Marie Farrell by threats, inducements or intimidation which purportedly identified him as the man she saw near the scene of the murder at Kealfadda Bridge in the early hours of the morning of December 1996 when they knew they were false?*
>
> *Did Garda Jim Fitzgerald, Detective Garda Jim Fitzgerald and Detective Sergeant Maurice Walsh conspire by threats, inducements or intimidation to get statements from Marie Farrell that Ian Bailey had intimidated her when they knew they were false?*

The Respondents dispute that they "*raised*" the issue of the Statutes of Limitation "*for the first time*" at the moment that the non-suit application was made. The very first item of pleading contained in the Respondents' Defence invoked and engaged the Statutes of Limitation. The matter was the subject of further particularisation in Replies to Particulars and the issue was joined in the Applicant's Reply to Defence. The reference to the Statutes of Limitation in the Defence was cited to the jury in the opening of the case by counsel on behalf of the Applicant. At no point did the Respondents resile from their reliance on the Statutes of Limitation. The Respondents further point out that, in the course of the hearing before the Court of Appeal, counsel for the Applicant conceded that the Plaintiff was *not* prejudiced by the timing of the application "*beyond costs*".

The Applicant refers to the withdrawal from the jury, save for two specific issues, of "*all aspects of his claim based on an over-arching conspiracy*". The Respondents note that the sole references, of which there are only two, to "*conspiracy*" contained in the Statement of Claim are to be found in the prayer for relief. Furthermore, in the course of the 64 days of the trial, counsel on behalf of the Applicant made a single reference only to this concept of an "*over-arching conspiracy*" and that reference came on day 61, in response to the application for a non-suit. Despite numerous invitations to do so, the

Applicant consistently omitted to define precisely what was the nature of the conspiracy alleged to have taken place.

Thereafter, before the Court of Appeal, the concept of an *"over-arching conspiracy"* was referenced on multiple occasions by counsel on behalf of the Applicant. In elucidation of the *"other aspects of conspiracy"* (ie other than the Marie Farrell allegations and other than the libel trial unlawful disclosure allegations), counsel on behalf of the Applicant listed various allegations all of which are itemised in the Applicant's *"Application for Leave and Notice of Appeal"* in Section 4 thereof at paragraph *'b)'* of the section entitled *"Summary of Relevant Facts"* (these matters are addressed later herein). In addition, counsel on behalf of the Applicant conceded before the Court of Appeal that each of the incidents referred to *"were probably outside the statute"*.

b) The Respondents do not dispute anything contained in this subparagraph.

c) The Respondents dispute the implication that the primary reason that the jury trial was *"allowed to run to some 64 days"* was the *"tactical decision"* of the Respondents to make their non-suit application when they did. The Respondents maintain, as they did before the learned High Court judge in the context of the costs application before that court, and as they did in the Court of Appeal, that had the application been made at the end of the Plaintiff's case, and had the same result ensued, then the vast majority of the evidence would have been required to be heard in any event. In this regard, the Respondents rely on a spreadsheet document analysing the evidence given by the various witnesses which said document is annexed hereto. This document was put before the High Court in the context of the costs application heard in that court and the document was also placed before the Court of Appeal.

Without prejudice to the foregoing, it is misleading to attribute (as the Applicant has done throughout his *"Application for Leave and Notice of Appeal"*) a 64-day trial to the decision to await the end of the evidence to make the non-suit application . The height of the Applicant's position must be that this resulted in the trial continuing beyond the 36 days of the Plaintiff's evidence for some proportion of the further 23 days of evidence in fact taken (given that the ruling did not dispose of the whole case). As already submitted however, the Respondents maintain that the vast majority of the additional 23 days of evidence would have been required in any event. It is also a matter of some relevance that when the Applicant called the case on for hearing, he estimated that the trial would last three weeks – at this point the Respondents

did not know what evidence would be called and would require to be addressed.

The Respondents further submit that the decision not to seek an earlier determination of the Statute issue was equally a decision of the Applicant, who was at all times aware that it was a matter relied upon by the Respondents, yet who chose not to seek an earlier determination of the issue. Parties are entitled to make tactical decisions and whereas the Respondents dispute that their decision to await the end of the evidence before moving their non-suit application was entirely a tactical decision, it is incontrovertibly the case that the Applicant made a decision not to seek an early ruling on the matter himself and proceeded, preferring to ignore so much of the defence as relied upon the Statutes of Limitation.

Summary of Relevant Facts

a) This paragraph is a reproduction of the Applicant's prayer for relief as contained in his Statement of Claim (the proceedings having issued on the 1st of May 2007). The respective references to "*conspiracy*" and "*unlawful means conspiracy*" within the prayer for relief are the only references to conspiracy contained in the Statement of Claim. There are, for example, no "*Particulars of Conspiracy*" or "*Particulars of Unlawful Means Conspiracy*". In response to a request for further detail as set out in a Notice for Particulars dated the 8th of October 2008, the Applicant declined to provide further detail.

b) The Applicant has set out in this paragraph a summary of the allegations he says constituted (presumably the entirety of) the conduct said to subtend the claim of an "*over-arching conspiracy*" against him. The allegations mirror the claims made in the Statement of Claim where, it is submitted, they are framed as a series of discrete allegations rather than as components of an "*over-arching conspiracy*". The Respondents do not seek to address the significance (in particular the time of occurrence) of these allegations here but rather they simply wish to highlight what they see as the inaccurate descriptions of certain allegations when juxtaposed against the evidence actually tendered. The Applicant refers to the provision to "*local persons*" of cannabis for the purpose of "*extracting false confessions*" from the Applicant. In the first instance, the Applicant's allegations stretched to the provision of cannabis to a single individual only – Martin Graham, incidentally not really a local person. Secondly, the evidence of Mr Graham was not that he was urged to secure false confessions. Rather, Mr Graham's evidence was that he was provided

with cannabis with a view to sharing same with the Applicant in the hope that the Applicant might volunteer some (it was hoped) truthful incriminating information.

c) The Respondents' application was based in part on the Statutes of Limitation. The Respondents also advanced other arguments, certain of which found favour with the Court. For instance, the Respondents argued that the two arrests of the Applicant were clearly lawful in nature leading the learned trial judge to conclude that *"no jury, properly instructed, could reasonably have found that the Gardaí did not have reasonable suspicion upon which they could base a lawful arrest"*. Additionally, the Respondents submitted, and the Court accepted, that all allegations claiming damage to reputation should have been excluded in circumstances where the Applicant had not sued for defamation. The Respondents also argued, and the Court concurred, that no liability could attach to the Respondents arising from the allegations relating to Martin Graham in circumstances where, according to the evidence given on behalf of the Applicant, no incriminating material was ever disclosed to Mr Graham or passed on to the Gardaí. A similar conclusion was urged (albeit the Court did not advert to it) in respect of the Malachi Boohig allegations (the alleged placing of improper pressure on the prosecutorial authorities) in circumstances where Mr Boohig gave evidence that he did not take any action on foot of the representations allegedly made to him by a single Garda. (The absence of an alleged co-conspirator was also relied upon by the Respondents.)

d) The Respondents dispute that the *"majority of the case"* was withdrawn from the jury. As already stated, the Respondents maintain, in conformity with the view of the learned High Court judge, that the *"central plank or core"* of the Applicant's case was left to the jury, namely the alleged suborning of Marie Farrell. A review of the Applicant's Statement of Claim fully supports this proposition.

e) The Applicant's Notice of Appeal to the Court of Appeal raised 17 numbered grounds of appeal, 4 of which comprised of a further 20 sub-headings resulting in a total of 32 discrete grounds of appeal. The Applicant's written submissions to the Court of Appeal stated that there were 17 grounds of appeal of which 7 would be focused on in the written submissions. The Applicant recites 3 grounds of appeal at this paragraph of his 'Application for Leave and Notice of Appeal' however, the Respondents would note that the third ground cited,

namely the ground speaking to the costs ruling, did not form part of the Applicant's written submissions to the Court of Appeal.

f) The Respondents do not dispute anything contained in this subparagraph.

g) The Respondents do not dispute anything contained in this subparagraph.

h) The Respondents do not dispute anything contained in this subparagraph.

i) The Respondents do not dispute anything contained in this subparagraph save only that, for the sake of clarity, the Respondents would note that the Court of Appeal awarded the Applicant the costs incurred as a result of the Respondents' request that the Court review its initial decision on the basis that the Court, an organ of the state, had been responsible for the additional hearings owing to its error and the Court felt that, in the circumstances, it would be most equitable if the Respondents (which include the State) discharged that burden.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

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 appeal from the Court of Appeal)—

The decision in respect of which leave to appeal is sought does not involve a matter of general public importance.

It is not, in the interests of justice, necessary that there be an appeal to the Supreme Court.

Please note that the Respondents also seek to cross-appeal in respect of the decision of the Court of Appeal to reject the cross-appeal before that Court relating to the decision of the learned High Court judge to deem a certain aspect of the alleged torts to be a continuing tort and thereby not liable to dismissal by virtue of the operation of the Statutes of Limitation. As per Order 58 Rule 18(3) of the Rules of the Superior Courts, the Respondents' cross-appeal is adumbrated in a separate Notice of Appeal.

1. It is respectfully submitted that neither the "*general public importance*" nor the "*interests of justice*" criteria is met in this case. The Applicant has not established any issue in the decision of the Court of Appeal that is of such general public importance that a further appeal to the

Supreme Court is warranted. Nor has it identified any basis for saying that such a further appeal is necessary in order to satisfy the interests of justice.

2. It is disputed that the question as to whether the deferral of an application for a non-suit based on the Statutes of Limitations represents an abuse of process amounts to a point of law of general public importance.

3. The Respondents reject the Applicant's characterisation of the purpose of the Statutes of Limitation as being *"to obviate the need for Defendants to meet stale claims"*. Whilst this is no doubt an objective of the legislation, the primary goal is in fact to ensure finality of litigation and causes of action. The Applicant argues that the timing of the non-suit application constituted an abuse of process. It is submitted that this is entirely inconsistent, however, with the submissions advanced on behalf of the Applicant before the Court of Appeal wherein it was conceded that the Applicant was not prejudiced by the timing of the application and wherein it was further accepted that his complaint would, if sustained, sound in costs only.

4. The Respondents reject the Applicant's submission that the application of the accepted principles in determining the non-suit application became *"unworkable"*. The Respondents also reject the submission that the trial judge's ability to apply the appropriate principles having heard the Respondent's evidence was *"doubtful if not impossible"*. Such an exercise is an entirely normal and standard judicial function; the Respondents fail to understand the Applicant's reasoning on this matter, not least as it is not explained.

5. The Applicant repeatedly refers to the Statutes of Limitation as a *"procedural bar"*. The Statutes of Limitation represent a legitimate statutory defence which is either pleaded and engaged or not pleaded. Once the statutory defence is engaged, the party pleading it is entitled to reply upon it unless and until he abandons it. A litigant's capacity to agitate all aspects of his case (including his defence) subsists throughout the case.

6. The Applicant refers to *"estoppel by conduct"* however he fails to identify the conduct on the part of the Respondents which it is alleged gives rise to the estoppel. The Respondents dispute that they took any action which could reasonably have indicated that they were abandoning their reliance on the Statutes of Limitation. The Respondents would also note that the Applicant did not argue *"estoppel by conduct"* before the Court of Appeal. The Applicant also ignores another essential feature of estoppel by conduct,; that is that the Applicant must have acted in some way to the Applicant's detriment as a result of that conduct, which renders it necessary in equity to estop the Respondents. Not only was the Applicant free to raise the issue at any time of the Applicant's choosing, but the Applicant makes no reference and has at no time made any reference to any action of the Applicant consequent upon such alleged conduct which could have provided any basis for any such estoppel.

7. The Applicant has argued that *"in light of the far reaching public policy considerations involved"* attaching to the question of whether a defendant can seek to move a non-suit application relying upon the Statutes of Limitation (the *"Application for Leave and Notice of Appeal"* refers to the *"raising"* of the issue for the first time but it is submitted that this is a misnomer given the matter was pleaded in the Defence) at the end of the evidence, the *"general public interest"* test should be deemed met. The Applicant has not however identified the *"far reaching public policy considerations"* to which reference is made. Express reference is made, however, to jury trials and to the public policy in not removing jury members from their normal lives for unnecessary lengthy periods. In circumstances where the number of civil jury trials in which this issue might pertain is, it is suggested, very low, it is submitted that no such *"far reaching public policy considerations"* in fact exist. In any event, it is submitted that this public policy is overstated. Insofar as it might be desirable to *"dis-incentivise" "conduct likely to prolong trials"*, it is submitted that the jurisdiction to make wasted costs orders provides an adequate dis-incentive. In addition, from the Plaintiff's point of view he lacks *locus standi* in this respect since he is unaffected by the general effects alleged in relation to juries and in effect chose to defer such consideration, if any, himself.

8. The Applicant has also sought to rely on a perceived lack of clarity as to what standard of proof should apply in circumstances where an an application for a non-suit founded on the Statutes of Limitation is moved at the end of a defendant's case as opposed to following a plaintiff's evidence. It is submitted that no such lack of clarity exists insofar as a plaintiff's case is taken at its height for the purposes of any determination. In the within case, there is no suggestion that the learned Trial Judge favoured any of the evidence given on behalf of the Respondents over any evidence given on behalf of the Applicant for the purposes of his statute rulings. In fact, there was no dispute between the parties as to the dates on which relevant events occurred. While it is strictly speaking irrelevant to the case, it may also be noted that the Applicant on the uncontested evidence in the case was in possession of the requisite *"knowledge"* by 1997 or 1998.

9. The Applicant argues that, even if it is permissible to make an application for a non-suit founded on the Statutes of Limitation at the end of a defendant's evidence, the decision to await that point in time should be capable of having implications in terms of costs. As a general principle, the Respondents do not dispute this proposition. Indeed, the Respondents submit that this is already the case and thus there is no *"general public interest"* to be served in *"clarifying"* the matter. In the circumstances of this case, the Respondents dispute that the Applicant should have been awarded any costs in the High Court.

10. The Respondents dispute that the trial in this case was *"materially and needlessly prolonged"* due to the timing of the non-suit application or that the jury were exposed to 60 days of *"irrelevant evidence"*. Equally the Respondents dispute that the Applicant should have been awarded any *"wasted costs"*. The Respondents take specific issue with the proposition

advanced by the Applicant that the jury were instructed to or had to "*cleanse their minds*" of this "*irrelevant evidence*". On the contrary, the Applicant had the benefit of presenting to the jury the details of matters that were statute-barred (such as the allegations made by Martin Graham that the Gardaí provided him with cannabis) which said evidence, though not in and of itself capable of grounding a finding in favour of the Applicant, was available to the jury to inform their deliberations and consideration of the evidence speaking directly to matters not withdrawn from them. The applicant's assertion lacks any reality since the applicant points to no actual irrelevant and prejudicial evidence which the jury would not have heard if the application had been made earlier.

11. The Respondents maintain, as they did before the learned High Court judge in the context of the costs application before that court, and as they did in the Court of Appeal, that had the application been made at the end of the Plaintiff's case, and had the same result ensued, then the majority of the evidence would have been required to be heard in any event. In this regard, the Respondents once again rely upon their spreadsheet document analysing the evidence given by the various witnesses which said document is annexed hereto.

12. The Applicant argues that it would be both in the general public interest and in the interests of justice to have a "*definitive ruling*" from this Honourable Court on the "*precise parameters of the tort of conspiracy*". The Applicant's argument in this regard is premised on what he portrays as an error by both the learned Trial Judge and the Court of Appeal in failing to conclude that the "*overarching*" or "*central conspiracy*" should have been left to the jury. The Applicant suggests that the intricacies of the operation of the Statutes of Limitation as it applies to a "*subsisting*" conspiracy would benefit from a definitive ruling. In the first instance, the Respondents note that the Applicant did not requisition the learned trial judge as to the parameters of the tort of conspiracy. Secondly, as is argued elsewhere in this document, it is submitted that the central conspiracy alleged by the Applicant *was* left to the jury. However, even if it was not, it is disputed that a disagreement with a narrow finding based on the Statutes of Limitation meets the threshold of constituting a matter in the general public interest or a matter requiring consideration in the interests of justice. On the contrary, the Applicant is, in actuality, submitting little more than that the High Court and the Court of Appeal were in error and requesting this Honourable Court to correct the alleged error. This, it is submitted, constitutes insufficient grounds to activate the ultimate appellate jurisdiction.

13. Insofar as the Applicant argues that it would be in the public interest for this Honourable Court to produce a definitive ruling on the question of the timing of an application for a non-suit based on the Statutes of Limitation, it is submitted that, in circumstances where the application did not dispose of the entire case, it is not in the public interest for the Supreme Court to give a decision on hypothetical issues.

14. Insofar as it is portrayed as unclear, it is submitted that the manner in which the Statutes of Limitation operate in the context of a claim founded in "*Unlawful Means Conspiracy*" is clear, namely that the unlawful means said to have been employed must have been so employed within the statutory period. Those unlawful means that occurred outside of the statutory period cannot form the basis of liability on the part of a defendant and *vice versa*. The Applicant has not pointed to any conflicting decisions that might raise an apprehension of inconsistency.

15. It is disputed that there is a general public interest to be served or that it is in the interests of justice for this Honourable Court to provide guidance as to the extent to which the Court of Appeal can revisit its own decisions prior to perfection. The decision in respect of which leave is sought to appeal on this issue determined that, in relation to decisions of the Court of Appeal wherein it is not obvious that an appeal to the Supreme Court will lie, the test applicable in the Supreme Court per the *Nash* case is equally applicable in the Court of Appeal, namely a test that requires the demonstration of exceptional circumstances and where the jurisdiction will only be exercised where it is necessary to do so to comply with the constitutional imperative to administer justice. In terms of decisions of the Court of Appeal where it *is* obvious that an appeal to the Supreme Court will lie, the High Court test will apply. This, it is submitted, is perfectly clear and sound position that does not require further guidance. In the circumstances of this case, the Court of Appeal was satisfied that exceptional circumstances had been demonstrated and that it should accede to the request to revisit its judgement.

16. In terms of the jurisdiction of this Honourable Court to grant leave to appeal by reference to the interests of justice, the Applicant has adverted to the interests of jury members. It is maintained that this submission is misconceived insofar as it must be by reference to justice between the parties that this Honourable Court considers a plea to this jurisdiction.

17. The Applicant has, additionally, made reference to the "*grave consequences*" suffered by him by virtue of the Respondents' course of action. Counsel on behalf of the Applicant conceded before the Court of Appeal that the Applicant was not prejudiced by the timing of the application and that his complaint on this front would, if substantiated, sound in costs only. In these circumstances, it is unclear how precisely the Applicant contends that the interests of justice are engaged.

18. The Applicant has not identified any unfairness in the procedures before the Court of Appeal (or the High Court) that would suggest that the interests of justice had not been served in the hearings before those Courts.

19. In all of the circumstances of the case, as determined by the High Court and the Court of Appeal, it would not be in the interests of justice to have a further appeal.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

In so far as they are relevant, the Respondents rely on the reasons given for opposing leave to appeal as reason for opposing the substantive appeal. In particular, the Respondents also says as follows:

1) There is no rule of law or procedure directing that an application for a non-suit founded on the Statutes of Limitation or otherwise must be brought no later than the end of the evidence of a plaintiff. As such, there is no restriction on a defendant from moving a non-suit application such as the one moved at the end of the entirety of the evidence in this case and it is submitted that the Applicant's proposition that same amounts to an abuse of process is simply groundless and misconceived.

   In the course of the hearing before the Court of Appeal, counsel for the Applicant conceded that the Plaintiff was *not* prejudiced by the timing of the application *"beyond costs"*. The Applicant has now posited that the timing of the non-suit application represented an abuse of process, primarily by reference to the impact imposed upon the jury's time. It is submitted that, insofar as the Applicant relies on the impact had on the jury in an effort to challenge the unfavourable decisions suffered by the Applicant but without having regard to the absence of prejudice suffered by the Applicant, the challenge is misconceived.

   As observed earlier, the Applicant has identified no evidence which in any other way may have impacted to the Applicant's disadvantage. Nor has the Applicant given any reason for supposing that, as between the parties, the Jury's decision in the case would be likely to have been influenced towards one side or another by reason of the length of the hearing.

   In any event, the Respondents maintain, as they did before the learned High Court judge in the context of the costs application before that court, and as they did in the Court of Appeal, that had the application been made at the end of the Plaintiff's case, and had the same result ensued, then the vast majority of the evidence would have been required to be heard in any event. The Respondents again refer to the spreadsheet annexed hereto.

2) Insofar as the High Court withdrew matters from the jury on foot of the non-suit application, all matters so withdrawn were properly removed from the consideration of the jury whether by reference to the operation of the Statutes of Limitation or otherwise. Insofar as certain matters were withdrawn from the jury by reference to the operation of

the Statutes of Limitation, had they not been withdrawn for such reason, the matters would have been liable to be withdrawn for other reasons, such as an absence of causation.

It is submitted that, in order to sustain a claim founded in *"Unlawful Means Conspiracy"* (which comprises of the agreement of two or more to do a lawful act by unlawful means), it is Incumbent on a plaintiff to identify an exhaustive list of the unlawful means said to have been employed. It is not sufficient to simply advert to some general over-arching conspiracy. Each of the identified instances of the employment of unlawful means is then liable to scrutiny by reference to the Statutes of Limitation.

The Respondents maintain that the conspiracy issue left to the jury was the only issue capable of being established on the basis of the pleadings and the evidence advanced. No stateable *"unlawful means conspiracy"*, other than that relating to the alleged suborning of Marie Farrell, was pleaded and no evidence capable of subtending any other *"unlawful means conspiracy"* recognisable at law was presented, such as to surmount both the Statutes of Limitations and causation considerations upon which the application for a non-suit was moved.

In Section 4 of the Applicant's *"Application for Leave and Notice of Appeal"*, within the section entitled *"Summary of Relevant Facts"* and, more specifically, paragraph "b)" thereof, the Applicant sets out a list of the actions of the Respondents alleged to have constituted the conspiracy against the Applicant. It is presumed that this represents an exhaustive list. The Respondents propose to address each allegation advanced. In so doing, it is noted that the Applicant's Plenary Summons issued on 1st May 2007 and that events occurring prior to 2nd May 2001 fell outside of the relevant limitation period:

- Two instances of alleged wrongful arrest – these arrests took place in February 1997 and January 1998 respectively, both outside of the limitation period. Even if the claims relating to these arrests had not been determined to be statute barred, the trial judge was of the view that he would also likely have withdrawn the question from the Jury *"on the basis that no jury, properly instructed, could reasonably find that the Gardaí did not have reasonable suspicion upon which they could base a lawful arrest."*;

- Alleged unlawful searches – these searches took place no later than September 2000, outside of the limitation period;

- Alleged unlawful surveillance – this relates to surveillance or *"collation"* of the Applicant as recently as February 2012. The Applicant did not plead a breach of his right to privacy but, even if he had, the discrete issue of the

collation of the Appellant could not possibly give rise to a breach of his constitutional right to privacy where he remains a *"person of interest"* in the investigation of the murder of Ms du Plantier;

- Alleged spreading of false information within the community – this relates to the claim that the Gardaí portrayed the Applicant as a violent man in conversation with Ms Claire Wilkinson in 1997 or 1998 and that the Gardaí described the Applicant as guilty in discussion with Mr John Dukelow in June or July 1997. Both of these conversations occurred outside of the limitation period. In any event, any such conversations would not have been actions that could have been characterised as *"unlawful"* for the purposes of establishing *"unlawful means conspiracy"*;

- Alleged pressure improperly applied to prosecutorial authorities – this allegation relates to a meeting that took place with State Solicitor Malachi Boohig in March 1998, according to his evidence, and therefore outside of the limitation period. Even if the claim relating to the interaction with Mr Boohig had not been determined to be statute barred, Mr Boohig's evidence was that he did not act upon any pressure that was allegedly brought to bear on him. Additionally, the evidence in this matter was that a single member of An Garda Síochána spoke with Mr Boohig. As such, there was no evidence of a conspiracy, which requires the participation of two or more individuals;

- Alleged provision of cannabis to *"local persons"* for the purposes of securing a false confession – this allegation relates to interaction with Mr Martin Graham up until no later than July 1997 (when Mr Graham left Ireland) and thus outside of the limitation period. Even if the claims relating to the interaction with Mr Graham had not been determined to be statute barred, the trial judge was of the view that the events surrounding Mr Graham were *"actions, if his evidence were accepted, without any consequence for Ian Bailey since no confession or prejudicial information was, in fact, obtained"*;

- Alleged suborning of Marie Farrell – these matters were left to the jury, on the basis that the allegedly bogus statements allegedly resulting from the suborning alleged remained on file and continued to exist.

As already noted, in the course of the hearing before the Court of Appeal, counsel on behalf of the Applicant conceded that each of the incidents referred above to, excluding the claims based on surveillance, took place outside of the statutory period. The Applicant has identified no other specific allegations subtending the general *"over-arching"* claim that should have been, but were not, left to the jury to consider.

3) In circumstances where no final orders had been made or perfected, the Court of Appeal had jurisdiction to revisit its earlier decision providing that it was satisfied that there were either strong reasons to do so or that there existed "*exceptional circumstances*" and providing that it was satisfied that it was necessary to do so to comply with the constitutional imperative to administer justice. It is submitted that the Court of Appeal in this case was satisfied, correctly, that the threshold was met.

4) The Respondents contend that the Court of Appeal was correct to stand over the learned Trial Judge's ruling on costs in circumstances where the entirety of the Applicant's appeal to the Court of Appeal was rejected.

   It is disputed that the effect of the "*tactical decision*" of the Respondents was to greatly elongate the proceedings. The Respondents maintain, as they did before the learned High Court judge in the context of the costs application before that court, and as they did in the Court of Appeal, that had the application been made at the end of the Plaintiff's case, and had the same result ensued, then the vast majority of the evidence would have been required to be heard in any event.

Name of counsel or solicitor who settled the grounds of opposition:

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

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Not applicable

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?	**No**
If Yes, please give details below:	**N/A**

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

If Yes, please give details below: **N/A**

Will you request a priority hearing? **No**

If Yes, please give reasons below:

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each respondent within 14 days after service of the notice of appeal.

Dated this 21st day of June 2018

CHIEF STATE SOLICITOR,
Solicitors for the Respondents,
Osmond House,
Little Ship Street,
Dublin 8

TO: The Registrar of the Supreme Court,
The Four Courts,
Inns Quay,
Dublin 7

Frank Buttimer & Company,
Solicitors for the Applicant,
19 Washington Street,
Cork

AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No S:AP:IE:2018:000082

IAN BAILEY

Applicant/Plaintiff

And

THE COMMISSIONER OF AN GARDA SIOCHANA, THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Respondent/Defendant

RESPONDENT'S NOTICE

Chief State Solicitor's Office
Osmond House,
Little Ship Street,
Dublin 8