THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 63

Record No. 2015/503

Finlay Geoghegan J.
Birmingham J.
Hogan J.

Between

Ian Bailey

Plaintiff/Appellant

and

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

Defendants/Respondents

Judgment of the Court delivered by Ms. Justice Finlay Geoghegan on the 14th day of March 2018

1. On the 26th July, 2017 judgment was delivered (Birmingham and Hogan JJ; Finlay Geoghegan J concurring) on the appeal of the plaintiff from the decision of the High Court in the plaintiff's claim heard before a judge and jury ("the first judgment").

2. The ultimate conclusion in the first judgment was set out in the final paragraph 122:

> *"As will have been seen, we are, accordingly, of the view that, save in one minor respect, the appeal should be dismissed and the cross-appeal brought by the State defendants should also be dismissed. We would, however, allow the appeal in respect of the ruling that the claim in respect of the alleged wrongful disclosure of the information by the Gardaí in advance of the defamation proceedings in December 2003 was statute-barred and direct a re-trial in respect of that part only of the plaintiff's claim."*

3. As appears the Court dismissed both the appeal and cross appeal brought by the State save in respect of one identified ruling of the trial judge "that the claim in respect of the alleged wrongful disclosure of the information by the Gardaí in advance of the defamation proceedings in December 2003 was statute barred". In respect of that claim alone the Court stated it was directing a retrial in respect of that part only of the plaintiff's claim.

4. At the time of delivery of the judgment the Court indicated, in accordance with common practice, that it would give the parties an opportunity of considering the judgment and adjourned the matter to hear and consider the question of costs and the form of order to be made.

5. Prior to the adjourned date (4th October, 2017) the Chief State Solicitor on behalf of the respondents notified the Registrar of the Court that it was proposed to make an application to the Court to reconsider its judgment in relation to the matters referred to at paras. 49 – 52 incl. for reasons set out which are repeated in subsequent submissions.

6. On the 4th October, 2017 having heard counsel, the Court indicated that it would hear submissions in relation to (1) the jurisdiction of the Court to reconsider, at the request of the respondents the relevant portion of its judgment and if it decided that it should do so the consequences for the decisions made on the appeal and cross appeal in the first judgment.

7. The Court received written submission from the respondents and the plaintiff on these two issues and oral submissions at a hearing on the 13th December, 2017.

Background

8. The background to the plaintiff's proceedings is fully set out in the first judgment. In short the plaintiff's claim was for damages and aggravated damages in respect of a number of alleged torts central to which was an allegation that members of An Garda Síochána engaged in a conspiracy to injure his reputation and to violate his constitutional rights in the investigation of the murder of Mme. Sophie Toscan du Plantier on 22/23 December, 1996. The allegations included that the Garda Síochána engaged in a conspiracy to procure statements, which would incriminate the plaintiff, from a number of persons including a Ms. Marie Farrell.

9. The proceedings commenced by the delivery of a plenary summons on the 1st May, 2007. They ultimately came on for trial in the High Court before Hedigan J. and a jury on the 4th November, 2014. Many witnesses were called by both parties. Ultimately on day 60 of the trial the respondents made an application that the claim be withdrawn from the jury primarily upon the grounds that all or almost all of the plaintiff's claim was statute barred and in respect of any part not stature barred on certain other grounds including insufficiency of evidence. Submissions were heard from counsel on days 60 and 61 of the trial and on day 62 the trial judge made a ruling on the respondents' application. The conclusion of the ruling was that certain of the claims were determined either to be statute barred or for other reasons not capable of being pursued and were not permitted to go to the jury. However the trial judge ruled that whether the alleged conspiracy by named gardaí to implicate the plaintiff in the murder of Ms. Toscan du Plantier by obtaining from Ms. Farrell statements they knew to be false happened or not was a matter for the decision of the jury; further it was a continuing cause of action and not statute barred and that two identified questions remained for determination by the jury. The jury answered each of the relevant questions in the negative and the plaintiff's claim was dismissed.

10. The appeal and cross appeal related primarily to the ruling of the trial judge on day 62 and a limited number of earlier rulings.

There were multiple issues on the appeal and cross appeal addressed in the first judgment.

11. One of the main issues in the appeal and cross appeal was the correctness or otherwise of the trial judge's rulings on the statute of limitations in relation to the plaintiff's causes of action including the cause of action in conspiracy. The first judgment ended its consideration of that aspect of the appeal and cross appeal at paras. 47 – 52 incl. by stating:

> *"47. Accordingly, in the light of the comments of McCarthy J. in Taylor, we find ourselves compelled to the conclusion that, subject to two important exceptions, Mr. Bailey's cause of action in conspiracy crystallised at this point – at all events no later than 1998 – because on his version of events the conspiracy was executed by members of the Gardaí during this period. It is not necessary for this Court to determine precisely what the relevant dates in 1997 and 1998 for this purpose actually were, because, on any view, these events long pre-dated 2nd May 2001, i.e., the last day of the six year time period permitted by s. 11 of the 1957 Act (read in conjunction with s. 11(6) of the 1961 Act) given that these proceedings were issued on 1st May 2007.*
>
> *48. There are, we think, two exceptions to this. First, we agree with the ruling of Hedigan J. to the effect that if the plaintiff's fundamental contention was correct and there had been a conspiracy on the part of the Gardaí to suborn Ms. Farrell as a witness, this was a continuing conspiracy which operated die de diem. After all, Ms. Farrell's statement implicating Mr. Bailey remained on the Garda file and it was capable of being acted upon by the authorities. In this respect, therefore, we agree with Hedigan J. that this particular aspect of the plaintiff's claim was not statute-barred and that he was accordingly correct in allowing this matter to go to the jury. To that extent, therefore, we would dismiss the State defendant's cross-appeal against this aspect of the findings of the trial judge.*
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> *49. The other exception relates to the alleged unlawful disclosure of confidential information by the Gardaí to the media in anticipation of the hearing of the defamation proceedings by the Circuit Court in November/December 2003. It is true that an order for third party discovery of such witness statements was made by the Circuit Court at the start of the trial, but the plaintiff's case is that there had already been an unlawful disclosure of such information by members of the Gardaí to, inter alia, the solicitors for the defendant newspapers in advance of any such order and that he accordingly has a cause of action for either unlawful means conspiracy and/or a breach of his constitutional right to privacy.*
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> *50. This issue was raised by counsel for the plaintiff, Mr. Creed S.C., with the trial judge on day 60. The trial judge **ruled** as follows [emphasis added]:*
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> > *"Mr. JUSTICE HEDIGAN: Well, I think that you are on very thin ground but I think it probably is just about something for the jury to decide. Why weren't the solicitors called, who were intended to be called if such evidence was actually given. So, it's all highly speculative, but it may well be something for the jury to deal with.*
> >
> > *Mr. CREED: If the jury accept that that information came from the Gardaí and I absolutely accept, judge, it's a matter for the jury, that they are entitled to say my privacy was breached thereby."*
>
> *51. We acknowledge, of course, that the plaintiff's defamation appeal was ultimately compromised on terms which remain confidential to the plaintiff and the various newspapers. If, however, there was a conspiracy which was put into effect – as the plaintiff alleges – then, in the light of the comments of McCarthy J. in Taylor, this would seem to be actionable in itself. This matter is not statute-barred and while it is true that viewed against the large panorama of complaints against members of the force this, may, on one view, amount to issue of lesser importance, the Court cannot, with respect, agree with the trial judge that if such disclosure occurred it was impossible to separate it out from earlier advance publicity which had been generated prior to 2001 and accordingly statute-barred.*
>
> *52. The Court is, accordingly, of the view that the appeal must be allowed in respect of this separate discrete claim and this claim (namely, whether there was an unlawful disclosure of information contained in witness statements by members of the Gardaí to, inter alia, the solicitors for the defendant newspapers in advance of any such discovery order and that he accordingly has a cause of action for a breach of either unlawful means conspiracy and/or a breach of his constitutional right to privacy. must be remitted to the High Court for a re-hearing."*

12. It should be observed that whilst in that part of the judgment the plaintiff's claim for breach of his constitutional right to privacy is considered as part of the claim in conspiracy and as an unlawful means conspiracy the conclusions of the first judgment at paras. 117 and 122 make clear that the only aspect of the trial judge's ruling with which the Court disagreed related to the claim for damages for breach of his constitutional right to privacy by reason of alleged unlawful disclosure by members of the gardaí of confidential information prior to the hearing of the defamation proceedings (in the Circuit Court in November/December 2003) and as understood by the Court a ruling by the trial judge that such claim was statute barred.

Respondents' Application

13. The respondents submit that first judgment is in error at para. 50 in referring to the words spoken by the trial judge set out therein as being a "ruling" on the adequacy of the evidence adduced in relation to the claim of an alleged unlawful disclosure by the gardaí of witness statements to the media defendants in the defamation claim in the Circuit Court prior to the hearing in November/December 2004. The respondents submit that these were simply observations or an indication given by the trial judge in an exchange with counsel for the plaintiff during the submissions on the respondents' application (on day 61 rather than day 60 as stated but nothing turns on that). The respondents further submit that following that exchange and having heard counsel for the respondents in reply the trial judge's ruling on all issues including this issue was given on day 62.

14. They further submit that on the appeal neither party contended, in written or oral submission that the comments of the judge made on day 61 set out at para. 50 of the first judgment were a "ruling" on the question as to whether there was evidence adduced during the trial in relation to the alleged wrongful disclosure of witness statements to the defendants in the Circuit Court defamation proceedings such that the plaintiff's claim for alleged breach of his right to privacy by reason thereof should be permitted to be left to the jury.

15. They further submit that the decision in the first judgment that this aspect of the plaintiff's claim should be remitted for hearing to the High Court is dependent upon the Court's error as to the status of the words spoken by the trial judge cited at para. 50 of the first judgment. They submit that the effect of this error is that this Court also in error considered that the only relevant issue to be determined was whether or not the trial judge had correctly or incorrectly determined that this aspect of the plaintiff's claim was

statute barred. They submit that it was never in dispute that any alleged disclosure of the witness statements (which they deny) happened proximately to the Circuit Court hearing in December 2003 and therefore within the six year limitation period i.e. after the 1st May, 2001. Rather they submit that the issue which this Court was required to determine on the appeal was, whether or not, having regard to the relevant admissible evidence, the trial judge ought to have permitted the plaintiff's claim for damages in respect of the alleged wrongful disclosure in relation to the witness statements prior to the Circuit Court defamation proceedings to go to the jury and by implication have added a separate question or questions for determination by the jury.

16. The respondents seek to have the Court revisit this discrete aspect of its judgment prior to making the final order on the appeal.

17. The plaintiff through his counsel and submissions does not dispute that the Court was in error in the first judgment in referring to the cited observations of the trial judge as being a "ruling" on the sufficiency of evidence to leave that aspect of the claim to the jury. Nor does he dispute that neither party contended that it was a "ruling".

18. The plaintiff also does not dispute that the Court may have jurisdiction to revisit a matter decided in a written judgment prior to the making of the final order on the appeal but submits that in accordance with the judgments of the Supreme Court cited below the relevant threshold to permit the Court to revisit the issue has not been reached on this application.

19. Insofar as the Court determines that it should revisit this aspect of its judgment then the appellant submits that on the evidence adduced at the trial, the trial judge ought to have left this aspect of the plaintiff's claim for determination by the jury.

Jurisdiction of the Court to revisit its Judgment

20. The parties agree, in the Court's view correctly, that the Court does have jurisdiction to revisit an issue decided in a written judgment before the order envisaged by the judgment is drawn up and perfected. There is however some dispute between them as to the criteria to be applied and threshold to be reached before the Court should exercise the jurisdiction to revisit a decision made.

21. The respondents are asking the Court to revisit a decision made. It is not simply a question of seeking to have corrected some factual error in the judgment which would not have an impact on the ultimate decision reached. The correction of such errors may be made pursuant to Order 28, rule 11 of the Superior Courts Rules.

22. The Court is referred to the consideration given by Clarke J. (as he then was) in the High Court *In Re McInerney Homes Limited*, [2011] IEHC 25 and to the English decisions to which he makes reference. The English decisions include that of the Court of Appeal per Wilson L.J. in *Paulin v. Paulin & anor* [2010] 1 WLR 1057, in which he reviewed a number of earlier English decisions including that of *In Re Barrell Enterprises* [1973] 1 WLR 19 in which the Court had stated:

> *"When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one."*

23. In *Paulin v. Paulin* Wilson L.J. considered that the reference to 'oral' judgments in Barrell was "in contradistinction not to written, reserved judgments but to written, sealed orders." It appears that there was subsequently concern expressed in English decisions to the requirement for "exceptional circumstances" as stated in *Paulin v. Paulin*. In *Compagnie Noga D'Importation Et D'Exportation SA v. Abacha* [2001] 3 All ER 513, Rix L.J. observed "that a formula of 'strong reasons' was an acceptable alternative to that of 'exceptional circumstances'".

24. In *McInerney Homes Ltd*. Clarke J. having set out at para. 3.6 a significant extract from the judgment of Wilson L.J. in *Paulin v. Paulin* then stated at para. 3.7:

> *"... I am, therefore, satisfied that the above quoted passage represents the law in this jurisdiction. I also agree that the formulation suggested by Rix L.J. in Cie Noga D'Importation et D'Exportation SA (as approved by May L.J. in Robinson v. Fernsby) is a more appropriate description of the relevant test. In those circumstances, it seems to me that, in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be "strong reasons" for so doing."*

25. The facts of *McInerney Homes Ltd* were quite different to the facts of this appeal and the basis for which this Court is being asked to revisit its decision. *McInerney Homes Ltd* was an examinership proceeding under the Companies (Amendment) Act, 1990 and an application to confirm the scheme of arrangement proposed by the Examiner. In the principal judgment Clarke J. had concluded that he should not confirm the scheme of arrangement as it was unfairly prejudicial to the banking syndicate who had opposed confirmation of the scheme. As is acknowledged by Clarke J. the nature of examinership proceedings are such that there may be distinctions to be drawn from ordinary inter partes proceedings. Also the basis upon which Clarke J. determined to revisit his judgment was that the underlying assumption behind the principal judgment was the likelihood that a particular receivership model would in fact be followed. Subsequent to the delivery of the principal judgment by reason of developments in relation to NAMA it became apparent that such assumption was no longer applicable.

26. On the appeal and cross appeal one of the issues before the Supreme Court was whether the High Court was correct to reopen the issue of unfair prejudice. On that issue O'Donnell J. delivering the majority judgment (Finnegan J. and McKechnie J. concurring) stated at para. 62:

> *"62. The trial judge referred to the judgment of the Court of Appeal of England and Wales in Paulin v. Paulin [2010] 1 W.L.R. 1057 and considered that this satisfied the criteria set out therein and that it was an exceptional case which justified a rehearing limited to the question of the likely outcome of any NAMA acquisition of the loans of Anglo and Bank of Ireland. I entirely agree with the judge's conclusion that it was necessary to reopen the issue. It is not necessary to express any view on the criteria set out in Paulin v Paulin. Once the trial judge observed that he himself had assumed that there was no longer any prospect of NAMA acquiring the loans, and that that assumption was based upon the somewhat artificial way in which the banks had approached the matter, then, in my view, he was entitled, and indeed arguably obliged, to reopen the matter. If indeed it was the case that the NAMA acquisition of the loans of Bank of Ireland and Anglo was imminent, then it could be said that the hearing, and indeed the judgment, had proceeded almost on a basis of common mistake and that justice required*

that the matter should be reconsidered."

27. Those judgments relate to the jurisdiction of the High Court to revisit an issue after judgment and before the order is perfected. Even as such it does not appear, with respect that it can be said that there is a clear determination in this jurisdiction as to whether the High Court if asked to revisit an issue already decided in a written judgment but before the relevant order is perfected must be satisfied that there are "exceptional circumstances" or "strong reasons" which warrant it doing so. It may be that nothing turns on either phraseology. The plaintiff in any event sought to distinguish the position of the Court of Appeal from that of the High Court having regard to its constitutional jurisdiction pursuant to Art. 34.4 and in particular Art. 34.4.3 which states:

"The decision of the Court of Appeal shall be final and conclusive, save as otherwise provided by this Article."

28. The relevant provision in Art. 34 which provides "otherwise" is Art. 34.5.3 which gives the Supreme Court appellate jurisdiction from a decision of the Court of Appeal if it is satisfied that:

"(i) the decision involves a matter of general public importance or

(ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court."

29. The submission made on behalf of the plaintiff is that the position of the Court of Appeal is closer to the former position of the Supreme Court under Art. 34 prior to the 33rd Amendment to the Constitution and accordingly to the approach taken by the Supreme Court in its judgments *inter alia*, in *Greendale Developments Ltd* [2000] 2 I.R. 514, *Abbeydrive Developments Ltd v. Kildare Co. Council* [2010] 3 I.R. at 397 and *Nash v. The Director of Public Prosecutions* [2017] IESC 51.

30. That submission is well founded, save, of course, that the Supreme Court was then - as now - referred to as the "Court of Final Appeal" and that status clearly informs the approach of the Supreme Court in those judgments. The Court of Appeal is not a court of final appeal as such. However, neither is it a court of first instance nor a court from which there is an automatic right of appeal as is the position in relation to the majority of proceedings before the High Court. It is a matter for the Supreme Court as to whether any particular application for leave meets the constitutional threshold. Accordingly a decision of the Court of Appeal is final and conclusive unless and until the Supreme Court grants leave to appeal therefrom for the purposes of Article 34.5.3. Hence except, possibly, in the case of a decision on a question which obviously meets the constitutional threshold it seems appropriate that the Court of Appeal consider an application, such as this, upon the basis that its decision may be final and conclusive. In summary, whilst the Court of Appeal is not a court of final appeal as such its judgment or decision on any individual appeal may be the final and conclusive judicial decision on the disputes in question and litigation between the parties.

31. It therefore appears that the principles set out by the Supreme Court, most recently summarised by O'Donnell J. in *Nash* (with which that part of his judgment Denham C.J., Clarke J., Dunne J. and Charleton J. concurred) are the applicable principles and this Court should follow closely the approach taken by the Supreme Court in those judgments allowing for the different factual contexts and nature of the errors identified.

32. Nash concerned alleged errors of fact in a judgment delivered by the Supreme Court on the 24th October, 2016 (Clarke J, with whom four other members of the Court agreed). However, the consideration given by O'Donnell J. to the principles according to which the Supreme Court may revisit a judgment in which an error is alleged goes beyond errors of fact. At para. 3 he stated:

"3 Litigants, lawyers, witnesses and observers can all make mistakes. Judges, even judges in appellate courts reviewing decisions for error, make mistakes; they do not mean to but they do. But they try extremely hard not to, and for the most part succeed. And in particular, they try to get the decision correct. The core and irreducible function of any court, even in cases with obvious and profound general consequences, is to resolve the issues between the parties to the litigation."

33. As he later points out the obligation to do justice fairly, and without fear or favour, which guided the judge to give the original judgment, should extend to a willingness to acknowledge error if justice should require it. However, the cases demonstrate that the courts only exceptionally make orders setting aside judgments already given. An application to do so runs directly counter to the important value of the administration of justice that there should be finality to litigation. In the case of the Supreme Court, as O'Donnell J. stated, this is encapsulated in the then Art. 34.4.6 (now Art. 35.4.6) which provides "the decision of the Supreme Court shall in all cases be final and conclusive". The balance between the finality of litigation and the exceptional jurisdiction acknowledged is explained by O'Donnell J. at paras. 9 and 10 of Nash:

9 The requirement of finality in litigation is not therefore the product of judicial decision or statute. It is encapsulated in the provisions of the Constitution which establishes this Court and which it is bound to uphold. That imposes constraints upon the court when it is invited to alter or set aside its decision. On the plain words of the Constitution it is not permitted and the court is obliged to uphold both the text and the values it espouses.

10 Notwithstanding the apparently all-embracing terms of Art. 34.4.6, there is however an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality. The justification for this is perhaps the fundamental constitutional obligation of this Court to administer justice which is in unqualified terms and is the governing principle of Art. 34. Any tension between these two provisions may perhaps be reconciled by considering that where by reason of judicial error or some other extraneous consideration, it is plain that the outcome of the case cannot be said to be the administration of justice for the purpose of Article 34 then it cannot be said to be a 'decision 'for the purposes of Art. 34.4.6. It is not necessary to discuss here the possible circumstances in which such an exceptional application could be made. It is plain it must be something fundamental to the decision. One clear example is where a case of objective bias is established for some reason in respect of one or more members of a court. See for example the discussion in Bula Ltd. v. Tara Mines (No. 6) [2000] 4 IR 412 at 476, and in another jurisdiction R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 at 585. The jurisdiction was originally identified in Re Greendale Developments Ltd. (No. 3) [2000] 2 IR 514. There Denham J (as she then was) said at p. 544:-

> *"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.""*

34. Finally, O'Donnell J. referred to the earlier guidance given by Murray C.J. (Denham, Hardiman, Geoghegan and Fennelly JJ. concurring) delivering a ruling on an application to set aside the decision of the Court which had dismissed an appeal pursuant to s.29 of the Courts of Justice Act, 1924 (as amended) on the grounds of an alleged error of fact in the judgment in *D.P.P. v. McKevitt* [2009] IESC 29:

> *"Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant."*

35. Applying the above to the different constitutional position of the Court of Appeal means that there is, notwithstanding Article 34.4.3 an exceptional jurisdiction to revisit a judgment of this Court which is otherwise entitled to finality where it is considered necessary to do so to comply with the constitutional imperative to administer justice. Whether that threshold is met will depend upon the relevant facts.

Application of Principles to Respondents' Application

36. The starting point in this application is that it is agreed by the parties, and must be acknowledged by the Court that it was in error in the first judgment in treating the observations made by the trial judge on the adequacy of the evidence to permit the issue of the alleged wrongful disclosure of witness statements to the defendants in the defamation proceedings be left to the jury as a "ruling".

37. The more difficult question is whether the error is such that the necessity of justice dictates that the Court should allow the application to reopen that part of its decision which it is contended flows from the error made. Another way of putting the question is whether if the Court were now to refuse to reopen and revisit that decision it would be in breach of its obligation to administer justice or of the constitutional rights of one or other of the parties.

38. The submission made by the respondents is that they would be denied justice if the Court refused now to revisit the decision made to remit the plaintiff's claim in respect of the alleged wrongful disclosure of the witness statements by the gardaí in advance of the defamation proceedings in December 2003 on the basis that the trial judge had incorrectly ruled that such a claim was statute barred. They also submit that as the decision made was to remit this part of the claim to the High Court there is not the frequent tension between re-opening and the finality of litigation.

39. The respondents further submit that the trial judge never ruled that such claim was statute barred; that he either ruled at para. D of the ruling on Day 62 that "no claim can arise … on the evidence that has been brought before the Court" or if the claim in question is not covered by such ruling that he did not rule on same.

40. They submit that if the error is not corrected and the Court does not revisit the decision made that on any retrial before the High Court the respondents may be prejudiced by an interpretation of the first judgment which is to the effect that the trial judge ruled that the evidence which was before him on this issue was adequate to permit the issue to be left to the jury and that such ruling was implicitly upheld by this Court who directed a retrial such that if on any retrial the same evidence was again adduced the respondents would not be in a position to dispute the adequacy of such evidence to permit the issues of fact in relation to the alleged wrongful disclosure of information be left for determination by the jury.

41. The further submission is that by reason of the error made by the Court in its first judgment that it did not address an issue which had been raised in the appeal before it and in respect of which opposing submissions had been made namely as to the adequacy of the evidence adduced during the trial in relation to the alleged wrongful or unlawful disclosure of the witness statements by the gardaí to the defendants in the defamation proceedings or to their solicitor.

42. The Court has concluded that on the particular facts of this appeal the respondents have discharged the requisite onus of establishing that the judicial error made in the first judgment, which was not caused by either party, has potential consequences which may include a denial of justice in the sense of a denial of fair procedures in the proceedings. As such, they constitute exceptional circumstances and warrant a revisiting of the decision made to remit one part of the plaintiff's claim to the High Court.

The error and its consequences

43. The error is, as already stated, the reference in para. 50 of the first judgment to the quotation from the trial judge as being a "ruling". It is acknowledged that it was not a ruling and was not contended to be such by either party during the appeal.

44. The consequence for the relevant decision of the Court in the first judgment is that its decision that the plaintiff's claim for damages by reason of the alleged unlawful disclosure of confidential information by the Gardaí to the defendants prior to the hearing of the defamation proceedings in the Circuit Court in November/December 2003 was not statute barred does not fully determine the issues in dispute on the appeal in relation to that part of the plaintiff's claim. The parties were in dispute as to whether the trial judge had made a ruling on the adequacy of the evidence given during the trial to permit questions of fact in relation to the claim of unlawful disclosure be determined by the jury and if he did give a ruling whether such ruling was correct.

45. It follows that such issues must be revisited by this Court before it determines whether its decision to remit part of the plaintiff's claim to the High Court should stand notwithstanding the error in the first judgment.

Issue on Appeal not decided

46. Following the ruling of the trial judge on Day 62 of the trial no cause of action for breach of constitutional rights was left to the jury.

47. In the notice of appeal, the plaintiff included at para. 6 a ground in relation to the constitutional right to privacy:

"The learned trial judge erred in failing to leave the cause of action for breach of constitutional rights, in particular the breach of the constitutional right to privacy of the plaintiff to the jury; further or in the alternative he did not rule on that issue in any meaningful way or at all, in his judgment in the nonsuit application at the conclusion of the evidence in the case".

48. In the written submissions of the plaintiff on the appeal it was contended insofar as relevant:

"The breach of constitutional rights was not left to the jury, nor was it even ruled upon. This was a surprising turn of events as the claim of breach of constitutional rights was ignored in the ruling on the nonsuit. This was despite a preliminary indication from the learned trial judge that he was of the view that it probably was a matter for the jury."

Later in the submissions at p.41 as an instance of the alleged breach of the plaintiff's right to privacy it was submitted:

"It was also the case of the plaintiff that the right to privacy was breached as the names of the persons who had given statements to the gardaí about Ian Bailey were given to the solicitors for the defendants in the libel trial of the plaintiff."

49. In the High Court and again in this Court counsel for the respondent raised issues in submission as to whether the plaintiff had properly pleaded a claim for damages for breach of constitutional rights. That particular issue will not, however, be revisited as it is implicit in the first judgment that the Court accepted that such a claim was pleaded and pursued in the High Court.

50. Specifically in relation to the alleged breach of the right to privacy by the disclosure to the defendants in the defamation proceedings (or their solicitors) of the names of persons who had given witness statements to the Gardaí or as was alternatively put disclosure of the witness statements themselves counsel for the respondents submitted that there was no evidence upon which the trial judge should have let a question go to the jury as to whether the Gardaí had disclosed or given witness statements or the names of persons who had given statements to the media, defendants in the libel action or their solicitors.

51. In the High Court, counsel for the plaintiff had made a submission to the trial judge on Day 61 which gave rise to the exchange with the trial judge part of which was set out in the first judgment of this Court at para. 50. The Court has been referred to a fuller extract of the exchange at the recent hearing:

*"**MR. CREED**: Yes, of course, yes. I think the Detective Superintendent also spoke in relation to it. Now I also say that as regards the libel action, just again dealing with the right to privacy, I say that that right to privacy was also breached by the names of the witnesses who had given statements to the Gardaí being furnished to the solicitors for the Defendants.*

***MR. O'HIGGINS**: There is no evidence of that.*

***MR. CREED**: With the greatest respect, Judge, it is open to the Jury to infer that this information came from the Gardaí because it was not public knowledge as to who gave statements to the Gardaí. All of the witnesses that were subpoenaed the information as to who gave relevant evidence to the Gardaí became known to the solicitors for the Defendants. The only way that they could have got that information, in my respectful submission, is from a Member of An Garda Síochána because, as in every situation when somebody is arrested, detained and interviewed, there are probably many, many statements given by many persons which are the basis for somebody's arrest. They are not made public knowledge.*

***MR. JUSTICE HEDIGAN**: Well, I think you are on very thin ground there but I think it probably is just about something for a jury to decide. Why weren't the solicitors called, who were intended to be called if such evidence was actually given. So, it's all highly speculative but it may well be something for the Jury to deal with.*

***MR. CREED**: If the Jury accept that that information came from the Gardaí, and I absolutely accept, Judge, it's a matter for the Jury, that they are entitled to say that my right to privacy was breached thereby."*

52. Later on Day 61 counsel for the respondents replied to this submission insofar as relevant to the evidence before the trial court at p.137 by stating:

"There was a suggestion that there was evidence on the basis of which the Jury might find that the Defendants in the libel action had been given statements by Gardaí.

…

There isn't a dickie bird about the Plaintiff's right to privacy and in my respectful submission it is wholly contrived that that comes into the case. He mentions Hanahoe v Hussey. Obviously in relation to that he is plainly statute-barred in relation to the arrests because those matters were completely public and if there was a Constitutional right to privacy engaged by those matters he knew everything about that in 2007. That is not, as I said yesterday, a claim related to the falseness of the arrest or the falseness of the imprisonment, it is a claim related, if it subsists at all. My Friend didn't call, nor did I, Mr. Courtney, Ms. Woods or Ms. Ryan or Arthur Cox Solicitor or seek any discovery from them to establish any of the matters which are put forward. I didn't call them because there is no [inaudible] evidence against me of any kind, no evidence. There is one sentence of hearsay from Ms. Farrell and it is not a matter for the Jury to draw inferences in relation to the matter. That is so far as that goes.

The Plaintiff in the case surmised that the Defence in the libel proceedings had got statements from the Gardaí. There is no evidence in relation to that. The Judge ordered on the application of the Plaintiff that the statements be given out by the Gardaí to everyone and that they were at that time and that is the end of the matter."

53. The trial judge gave his ruling on day 62. The parties agree that the only potentially relevant ruling of the trial judge to the plaintiff's claim for alleged breach of the right to privacy by the alleged disclosure of statements by the gardaí at para. D:

> *"What of the rest of the case?*
>
> *...*
>
> *D. Damaging ongoing publicity or media attention. It is impossible to disentangle the pre and post 2001 media coverage. Claims arising from the former are statute-barred and the latter was inevitable and uncontrollable by anyone. No claim can arise out of that on the evidence that has been brought before the Court.*
>
> *…"*

54. By reason of the error made by this Court in the first judgment in assuming that there had already been a ruling of the sufficiency of admissible evidence in relation to the wrongful disclosure aspect of the claim, this Court assumed that the trial judge had thereby ruled in para. D. that the claim in respect of the alleged disclosure of the statements or names was statute barred: see para. 51 of the first judgment.

55. The Court has reconsidered the relevant portions of the oral hearing of the appeal. It is satisfied that at the hearing of the appeal, the issue as to whether or not there was evidence adduced during the trial in the High Court sufficient to leave a question to the jury as to whether Gardaí had given the statements in their possession to the defendants in the defamation proceedings was in dispute and submissions relative thereto were made. There were, in addition, other issues in dispute in relation to the alleged claim for damages for breach of constitutional right to privacy by the alleged wrongful disclosure by the Gardaí, including whether it was pleaded or pursued.

56. As I have just mentioned, in the first judgment this Court had proceeded on the basis that in his ruling at para. D the trial judge had thereby ruled that the wrongful disclosure claim was statute-barred and held that he was in error in doing so. It was for this reason (i.e., the statute-barring reason) that this Court had allowed the appeal. The Court's judgment that this part of the claim is not statute barred is not, as such, in dispute and nor does it require re-consideration.

57. This Court's error was rather a different one: it wrongly assumed that the trial judge had in fact ruled that there was sufficient evidence to go to the jury on the wrongful disclosure claim when, he does not appear to have done so in his ruling at para D. Indeed, as I have also pointed out, the trial judge's failure to rule on this aspect of the plaintiff's claim was one of the plaintiff's grounds of appeal and was ventilated by his counsel in the course of the appeal.

58. In the light of this error, this Court is now required to consider whether there was in fact sufficient evidence on the wrongful disclosures claim which might properly go to the jury since a failure to rule on this issue can only be prejudicial to the plaintiff if there was evidence adduced in the High Court such that questions in relation to the alleged wrongful disclosure by the Gardaí ought to have been left to the jury. This, accordingly is the issue which this Court must now decide on this appeal in order to determine whether its decision to remit part of the plaintiff's claim to the High Court should stand.

59. In fairness to the trial judge it should be noted that there was no request for clarification or a ruling on this issue after his ruling was given on day 62.

Adequacy of Evidence

60. The respondents' submission at all times on the appeal has been that there was no admissible evidence led during the trial in the High Court subtending the allegation that there was disclosure by the Gardaí of the witness statements to the media defendants in the Circuit Court libel proceedings. In the written submissions filed on the 18th October, 2017 they set out at paras. 32 and 33 what they contend was the only testimony given in the High Court which touched on the issue.

61. In the replying written submissions of the plaintiff filed on the 17th November, 2017 it is not disputed that the testimony set out by the respondents in their written submissions is the only relevant testimony. At the oral hearing counsel for the plaintiff confirmed that to be the position. He did submit that such evidence required to be considered by this Court in the context of certain evidence given by retired Detective Superintendent Dermot Dwyer on Day 58. The submission made on behalf of the plaintiff is that the evidence cited by the respondents in their submissions was in that context sufficient to allow the issue of unlawful disclosure of the witness statements by the gardaí to the media defendants to be left to the jury.

62. The relevant evidence referred to by the respondents is evidence given by the plaintiff during his cross-examination on Day 10 and by Ms. Farrell both in direct evidence and cross-examination on Days 18 and 23 and by Ms. Cery Williams on Day 56. It is necessary to set these out in full:

> *(a) "Under cross-examination, the Plaintiff/Appellant gave the following testimony on Day 10, p.37:*
>
> *"Q. You say that Mr. Bailey. The position is, as I understand it, firstly you were represented by a solicitor with whom you had at that time a very long standing relationship of a number of years from 1997 until 2003?*
>
> *A. Yes.*
>
> *Q. Also ably represented by Mr. Duggan, who was your Counsel at the time?*
>
> *A. Yes.*
>
> *Q. And continues to be?*
>
> *A. Yes.*
>
> *Q. And that insofar as the Court made orders in the libel proceedings in 2003, those were orders made in circumstances where you were represented, matters proceeded in open Court and the Judge*

reached the decisions the Judge reached in relation to what disclosure of material or production of information there was to be. Isn't that right?

A: There was and we become aware because the newspaper Defendants did a discovery application on the day of the - the proceedings started on the Monday.

Q. Yes?

A. And we became aware that they had these documents a long time before and we will be bringing evidence on this point.

Q. All right. You say you will be bringing evidence on this point?

A. We will be bringing evidence on this point.

Q. Then what we will do is we will deal with that evidence when it arises, Mr. Bailey, but I want to suggest to you that there was no wrongdoing on the part of the State Defendants in the context of the libel trial?

A. Ah well, the State Defendants?

Q. You disagree with that?

A. I disagree with that. There was definitely, to put it at a very polite level, some level of collusion. I put it no stronger than that.

Q. Firstly can I suggest that that is, you may describe it as polite, but that is incorrect?

A. Well, I know it to be correct and we will be bringing evidence. There is actually an affidavit, just on this point, there is an affidavit within the libel appeals where Con Murphy addresses that in the form of an affidavit. I can make sure that's pulled out of the hat.

Q. Mr. Murphy is not available, he is deceased. You know that, you know that anything that he has recorded?

A. He made a sworn...(INTERJECTION).

Q. Is not admissible?

A. Is it, I don't know really, he made a sworn - is it, I don't know.

Q. Can I cross-examine the affidavit?

A. Yes.

Q. I can't, I can't cross-examine the affidavit?

A. Well, you should be able to.

Q. So, Mr. Bailey, in those circumstances the affidavit is not evidence in these proceedings?

A. Okay.

Q. I think you know that?

A. I didn't, I am sorry."

(b) In her evidence-in-chief on Day 18 p.76, the following exchange took place between Marie Farrell and counsel for the Plaintiff/Appellant:

"Q. Now as a consequence of receiving that subpoena did you do anything on the following day?

A. I rang the solicitors --

Q. Yes.

A. -- who had issued it and I told them I would not be appearing in Court.

Q. Was there contact made with you by anybody after that?

A. They told me, whoever I spoke to in the solicitors said that...(INTERJECTION)

Q. We don't want to know what they said but did somebody contact you the following few days after that?

A. Well the solicitors contacted me.

Q. Right?

A. I met them in Schull.

Q. Yes. Did you say anything to them?

A. I met them in a pub in Schull.

Q. Do you know who they were?

A. Karen Woods and Sinead Ryan.

Q. Right.

A. I told them that I would not be going to Court. I told them that, you know, that what I had to say might actually benefit Mr. Bailey more than it would benefit them.

Q. Yes?

A. I didn't go into any details.

Q. That was a brief conversation, was it?

A. I met them for about a half an hour, I had a coffee with them.

Q. Yes. Did you ascertain where your name was got, how your name was ascertained for subpoena purposes?

A. They told me they had all of the Garda statements.

Q. Yes. Did you do anything about that? Did you make a complaint to anybody?

A. I rang Superintendent Liam Horgan in Bantry.

Q. Yes. What did you say to him or what did you discuss with him?

A. I asked him why were statements handed over and he said that he didn't know anything about it, he had no control over it.

Q. Yes.

A. He said that he would get back to me.

Q. Did he discuss with you about the newspapers or

anything like that?

A. I can't remember."

(c) Under cross-examination, Ms Farrell gave the following evidence on Day 23 p.24:

"Q. I think that that libel case was upcoming quite considerably later in 2003. Is that correct?

A. Yes, I think so.

Q. And I think you have described various efforts to get you to attend the libel case, is that so?

A. Yes.

Q. And you suggest that Garda Kelleher attempted to get you to attend the libel case, that Superintendent Dwyer at some stage attempted to get you to attend the libel case and that a meeting was arranged between yourself and two solicitors in Schull in an effort to get you to attend the libel case. Is that correct?

A. Well, the two solicitors came to Schull to meet anybody that they had subpoenaed. It wasn't just me.

Q. Yes. What did you say happened when you met the solicitors?

A. I met them for a coffee and I told them I didn't want to go to Court.

Q. Yes?

A. And they said, like, once I had been subpoenaed I would have to go.

Q. Yes?

A. I think I asked them, I think they said that they had some of my statements. I can't remember the exact conversation but I can give you the gist of it. They had some of my statements and I asked them how they got them and they said they had the Garda file I think.

Q. They will say that that is absolutely not so?

A. No, that is...(INTERJECTION).

Q. They did not have any Garda file or any statements at that time?

A. They didn't have them with them but they told me they had access to them.

Q. They will say they didn't have them at all and that insofar as you suggest that, that that is not correct?

A. No, that is because I contacted Superintendent Liam Horgan in Bantry straight after meeting them and I asked him how come that they had got statements that I had given to the Gardaí, that I thought they were confidential.

Q. I think Superintendent Liam Horgan is dead, isn't that right?

A. Oh, I don't know.

Q. Sorry, I may be wrong, he may not be?

A. No.

Q. Sorry, it is Hogan who is dead?

A. Sorry.

Q. Can I suggest that at no time were you told that statements had been given to...(INTERJECTION)

A. No, I was. I was definitely told that.

Q. To anyone. I think that you were told by all parties that it was your obligation to attend Court when you got a summons and that that was an obligation which the Court was entitled to enforce. Is that correct?

A. I was told once I had been subpoenaed that I would have to turn up."

63. On Day 56 of the trial Ms. Cery Williams was asked:

*"**MR. MUNRO**: In relation to the libel trial and information about it. When the people came to ask you about the libel trial?*

A. Yes.

Q. Did you wonder where they got your name from, the lawyers, or did they say?

A. I presumed it was because I had made statements.

Q. To the Gardaí?

A. Yes."

64. Counsel for the plaintiffs referred us to evidence given by the retired Det. Supt. Dwyer on Day 58. Firstly in his direct evidence at p.47 he gave evidence to the effect that on the morning of the libel trial he had telephoned Ms. Farrell upon whom a witness summons had been served and who had told him that she was not going to go to court because of potential media publicity; that he explained to her that she had no choice but to go to court as a witness summons had been served on her; that he then offered to collect her at a named pub and bring her into the courthouse. Further that he arranged for a Garda on duty at the courthouse in Cork to get a taxi to come and collect her and gave her €20 to cover the taxi going home. Counsel also referred us to evidence given at p.58 on cross-examination to the effect that Mr. Dwyer had been in court for most of the hearing of the libel action and that there was also a Garda liaison officer present in court.

65. His submission on behalf of the plaintiff was that the evidence of the plaintiff and, in particular, Ms. Farrell when viewed in the context of the evidence of Det. Supt. Dwyer was sufficient evidence to leave the issue as to whether there had been disclosure by the gardaí to the jury. Whilst it was accepted that there was not direct evidence that the defendants in the libel action or their solicitors had obtained the witness statements from the Gardaí that there was sufficient evidence from which a jury might infer that they were in possession of the witness statements and had as a matter of probability obtained them from the Gardaí.

66. In relation to the evidence given by Ms. Farrell that she had been told by the solicitors for the defendant that they had her witness statement, it was submitted that as there was no objection at the time to such evidence and in effect acquiescence in Ms. Farrell giving that evidence before the jury that it was admissible evidence. In this respect he relied upon the following dicta of Birmingham J. in his judgment in *C McD v. Ireland* [2017] IECA 81 at para. 35:

"35. The complaint is made that the section permits the introduction of hearsay evidence and indeed allows the determination of the application on the basis of hearsay evidence. However, on closer analysis, the section is not about the introduction of hearsay. What the Chief Superintendent was told outside the court is not admissible in evidence. Even if a Chief Superintendent was prepared to say what someone else told him, perhaps because his source was now dead or for some other reason not amenable to retribution, that evidence would not be admissible absent acquiescence or consent by the party entitled to object. However, what is admissible by virtue of the statute is the belief or opinion formed by the Chief Superintendent. That is not hearsay. However, and but for the statute, it would have been inadmissible as opinion evidence offered by a non-expert witness."

67. In summary, the evidence adduced at the trial which may be considered potentially to be relevant evidence to the issues as to whether the media defendants in the libel trial or their solicitors either had the Garda statements, the Garda file or a list of the persons who gave statements to the Gardaí or the issue as to whether if they did so the Gardaí had given or disclosed such statements or information to them in summary was:

1. The evidence of Mr. Bailey that he became aware that the newspaper defendants had the statements a long time before the hearing of the libel action.

2. The evidence of Ms. Farrell that:

(i) she was told by the solicitors that they had all the statements;

(ii) she asked them how they got them and she thinks they said they had the Garda file or that they had access to them; and

(iii) the solicitors did not have them with them when speaking to her, and

(iv) she was definite that she was told that the statements had been given to them.

3. Ms. Williams presumed that the solicitors had her name because she made a statement to the Gardaí.

68. The evidence of the retired Det Supt Dwyer is not evidence of either the fact that the solicitors had the statements or names or that they were given same by the gardaí. At best it is evidence of cooperation by the Gardaí in relation to the libel action by ensuring that Ms. Farrell would come and give evidence at the hearing.

69. The evidence of Mr. Bailey cannot, in the Court's view, be considered to be evidence probative of the fact that the Gardaí gave or disclosed to the media defendants or their solicitors the statements.

70. The evidence of Ms. Farrell as to what she was told by the solicitors for the media defendants requires consideration. If the issue had been specifically addressed in the course of the ruling by the trial judge it does not appear to the Court that he could have ruled that the evidence was admissible as evidence of the truth of the statements which she said were made to her by reason of the rule against hearsay. In accordance with the rule against hearsay the evidence of Ms. Farrell as to the speaking of such words to her is, subject to any relevant exception, inadmissible to prove the truth of the facts which the statements assert.

71. The rule against hearsay was succinctly explained by Kingsmill Moore J. in *Cullen v. Clarke* [1963] I.R. 368, 378 when he stated:

> *"[I]t is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert. … This is the rule known as the rule against hearsay."*

72. Counsel for the respondents submit that in application of this rule the testimony of Ms. Farrell of the words spoken to her by the solicitors for the media defendants is inadmissible to prove the truth of the facts asserted by such statements.

73. Counsel for the plaintiff primarily relied upon the fact that there was no objection to this evidence at the time it was given and that it was elicited in cross-examination.

74. The facts that this testimony was given in cross-examination, having regard to the question asked, namely "what did you say happened when you met the solicitors?" does not, in the Court's view, provide any basis upon which the testified statements from the solicitors should, exceptionally, be regarded as admissible to prove the truth of the facts in such statements.

75. In relation to the absence of an objection at the time, counsel for the plaintiff relied upon the statement by Birmingham J. in *C McD v. Ireland* in the extract set out above that evidence by a Chief Superintendent of what someone else told him would not be admissible "absent acquiescence or consent by the party entitled to object".

76. The Court recognises that there may be circumstances in which a party by either acquiescence or consent may lose a right to object to the admissibility of evidence which would properly be considered as inadmissible by reason of the hearsay rule. However, it does not follow that a failure to object when a person gives evidence of a statement made to him or her will, necessarily, render such statement admissible as evidence of the truth of the facts contained in the statement. This follows from the proper understanding of the rule against hearsay. McGrath: *Evidence* (2005 Thompson Round Hall) at p. 214 having quoted the extract from Kingsmill Moore J. *in Cullen v. Clarke* as set out above put it thus:

> *"This passage serves to emphasise a cardinal and, at times, misunderstood, aspect of the rule against hearsay which is that it does not exclude all out-of-court statements, just those that are offered for the purpose of proving the truth of their contents. However, as will be seen below, the line between out-of-court statements that are properly to be regarded as hearsay and those that fall outside the ambit of the rule is not easy to draw and there are a number of issues that are still to be resolved in this jurisdiction as to where that line should be drawn."*

Later at p.219 having repeated the extract from Kingsmill Moore J. in *Cullen v. Clarke* they referred to a well known passage from the judgment of Lord Wilberforce in *Ratten v. R.* [1972] A.C. 378 where he drew a distinction between hearsay and original evidence at p.387:

> *"The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on and then a single 'testimonially', i.e., as establishing some fact narrated by the words."*

McGrath then opines:

> *"Thus, the dividing line between out-of-court statements that are hearsay and prima facie inadmissible and those that are admissible as evidence to prove that they were made is drawn according to the purpose for which the statement is being tendered."*

77. The plaintiff's claim in these proceedings in the High Court was multi-faceted. There were many claims and issues. In the context of this trial the Court has concluded that the fact that there was no objection made, at the time, to Ms. Farrell giving evidence of the statements allegedly made to her by the solicitors for the defendant cannot mean that they either acquiesced or consented to such evidence of the words allegedly spoken being treated as admissible evidence to establish as put by Lord Wilberforce "some fact narrated by the words". Accordingly such evidence should not be considered as admissible to prove any fact of disclosure by the Gardaí.

78. The Court has accordingly concluded that the only potentially relevant admissible evidence of the fact that the media defendants or their solicitors even had the witness statements in advance of the hearing in the Circuit Court was the bald statement of Mr. Bailey that he became aware of that fact. The Court has also concluded that there is no admissible direct evidence of the alleged fact that the Gardaí disclosed or gave such statements or a list of the names of persons who had given statements to the media defendants or their solicitors. The Court has furthermore concluded that the evidence of Mr. Bailey that he was aware of this alleged fact is not sufficient evidence to leave to the jury a question as to whether the Gardaí had disclosed or given such statements to the media defendants or their solicitors. It would not be a permissible inference for the jury to draw from Mr. Bailey's awareness of the alleged fact. Finally the evidence of Ms Williams is only of an assumption made by her that the solicitors had her name because she made a statement to the Gardaí which does not take the matter further from the plaintiff's point of view.

79. Accordingly the Court has concluded that if, as appears probable, the trial judge failed to give a ruling on the question as to whether an issue or issues should be left to the jury in relation to the alleged claim for damages for breach of a constitutional right to privacy by reason of alleged unlawful disclosures of confidential information namely witness statements or a list of names of persons who gave statements by the Gardaí, such failure was not such as to have prejudiced the plaintiff in his trial. This is so because this Court has concluded that if the issue was specifically addressed with the more focused submissions such as have now been made to this Court since the delivery of the first judgment that the trial judge should have ruled that there was no admissible evidence of an alleged disclosure by the Gardaí of the witness statements or list of names and no evidence given from which it would be permissible for the jury to infer such fact.

80. It follows that in the exceptional circumstances set out above the Court must now, in the interests of justice, change the decision made in the first judgment as set out at para. 122 to allow the appeal in respect the claim in respect of the alleged wrongful disclosure of the information by the Gardaí in advance of the defamation proceedings in December, 2003 and directing a retrial in respect of that part only of the plaintiff's claim.

81. The decision and order of the Court for the reasons set out in the first judgment and this judgment is that the appeal of the plaintiff and cross appeal of the respondents be dismissed.