THE HIGH COURT

[2013 No.98P]

BETWEEN

SEAN GALLAGHER

PLAINTIFF

AND

RAIDIÓ TEILIFÍS ÉIREANN

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on the 11th April 2017

Introduction

1. The defendant ('RTÉ') moves for an order dismissing the present action for failure to make proper discovery. As an alternative, RTÉ seeks an order staying the proceedings pending the making of proper discovery. As a further alternative, RTÉ seeks an order directing the plaintiff ('Mr Gallagher') to swear a further supplemental affidavit of discovery in accordance with certain proposed directions. Mr Gallagher opposes the grant of any of those reliefs.

2. At the hearing of the application, RTÉ's position had evolved in that, without expressly abandoning its claim to any of the reliefs just described, it asked the Court to consider making an Order appointing an independent expert on electronic discovery to oversee the completion of the discovery process by Mr Gallagher and fixing Mr Gallagher with the associated costs and with the costs of the present application. Mr Gallagher's position had also evolved in that, in the course of the hearing, by letter from his solicitors dated 29 April 2016, he made an open offer to resolve the application. Essentially, the offer was that Mr Gallagher would swear an additional affidavit addressing the issues concerning his discovery that have been raised by RTÉ, and exhibiting a report in that regard by his information technology ('IT') consultants, or that Mr Gallagher would consent to the appointment of an independent IT expert to oversee his discovery process and that he would defray up to €15,000 of the associated cost (or 50% of that cost, if greater than that amount), subject to agreement that such cost would form part of his overall legal costs for the purpose of O. 99 of the Rules of the Superior Courts ('RSC'), 'consistent with the provisions of O. 31, r. 12(3)(c)' of those rules.

The underlying claim

3. A plenary summons issued on 4 January 2013 and Mr Gallagher delivered a statement of claim on the same date.

4. Mr Gallagher's claim primarily relates to the conduct by RTÉ of a televised debate ('the debate') in which he participated on 24 October 2011. RTÉ is a statutory corporation and is the national public broadcaster on television, radio and, in more recent years, the internet. The debate occurred in the context of the 2011 Irish Presidential election ('the election') in which Mr Gallagher was nominated as a candidate on 27 September 2011. Polling in that election took place on 27 October 2011. Mr Gallagher was not elected.

5. Mr Gallagher expressly pleads that, prior to the debate, in a number of identified opinion polls taken from the middle of October 2011 onwards, he was the clear frontrunner amongst the candidates.

6. In the course of the debate, the presenter questioned Mr Gallagher about a statement that had just been made concerning him on a social media account purporting to be that of the official campaign of another candidate ('the statement').

7. Mr Gallagher claims that the statement concerned was put to him with the express purpose of undermining his credibility and that, in publishing it in that way, RTÉ acted wrongfully or negligently.

8. Mr Gallagher contends that RTÉ aggravated its wrongful or negligent conduct towards him by rebroadcasting extracts from the debate in the course of a radio programme the following morning.

9. Mr Gallagher pleads, among other particulars of the wrongful conduct he alleges, that RTÉ directed and edited the debate with the improper aim of altering the course of the election to promote the electoral chances of another candidate and to damage those of Mr Gallagher. Mr Gallagher also pleads that the alleged wrongful conduct of RTÉ constituted targeted malice that was specifically intended to injure and damage him.

10. Mr Gallagher further pleads that the marked decline between his projected share of the first preference votes in the various opinion polls upon which he relies and his actual share of the first preference votes cast in the election was significantly caused, or contributed to, by RTÉ's wrongful or negligent conduct towards him.

11. Mr Gallagher asserts that he made a complaint to the Broadcasting Compliance Committee ('the Committee') of the Broadcasting Authority of Ireland ('BAI'), which was upheld in a decision dated 7 March 2012, in that the said Committee deemed the broadcast of the statement and its re-broadcast on radio the following day without clarification to be unfair to him.

12. Mr Gallagher seeks two declarations: first, one that the broadcast of the debate was neither objective nor impartial nor fair to his interests; and second, one that the said broadcast was deliberately and unfairly edited, presented and directed by RTÉ in order to damage his prospects in the election. Mr Gallagher also claims damages, including aggravated or exemplary damages, or both, against RTÉ for negligence and breach of duty (including breach of statutory duty), and for misfeasance in public office.

13. RTÉ delivered a defence on 27 June 2013.

14. It admits the broadcast of the debate and, in the course of it, the attribution of the statement to the social media account concerned. It denies that it acted wrongfully or negligently, or that it is guilty of misfeasance in public office.

15. RTÉ specifically denies that the decline in Mr Gallagher's share of first preference votes, between the carrying out of the relevant opinion polls prior to the election and the conduct of the election poll itself, was caused by any wrongdoing or negligence on its part.

16. RTÉ admits that the BAI Committee gave its decision on 7 March 2012 on a complaint made by Mr Gallagher but disputes that his

pleas concerning that decision are accurate or complete. RTÉ further admits that, prior to the commencement of the present action, it acknowledged the findings of the Committee and apologised to Mr Gallagher for the mistakes it had made; in particular, for its failure to verify the origin of the statement or to broadcast the fact that the provenance of the statement was in issue and, in those respects, for its failure to comply with its obligation of fairness towards Mr Gallagher.

17. RTÉ denies the occurrence of the consequential loss or damage claimed by Mr Gallagher or that it bears any responsibility for any such loss or damage as may have occurred. RTÉ pleads, alternatively, that any loss of opportunity, loss of electoral prospects or reputational damage that Mr Gallagher did suffer was caused by his own conduct in respect of the underlying controversy or controversies to which the statement at issue was alleged to be germane, or by his own conduct during the campaign, including his performance during the debate, or through some combination of those factors.

Procedural background
18. Through their respective solicitors, RTÉ wrote to Mr Gallagher on 28 November 2013 requesting that he make voluntary discovery of various identified categories of documentation. Agreement could not be reached on that request and RTÉ issued a motion seeking an order directing Mr Gallagher to make discovery. The parties later did reach agreement and, on 2 May 2014, an Order was made on consent directing the discovery of six identified categories of documentation by Mr Gallagher.

19. Mr Gallagher swore an affidavit of discovery on 21 November 2014. RTÉ wrote to Mr Gallagher on 1 April 2015 expressing dissatisfaction with the form and content of that affidavit and requiring Mr Gallagher to swear a supplemental affidavit in order to make what RTÉ considered to be full and proper discovery. On 15 June 2015, RTÉ wrote again, threatening a further application to the court in the absence of a satisfactory response. On 3 July 2015, Mr Gallagher served a notice of trial. The present motion issued on 12 October 2015, initially returnable for 9 November 2015. It is grounded on an affidavit sworn on 12 October 2015 by Trish Whelan, a solicitor in the RTÉ Solicitors' Office. Mr Gallagher swore an affidavit in reply on 16 November 2015 in which he acknowledged that there were frailties and errors in his original affidavit of discovery and proposed to swear a supplemental one. Against that background, the motion was adjourned twice until 10 December 2015, when Mr Gallagher was directed to furnish a supplemental affidavit of discovery on or before 19 December 2015 and the motion was then further adjourned to 19 January 2016 on that basis.

20. Mr Gallagher swore a supplemental affidavit of discovery on 17 December 2015.

21. On 19 January 2016, RTÉ wrote to Mr Gallagher expressing its dissatisfaction with the form and content of that supplemental affidavit and, by extension, its continuing dissatisfaction with the adequacy of the discovery he has made. RTÉ wrote again on 3 February 2016, raising further issues on the adequacy of that discovery. Ms Whelan swore a second affidavit on 16 February 2016, detailing RTÉ's complaints concerning the asserted continuing inadequacy of Mr Gallagher's discovery in the context of the present application. It was supplemented by an affidavit sworn on 17 February 2016 by Tom Gilsenan, the principal and director of a business named Informa, which provides information management services to include all elements of the Electronic Reference Discovery Model ('the EDRM model'), a widely adopted standard in the emerging field of electronic discovery ('e-discovery'). Mr Gallagher swore a further affidavit in response on 3 March 2016.

The discovery ordered
22. In the Order of the Court made on 2 May 2014, Mr Gallagher was directed to make discovery of six separate categories of documentation, now or formerly in his possession. In very broad outline, those categories comprise:

> (i) All documents which refer to or evidence: (a) polls or research, or both, conducted by or on behalf of Mr Gallagher concerning the prospects of his election as President of Ireland or issues or controversies that could reduce those prospects; and (b) the reasons or possible reasons why he was not elected President of Ireland.
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> (ii) All documents put into the public domain by or on behalf of Mr Gallagher which record or refer to or evidence: (a) the business or personal transactions or controversies in respect of which questions were put to him during his election campaign; and (b) all communications or statements made by him or on his behalf in respect of those transactions or controversies.
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> (iii) All documents which record or refer to or evidence statements made by Mr Gallagher during the election campaign to include: those touching on the nature and extent of his role and activities concerning the Fianna Fáil political party, including (a) those touching on the assertion that Mr Gallagher arranged for a person or person to meet the Taoiseach in exchange for payment to that party, and (b) those touching on the assertion that Mr Gallagher called to the house of one such person to deliver a photograph, or to collect money, or to collect a cheque for €5,000, or any combination of those things.
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> (iv) All documents which record or refer to or evidence the preparation that Mr Gallagher undertook for: (a) the style of questioning expected in the debate, and (b) the issues likely to be raised in the debate, including that of payments made or a cheque delivered in exchange for a meeting or dinner with the Taoiseach.
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> (v) All documents which record or refer to or evidence the targeted malice of RTÉ towards Mr Gallagher; the intention of RTÉ to injure or damage him; the ulterior motive of RTÉ to alter the course of the election, or damage the chances of Mr Gallagher or promote those of another candidate in that election; and the acts and omissions of RTÉ that were outside its statutory powers and duties.
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> (vi) All documents which record or refer to or evidence: (a) the social media statement that is the subject of Mr Gallagher's claim; and (b) the misattribution of that statement.

23. In its request for voluntary discovery of 28 November 2013, which culminated in the consent Order just described, RTÉ did point out that its use of the term 'documents' in that request encompassed 'each and every document of any description, medium or format (whether electronic or otherwise) including (but not limited to) reports, briefing documents, advices, opinions, memoranda, databases, correspondence, diary entries, e-mails, records [and] notes (including manuscript notes and aides memoire).' In material part, that assertion does no more than reflect the express provision of O. 31, r. 12(13) of the RSC, whereby, for the purposes of that rule, 'documents' includes 'all electronically stored information.'

24. But there is no suggestion on the face of the Order made on 2 May 2014 that the discovery ordered, or any party of that discovery, was being directed pursuant to the provisions of O. 31, r. 12(2)(c) of the RSC. That is perhaps unsurprising in view of the difficulty identified by the authors of Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (2nd edn., 2013) (at para. 20-15) in respect of the requirement of O. 31, r. 12(6)(a)(iii) whereby, when the discovery sought includes electronically stored information,

a party seeking voluntary discovery should specify whether its production is sought in searchable form. As might be anticipated, the difficulty is that in most cases, a party will be unaware of the form and contents of his opponent's documents and whether they include electronically stored information.

25. Order 31, rule 12(2)(c) of the RSC permits the Court, when ordering discovery that includes electronically stored information, to make one or other of two further specific orders depending on whether the said information is stored in searchable form. Order 31, r. 12(3)(b) provides that an Order made under sub-r. (2)(c) may include a provision for inspection and searching of documents to be undertaken by an independent expert. Sub-rule (3)(c) provides that the party seeking such an order shall indemnify that expert in respect of his or her fees and expenses, which fees and expenses shall form part of the costs of that party for the purpose of O. 99.

The issues arising

26. In the course of argument, Counsel for RTÉ identified 17 separate asserted deficiencies in the discovery so far made by Mr Gallagher. However, it seems to me that those asserted deficiencies can be conveniently grouped together and addressed under three broad headings: first, failure to make discovery in the appropriate form; second, failure to make proper discovery of the electronically stored information that Mr Gallagher now acknowledges he holds (or has held); and third, failure to make proper discovery by reference to a number of specific criticisms or admissions. Mr Gallagher rejects all, or almost all, of the relevant criticisms and complaints.

i. the form of discovery

27. Mr Gallagher was ordered to make discovery on 2 May 2014. He swore an affidavit of discovery on 21 November 2014 ('the first discovery affidavit'), just over six months later. That affidavit lists 80 documents in the first part of the first schedule and none in the second part. In the second schedule, it simply recites: 'Miscellaneous privileged solicitor-client correspondence from January 2014 to date in relation to the discovery categories sought.'

28. Order 31, rule 12(13) of the RSC requires an affidavit of discovery to be made in the form prescribed in the relevant appendix to those rules (Form No. 10 in Appendix C). In the first and second parts of the first schedule to that affidavit, a deponent is required to list the documents (and electronically stored information) in his or her possession, power or procurement. The deponent is to list in the second part of that first schedule those documents that he objects to the production of (as subject to an applicable privilege against production or inspection). In the second schedule to that affidavit, the deponent is to list those documents (and electronically stored information) that he or she has had in his or her possession, power or procurement but does not have any longer. The prescribed form of affidavit requires the deponent to state when the documents in the second schedule were last in his or her possession; what has become of them since; and in whose possession they now are. The prescribed form of affidavit also includes a standard final paragraph confirming the deponent's understanding of the nature and scope of the discovery obligation.

29. In his affidavit sworn on 16 November 2015, Mr Gallagher acknowledges that his first discovery affidavit omitted the standard final paragraph, before going on to explain that the recital comprising the second schedule was mistakenly placed there and should have been included instead under the second part of the first schedule, as an assertion of legal professional privilege against the production or inspection of the documents it describes. Mr Gallagher averred that those deficiencies would be addressed in a supplemental affidavit of discovery.

30. As previously described, Mr Gallagher swore a supplemental affidavit of discovery on 17 December 2015 ('the second discovery affidavit'), subsequent to the issue of the present motion. That affidavit is more discursive in its contents than the form of discovery affidavit prescribed under the rules, in that it seeks to explain the steps that Mr Gallagher had taken to comply with his discovery obligations. It does include the standard final paragraph. In the first part of the first schedule, it lists a further 70 documents. The second part of that schedule simply recites: 'Miscellaneous litigation privileged solicitor-client correspondence from January 2014 to date.' Just three documents are listed in the second schedule; each is an e-mail from RTÉ to the Gallagher campaign, the omission of which from the first affidavit of discovery had been flagged in correspondence and on affidavit by RTÉ.

31. I am satisfied, in respect of the form of Mr Gallagher's first and second affidavits of discovery and, in particular, the identification of the documentation over which he wishes to claim privilege, that each of those affidavits is deficient. The manner in which privilege must be asserted was made clear by the Supreme Court in *Bula Ltd v Crowley* [1991] 1 IR 220 (at 222). What is required is 'an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad head of privilege being claimed for it.' It is no answer to say, as Mr Gallagher does, in respect of a failure to comply with this requirement that 'there could be no litigation utility to scheduling clearly privileged communications at length.' There is an obvious litigation utility to such scheduling; it assists an opponent in forming a view concerning whether privilege is being properly claimed in respect of each identified document and, accordingly, whether that claim is, or is not, susceptible to challenge.

ii. electronically stored information

32. In his affidavit sworn on 16 November 2015 in response to the present motion and in his supplemental affidavit of discovery sworn on 17 December 2015, Mr Gallagher provided an explanation of the process whereby he sought to comply with the discovery order of 2 May 2014. That explanation was elaborated upon in his affidavit of 20 March 2016. In short summary, it is this.

33. An information technology company named ICT Project Management Limited ('ICT') provided the Gallagher campaign with a server from which to run the e-mail accounts of the various campaign team members ('the server'). The device concerned was not, strictly speaking, a 'server' at all but, rather, a network-attached storage ('NAS') device, suggested by ICT as a more economical alternative to a conventional server. Its primary purpose was to act as a shared drive or location for campaign team documents. The information on the server was not backed up. After the election, the server, a pc and a laptop were removed from the campaign's headquarters at St. Stephen's Green, Dublin, and were installed in Mr Gallagher's home.

34. The e-mail accounts of campaign team members had been hosted 'in the cloud' on a service named 'Google Apps for Business.' There was no local back-up for those e-mail accounts either on the server or any other device. Shortly after the election, in the first fortnight of November 2011, a decision was made to retire all bar five of the campaign's 24 e-mail accounts. Mr Gallagher has identified the five e-mail accounts that were retained. Prior to retiring the other 19 accounts, ICT exported their contents to the server in 'MBox file format' using 'Backupify' software. Mbox is a generic term for a family of related file formats used for holding or archiving collections of e-mail messages. Backupify is a software company that provides 'cloud to cloud data backup' software and services for use in conjunction with, amongst other products, Google Apps.

35. The contents of the five remaining live e-mail accounts were not exported to the server. Instead, they were simply retained by Mr Gallagher 'for possible future use.' One of them was the campaign's 'press' e-mail account. It had been used by the campaign's press officer, Suzanne Collins. Mr Gallagher avers that it soon became apparent that there was no need to retain all five remaining accounts and it was decided that the 'press' account should also be retired. According to Mr Gallagher, 'it lapsed in August 2012 when it was not renewed when it would have come up for annual renewal.' It was allowed to lapse without having been backed up prior to expiry. On 12 September 2012, the following month, Mr Gallagher's solicitors wrote a letter before action on his behalf to RTÉ.

36. By the time Mr Gallagher came to make inquiries concerning the contents of the press account 'at the time of making discovery', his IT advice was that, by then, Google would have purged the contents of the account and that, in consequence, 'it would be fruitless to pursue Google at this remove.' Subsequent to the issue of the present motion, Mr Gallagher made specific inquiries and was informed by Google support that it is not possible to recover the contents of one of their e-mail accounts more than thirty days after it has been closed.

37. The preceding narrative is drawn primarily from the affidavit that Mr Gallagher swore on 3 March 2016. In his earlier affidavit, sworn on 16 November 2015, Mr Gallagher averred that he had initially assumed that all the relevant material had been retained on the server, and that the true position only became apparent to him when he 'went to consult with IT experts as to the potential reasons for the omission of documents from [his] original discovery.' This implies that Mr Gallagher chose not to consult with IT experts in originally compiling his discovery. Indeed, Mr Gallagher acknowledged as much in that earlier affidavit when he confirmed that he was only then 'in the process of engaging IT consultants, ICT Project Management', to assist him in a review of his discovery. However, it must be said that the latter averment is not easy to reconcile with the averment in Mr Gallagher's second affidavit of discovery, sworn on 17 December 2015, that: 'Since April 2015 and more intensively over the last few months I have engaged with ICT in reviewing and re-examining the potentially relevant documents, records and electronic information, together with archived data held by ICT.'

38. It does seem to me to be a matter of some legitimate concern that Mr Gallagher allowed an e-mail account of, at the very least, significant potential relevance to the matters likely to be in issue in these proceedings to lapse one moth prior to sending the letter before action in this case.

39. In his second or supplemental affidavit of discovery, sworn on 17 December 2015, having reiterated that the contents of the 19 e-mail accounts that he did not intend to retain had been exported to the server in Mbox format at the conclusion of the campaign, Mr Gallagher goes on to aver that '[m]any of the emails as now stored on the NAS device are not in readily searchable format and it has been necessary to open e-mails individually to examine their relevance and print them off.' In an affidavit sworn on 16 February 2016, Ms Whelan on behalf of RTÉ quotes from her letter of 19 January 2016, which includes the response:

> 'As your client and his IT consultant must be aware, Mbox files are simply an archive format and can easily be converted using any number of free software tools into a searchable format. Your client's assertion that documents stored on the NAS device are not readily searchable is untenable.'

This drew the following retort from Mr Gallagher in his affidavit sworn on 3 March 2016:

'I am informed and acknowledge that appropriate software can be obtained for the purposes of converting Mbox files into a searchable format. However, the discovery process undertaken was to manually review the emails individually in an email account. It is undoubtedly laborious to review this volume of documents manually. I do not accept that individual inspection of documents is a defective means of compliance.'

That response does seem to miss the point, which was that it was incorrect to aver that it was necessary to manually review the relevant emails, not that it was wrong to manually review them. The erroneous assertion that it was necessary to do so, which I assume was not deliberate, implies that Mr Gallagher had still not obtained the appropriate expert advice when he came to swear his supplemental affidavit of discovery.

40. RTÉ makes a further complaint that many of the documents that Mr Gallagher has discovered have not been produced in their original format or have been edited. Mr Gallagher avers in response that he has not engaged in any editing of the documentation he has discovered. Rather, he asserts, his campaign used the Microsoft Word computer program to produce document templates for press releases and press query responses. Those templates were adapted or edited by campaign workers as the occasion warranted, and a soft copy of each such modified template was retained (presumably, on the server, although that is not expressly stated). Mr Gallagher has discovered a printed hard copy of each of those soft copy documents. RTÉ replies that no such explanation was proffered in conjunction with the original discovery of those documents and, more pointedly, complains that none of the accompanying metadata (for example, date of inception of each such template and date of its modification to produce each such document) has been discovered, nor has the e-mail to which each completed press release or press query response would, presumably, have been attached.

iii. e-discovery

41. From the affidavits that Mr Gallagher has sworn in opposition to this application and from his two affidavits of discovery, it is evident that much of the material that he has disclosed so far comprises, or derives from, electronically stored information.

42. Beyond the provisions of O. 31, r. 12(1)(c), (2)(c), (3) and (6)(a)(iii) of the RSC already briefly alluded to, there is no other rule of court nor any practice direction governing e-discovery. As Abrahamson, Dwyer and Fitzpatrick note at para. 20-05 of the edition of their work already cited, '[i]nstead, it has been left to practitioners, through trial and error, to develop informal common practices in collating, reviewing and disclosing electronically stored information.' Those authors instance the then extant '*Good practice guide to electronic discovery in Ireland*', April 16, 2013, eDiscovery Group of Ireland, as a comprehensive statement of best practice in e-discovery. RTÉ invokes the more recent '*Good Practice Discovery Guide*', v2.0-November 2015, Commercial Litigation Association of Ireland ('CLAI') as an appropriate benchmark against which to assess the adequacy of Mr Gallagher's discovery.

43. In his most recent affidavit, Mr Gallagher acknowledges the frequent value of those guidelines in commercial cases but points out that this is not a commercial case. Further, he observes that such guidelines do not have the force of law and that he is not obliged to adhere to them in the context of the discovery that he has been ordered to make. Each of those observations is unimpeachable as far as it goes. However, in my judgment, the guidelines can provide a useful tool in many actions where the discovery of electronically stored information is in issue, although obviously not in all.

44. Mr Gallagher points out more than once in the affidavits he has sworn in the present application that his campaign was a

grassroots, community-based one, without enormous financial resources. Nevertheless, he also expressly pleads that he obtained the indorsement of four local authorities for the purposes of his nomination as a candidate in the election. The campaign that followed was, by definition, a substantial, nationwide endeavour for election to the highest office in the State. Mr Gallagher pleads that RTÉ's conduct caused, or significantly contributed to, the marked decline in his share of the vote in that presidential election; RTÉ pleads in response that any such decline as did occur was not the result of its conduct but rather of Mr Gallagher's own conduct in the way his campaign dealt with the controversies that arose concerning him or in the way he performed as a candidate during the campaign and in the debate, or both. It does not seem unreasonable, in the context of the resolution of issues of such significance, to require that an appropriately rigorous approach should be taken to the proper discovery of electronically stored information in the possession or power of either party.

45. After all, as Counsel for RTÉ was not slow to point out, Mr Gallagher, through his solicitors, has expressly quoted from the Commercial Court Practitioner's Handbook (2011), also published by the CLAI, in his critique of the electronic discovery already made by RTÉ.

46. In England and Wales, the Commercial Court User's Committee there set up a working group on electronic disclosure under the chairmanship of the Honourable Mr Justice Cresswell. The Cresswell Committee reported on 5 October 2004. In setting out the relevant legal background in that jurisdiction, the Committee noted that the litmus test in considering the extent of the duty of search where discovery is ordered is that of reasonableness, which has the virtue of flexibility and which takes account of the overriding objective of enabling the court to deal with cases justly and at proportionate cost. That reflects the position in this jurisdiction, for as Budd J. explained in *Atlantic Shellfish Ltd v Cork County Council* [2006] IEHC 215:

> 'An order for discovery under the [RSC] carries with it the duty to search archives of records or files diligently for material documents including computer records… a party is required to make a reasonable search for documents falling within the scope of the order.'

47. Different guidelines employ different classifications of electronically stored information or 'data types.' For example, the CLAI Good Practice Discovery Guide, already cited, identifies four data types: active, inactive, residual and legacy data. The Creswell Committee, largely borrowing the categorisation adopted by Scheindlin J. in the U.S. Federal District Court case of *Zubulake v UBS Warburg LLC 217 F.R.D. 309* (S.D.N.Y. 2003), posits five: active or online data; embedded data; replicant data; back-up data; and residual data. 'Inactive' or 'back-up' data includes data that has been electronically backed-up, stored or archived. 'Embedded' data includes 'metadata', an example of which would be the information typically stored about a document produced by a word processing programme, such as the identity of its creator, the date of its creation, the identity of any person who edits it, the date or dates of any such editing, the identity of any person who accesses it, and the date or dates upon which it has been accessed, and so on.

48. Commenting on the categorisation of electronically stored information suggested in the Cresswell Report, Abrahamson, Dwyer and Fitzpatrick conclude (at para. 20-09 of the work already cited):

> 'Thus, electronically stored information is not simply limited to documents as they appear on-screen and which can be printed out. Instead, it also refers to all previous drafts of those documents or e-mails, as well as all metadata regarding the creation and characteristics of the document itself.'

49. In *Thema Intl. Fund v HSBC Inst. Trust Services (Ireland) Ltd* [2012] 3 IR 528 (at 538), Clarke J. was careful to observe that the court should not be prescriptive in relation to the way in which discovery is to be approached in every case of any complexity or where the scale of discovery is likely to be significant, before going on to express the view (at 539) that proportionality must be a relevant consideration when the court has to determine the way in which a party is to comply with its discovery obligations. In that case, a four-stage process had been utilised by the party making discovery comprising: (a) retrieval; (b) uploading and de-duplication; (c) search; and (d) review.

50. Commenting on the 'retrieval' stage of the process, Clarke J. noted that it is necessary to identify the so called 'universe' of documents which might conceivably have some relevance to the case. That can entail establishing, through appropriate questionnaires directed to the personnel involved, the location of relevant documentation and the identity of persons who may have information in that regard, followed by the assembly of the material thereby identified for review. Where large quantities of documentation or information are involved, it may be necessary, prior to review, to interpose the other stages envisaged i.e. the uploading of the materials into a searchable database, the excision of unnecessary duplication within the body of those materials, and the identification of the relevant documentation or information on the database through the application of appropriate search terms and, perhaps also, using technology assisted review ('TAR') – i.e. the application of software employing algorithms that predict relevance based on a comparison with previously encoded material where the pool of potentially relevant documents is very large; see *Irish Bank Resolution Corp. v Quinn & Ors* [2015] IEHC 175. Whether the pool of potentially relevant documentation or information held by Mr Gallagher is large enough to warrant the application of any such intermediate stage in the electronic discovery process here seems to me to be, at present, unclear.

iv. the discovery so far made by Mr Gallagher

51. Mr Gallagher first swore an affidavit of discovery on 21 November 2014, 22 months after he commenced these proceedings, almost a year after RTÉ wrote to him to request voluntary discovery, and over six months after the Court ordered him to do so. Mr Gallagher swore a supplemental affidavit of discovery on 17 December 2015, over nine months after RTÉ required him to do so and only after RTÉ issued a motion to have the proceedings struck out for his failure to make proper discovery, even though, surprisingly in the circumstances, he had served a notice of trial on 3 July 2015.

52. In the first affidavit that he swore on 16 November 2015 in opposition to that application, Mr Gallagher frankly acknowledged that there were frailties in his original discovery, subsequently conceded as 'errors' in his supplemental discovery affidavit sworn on 17 December 2015. In that first affidavit, by way of explanation, Mr Gallagher averred that he had taken primary responsibility for effecting compliance with his discovery obligations as 'I do not have significant resources to expend on IT experts nor on legal representatives to carry out and review all discoverable documents.' There are several difficulties with that terse explanation. The first is that Mr Gallagher provides no information concerning the scope of the discovery exercise he had taken personal responsibility for conducting and, thus, no indication of the estimated cost of obtaining the necessary technical and legal assistance to conduct it properly. Second, in asserting that he does not have significant resources to expend on that assistance, Mr Gallagher provides no evidence or information concerning his means. Third, Mr Gallagher does not address the obvious difficulty he faces in purporting to make proper discovery without the appropriate technical or legal assistance.

53. In relation to that third difficulty, Mr Gallagher avers that, in originally attempting to comply with his discovery obligations, he had

individually reviewed records on the server to assess their discoverability. That averment gave rise to some understandable disquiet on the part of RTÉ, since it appears to imply that no proper steps had been taken at the initial 'retrieval' stage of the process to identify the so called 'universe' of potentially relevant documents beyond whatever electronically stored information might be found on the server and that Mr Gallagher was purporting to carry out the discoverability review of such documents as might be found there without professional legal assistance.

54. Unsurprisingly, Mr Gallagher goes on to acknowledge that he had failed to access several relevant e-mail accounts in conducting that exercise and that IT professionals were subsequently consulted for the limited and specific purpose of reactivating certain other e-mail accounts and retrieving potentially relevant material from them. At that point, Mr Gallagher avers that he then began to examine those additional documents after which he consulted with his legal advisers concerning their relevancy. Mr Gallagher concludes the relevant portion of that affidavit by averring that he was then in the process of engaging IT consultants, [ICT], to assist with his review of those subsequently identified documents. Those averments are substantially repeated in Mr Gallagher's supplemental affidavit of discovery sworn on 17 December 2015.

55. In response to RTÉ's expression of disquiet, in his second affidavit, sworn on 3 March 2016, Mr Gallagher expands on his earlier evidence (or, depending on one's point of view, slightly alters that evidence), averring that he engaged extensively with his solicitors regarding the documents 'likely to be encompassed by the categories of documents, which were directed to be discovered', and that he sought ongoing advice through his solicitors in relation to documents where he was 'in doubt as to their discoverability.' In relation to the so called 'universe' of potentially discoverable documents, Mr Gallagher avers that, 'at the outset of the discovery review', inquiries were made of the four leading campaign team members as to whether they held, or were aware of, other relevant documentation.

56. It is noteworthy that none of Mr Gallagher's consultants or advisers has sworn an affidavit concerning the nature or extent of their involvement in that process of retrieval and review.

57. A 'without prejudice' meeting took place between the parties' respective IT experts at the beginning of March 2016 but it did not resolve the matters now at issue.

58. In my judgment, the procedure that Mr Gallagher describes falls some way short of the appropriate identification and review of potentially relevant documents that is an essential component of proper compliance with the obligation to make discovery.

59. In that regard, Counsel for Mr Gallagher places great reliance on the decision of the Supreme Court in *O'Leary v Volkswagen Group Ireland Ltd* [2015] IESC 35, in which the Supreme Court was satisfied that the judge at first instance was correct to find that certain deficiencies in a party's initial discovery of electronically stored information, once identified, had been assiduously addressed and rectified by the party concerned, such that no further order was required. The deficiencies in the approach to discovery adopted by Mr Gallagher in this case preclude a finding of that kind - i.e. that through the remedial steps he has taken he has complied with his discovery obligations in so far as is reasonably possible.

v. specific criticisms of the discovery so far made

60. RTÉ makes a number of specific complaints about the paucity of documentation so far discovered by Mr Gallagher. It submits that it is not credible that Mr Gallagher would have so few, or no, documents to discover referring to: polls or research conducted on his behalf concerning his electoral prospects; or the reasons or possible reasons for the failure of his campaign; or internal campaign communications referable to the controversies that arose concerning him; or his preparation for the debate; or the targeted malice and intention to injure and damage him that he attributes to RTÉ; or the social media statement broadcast during the debate about which he complains or the misattribution of that statement.

61. In response, Mr Gallagher avers that, as his election campaign had a single purpose, there was no focus on systematic archiving or preservation of documents or records. He conducted no polls, nor any research based on the opinion polls published in the media. He did not engage in any written communication about the reasons for the campaign's failure, nor was there any analysis of that failure. Internal campaign communications occurred primarily through oral discussions in person, at meetings and on the telephone, rather than by letter, memo, e-mail or text. No one should expect Mr Gallagher to have any documents evidencing RTÉ's targeted malice towards him or its intent to injure and damage him.

62. Mr Gallagher submits, correctly in my view, that in the context of an interlocutory application, the Court cannot resolve a dispute of fact, as it cannot make factual findings simply by comparing and contrasting the conflicting affidavits that have been filed; see *Green Pastures (Donegal) v Aurivo Co-operative Society & Anor*. [2014] IEHC 209 and *Boliden Tara Mines Limited v Cosgrove & Ors*. [2010] IESC 62. Nonetheless, a party is always entitled to move for further and better discovery by reference to the principles identified in *Sterling-Winthrop Group Ltd v Farbenfabriken Bayer A.G.* [1967] I.R. 97 and subsequent cases, although no such application is before the Court at present.

63. A specific issue arose in respect of the late discovery by Mr Gallagher of documents concerning the complaint that he made to the BAI, insofar as they refer to the social media statement that is the subject of Mr Gallagher's claim and the misattribution of that statement. Those documents were in a file maintained by the solicitors who represented Mr Gallagher in relation to that complaint. The complaint was made in November or December 2011 and, as noted earlier, the BAI Committee gave its decision on 7 March 2012. Mr Gallagher sent a letter before action to RTÉ on 12 September 2012 and brought these proceedings on 4 January 2013. RTE requested voluntary discovery on 28 November 2013. Gilligan J. made an order directing Mr Gallagher to make discovery on 2 May 2014. Mr Gallagher swore an affidavit of discovery on 21 November 2014. It did not identify or schedule those documents. They are scheduled to Mr Gallagher's supplemental affidavit of discovery, sworn on 17 December 2015. In his first affidavit in opposition to the present application, sworn on 16 November 2015, Mr Gallagher avers 'I have only received those files from my then solicitor since originally making discovery.' Mr Gallagher provides no explanation concerning when he first sought those files or what, if any difficulty, he encountered in obtaining them.

64. Mr Gallagher submits that, since the omission of those documents from his original discovery affidavit has now been addressed, it is immaterial to the present application. RTÉ contends that the unexplained omission of those documents from Mr Gallagher's original affidavit of discovery is a factor to be weighed in the balance in considering the adequacy of his approach to the discovery process generally.

The application to strike out

65. This aspect of the application can be shortly disposed of. The parties agree, and I accept, that there is a discretion vested in the Court to strike out a claim or defence for failure to comply with an order for discovery but that it is one that should only be exercised

where that failure is the result of wilful default or negligence; *Mercantile Credit Company of Ireland Ltd v Heelan* [1998] 1 IR 81. Even then, the Court must consider whether it is nevertheless possible to conduct a fair trial; *Hansfield Developments & Ors v Irish Asphalt Ltd & Ors* [2010] IEHC 32, following *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance plc & Anor* [2010] 4 I.R. 1. The jurisdiction exists to secure compliance with the orders of the court and not to punish errant litigants.

66. In opposing RTÉ's application for an order striking out the proceedings, Mr Gallagher submits that discovery on his side 'is far less likely to be determinative of the issues in the case' than that on the part of RTÉ. That is because Mr Gallagher contends that the case 'revolves around [RTÉ's] duty towards [him] to act impartially in its political coverage' and on RTÉ's failings in broadcasting the social media statement at issue during the debate. While those matters are, no doubt, significant issues in the case as pleaded, Mr Gallagher fails to acknowledge that, in pleading its defence to his claim for damages against it, RTÉ has raised issues about his own acts and omissions, both in the way that his campaign dealt with certain controversies in which he was, or had been, involved and in the way in which he performed as a candidate during the campaign and in the debate. In the context of an interlocutory application, I am in no position to decide the issue or issues 'likely to be determinative of the proceedings' at trial.

67. In his second affidavit, sworn on 3 March 2016, Mr Gallagher expresses the view that his discovery is likely to have only 'peripheral relevance' to the 'principal issues' in the case. Again, that is a question that cannot be determined in the context of an interlocutory application.

68. To recapitulate, I am satisfied that, despite having sworn two affidavits of discovery to date, Mr Gallagher has failed to swear an affidavit in the appropriate form; has failed to make discovery of certain relevant metadata that he holds, and has failed, more generally, to make proper discovery of the documentation (including electronically stored information) in his possession or power. While I do not find that default to be wilful or contumelious, I am driven to the conclusion, in the context of the evidence I have sought to summarise, that it was negligent. Nonetheless, I do not think that it has yet compromised the prospect of a fair trial to the extent that the justice of the case warrants an order striking out the proceedings.

69. What, then, is the appropriate remedy to rectify that default? In *Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors* [2015] IEHC 175, Fullam J followed the approach flagged by Geoghegan J in the following passage from his judgment in *Dome Telecom Ltd v Eircom Ltd* [2008] 2 IR 726 (at 735-6):

> '…I would reject any idea that the right to discovery of documents should be exclusively based on an interpretation (literal or otherwise) of the relevant rule of court.
>
> …
>
> In modern times courts are not necessarily hidebound by interpretation of a particular rule of court. More general principles of ensuring fair procedures and efficient case management are frequently overriding considerations. The rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hide bound by it. It is common knowledge that a vast amount of stored information in the business world which formerly would have been in a documentary form in the traditional sense is now computerised. As a matter of fairness and common sense the courts must adapt themselves to this situation and fashion appropriate analogous orders of discovery.'

70. I do not think that Mr Gallagher's default can be properly rectified by the first of the two alternative proposals for the resolution of the present application that he has put forward. I note that there is significant common ground between the substance of Mr Gallagher's second alternative proposal and the contents of the specific order sought by RTÉ.

71. In that regard, Mr Gallagher proposes the appointment of an independent IT expert – as agreed between the parties or, in default of such agreement, by the Court – to review and report upon Mr Gallagher's discovery. Mr Gallagher proposes to indemnify RTÉ in respect of the cost of such appointment up to €15,000 or to contribute 50% of any higher cost (whether of the total cost or of the portion of that cost above €15,000 is not entirely clear), subject to agreement that the fees and expenses so indemnified shall form part of Mr Gallagher's costs of the proceedings for the purposes of O. 99 of the RSC.

72. In arguing for the justice or fairness of that proposal, Mr Gallagher points to the provisions of O. 31, r. 12(3)(c) of the RSC, whereby, where the Court has ordered the discovery of electronically stored information and has included in the said order a provision that the inspection and searching of the data concerned is to be undertaken by an independent expert rather than by the party seeking discovery, the party seeking discovery shall indemnify that expert in relation to all fees and expenses reasonably incurred by him, which fees and expenses shall form part of that party's costs for the purposes of O. 99.

73. Of course, the appointment of such an expert under the said rule was not sought or directed when Gilligan J. ordered discovery on 2 May 2014. It now arises in the quite different context of the appropriate remedy for Mr Gallagher's failure to make proper discovery in compliance with the terms of that Order. But it does seem to me fair that, in those circumstances, the parties should now share the obligation to indemnify the appropriate expert, subject to the entitlement of each to treat their share of the fees and expenses reasonably incurred by that expert as part of their costs for the purposes of O. 99.

Conclusion

74. For the reasons I have given, I propose to make an order in the following terms:

> (i) An independent expert on electronic discovery is to be appointed forthwith by agreement between the parties or, failing such agreement, by the Court.
>
> (ii) As soon as practicable thereafter, the said expert is to conduct a comprehensive review of the discovery to be made by the plaintiff in accordance with the Order of 2 May 2014 and the guidelines set out in The Good Practice Discovery Guide, Commercial Litigation Association of Ireland, (v2.0 – November 2013).
>
> (iii) The plaintiff is forthwith to identify, and to provide the said expert with access to, a list of custodians who may hold data covered by the Order of 2 May 2014 and of the devices on which such data may be held, together with any other information reasonably requested by the said expert for the purpose of the said review.
>
> (iv) The said expert is to provide a report in writing to the solicitors for each of the parties within four weeks from the date of his or her appointment (or such further period as may be agreed in writing between the parties) setting out the

results of the said review.

(v) All communications between the said expert and the plaintiff in connection with the said review and report are to be copied to the defendant.

(vi) The plaintiff is to swear a further consolidated or comprehensive affidavit of discovery as soon as practicable following receipt of the said report, having regard to its contents and to the requirements of O. 31 and Form 10 in Appendix C of the RSC, and exhibiting the said report to that affidavit.

(vii) The parties shall be jointly and severally liable to indemnify the said expert in respect of all fees and expenses reasonably incurred by him or her, with each party to pay 50% thereof, and such fees and expenses so indemnified shall form part of the costs of each party for the purposes of O. 99.

(viii) The motion is to be adjourned for a period of twelve weeks from the date hereof.

75. I will hear the parties in respect of any further or ancillary orders required on the adjourned date and I will deal with the costs of the present application on that date, having heard the submissions of the parties on that issue.