



**THE COURT OF APPEAL**

**CIVIL**

**Record Number: 2021/303-305**

**Neutral Citation: [2024] IECA 43**

**Barniville P.**

**Collins J.**

**Haughton J.**

**BETWEEN**

**DARRAGH MACKIN**

*Plaintiff/Respondent*

**AND**

**DENIS O'BRIEN AND JAMES MORRISSEY**

*Defendants/Appellants*

**AND**

**Record Number: 2021/306-308**

**Neutral Citation: [2024] IECA 43**

**BETWEEN**

**GAVIN BOOTH**

*Plaintiff/Respondent*

**AND**

**DENIS O'BRIEN AND JAMES MORRISSEY**

*Defendants/Appellants*

**JUDGMENT of Mr. Justice Maurice Collins delivered on 23 February 2024**

## **BACKGROUND**

1. This Judgment relates to a number of appeals which were heard together and which raise common issues.

### *Background and Dramatis Personae*

2. For the purposes of this Judgment, the factual background can be stated relatively briefly. In 2016 Mr Mackin and Mr Booth were both employed by the firm of KRW Law in Belfast: Mr Mackin as a solicitor and Mr Booth as a para-legal (he has since qualified as a solicitor). KRW Law, together with Caoilfhionn Gallagher (now Caoilfhionn Gallagher KC) and Jonathan Price from Doughty Street Chambers in London, were engaged to prepare a report on media ownership in Ireland. The report, entitled “*Report on the Concentration of Media Ownership in Ireland*” (“*the Report*”) was published on the 19 October 2016. It is described as an “*Independent Study commissioned by Lynn Boylan MEP on behalf of the European United Left/Nordic Green Left (GUE/NGL) Group of the European Parliament*” and Mr Booth, Mr Mackin, Ms Gallagher and Mr Price are identified as its authors.
3. Lynn Boylan is a Sinn Féin politician who is now a member of the Seanad but who was a Member of the European Parliament in the period from 2014 to 2019. The European

United Left/Nordic Green Left (now called the Left in the European Parliament) is a political grouping in the European Parliament with which Sinn Féin is aligned.

4. Denis O' Brien is a well-known businessman who, as of 2016, held a controlling interest in Communicorp, a company with significant holdings in the commercial radio sector in Ireland and who also held a significant shareholding in Irish News and Media ("INM"), the publishers of the *Irish Independent* and the *Sunday Independent*, newspapers with large circulations in the State. James Morrissey is an associate of Mr O' Brien who has frequently acted as his spokesman or representative.

#### *The Report*

5. The Report expressed significant concern about the concentration of media ownership in the State. It identified RTÉ and Mr O' Brien as "*the two most important controlling entities in the Irish media landscape*" stating of Mr O' Brien that he had "*a dominant position within the Irish print media sector, given his ownership of a significant minority stake in the country's largest newspaper publisher, Independent News and Media ("INM"), and substantial holdings in the commercial radio sector.*"<sup>1</sup> The Report proceeded to reach conclusions and make recommendations, the first of which referred specifically to Mr O' Brien, in the following terms:

---

<sup>1</sup> Report at para 1.5.

*“We conclude that there are extremely grave concerns about the high concentration of media ownership in the Irish market, and in particular regarding the position of INM and Mr. Denis O’Brien. Accumulation of communicative power within the news markets is at endemic levels and so Ireland has one of the most concentrated media markets of any democracy. This feature – alarming in itself – must be viewed alongside the other gravely concerning aspects of the Irish media landscape which we have highlighted: sustained and regular threats of legal action by Mr. O’Brien to media organisations and journalists who are engaged in newsgathering or reporting about his activities, and the ‘chilling effect’ of the current defamation laws. This is a toxic combination for freedom of expression and media plurality.”<sup>2</sup>*

*The Statement of 26 October 2016*

6. On 26 October Mr Morrissey issued a “*Statement on behalf of Mr Denis O’ Brien in response to the Report Commissioned by Ms Lynn Boylan MEP (Sinn Féin)*”. The Statement is set out in full in the judgment under appeal. It suggested that the self-described “*independent study*” was not in reality an independent exercise but was part of the Sinn Féin agenda. Mr O’ Brien complained that the Report had not focussed on RTÉ or on lack of objectivity in the media generally when reporting on itself. The Statement concluded as follows:

---

<sup>2</sup> *Ibid* at para 6.1.

*“Sinn Féin/IRA certainly got the report they paid for. The cost of this report won't have bothered them too much. They collected €12 million over 20 years in the U.S. (Irish Times March 7, 2015). The IRA is reported to have €400 million in global assets (Irish Times August 29, 2015). Brian Feeney, author, has suggested that a way should be found to stop ‘Sinn Féin people saying the IRA has gone away when self – evidently it hasn't’.*

*The report references the words ‘chilling effect’ and the law in the same sentence. I bow to Sinn Féin's superior knowledge on these topics.*

*Maybe instead of commissioning reports Sinn Féin would commit just some of its vast resources and support an ailing industry – become a fully-fledged broadcaster and publisher and create some jobs for a change?”*

#### *High Court Proceedings*

7. In October 2017, Mr Mackin and Mr Booth issued defamation proceedings against Mr O’ Brien and Mr Morrissey, each seeking damages (including aggravated and/or exemplary damages) for defamation, an injunction restraining further defamatory statements and a correction order pursuant to section 30 of the Defamation Act 2009 (*“the 2009 Act”*).

8. In their respective Statements of Claim, which were delivered in February 2019 and which are in materially identical terms (Mr Mackin and Mr Booth are represented by a common legal team), Mr Mackin and Mr Booth plead that they had been defamed by the publication of the following words in the Statement:

*“Sinn Féin/IRA certainly got the report they paid for”.*

These words, it is said, *“in their natural and ordinary meaning meant, and were understood to mean, and/or by innuendo, meant, that the Plaintiff*

*(a) received payment from an unlawful organisation, viz. the IRA;*

*(b) had acted for an unlawful organisation, viz. the IRA;*

*(c) was not acting in line with his professional obligations;*

*(d) lacks integrity;*

*(e) is unfit to be a solicitor;*

*(f) is unprofessional;*

*(g) is dishonourable.”*

9. In July 2019, Mr O’ Brien and Mr Morrissey delivered joint Defences in both actions. Those Defences plead a variety of different defences, including that the Plaintiffs were not identified in the Statement and a denial that the Plaintiffs were the authors of the Report. The Defences also deny that the Statement meant or was understood to mean any of the meanings pleaded by the Plaintiffs. They then plead a defence of truth in the following terms:

*“The Defendants plead that the true meaning of the Statement is set out hereunder and that, in respect of those meanings, the words published in the statement were true:*

*Particulars of Meaning*

- i. The Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study;*
- ii. The Report was neither balanced nor fair since it did not focus on RTÉ which is the largest media entity in Ireland;*
- iii. The Report was designed to advance the political agenda of Sinn Féin;*
- iv. Sinn Féin supported and continues to be associated with the IRA;*
- v. Any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position on media ownership and its opposition to the First Named Defendant and Independent News and Media plc, and;*
- vi. The violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect.*

*13 In respect of the aforesaid, the Defendants shall rely upon the Defence of truth as provided for in s. 16 of the Defamation Act 2009.”*

Each of the Defences defines “*the Statement*” as “*the 3 page press statement*”. On its face, therefore, the pleaded defence of truth refers to the entirety of the Statement and not just the specific sentence of which the Plaintiffs complain.

10. The Defences also plead a defence of honest opinion, in the following terms:

*14. The Defendants plead that the words published in the Statement consisted of opinions honestly held by them which, at the time of the publication, they believed to be true.*

*Particulars of fact upon which honest opinions were based*

*15 The honest opinions held by the Defendants were based on the following allegations of fact:-*

*i. the Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study;*



*ii. the Report was neither balanced nor fair since it did not focus on RTÉ which is the largest media entity in Ireland;*

*iii. the Report was designed to advance the political agenda of Sinn Féin;  
part of Sinn Féin's agenda is to criticise Apple and the First Named Defendant;*

*iv. the media industry in Ireland is in decline;*

*v. the First Named Defendant invested a lot of money in Independent News and Media at a time when it was in significant financial difficulties;*

*vi. RTÉ should have been considered in the Report but this was not done;*

*vii. Sinn Féin supported and continues to be associated with the IRA;*

*viii. any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position of media ownership and its opposition to the first named defendant and Independent News and Media plc;*

*ix. the violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect.*

*16. Further, the opinion published by the Defendants related to a matter of public interest, namely the Report published by GUE/NGL having been commissioned by Lynn Boylan MEP which concerned media ownership.*

*17. In respect of the aforesaid, the Defendants shall rely upon the Defence of honest opinion as provided for in s. 20 of the Defamation Act 2009”.*

Again, this plea on its face refers to the entirety of the Statement and not just the limited words relied on by the Plaintiffs.

11. The Defences also pleaded defences of qualified privilege and fair and reasonable publication on a matter of public interest pursuant to section 26 of the 2009 Act but it is only the defences of truth and honest opinion that are at issue in these appeals.
12. In their respective Replies to Defence, Mr Mackin and Mr Booth take issue with these pleaded defences. As regards the defence of truth, it is said that the “*the Defendants have not pleaded the defence of truth as regards the meanings set out by the Plaintiff in the Statement of Claim*”. With respect to the defence of honest opinion, it is said that the statement that Sinn Féin/IRA paid for the Report is a statement of fact and not a statement of opinion. It is also said that the statements relied on by the Defendants as statements of fact are actually statements of opinion.

13. Both sides raised particulars of the other's pleadings. In response to a notice for particulars raised by the Defendants, the Plaintiffs explained that they had been employed by KRW Law at the time the Report had been commissioned (Mr Mackin as a solicitor and Mr Booth as a para-legal) and that there had been a bidding process for European Parliament funding in which KRW Law and Doughty Street Chambers had made a joint proposal. The fee payable for the Report had been split equally between KRW Law and Doughty Street Chambers and neither Mr Mackin nor Mr Booth was remunerated personally or directly for their work. Each described themselves as co-authors of the Report and each identified a Francesco De Feo as the person responsible for commissioning it.

*The Applications in the High Court*

*The Strike-Out Applications*

14. In January 2021, Mr Mackin and Mr Booth each issued a notice of motion seeking the following reliefs:

*“(1) An order pursuant to O. 19, r. 27 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, striking out the defence of truth under s. 16 of the Defamation Act, 2009, and/or striking out such imputation(s) pleaded by the Defendants as are not reasonably capable of being*

*borne by the statement in respect of which the action is brought and or which are not reasonably capable of bearing a defamatory meaning;*

*(2) Further and in addition or in the alternative, an Order pursuant to O. 19 r. 27 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court striking out the defence of honest opinion under s. 20 of the Defamation Act, 2009, and/or striking out such imputation(s) pleaded by the defendants as are not reasonably capable of being borne by the statement in respect of which the action is brought and/or which are not reasonably capable of bearing a defamatory meaning.”*

15. Order 19, Rule 27 RSC is in the following terms:

*“27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.”*

#### *The Applications for Discovery*

16. Shortly before the issue of these strike-out applications, the Defendants issued motions for discovery in each action. The precise categories of documents sought are set out in

an Appendix to this Judgment. In broad terms, the Defendants sought documents relating to the commissioning of the Report and the role of GUE/NGL in that process, documents relating to how the Report was paid for and documents relating to the scope of the engagement and the terms of reference. The Defendants also seek all drafts of the Report.

17. The Plaintiffs also brought applications for discovery, seeking documents disclosing the extent of circulation and publication of the Statement and, in the context of the pleaded defence of reasonable publication, documents evidencing any attempts by or on behalf of the Defendants to obtain a response from the respective Plaintiffs, and/or to verify the contents of the Statement so far as it related to them, prior to its publication. Again, the precise categories sought are set out in the Appendix.

## HIGH COURT JUDGMENT AND ORDERS

18. These six motions were heard together by Heslin J in the High Court. On 30 September 2021, he gave a thorough and comprehensive written judgment ([2021] IEHC 660). For the reasons set out in that judgment, the learned Judge concluded that the defences of truth and honest opinion should be struck out. As regards discovery, the Judge directed discovery of the documents sought by the Plaintiffs but he declined to direct any of the discovery sought by the Defendants. All of these decisions were appealed to this Court.
19. As regards the strike-out applications, there was no dispute in the High Court (or in this Court on appeal) that by virtue of Order 19, Rule 27 RSC and/or the court's inherent jurisdiction, the court had jurisdiction to make the orders sought by the Plaintiffs. In that context, the Judge referred to a number of authorities, including *Ryanair v Bravofly* [2009] IEHC 41 and *Ryanair v Google Ireland* [2017] IEHC 90, which addressed Order 19, Rule 27, as well as authorities on Order 19, Rule 28 RSC and the inherent jurisdiction, including *Barry v Buckley* [1981] IR 306, *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 and *Delahunty v Player and Wills (Holland) Ltd* [2006] 1 IR 304, all of which emphasised that the jurisdiction to strike out all or part of a pleading should be exercised sparingly and only in clear cases. Again, that was and is common case.

### *The Defendants' Defence of Truth*

20. Understandably, in addressing the application to strike out the Defendants' defence of truth, the Judge attached particular importance to this Court's decision in *Ganley v RTE*

[2019] IECA 18 (“*Ganley*”) given that it too involved an attempt to strike out such a defence of truth. The parties agreed that the correct approach to the strike-out application was that set out by Irvine J in her judgment in *Ganley* (Birmingham P and Baker J agreeing) and so it warrants detailed consideration here.

21. In *Ganley*, the plaintiff sued in respect of an episode of *Prime Time* about his business affairs. He did not identify any specific defamatory words but maintained that the programme as a whole was defamatory of him. His statement of claim set out a number of defamatory meanings, including that the plaintiff had links to organised crime and had made false claims in relation to his business affairs and connections. In its defence, RTÉ denied all but one of those pleaded meanings but, in respect of certain of those meanings, it also pleaded that those meanings were true in substance and then pleaded the specific meaning in which the words were said to be true (“... *to the extent that* ...”). RTÉ also pleaded that the “*sting*” of the words in the programme, taken as a whole, was that the plaintiff had a tendency to make false or exaggerated claims in respect of business or other matters, setting out a number of matters on which RTÉ intended to rely to establish the truth of that sting. The plaintiff then brought an application to have those paragraphs of RTÉ’s defence struck out pursuant to Order 19, Rule 27 RSC, contending that RTÉ was not entitled to rely on a defence of truth by reference to the alternative meanings pleaded by it. That application had been refused in the High Court (Barrett J) and the plaintiff appealed to this Court.
22. Irvine J began her analysis by explaining that the Court had not been asked to condemn any of RTÉ’s pleading as scandalous or embarrassing. What had been urged on the

Court was that the relevant paragraphs were, as a matter of law, unsustainable and that for that reason should be considered “*unnecessary*” and/or prejudicial and so should be struck out. There was, she emphasised, a high bar for judicial intervention, citing the statement of Eady J in *Hamilton v Clifford* [2004] EWHC 1542 (QB) to the effect that a judge should intervene only if satisfied that it would be “*perverse*” for the jury to uphold the meaning canvassed by the defendant and the observation made by Simon Brown LJ in *Jameel v Wall Street Journal Europe* [2003] EWCA Civ 1694, [2004] EMLR 6 that the judge’s function was “*no more and no less than to pre-empt perversity.*” There was, Irvine J noted, no dispute that a defendant was entitled to plead so as to justify any reasonable meaning of the words published which a properly directed jury might find to be the real meaning (citing *Quigley v Creation Press Ltd* [1971] IR 269). Meaning was ultimately a matter for the jury and the role of the court was only to determine whether the words were *capable* of bearing a particular meaning or, in other words, “*to lay down the limits of the range of the possible defamatory meanings of which the words are capable*” (citing Hirst LJ in *Mapp v News Group Newspapers Ltd* [1998] QB 520, at 523). Striking out a defence proposing an alternative meaning had been aptly described as a “*drastic remedy*” in *Polly Peck Plc v Trelford* [1986] QB 1000 and the appropriate approach was “*an exercise in generosity, not in parsimony*” in which “*the longstop is the jury*” (per Sedley LJ in *Berezovsky v Forbes* [2001] EWCA Civ 1251, [2001] EMLR 45)

23. Irvine J then cited with obvious approval the principal authorities from England and Wales on the boundaries of permissible pleading in a libel action, including *Polly Peck, Lucas Box v News Group Newspapers Ltd* [1986] 1 All ER 177, [1986] 1 WLR 147,



*Khashoggi v IPC* [1986] 3 All ER 577, [1986] 1 WLR 1412, *Prager v Times Newspapers Ltd* [1988] 1 All ER 300, [1988] 1 WLR 77 and *Warren v Random House Group Ltd* [2007] EWHC 2856 (QB), [2009] QB 600. One of the “key principles” established by those authorities was that “if a plaintiff contends that certain words defamatory of him or her have a particular meaning, a defendant is permitted to plead an alternative meaning which they are entitled to justify by reference to the content of the impugned publication.” That was subject to the proviso that the words were capable of supporting that alternative meaning, but it was for the jury to decide what the true meaning was and it would not have been correct for the High Court judge to strike out the alternative meanings pleaded by RTÉ “unless satisfied that no reasonable person would consider the programme might validly support that meaning” (at para 88).

24. As for RTÉ’s plea as to “sting” of the programme, Irvine J saw no error in the High Court judge’s conclusion that such pleading was permissible, particularly as the plaintiff himself had not identified any particular words said to have the defamatory meanings pleaded by him and was relying on the programme as a whole. That was a permissible “Polly Peck defence” which permitted a defendant to contend “that seemingly separate allegations made by a plaintiff have a common sting and may be considered a variant on a generalised theme, and that the generalised allegation can be proved to be substantially true” (at para 61).

25. At para 82 of her judgment, Irvine J referred with evident approval to the approach taken by the High Court judge, whereby he identified three questions to be addressed as follows:

*“(i) is the alternative meaning contended for by the defence capable of arising from the publication?”*

*(ii) does the defence meaning arise from a separate and distinct allegation in the impugned publication about which the plaintiff does not complain?*

*(iii) Are proper particulars of fact provided that are capable of supporting the defence?”*

I will refer to these questions as the *Ganley* questions.

26. In the judgment under appeal, Heslin J correctly observed that *Ganley* demonstrated “*how high the bar is set*” for a plaintiff seeking to strike out elements of a defendant’s defence (Judgment, para 30). He then proceeded to examine each of the disputed pleas by reference to the *Ganley* questions. As regards the first question – meaning – the Judge referred to (*inter alia*) *McGarth v Independent Newspapers (Ireland) Ltd* [2004] IEHC 67, [2004] 2 IR 425 and *Gilchrist v Sunday Newspapers Limited* [2017] 2 IR 284. He reminded himself of the limited role of the judge and the importance of the words complained of being construed in context. He cited *McKeith v News Group Newspapers* [2005] EWHC 1162 (QB) as authority for the proposition that the court should lean against upholding an alternative meaning if it would result in a lengthy, wide-ranging and costly inquiry at trial. Finally, he drew from a number of sources the proposition

that any alternative meaning relied on by a defendant had to be defamatory (Judgment, paras 46-47).

*“The Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study”*

27. The Judge then addressed the first of the Defendants’ pleaded meanings. He considered that, when read in the context of the overall Statement, the words complained of by the Plaintiffs were capable of this pleaded meaning and that, in that meaning, could be considered defamatory of the Plaintiffs in that they had written a report which lacked independence (Judgment, para 48). Therefore, *Ganley* question (i) was to be answered affirmatively. However, that was, in his view, “*a separate and entirely distinct allegation*” of which the Plaintiff made no complaint. The gravamen of their complaint was that “*the plaintiff acted for and was paid by an unlawful organisation, namely the IRA*” and to suggest that they lacked independence as the authors of a report was “*fundamentally and materially different*” to a suggestion that they acted for and were paid by a terrorist organisation. These two allegations did not, in the Judge’s view, share a “*common sting*” in the sense used in *Polly Peck*. It followed that *Ganley* question (ii) had to be answered in the affirmative. That rendered it unnecessary to address *Ganley* question (iii) (whether proper particulars of fact capable of supporting the defence had been provided): Judgment, para 49. The first of the meanings relied on by the Defendants was therefore impermissible.

*“The Report was neither balanced nor fair since it did not focus on RTÉ which is the largest media entity in Ireland”.*

28. Adopting the same approach, and emphasising that the jury would be asked to interpret the specific words complained of by the Plaintiffs in the context of the Statement as a whole, the Judge concluded that those words were capable of bearing the pleaded meaning, thus answering *Ganley* question (i) in the affirmative (Judgment, para 50). Again, however, the Defendants failed at the next hurdle because, even on the assumption that the pleaded meaning was defamatory, it related to an entirely distinct allegation about which the Plaintiffs made no complaint and did “*not meet the case made as per the plea*” in each Plaintiff’s Statement of Claim (Judgment, para 51). In those circumstances, there was no need to assess *Ganley* question (iii).

*“The Report was designed to advance the political agenda of Sinn Féin”*

29. Heslin J held that this meaning was capable of arising from the words complained of and again answered *Ganley* question (i) in the affirmative. While expressing doubt that, so understood, the words would be defamatory of the Plaintiffs, even if he was wrong in that view, the Defendants again failed at the next hurdle as the Plaintiffs’ complaint was “*not that the words to which he objects mean that he authored a report designed to advance Sinn Féin’s political agenda. The gravamen of his complaint is of a fundamentally different character, namely, that the words used meant and were understood to mean that he acted for and was paid by an unlawful organisation, namely the IRA.*” The Defendants’ meaning arose from an allegation in respect of which the

Plaintiffs made no complaint and was therefore impermissible (Judgment, para 52). Again, the Judge did not consider it necessary to address *Ganley* question (iii).

*“Sinn Féin supported and continues to be associated with the IRA”.*

30. Even accepting that the words complained of were capable of this meaning (and in this context the Judge noted the Defendants’ submissions emphasising that the words referred to both Sinn Féin and the IRA), the Judge did not consider that such meaning was capable of being defamatory of the Plaintiffs (as opposed to being potentially defamatory of Sinn Féin). In any event, there was no “*common sting*” which this meaning addressed so, once again, *Ganley* question (ii) had to be answered in the affirmative and there was no need to address *Ganley* question (iii).

*“Any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position on media ownership and its opposition to the first named defendant and Independent News and Media Plc.”*

31. Again, the Judge concluded that once the statement complained of by the Plaintiffs was read in conjunction with the entirety of the Statement, this pleading meaning “*could fairly be said to possibly arise.*” Again, however, he had difficulty in seeing how such a meaning was capable of being defamatory “*of the Plaintiffs*”. But, in any event, it did not meet the case made by the Plaintiffs. The Plaintiffs did not contend that the words meant what the Defendants were seeking to defend. The essence of their complaint was “*fundamentally different*”, namely that each of them had “*acted for and was funded by*

*a terrorist organisation.*” There was no common sting and *Ganley* question (ii) had therefore to be answered in the affirmative. The plea therefore was impermissible. Again, there was no need to assess *Ganley* question (iii) (Judgment, para 54).

*“The violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect”.*

32. Here the Judge was not persuaded that the words complained of were capable of being understood to have the pleaded meaning. Therefore, *Ganley* question (i) had to be answered in the negative. But even if he was wrong in that view, the meaning was not defamatory of the Plaintiffs and did not meet the claim made by the Plaintiffs (Judgment, para 55).
33. Before turning to the defence of honest opinion, the Judge made some conclusionary remarks. None of the meanings contended for the Defendants satisfied the *Ganley* test. The majority of those meanings did not appear to be defamatory of the Plaintiffs and all arose from “*separate and distinct allegations in the impugned publication*” about which the Plaintiffs did not complain. These conclusions fairly reflected the Judge’s detailed analysis. However, he also went on to express the view that, although it was not necessary to address *Ganley* question (iii), no particulars of fact had been provided that were capable of supporting any of the Defendants’ pleaded meanings (Judgment, para 56).

*The Defence of Honest Opinion*

34. Having set out section 20 of the 2009 Act, Heslin J then referred to the judgment of the High Court (Barton J) in *Ryanair v Van Zwol* [2017] IEHC 798, citing the following passages from that judgment which he considered to be of “*fundamental relevance*” to the application before him:

*26 Accepting that it is appropriate, in the circumstances of this case, that the jury should see the whole of the article in which the words complained of appear, contained as they are in the first paragraph of the ‘Pilot Update’, nevertheless, the opinions, if such they be, upon which the Defendants seek to rely in the defence of honest opinion must, in my judgment, be found in or discernible from the words of the statements which are the subject matter of the proceedings. Moreover, such opinions must bear or be capable of bearing the defamatory meanings about which the Plaintiffs make complaint and not some other defamatory meanings about which no complaint is made.*

*27 In my judgment, proving an honestly held opinion which is defamatory, or capable of bearing a defamatory meaning, on a matter of public interest [] that conveys a separate and distinct ‘sting’ about which no complaint is made would be a pointless exercise and would warrant the plea being struck out.*

*28 Having carefully considered the Defence and the particulars of honest opinion pleaded in this case I am satisfied that the submissions made on behalf*

*of the Plaintiffs are correct and that even if the words complained of were capable of bearing or conveying the defamatory meanings particularised by the Defendants, which in my view is questionable, such do not address and are not concerned with the defamatory meanings asserted by the Plaintiffs but convey, if they convey at all, a 'sting' about which no complaint is made, accordingly, the Court will accede to the application and will make an order striking out the plea of honest opinion from the Defence."*

35. Applying those principles, it was, in the Judge's view, "*crystal clear*" that the Defendants were not expressing opinions in the meanings complained of by the Plaintiffs. Insofar as they claimed to be expressing opinions in the alternative meanings for which they contended "*those alleged opinions were either (a) not defamatory of the plaintiff at all or (b) to the extent that could [sic] be considered to be defamatory of the plaintiff, they relate to matters in respect of which the plaintiff makes no complaint and (c) they do not share a 'common sting' insofar as the claim which is made by the plaintiff is concerned*" (Judgment, para 60). That was the essence of the Judge's ruling, as is evident also from para 68 where he summarises his conclusion.
36. *Ryanair v Van Zwol* also involved a strike-out application. As is evident from the passage above, the plaintiff's complaint related to a single paragraph in a longer article.
37. The Judge also observed that paragraph 14 of the Defence did not identify the opinions said to have been held by the Defendants, while paragraph 15 particularised what were pleaded to be the facts on which the opinions were held. Comparing the contents of



paragraph 15 with the contents of paragraph 12 (the defence of truth), the Judge observed that paragraph 15(i), (ii), (iii), (viii), (viii) (*bis*) and (ix) repeated *verbatim* the meanings pleaded in paragraph 12 but pleaded them as “*facts*” on which the Defendants’ opinion was said to have been based. The Judge had an obvious and understandable difficulty with that approach. He then recited the other pleaded “*facts*” and stated that the allegations of fact pleaded by the Defendants did not “*speak to opinions defamatory of the plaintiff of which he makes any complaint*” (Judgment, para 66). However sophisticated the Defendants’ submissions were, they did not answer the Plaintiffs’ application and “[n]owhere in the pleadings did the defendants make the case that the opinion: ‘Sinn Féin/IRA certainly got the report they paid for’ had a different meaning than the meaning contended at para. 12 in the context of the defence of truth and they most certainly do not plead that they were expressing opinions in the meanings complained of by the plaintiff” (Judgment, para 67).

38. Heslin J accordingly struck out the defences of truth and honest opinion from each of the Defences.

#### *The Discovery Applications*

39. The Judge then turned to the respective discovery applications. He set out in some detail the principles applicable, about which there was no dispute. He was not persuaded to direct discovery of any of the categories sought by the Defendants.

40. As regards *category 1* (documents related to the commission of the Report), the Judge took the view that there was no issue between the parties as to who commissioned the report, referring in that context to the statements on the first and last pages of the Report and to what was pleaded by the Defendants themselves. The category was therefore not relevant or necessary.
41. As regards *category 2* (documents relating to how the Report was paid for) the Judge took essentially the same view: there was no issue between the parties relating to payment and, in particular, no issue as to whether the Report had been paid for by the IRA (Judgment, paras 86 & 87).
42. Turning to *category 3* (documents relating to the scope of the engagement and the terms of reference) the Judge noted that the justification offered for this category (which was also, he noted, a justification for the earlier categories) was that issues of lack of independence and lack of balance and fairness and the advancement of an agenda were issues in the case. However, in light of his earlier ruling on the defences of truth and honest opinion, the Judge was not persuaded that this category could fairly be said to be reasonable or necessary (Judgment, para 91).
43. Finally, as regards *category 4* (drafts of the Report), the Judge was not persuaded by the proffered justification – that a “*key issue*” in the case was the authorship of the Report. The Judge did not consider the category to be relevant or necessary but, in any event, he considered that the information sought could more appropriately be sought by way of interrogatories (Judgment, para 99).

44. The Judge then turned to the Plaintiffs’ applications. As regards *category 1* (documents disclosing the extent of circulation and publication of the Statement), the Judge was satisfied that this category was relevant and necessary and was fortified in that view by the fact that similar discovery had been directed by the High Court (Meenan J) in *Adams v BBC* [2020] IEHC 441. He rejected the Defendants’ contention that the extent of circulation and publication was a matter for proof by the Plaintiffs and therefore should not be the subject of a discovery order. In his view, the fact that the Plaintiffs bore the burden of proof was a “*strong argument*” in favour of discovery.
45. As for *category 2* (documents evidencing any attempts by on behalf of the Defendants to obtain a response from the respective Plaintiffs, and/or to verify the contents of the Statement so far as it related to them, prior to its publication), the Judge considered that category to be relevant and necessary having regard to the Defendants’ pleaded defence of reasonable publication pursuant to section 26 of the 2009 Act, citing in support a judgment of mine (given while sitting in the High Court) in *Desmond v Irish Times Limited* [2020] IEHC 95.
46. The Judge duly made orders in each of the six motions in the terms indicated in his Judgment. In each case, he awarded costs against the Defendants, subject to a stay in the event of an appeal.

## APPEALS

47. All the orders made by the Judge were appealed by the Defendants to this Court. The Defendants' Notices of Appeal from the strike-out orders made by the Judge contain a number of rather generic grounds, including an assertion – without more – that the Judge erred in his application of the *Ganley* test as regards the defence of truth and an equally bald assertion that the Judge erred in his application of the test enunciated in *Ryanair v Van Zwol* as regards the defence of honest opinion.
48. The Defendants' written submissions are only marginally more informative. Having referred to the high threshold for intervention by way of a strike-out application, and having cited from *Polly Peck*, *Lucas-Box*, *Ganley* and *Adams v BBC*, the submissions assert that the three *Ganley* questions should have been answered “yes”, “no” and “yes” and that, accordingly, the application to strike out the defence of truth should have been refused. The pleaded meanings, so it is said, are “clearly” capable of arising from the words complained of by the Plaintiffs, “clearly” do not arise from any separate and distinct allegation in the Statement about which no complaint is made and the pleaded particulars are “clearly” capable of supporting the defence. As regards the defence of honest opinion, it is said that the words complained “clearly” sets out the honestly held opinion of the Defendants, the particulars of facts are “clearly” set out in para 15 of the Defence and there can be “no doubt” as to the case the Plaintiffs have to meet per *Control Risks v New Library Ltd* [1990] 1 WLR 183 and *Van Zwol*.

49. The Plaintiffs have not cross-appealed or sought to vary the judgment and order of the High Court. They each filed a single set of submissions addressing all appeals. The strike-out appeals are addressed in very brief terms. What is said is that the Plaintiffs agree that *Ganley* sets out the applicable test, that the Judge applied that test and that the Defendants' submissions had failed to engage with the Judge's analysis or identify any error on his part, either as regards the defence of truth or the defence of honest opinion.
50. In any event, detailed and helpful oral submissions were subsequently made by Mr Lehane SC for the Defendants and Mr Hogan SC for the Plaintiffs. Shortly after the conclusion of the hearing, the Court identified certain issues on which it requested further submissions which were duly provided by the parties. So far as relevant, I will refer further to the arguments made at the hearing, and the issues addressed in those further submissions, in my analysis below. One point I should note immediately, however, is that Mr Lehane made it clear in his submissions that the defences of truth and honest opinion were directed at, and limited to, the words complained of by the Plaintiffs. The meanings he sought to rely on were, he said, meanings which those words were capable of bearing, understood by reference to the Statement as a whole and he was not seeking to rely on meanings derived from other parts of the Statement on which the Plaintiffs had not sued. Similarly, the honest opinion defence related to the words complained of only.
51. The parties also provided written submissions in relation to the discovery appeals and those appeals were also addressed in oral submissions although, understandably, all

parties focused their forensic firepower on the strike-out appeals (and principally on the defence of truth). At the conclusion of the hearing, the Court directed the parties to exchange correspondence on an issue relevant to one of the categories of discovery sought by the Plaintiffs and I will refer to that correspondence when addressing that category.

## ANALYSIS

### *The Proper Scope of Appellate Review Here*

52. There was some discussion in the parties' submissions about the proper scope of appellate review in appeals from interlocutory orders (as these appeals all are) and as to the threshold that appellants were required to surmount in such appeals.
53. These issues have been discussed in many decisions of this Court and of the Supreme Court. As regards discovery appeals specifically, the appropriate approach has been clarified by the Supreme Court in *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211 and *Waterford Credit Union v J & E Davy* [2020] IESC 9, [2020] 2 ILRM 344. These make it clear that decisions of the High Court in relation to discovery are entitled to a "*a significant measure of appreciation*" on appeal and ought not be disturbed unless they are "*outside the range of any order which could reasonably have been made.*" That is the approach I shall take to the discovery appeals.
54. The judgment of Irvine J in *Ganley* (which involved discovery appeals as well as the appeal from the High Court's refusal to strike out the defence of truth) also addresses the standard of review. The judgment states that, in order to succeed in such an appeal from an interlocutory order, the appellant must be in a position to demonstrate that the High Court judge erred in his or her approach to the application such that the order should be considered unreasonable or unjust to the point that the proper administration of justice would warrant setting aside or varying the order. It followed, in her view, that

a “*significant margin of appreciation*” must be afforded to the High Court judge (*Ganley*, para 24).

55. The Defendants accepted that this was the threshold applicable to their strike-out appeals. That being so, and having regard to the fact that, as will appear, the outcome of those appeals does not turn on the standard of review, it is not necessary to address the issue further here. I would, however, observe that an order striking out a defence of truth or honest opinion in a defamation action (and of course no such order had been made by the High Court in *Ganley*) will have far-reaching consequences for the defendant. It is an exceptional order, one characterised in the authorities as a “*drastic remedy*.” Where such an order is made, the basis for it should be carefully scrutinised on appeal, arguably more strictly than an order declining relief, an order that leaves the disputed defence(s) to the “*longstop*” of the jury: see in this regard the observations of Sedley LJ in *Berezovsky v Forbes Inc*, at para 16.

56. In any event, the views of the Judge are clearly entitled to considerable weight and his conclusions should not be lightly interfered with. That would be so in any case. It is particularly so here having regard to the very thorough and careful assessment undertaken by Heslin J.

### ***The Order striking out the Defendants’ Defence of Truth***

57. While the parties were agreed that the applicable test was that set out in paragraph 82 of Irvine J’s judgment in *Ganley*, that test appears to me to be no more than a useful



shorthand that is not – and does not purport to be – a definite or comprehensive statement of the effect of the complex jurisprudence in this area. Furthermore, and significantly, the circumstances in *Ganley* and the circumstances here differ materially. The plaintiff in *Ganley* sued in respect of the entire of a lengthy TV programme – though, obviously, his specific complaints highlighted particular aspects of that programme. RTÉ expressly pleaded a “*common sting*” by way of defence. In contrast, the Plaintiffs here sue in respect of a single sentence and the pleaded meanings relied on by the Defendants relate to that sentence (albeit construed by reference to the whole Statement) and do not seek to broaden those meanings by way of any form of “*common sting*” reaching beyond the parameters of that sentence.

#### *The Defence of Truth*

58. The 2009 Act abolished the defence of justification and enacted, in section 16, a new statutory defence of truth. Section 16(1) provides that it shall be a defence “*for the defendant to prove that the statement in respect of which the action was brought is true in all material respects.*” Section 16(2) qualifies (or appears to qualify) subsection (1) by providing that in a defamation action “*in respect of a statement containing 2 or more distinct allegations against the plaintiff, the defence of truth shall not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining allegations.*”

59. Section 16 gives rise to a number of interesting issues, which are discussed in detail in Cox & McCullough, *Defamation Law and Practice* (2<sup>nd</sup> ed; 2022) (“Cox & McCullough”). These include the meaning of “*the statement in respect of which the action was brought*” and, in particular, whether “*the statement*” refers to the overall publication or (where different) only to the specific words complained of (para 5-49 – 5-52), what “*true in all material respects*” means in subsection (1) (para 5-31 – 5-33) and as to scope and effect of section 16(2) (para 5-76 and following). However, none of these issues formed any part of the debate in these appeals and it is not necessary to discuss them here. Neither side argued that section 16 had altered the common law rules as the proper scope of the defence of truth (justification) and, in particular, the entitlement of a defendant to rely on alternative meanings for the purposes of such a defence.
60. The defence of truth is inextricably bound up with the issue of meaning: the “*defendant is required to prove (and confined to proving) the truth (in all material respects) of the meaning that the [defamatory] statement is deemed to bear*” (Cox & McCullough, para 5-22). Meaning is often elusive and may be significantly dependent on context. Historically, and currently, in defamation actions brought in the High Court the ultimate function of determining meaning is vested in the jury. The role of the judge is to “*delimit the outside boundaries of the possible range of meanings that might be ascribed thereto by the notional reasonable reader*” (*Gilchrist v Sunday Newspapers Ltd* [2017] IECA 191, para 35) or, as it is put in some of the authorities from England and Wales, to “*pre-empt perversity*” by withdrawing alleged meanings that it would be perverse to ascribe to the statement at issue.

61. This division of function is reflected in the 2009 Act: see sections 14 and 34(2). It is also at the heart of the jurisdiction that the High Court was asked to exercise here. That is not in dispute and neither is there any dispute that the threshold for granting relief is a high one. The judge hearing a strike-out application must be careful not to trespass into the province of the jury. In fairness to the High Court Judge, it is very clear from his careful judgment that he was fully aware of the limits of his jurisdiction and asked himself the correct question – whether the words complained of, in context, were *capable* of bearing the meanings pleaded by the Defendants. In respect of five of the six pleadings meanings, the Judge answered that question affirmatively. Even so, he proceeded to strike out the entirety of the Defendants’ truth defence. Whether he was correct in doing so is, of course, the core question arising in this aspect of the strike-out appeals.
62. The starting point is that, as a matter of principle, a plaintiff is entitled to bring an action for defamation in respect of part only of a publication. That is so well-established a proposition that it barely needs authority but *Polly Peck* provides such authority in any event and the analysis of O’ Connor LJ in the Court of Appeal was endorsed by this Court in *Ganley*.
63. But, in every case, “*the jury is entitled to see and read the whole publication*” and there is “*no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed*”: *Polly Peck*, 1020E-F. Therefore “*the defendant is entitled to look at the whole publication in order*

*to aver that in their context the words bear a meaning different from that alleged by the plaintiff*”: *Polly Peck*, 1032B.<sup>3</sup>

64. Consideration of the whole publication may modify the effect of the alleged defamatory meaning (as in *Thompson v Bernard* (1807) 1 Camp 48) or remove the alleged defamatory meaning altogether (as in the so-called “*bane and antidote*” cases, such as *Charleston v News Group Newspapers* [1995] 2 AC 65, approved by the High Court in *Griffin v Sunday Newspapers* [2011] IEHC 331, [2012] 1 IR 114).
65. However, the entitlement of a plaintiff to sue in respect of a part only of a publication is not unqualified. A plaintiff is not “*permitted to use a blue pencil upon words published of him so as to change their meaning and then prevent the defendant from justifying the words in their unexpurgated form*”: *Polly Peck*, 1023G. Thus, a plaintiff cannot omit words from the passage complained of if the omission alters the sense and meaning of the passage: see the lengthy discussion of *Brembridge v Latimer* (1864) 12

---

<sup>3</sup> It is well-established that the hypothetical “*reasonable reader*” will have read the whole of the allegedly defamatory publication: see the discussion in *Cox & McCullough* at paras 3-37 – 3-38 and also at para 3-52 as well as the decision of this Court in *Gilchrist v Sunday Newspapers Limited* [2017] IECA 191, [2017] 2 IR 714, at para 37. The broader context and circumstances of publication may also be relevant: *Cox & McCullough*, at para 3-69 and following. See also *Gatley on Libel and Slander* (13<sup>th</sup> ed; 2022) (“*Gatley*”) at para 3-031. Elsewhere in *Gatley*, it is suggested that the proposition that the court should consider the whole publication cannot, in view of the court’s case management powers to control issues of relevance, any longer be taken literally where there is a large publication such as a book (para 12-11, footnote 111, citing *Warren v Random House Group Ltd* [2009] QB 600, at [103]). Whether or not that is so, it has no relevance here where the whole publication is a press statement running only to a couple of pages of text.

WR 878; 10 LT 816, 4 NR 285 in *Polly Peck*, as well as the discussion of *Templeton v Jones* [1984] 1 NZLR 448.

66. The question in every case is whether the statement(s) sued upon is properly severable from the wider publication.
67. In *Polly Peck*, O' Connor LJ regarded as "*self-evident*" the proposition that, where that publication "*contains two distinct libels, the plaintiff can complain of one and the defendant cannot justify that libel by proving the truth of the other*" (at 1020H; see also at 1032C-D). If, however, the allegations have "*a common sting*", they are not to be regarded as separate and distinct allegations and in such circumstances the defendant is entitled to justify that sting and to rely upon the wider publication for that purpose: *Polly Peck* at 1032D-E. Whether a defamatory statement is separate and distinct from other defamatory statements in the same publication will, in every case, be a question of fact and degree.
68. However, while there was much discussion about "*common stings*", this is not a *Polly Peck* case. As clarified by Mr Lehane in argument, the Defendants' truth defence is directed to proving the truth of the specific words complained of by the Plaintiffs (albeit not in the meanings pleaded by them). In contrast to RTÉ's defence in *Ganley*, it does not assert any form of "*common sting*" or "*generalised allegation*" arising from the Statement as a whole (or from some part or parts of the Statement not relied on by the Plaintiffs) that it seeks to prove. What the Defendants say is that the words complained of, in the alternative meanings pleaded by them, are true.

69. As a matter of principle, it is clear that it is open to a defendant to plead in this manner: *“[i]n cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him, and pleads the meanings which he asserts they bear by way of false innuendo ...”* – and that is the case here – *“the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different from that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and to give particulars of the facts and matters upon which he relies in support of his plea...”*: *Polly Peck* at 1032B-C. That passage was expressly approved by Irvine J for this Court in *Ganley* and represents the law in this jurisdiction. As is pithily stated in *Cox & McCullough*, at para 5-57, *“it is perfectly legitimate for a defendant to plead the defence of truth in respect of the meaning which s/he contends the statement bears”* (the *“statement”* referred to here being the statement sued on by the plaintiff).
70. A defendant who denies the meanings pleaded by the plaintiff *“must set out what meaning the defence attributes to the words if they seek to rely upon a plea of justification. The plea once made must be supported by the facts upon which it is based in order that the plaintiff will know the case that he has to meet”*: *Ganley*, at para 73. That clearly reflects and adopts *Lucas Box*.
71. However, the authorities suggest that there may be some further limits on a defendant’s freedom to plead truth in this context. In *Polly Peck* itself, O’ Connor LJ stated as a general principle that *“the trial of the action should concern itself with the essential*

*issues and the evidence relevant thereto*". Public policy, as well as the interests of the parties, required that the trial should be kept strictly to the issues necessary for a fair determination of the dispute: page 1021B. He returned to that theme later in his judgment, observing that in "*all cases it is the duty of the court to see that the defendant, in particularising a plea of justification or fair comment, does not act oppressively*" (at 1032E-F). Whether the particularisation of the plea was oppressive depended not only on the individual facts but also on the attitude of the plaintiff, who could limit the extent and cost of inquiry at trial by making "*timely admissions of fact*" (*ibid*).

72. No such issue arose in *Polly Peck* but the observations of O' Connor LJ have been considered in a number of subsequent cases, including two other decisions of the Court of Appeal of England and Wales to which this Court was referred in the Plaintiffs' further submissions, *United States Tobacco International Inc v British Broadcasting Corporation* [1998] EMLR 816 (1988) and *Cruise v Express Newspapers Plc* [1999] 2 WLR 327.
73. In *United States Tobacco International Inc v British Broadcasting Corporation*, the plaintiffs sued in respect of two related allegations made in a BBC TV programme concerning the alleged promotion of "*Skoal bandits*" (oral snuff/chewing tobacco) to children in breach of an agreement that the first plaintiff had entered into with the Department of Health. The plaintiff's statement of claim set out a portion of the transcript of the programme which also contained an allegation that *Skoal bandits* were a dangerous carcinogen that posed a risk to public health. The plaintiffs made no complaint of that aspect of the programme but in its defence the BBC sought to set up

the truth of that allegation as a defence. The plaintiffs sought to strike out that part of the BBC's defence.

74. In *Cruise*, the plaintiffs (the actor Tom Cruise and his then wife, actress Nicole Kidman) sued in respect of an article which, they said, meant that their marriage was a sham and also that Ms Kidman had behaved arrogantly. The article had also written about the plaintiffs' membership of the Church of Scientology. While the plaintiffs did not make any complaint about those aspects of the article, the entirety of the article was set out in their statement of claim. In those circumstances, the defendant pleaded the truth of various allegations contained in the article about the operations of the Church of Scientology. The plaintiffs applied to strike out those aspects of the newspapers' defence.

75. In each case, the High Court struck out the impugned pleading and that decision was upheld on appeal. That was so even though in *United States Tobacco International Inc* the majority of the court (Purchas LJ and Nicholls LJ) accepted that the health risk allegations (which the plaintiffs had not sued on) and the other allegations (which they had sued on) were materially connected (the court in *Cruise* took the view that the allegations being sued on by the plaintiffs were wholly separate and distinct from the allegations relating to the Church of Scientology and did not share any "*common sting*"). In each case, the court considered that it would be oppressive of the plaintiffs to allow the defendant to introduce a further issue into the case that would add greatly to its length, complexity and costs: see per Nicholls LJ in *United States Tobacco International Inc* at page 829 and Brooke LJ in *Cruise* at pages 347C – 348C.



76. These decisions appear to be based largely on considerations of case management/proportionality, rather than any brightline principle or rule of pleading, though *Gatley* takes from *United States Tobacco International Inc* the proposition that a claimant does not complain of a particular charge merely because that charge is set out in his statement of case.<sup>4</sup> Severability, it is said, is a question of substance and not of whether the charges are textually intermingled: para 12-004, footnote 36. That no doubt is so, though that question will always be fact dependent. and often will not permit of a ready answer. Furthermore, the analysis in *Gatley* does not appear to fully explain the decision in *Cruise*. There, the allegations sued on by the plaintiffs and the further allegation sought to be relied on by the newspaper were held to be separate and distinct. If that was, in itself, a sufficient basis for striking out the newspaper's defence insofar as it related to the activities of the Church of Scientology, it prompts the question how discretionary considerations of case management came to be discussed in *Cruise* at all. However, we did not have the benefit of any detailed submissions on this line of caselaw (which also includes *Carlton Communications Plc v News Group Newspapers Ltd* [2001] EWCA Civ 1644, [2002] EMLR 299 and *McKeith v News Group Newspapers Ltd* [2005] EWHC 1162 (QB), [2005] EMLR 780, to which the High Court Judge briefly refers in his Judgment) and it does not appear to have been considered previously in this jurisdiction. As a result, it appears appropriate to approach it with a degree of caution.

---

<sup>4</sup> See also *Cox & McCullough* at 5-64 where the authors suggest, by reference to these cases, that it is "legitimate for the judge to require that the focus only be on certain allegations that constitute the essential issues of the case", explaining that this "will typically arise as a matter of case management."

*The Judge's Ruling on the Pledaded Defence of Truth*

*General*

77. The Plaintiffs here have elected to sue on a single sentence – “*Sinn Féin/IRA certainly got the report they paid for*” – extracted from the longer Statement issued in response to the publication of the Report. In their respective statements of claim, the Plaintiffs have set out the (identical) defamatory meanings which they say this statement bears in relation to them. These pleaded meanings are said to arise from the natural and ordinary meaning of the statement: in other words they are false/popular innuendoes and no issue of any form of true innuendo arises.
78. At trial, the tribunal of fact – presumptively a jury – will have to determine what these words mean. However artificially, the law demands that a single meaning be given to the words: *Cox & McCullough*, para 3-20, as well as the decision of this Court in *Speedie v Sunday Newspapers Ltd* [2017] IECA 15. But, as already explained, the meaning of the words does not fall for determination at this stage. The only issue of meaning that arises here is whether the words are *capable* of bearing the pleaded meanings – and in particular the alternative meanings pleaded by the Defendants – or whether a finding that that is what the words meant would be “*perverse*”.
79. The Plaintiffs are entitled to plead what they say the words mean and have done so. However, the Defendants are not constrained by those pleaded meanings. They are entitled to plead that the words carry a different meaning *and* that, in *that* meaning, the

words are true. That principle was not in dispute in this Court or, it seems, in the High Court.

80. But there is nonetheless significant dispute as to the application of that principle. On the Plaintiffs' argument – an argument which clearly was accepted by the Judge – the single sentence on which they sue contains (or arguably contained) a number of distinct defamatory “*stings*”. One is that the Plaintiffs were paid by the IRA, a terrorist organisation. It is in respect of that “*sting*” – and that sting alone – that the Plaintiffs sue. While the statement may also be capable of being understood to mean that the Plaintiffs authored a report that lacked independence, and while such a meaning was arguably defamatory of the Plaintiffs, that is, according to the Plaintiffs, a separate and distinct “*sting*” which the Defendants are not entitled to justify.

81. In my view, that argument is fundamentally mistaken because it confuses two distinct matters, separate *stings* and contested *meanings*. The Plaintiffs have pleaded their *meanings*, some (though by no means all) of which refer to the IRA (to the exclusion of any reference to Sinn Féin, even though the statement complained actually refers to “*Sinn Féin/IRA*” ). The Defendants have pleaded alternative *meanings* in respect of the same words. Those meanings are contested but, subject only to being meanings that the words are capable of bearing (understood in context), the Defendants are entitled to plead the truth of the words published by them, in those meanings.

82. In the course of the hearing of the appeals, Mr Hogan SC (for the Plaintiffs) accepted that his argument was effectively that the Defendants either had to plead the truth of

the allegation that the Plaintiffs had associated with the IRA or else had to accept that they did not have a defence of truth.<sup>5</sup> In my view, that argument cannot be accepted. To do so would permit the Plaintiffs to impose their contested (and contestable) meanings of the words at issue on the Defendants and constrain the Defendants to justify, or not, by reference to those meanings only, even though at trial, the jury (or judge if sitting without a jury) may reject the Plaintiffs' meanings. That is not the law as I understand it.

83. It does not appear to me to be legitimate to take a single word from the sentence sued on ("IRA") and assert that it constitutes a separate "*sting*", distinct from whatever meaning the full sentence may be found to bear, properly understood in its context. That is perhaps particularly so where the Plaintiffs must rely on the entirety of the words complained of (and indeed on the Statement as a whole) for the purposes of identification. Such an approach is not supported by *Polly Peck* or decisions such as *United States Tobacco Inc* or *Cruise*. None of those cases endorsed the reductionist approach advanced by the Plaintiffs here, which appears to me, in this respect, to involve the "*blue-pencil*" approach criticised by O' Connor LJ in *Polly Peck*.

84. I should make it clear that I do not mean to suggest that a jury might not find that the true meaning (or "*sting*") of the words complained of by the Plaintiffs was that they had received payment from an unlawful organisation, the IRA (meaning (a)) or that they had acted for that organisation (meaning (b)). In that event, given that the Defendants

---

<sup>5</sup> Transcript of the hearing before this Court, page 148.

do not assert the truth of the words in either of those meanings, any defence of truth would fail and, subject to the other defences pleaded by the Defendants, the jury would presumably proceed to assess damages. But the fact that the Plaintiffs' pleaded meanings may ultimately be accepted by the jury does not mean that the Defendants ought to be excluded, at this preliminary stage, from pleading alternative meanings (provided of course that the words complained are *capable* of bearing those meanings) and seeking to prove the truth of the words complained of in those meanings.

85. Even if, in principle, a single sentence could contain within it two or more distinct and severable “*stings*” (as the Plaintiffs contend here, albeit without being in a position to point to any authority supportive of that contention), it would ultimately be a matter for the jury to determine whether that is the case here, having regard to its view of the true meaning of the words complained of. Even if was *arguable* that those words indeed contained separate stings – and as I have said, the better view appears to me that the real issue between the parties is about contested meanings rather than separate stings – that would not provide a basis for the “*drastic remedy*” sought by the Plaintiffs here.
86. Notably, the Plaintiffs themselves appear to have pleaded their claims on a broader basis. The defamatory meanings pleaded by them do not stop at (a) and (b). The meanings set out at (c) – (g) are not, on their face, limited to or dependent upon alleged association with the IRA and appear instead to involve some wider and more general “*sting*”. They are, on their face, standalone and independent pleas which are capable of being read as directed to the suggestion that the Plaintiffs were professionals who participated in an exercise that lacked independence and delivered the outcome desired

by those who had engaged them. When that point was made in the course of argument, Mr Hogan submitted that all these further meanings were dependent on association with the IRA, so that (for example) meaning (c) should properly be read as it if said “*was not acting in line with his professional obligations [because he received payment from/had acted for the IRA].*” The same argument appears to have been made to and accepted by the Judge, given that he states in Judgment that the gravamen of all the pleaded meanings was “*that [each Plaintiff] acted for and was paid by an unlawful organisation, namely the IRA*” (Judgment, para 49). Without great respect to the Judge, in the absence of any express wording to that effect, it is difficult to see how that can be stated with such confidence. That is especially so when the Judge’s approach necessarily involves carving out “*the IRA*” from the language actually used in the words complained of, which is “*Sinn Féin/IRA*”. Ultimately – subject to any potential amendment of the Plaintiffs’ pleadings – the scope of their claim will fall to be determined at trial but, as a matter of ordinary language, it is not at all clear that the meanings pleaded at (c) – (g) are to be limited in the manner suggested by the Plaintiffs and held by the Judge.

Defendants’ meaning (i) – “The Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study”

87. I have set out the Judge’s analysis of this pleaded meaning earlier in this judgment. He found that the words complained of, understood in the context of the Statement as a whole, were capable of bearing this meaning and, in that meaning, were defamatory of

the Plaintiffs. There is no appeal from these findings, which appear to me to be entirely reasonable.

88. The Judge nonetheless concluded that the pleading was unsustainable because it related to a separate and entirely distinct allegation of which the Plaintiffs had not made a complaint. He thus answered *Ganley* question (ii) in the affirmative. It will be evident from the discussion above that I respectfully disagree with the Judge. Having ruled that the meaning arguably arose from the specific words complained of by the Plaintiffs, the Judge was wrong to look for any “*common sting*” as a condition of permitting the Defendants to plead the truth of that meaning. Nothing in *Polly Peck* or *Ganley* supports such an approach where, as here, the defamation claim arises from one short sentence and where the real issue between the parties is as the true meaning of that sentence. The approach taken by the Judge effectively permitted the Plaintiffs to blue pencil the words at issue (by deleting all the words but “*IRA*” even though that word does not in fact appear on its own in the sentence and even though the Plaintiffs necessarily rely on the remaining words, and on the Statement more generally, in order to establish identification) and to impose their contested (and contestable) meanings of those words on the Defendants, thereby constraining them to justify, or not, by reference to those meanings only. For the reasons I have explained already, that was not a correct approach and I would respectfully set aside the Judge’s finding on this point.

89. The Judge did not suggest, nor was this Court invited to conclude, that the Defendants could or should be excluded from seeking to prove the truth of the words in this meaning as a matter of case management.

90. In these circumstances, *Ganley* question (iii) – whether proper particulars of fact have been provided that are capable of supporting the defence – must be addressed. The Judge, it will be recalled, expressed the view (*obiter*) that no particulars of fact had been provided that were capable of supporting this or any of the other meanings pleaded by the Defendants (Judgment, para 56). Given that the Defences fail to set out any particulars whatever, that conclusion is inevitable. As Irvine J explained in *Ganley*, the plea once made “*must be supported by the facts upon which it is based in order that the plaintiff will know the case that he has to meet.*” Considerations of basic fairness require that to be the case. In addition, it is important from a case-management viewpoint that the parameters of the dispute are clearly delineated from an early stage so as to avoid an unfocused and excessively lengthy trial.
91. If the Defendants wish to rely on the plea that the Report prepared by the Plaintiffs (*inter alia*) is not an “*independent study*”, as they clearly do, it is incumbent on them to provide proper particulars of the facts on which that plea is based. That is especially so given that the Plaintiffs were, at the time of their involvement in the preparation of the Report, legal professionals and having regard to the fact that the Report expressly asserts that it *is* an independent study. The allegation here is neither trivial nor self-explanatory. It requires to be particularised.
92. As I explain below, I consider that the Defendants should be allowed an opportunity to amend their Defences so as to provide appropriate particulars now.



Defendants' meaning (ii) – “The Report was neither balanced nor fair since it did not focus on RTÉ which is the largest media entity in Ireland”

93. The Judge again answered *Ganley* question (i) in the affirmative in respect of this meaning and again there is no appeal from that aspect of his judgment.
94. Even so, there was considerable discussion of this pleaded meaning in the course of argument.<sup>6</sup> In argument, I suggested that the pleaded meaning conflated an alleged *meaning* (the Report was neither balanced nor fair) and a *particular* that might be relied on to establish the truth of that meaning (the Report did not focus on RTÉ which is the largest media entity in Ireland). I remain of that view and in my opinion the pleaded meaning should be amended so to read “*The Report was neither balanced nor fair*”.
95. For all of the reasons already given, I respectfully disagree with the Judge’s conclusion that this meaning (whether in the form pleaded or the modified version set out above) is unsustainable by reference to *Ganley* question (ii).
96. In argument, the Court expressed concern that such a meaning might result in a wide-ranging inquiry that would or might result in an excessively long and expensive trial. That is an entirely legitimate concern. However, I do not consider that a plea to the effect that the Report was neither balanced nor fair should, as a matter of principle, give rise to any materially wider evidential inquiry than a plea that the Report was not an

---

<sup>6</sup> Transcript at page 53 and following (submissions of Mr Lehane).

independent study. Furthermore, the Defendants will not be permitted to leave such a plea at large. For the reasons set out above, the Defendants should have provided, and must now provide, particulars of the facts upon which this plea is based. Doing so will necessarily delimit the inquiry at trial.

*Defendants' meaning (iii) – “the Report was designed to advance the political agenda of Sinn Féin”*

97. The Judge answered *Ganley* question (i) in the affirmative in respect of this meaning and there again there is no appeal from that aspect of his judgment.
98. Again, it was not suggested that the Defendants could or should be excluded from seeking to prove the truth of the words in this meaning as a matter of case management.
99. I respectfully do not agree with the Judge's view that this meaning is unsustainable because it relates to a separate and distinct sting in respect of which the Plaintiffs have not complained.
100. The Defendants must, however, provide proper particulars of the facts and matters on which this plea is based.

Defendants' meaning (iv) – “Sinn Féin supported and continues to be associated with the IRA.”

101. I agree with the Judge that even if this meaning is capable of being borne by the words complained of (which is far from clear to me) it is not defamatory, or even arguably defamatory, of the Plaintiffs. It follows that it should be struck out and I would affirm the Judge's order to that extent.
102. The Defendants have elected not to plead any meaning that links the Plaintiffs to the IRA (that is, of course, the Plaintiffs' fundamental objection to their meanings) and, in those circumstances, the Defendants should not be permitted to bring the IRA, and its alleged links with Sinn Féin, into the case by a back door. That would give rise to significant potential prejudice to the Plaintiffs, as well as opening up a significant (and irrelevant) area of inquiry at trial.

Defendants' meaning (v) – “Any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position on media ownership and its opposition to the first named defendant and Independent News and Media Plc.”

103. The Judge considered the words complained of, in the context of the Statement as a whole, were capable of bearing this meaning. There is no appeal against that finding. However, he did not see how the words in that meaning could be said to be defamatory of the Plaintiffs, as opposed to being potentially defamatory of Sinn Féin. I respectfully disagree. This pleaded meaning is potentially defamatory of the Plaintiffs because it

could be understood to suggest that the Report prepared by them (*inter alia*) was supportive of Sinn Féin's position on media ownership, and its alleged opposition to Mr O' Brien and INM, simply on the basis that the Report had been commissioned by Sinn Féin. That *could* be considered to constitute an imputation on the professional independence and/or integrity of the Plaintiffs.

104. Again, it was not suggested that the Defendants could or should be excluded from seeking to prove the truth of the words in this meaning as a matter of case management.
105. I respectfully disagree with the Judge's analysis of *Ganley* question (ii) but I agree with his view that the Defendants have not provided proper particulars of this plea (*Ganley* question (iii)). The Defendants must provide proper particulars of the facts and matters on which this plea is based if this plea is to be maintained.

*Defendants' meaning (vi) – "The violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect."*

106. I agree entirely with the Judge's conclusions that this meaning simply does not arise from the words complained of, however broadly construed. In any event, this pleaded meaning is not capable of being understood as being referable to, less still as defamatory of, the Plaintiffs. It follows that this plea should be struck out and I would affirm the Judge's order to that extent. The observations made above about pleaded meaning (iv) apply equally here.

### *Conclusions and Order*

107. I consider it appropriate to permit the Defendants to amend their Defence so to provide appropriate *Lucas Box* particulars. The Plaintiffs did not seek such particulars or complain of their absence when the Defences were served. Furthermore, the failure to particularise was not a basis on which the strike out motions were brought (though it is clear that the point was made in argument in the High Court). More generally, in any strike out application, a court should consider whether the impugned pleading could be saved by an amendment: as Clarke J stated in *Moffitt v Agricultural Credit Corporation plc* [2008] 1 ILRM 416, it is “*well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success*” (at para 3.1). That principle can be traced back to the judgment of McCarthy J in *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 (which was cited by Clarke J in *Moffitt*) and has been affirmed in many subsequent decisions, including by the Supreme Court in *Lawlor v Ross* [2001] IESC 110 (also cited in *Moffitt*). In the circumstances here, it would be inappropriate and disproportionate to strike out the defence of truth (insofar as it is otherwise permissible) because of the failure to plead that defence properly, without allowing the Defendants an opportunity to remedy the defect.
108. I would therefore permit the Defendants to rely on pleaded meanings (i), (ii) (subject to the modification indicated), (iii) and (v) for the purposes of a defence of truth, subject to providing appropriate particulars. It is a matter for the Defendants to determine what

particulars to plead but they must be properly connected to the pleaded meanings. The activities of the IRA and the relationship between it and Sinn Féin are not relevant to any of the meanings at paragraph (i), (ii) (modified), (iii) or (viii) and it follows that such matters may not be relied by the Defendants for this purpose.

109. Accordingly, I would allow the Defendants' appeals to the extent that I would not strike out paragraph 12(i), (ii) (subject to the deletion of the words following "*the Report was neither balanced nor fair*"), (iii) and (v). I emphasise that that does not imply any judgment as to merits, or ultimate prospects of success, of that defence. That will be a matter for a jury. I am holding only that, in respect of those pleaded meanings, the Defendants should not be shut out at this stage from making their case to the jury. Furthermore, as in any defamation action, the Defendants plead truth at their own risk. It is well-established that running an unsuccessful defence of truth may lead to an increased award of damages against the defendant, whether by way of higher compensatory damages or by an award of aggravated damages (in this context see the discussion in *Cox & McCullough*, at 11-72 and following, of the effect of section 32(1) of the 2009 Act, at 11-72).

### ***The Order striking out the Defendants' Defence of Honest Opinion***

#### *The Defence of Honest Opinion*

110. The 2009 Act abolished the defence of fair comment and enacted, in section 20, a new statutory defence of honest opinion. Section 20(1) provides that it shall be a defence

*“for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held.”* The elements of the defence are helpfully explained in *Cox & McCullough*:

*“(a) What is published must be shown to be a statement of opinion rather than a statement of fact;*

*(b) The opinion must be shown to have been honestly held and, in order for it to be honestly held, various criteria must be fulfilled; namely*

*(i) the opinion must be based on allegations of fact that, in general, must be proven to be true and must be reasonably accessible to the recipient of the publication;*

*(ii) the publisher of the opinion must believe in its truth; and*

*(iii) the opinion must be related to a matter of public interest.”* (para 6-23)

111. As *Cox & McCullough* observes, the distinction between facts and opinion is very difficult to draw. Section 21 of the 2009 Act is intended to provide some guidance. It provides that the matters to which a court in a defamation action shall have regard in distinguishing between a statement consisting of allegations of fact and a statement consisting of opinion, *“shall include (a) the extent to which the statement is capable of being proved; (b) the extent to which the statement was made in circumstances in which*

*it was likely to have been reasonably understood as a statement of opinion rather than a statement consisting of an allegation of fact; and (c) the words used in the statement and the extent to which the statement was subject to a qualification or a disclaimer or was accompanied by cautionary words.”*

*The Issues here*

112. The debate on the honest opinion defences in these appeals was limited. The Defendants did not dispute Heslin J’s summary of the law or suggest that he was in error in relying on, and applying, the decision of Barton J in *Ryanair v Van Zwol*. As the Appellants presented it, the issue arising in relation to the striking out of the defence of honest opinion was effectively a mirror image of the issue arising in relation to the striking out of the defence of truth.
113. Tempting as it may be to approach the issue that way, I do not think that we can shut our eyes to the wider difficulties that arise from the manner in which the Defendants have pleaded the honest opinion defence. As the Judge observed at para 61 of his Judgment, the Defences do not identify the opinions that the Defendants say they held and which they say are protected by the defence of honest opinion. That is in contrast to the defence in *Ryanair v Van Zwol* (see paragraph 12 of that judgment). That gives rise to an unacceptable uncertainty as to the scope of the defence that the Defendants seek to rely on, which is compounded by the terms of the particulars set out in paragraph 15 of the Defences.



114. In England and Wales, a defendant pleading a defence of honest opinion must “*specify the (defamatory) imputation he seeks to defend as honest opinion*”: *Gatley*, para 29-016. While the immediate source of that requirement is said to be a Practice Direction (CPR PD 53B), in my views that is an elementary requirement of proper pleading practice: a defendant must identify what, on their case, is the opinion or opinions that they honestly held. In this regard, I agree entirely with the views of Nicholls LJ in *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183:

*“In my view the starting point is to identify the comment the defendants say is to be found in the words complained of and which they are seeking to defend as fair comment. At once one runs into difficulty with the pleading as drafted. Nowhere in paragraph 7 or the particulars given thereunder does the pleader identify this comment. This is manifestly unsatisfactory. A plaintiff is entitled to know what case he has to meet under a defence of fair comment just as much as he is entitled to know what case he has to meet when faced with a defence of justification. Where justification is pleaded, a defendant is now required to spell out in his pleading the meaning of the words, which if it is their true meaning, he will seek to justify. These are the so-called “Lucas-Box” particulars: see Lucas-Box v. News Group Newspapers Ltd. [1986] 1 W.L.R. 147, 153, and the observations of Mustill L.J. in Viscount De L'Isle v. Times Newspapers Ltd. [1988] 1 W.L.R. 49, 60. In my view by parity of reasoning, when fair comment is pleaded the defendant must spell out, with sufficient precision to enable the plaintiff to know what case he has to meet, what is the comment which the defendant will seek to say attracts the fair comment defence.*

*No doubt there may be very simple cases where the position is obvious and a plaintiff, confronted with a plea of fair comment, will need no further guidance on what is the comment to which the plea is directed. That is not the present case.” (at 189A-E)*

115. This is not such “*a very simple case*” either and the Defendants ought to have spelled out, with sufficient precision to enable the Plaintiffs to know what case they have to meet, what are the opinions which they say attract the defence of honest opinion.
116. It seems reasonable to assume that Defendants wish to rely on the same meanings as were relied on by them for the purpose of the defence of truth (and not the meanings relied on by the Plaintiffs, which the Plaintiffs deny). However, as the Defences currently are drafted, those meanings are pleaded as particulars of fact upon which the Defendants’ (unidentified) honest opinions were based. The same statement or meaning cannot simultaneously do duty as “*honest opinion*” and as an allegation of fact said to sustain such an opinion. An *opinion* that the Report “*was not an independent study*” cannot properly be based on an *allegation of fact* that the Report was not such a study.
117. In principle, the Defendants are entitled to plead the matters pleaded at paragraph 15 (i), (ii) (in the modified form set out above), (iii) and (viii) as defamatory imputations or meanings constituting statements of opinion to which the defence of honest opinion applies. Ultimately, of course, a jury may conclude that the statement complained of by the Plaintiffs is one of fact rather than of opinion but at this stage the threshold is simply

whether that statement is *capable* of being interpreted by a jury as a statement of opinion, in one or more of the meanings contended for by the Defendants. In my view, the statement is *capable* of being interpreted as a statement of opinion in one or more of the meanings set out at paragraph 15(i), (ii) (in the modified form set out above), (iii) and (viii) (though of course as currently pleaded these are pleaded as particulars of fact rather than as opinions).

118. I agree with Heslin J that the Defendants may not rely on what is pleaded at paragraph 16(viii) or (ix) as defamatory meanings to which the defence of honest opinion applies. The words complained of are not capable of bearing those meanings, whether understood as statements of fact or of opinion.

119. The Defendants must also set out clearly the allegations of fact on which such opinions were based. Some of the other “*particulars of fact*” set out in paragraph 15 – such as the pleas at (iv) – (vii) - may be directed to this. But on any view the manner in which the honest opinion defence is pleaded is unclear and unsatisfactory. The Defendants must now review and replead that defence. In doing so, the Defendants should be astute to plead only factual matters related to the opinions pleaded. As stated above, the activities of the IRA and the relationship between it and Sinn Féin are not relevant to any of the permissible meanings in paragraph 15. It follows that, if the Defences are amended to plead those meanings as statements of opinion protected by the defence of honest opinion, such matters may not be pleaded as allegations of fact on which those opinions were based.

*Conclusions and Order*

120. Assuming that the Defendants are willing to amend their Defences to plead a defence of honest opinion within the parameters indicated in this judgment, I would allow them an opportunity to do so and I would allow their appeals on this aspect of the strike-out application to that extent.

### ***The Discovery Orders***

#### *The Discovery sought by the Plaintiffs*

121. I will deal with this first as the scope of the dispute between the parties reduced significantly at the hearing.
122. As regards *category 1* (documents disclosing the extent of circulation and publication of the Statement), it appears to me that the Plaintiffs are entitled to find out to whom the Statement was circulated and published *by or on behalf of the Defendants*. Insofar as the category ordered by the Judge is broader in scope, it is, to that extent, impermissibly wide in my view. I would, accordingly, vary the order made by the Judge so as to direct discovery of all documents evidencing or recording the extent of circulation and publication of the Statement *by the Defendants, their servants or agents*.
123. As for *category 2* (documents evidencing any attempts by on behalf of the Defendants to obtain a response from the respective Plaintiffs, and/or to verify the contents of the

Statement so far as it related to them, prior to its publication), the Court directed the Defendants' solicitors to write confirming whether, for the purpose of their section 26 defence, they were making the case that, prior to the publication of the Statement, they had made attempts to get a response from the Plaintiffs and/or had made attempts to verify the assertions and allegations concerning the Plaintiffs. It is clear from the correspondence subsequently provided to the Court that the Defendants have now unequivocally confirmed that they did not make any such attempts. Therefore that is not an issue in the case and as a result *category 2* falls away.

*The Discovery sought by the Defendants*

124. As regards *category 1* (documents related to the commission of the Report) and *category 2* (documents relating to how the Report was paid for) the Defendants have failed to identify any error in the Judge's approach or the conclusions reached by him. I would therefore affirm his refusal to direct discovery of these two categories.
125. As for *category 3* (documents relating to the scope of the engagement and the terms of reference) the Judge's decision to refuse this category followed inevitably from his view that the defences of truth and honest opinion were unsustainable and ought to be struck out. I have reached a different conclusion about those defences. In light of the scope of these defences which I have concluded that the Defendants are entitled to maintain, this category of discovery appears to be relevant and necessary. It has not been suggested that making discovery of this category of documents would impose any

disproportionate burden on the Plaintiffs or that there was any other particular factor weighing against directing discovery of this category. I would therefore vary the order made by the Judge so as to direct discovery of this category.

126. Finally, as regards *category 4* (previous drafts of the Report) the rationale offered for discovery of this category relates to the issue of the Plaintiffs' authorship of the Report. I agree with the Judge that, in circumstances where the Report itself identifies the Plaintiffs as co-authors of it, no issue of authorship appears to arise to which this category of documents could be said to be relevant. I would therefore affirm the Judge's refusal of this category.

## CONCLUSIONS

127. I would allow the Defendant's appeals from the orders made by the Judge striking out their defences of truth and of honest opinion to the extent indicated above. I would also vary the discovery orders made by the Judge in the manner just explained.
128. The Court will hear the parties before determining the precise orders to be made on the strike-out appeals. Provisionally, it seems appropriate to direct the Defendants to deliver an Amended Defence in both actions, within the parameters indicated in this judgment, with the actions proceeding thereafter in the High Court in the ordinary way. But the parties will have an opportunity to consider this judgment and then canvass the form of order (including as to costs) that they contend is the appropriate order for the Court to make.
129. The parties will be notified of the hearing date. In advance of that date, the parties should correspond setting out the form of order that they will be asking the Court to make and copies of that correspondence should be provided to the Court of Appeal Office not less than 48 hours prior to the hearing.

*Barnville P and Haughton J have indicated their agreement with this judgment.*

## **APPENDIX - CATEGORIES OF DISCOVERY SOUGHT**

### **I - Categories sought by the Defendants**

#### ***Category 1***

*All documents evidencing the commissioning of the “Report on the Concentration of Media Ownership in Ireland” (the “Report”) to include, but not limited to:*

- The original request for the commissioning of the Report to include any request/s made both of and by Lynn Boylan MEP;*
- The engagement of GUE/NGL in the commissioning of the Report;*
- The commissioning by GUE/NGL of the Report, to include any documents relating to the applicable procurement/tender process.*

#### ***Category 2***

*All documents evidencing the invoicing, payment or payments for the “Report on the Concentration of Media Ownership in Ireland” (the “Report”) in particular, but limited to, any invoices, receipts and bank/financial statements relating to payments, either direct or indirect, in respect of the commissioning of the Report.*

#### ***Category 3***

*All documents evidencing the terms of reference and/or scope of the “Report on the*



*Concentration of Media Ownership in Ireland” (the “Report”) as commissioned, to include, but not limited to, any instructions given both to and by KRW Law LLP in relation to the commissioning and/or scope and drafting and/or wording of the Report.*

***Category 4***

*All drafts/working versions of the “Report on the Concentration of Media Ownership in Ireland” (the “Report”) to include, but not limited to, any documents associated with the said drafts or portions thereof identifying the author or authors of the Report or portions thereof.*

**II - Categories sought by the Plaintiffs**

***Category 1***

*All documents evidencing or recording the extent of circulation and publication of the press statement issued by the defendants on the 26<sup>th</sup> October 2016.*

***Category 2***

*All documents evidencing or recording:*

- (a) All attempts made by the defendants, their servants or agents, to obtain a response from the plaintiff prior to publishing the words complained of;*

(b) *All attempts made and the means used by the defendants, their servants or agents, to verify the assertions and allegations concerning the plaintiff in the words complained of.*