



THE COURT OF APPEAL

2017/116

2017/117

2017/118

**Birmingham P.
Irvine J.
Baker J.**

BETWEEN

DECLAN GANLEY

**PLAINTIFF /
APPELLANT**

AND

RAIDIÓ TELIFÍS ÉIREANN

**DEFENDANT /
RESPONDENT**

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of January 2019

1. These defamation proceedings arise as a result of an episode of *Prime Time*, a current affairs programme broadcast by RTE, on the 27th November 2008. The broadcast focused upon the life of Mr. Declan Ganley, a prominent Irish businessman, and in particular his business interests. Mr. Ganley maintains that the programme as a whole was defamatory of him with the result that he commenced the within proceedings by plenary summons on the 15th December 2011. The substantive proceedings have not yet been heard notwithstanding the fact that almost ten years have now passed since the broadcast was aired.

2. This judgment relates to a number of appeals arising from certain interlocutory orders made by Barrett J. in the High Court on the 1st March 2017. The appeals may be summarised as follows:-

(i) RTE's appeal against the refusal of the High Court judge to strike out the plaintiff's claim for want of prosecution and in particular his failure to make proper discovery;

(ii) Mr. Ganley's appeal against an order granting the defendant liberty to cross-examine him in respect of his affidavits of discovery sworn on the 27th August 2014 and the 10th April 2015;

(iii) RTE's appeal against an order requiring that it forthwith comply with an order for discovery made on the 4th February 2015 and refusing its application that it be permitted to file in court its affidavit of discovery in a sealed envelope pending further order of the court;

(iv) Mr. Ganley's appeal against the refusal of the High Court judge to strike out paras. 8, 9 and 10 of RTE's defence delivered on the 15th November 2012; and

(v) RTE's appeal against the order of the High Court judge which provided that the costs of all three interlocutory applications heard by him be reserved to the hearing of the action.

3. I will deal with each of the appeals in turn but before doing so I will endeavour to summarise the pleadings exchanged between the parties and the history of the discovery process.

The Pleadings

4. In his statement of claim delivered on the 17th April 2012, Mr. Ganley claims that the words broadcast by RTE in the course of the programme, in their ordinary and natural meaning, and/or by way of innuendo, had the meanings ascribed to them at para. 6 of his statement of claim, namely that:-

"6(a) the Plaintiff had links to organised crime;

(b) the Plaintiff falsely claimed to be a paid advisor to the government of Latvia;

(c) the Plaintiff had a direct business relationship with a Kosta Tribecka who worked for him at a company called Anglo Adriatic;

(d) the Plaintiff had a close friendship with Kosta Tribecka and had accompanied him on a trip;

(e) the Plaintiff was somehow involved in the death of said Kosta Tribecka, and using the juxtaposition of pictures of the man's dead body, deliberately and shockingly shown; alongside words linking his death to the Anglo Adriatic Fund which it was alleged the plaintiff was behind, raised obvious suspicions the Plaintiff was responsible for or involved in that person's death;

(f) the Plaintiff falsely and misleadingly claimed to have done a deal to bundle six television stations together in Central America;

(g) the Plaintiff's actions caused the Anglo Adriatic Fund to lose the life savings of thousands of Albanian pensioners their life savings (sic);

(h) the Plaintiff was covertly working for the United States' Central Intelligence Agency and/or an ill-defined group known as the 'Neocons'."

5. Prior to receiving Mr. Ganley's reply to its notice for particulars dated the 4th July 2012, RTE filed its defence on the 15th November 2012. The defence may be described as a full defence in which RTE complains that Mr. Ganley, in his statement of claim, failed to identify any specific words in its programme defamatory of him. Further, it pleads that the words broadcast in their ordinary or natural meaning or by way of innuendo do not bear the meanings alleged at para. 6 of the statement of claim save for the meaning pleaded at para. 6(f). RTE further pleads that the sting of the words in the programme, when taken as a whole, mean that Mr. Ganley has a tendency to make exaggerated claims in respect of business and other matters, and seeks to justify this meaning. In that regard it sets out at para. 10(a)-(g) of its defence the facts upon which it intends to rely to support this contention in addition to the matters already pleaded in the defence. In the further alternative, RTE maintains that the words complained of were published on an occasion of qualified privilege.

6. Because of the controversy concerning paras. 8, 9 and 10 of the defendant's defence, it is convenient at this point to set out the full text of those paragraphs:

"8. If, which is denied, the words broadcast bore the meanings pleaded at paragraphs 6(c) and (d) of the Statement of Claim, and if, which is denied, the said meanings or either of them are defamatory, the same are true in substance and in fact to the extent that the Plaintiff and Mr. Kosta Tribecka both worked in connection with the Anglo Adriatic Investment Fund (and were among a small number of persons engaged in doing so). The Fund itself accepted vouchers, many of which were bought on an unofficial market, but it was never allowed to invest them in privatised enterprises. People who had deposited vouchers in the Fund felt aggrieved that the Fund ceased trading with little or no explanation to depositors.

9. If, which is denied, the broadcast bore the meaning pleaded at paragraph 6(b) of the Statement of Claim, the same was true in substance and in fact to the extent that the plaintiff frequently exaggerated his role, vis-à-vis the Latvian Government in the early stages of Latvian independence.

10. Without prejudice to the foregoing, if, which is denied, the broadcast is defamatory of the Plaintiff, the Defendant pleads 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. In this respect, in addition to the matters already pleaded, the plaintiff will rely on, *inter alia*, the following:-

(a) At a meeting between the Plaintiff and Michael Bourke, an IMF adviser, in Riga the Plaintiff represented to Michael Bourke that he, the Plaintiff, was in the process of setting up a bank called Ganley International Bank and that he was getting a licence from the Ministry of Finance in Latvia. Michael Bourke checked the following day to find that there was no application for a licence for this bank pending.

(b) The Plaintiff has previously made an exaggerated claim to hold a controlling interest in one of Europe's largest on-shore gas fields located in the Balkans.

(c) The Plaintiff has previously made an exaggerated claim that he was an adviser on technology and terrorism to the Club De Madrid group of international heads of government whereas he had in fact participated in a summit in 2005 and was a member of the ad hoc working group on science and technology and shared its conclusions in the related session of the summit.

(d) The Plaintiff claimed in May 2004 to be the beneficiary of an impending \$70 million contract for a telecommunications network in Iraq when he knew that any contract which it had been thought might be given to a company controlled by or partly controlled by the Plaintiff had been cancelled in March 2004.

(e) The Plaintiff has falsely claimed that it was he who caused his firm to withdraw from the said contract when it was in fact by the Coalition Provisional Authority in Iraq, despite the threats and protests of persons in association with whom the Plaintiff was seeking to be awarded the said contract, because an inappropriate term had been inserted in it allowing for the building of an infrastructure for a fourth cellular phone network in Iraq despite the protest of a person or persons.

(f) In September 2009, during a debate with the then Minister for State, Dick Roche, on RTE Radio One 'News at One', the Plaintiff was asked why in respect of some of his companies he registered himself as a British citizen when it suited him. The Plaintiff replied that he had 'never done that'. Records in Companies House show that in 1995 Ganley International was registered, listing the Plaintiff as a director and his nationality as 'British'. Subsequent handwritten entries in 2001 and in 2002 list the plaintiff's nationality as 'British'. The records were only changed to reflect the plaintiff's nationality as 'Irish' in 2006.

(g) In the accounts for Rivada Networks Limited filed in the Companies Registration Office for the years 2006 and

2007, it stated that the Plaintiff had no beneficial interest in the US parent company, Rivada Networks. When Colm Keena of the 'Irish Times' queried this assertion the Plaintiff declined to comment. However, shortly after this interview a new set of accounts for 2007 was filed in the Companies Registration Office stating that the plaintiff had a 43.2 per cent interest in Rivada Networks."

7. RTE's notice for particulars dated the 4th July 2012 was replied to on the 23rd April 2013. Once again, no specific words were identified in support of the claim of defamation, with Mr. Ganley asserting that the programme in its totality was defamatory. Of particular relevance to the first order of the High Court under consideration in this judgment is the reply set out at para. 12 which reads as follows:

"The plaintiff repeats his reply to Notice 2 above. The entire programme was crafted with a slant, by the selection of certain material, the choosing of only certain interviews and the decision to leave out other interview content to create the clear impression in the minds of the viewer that the plaintiff was a shady individual, involved with the mafia or protected by the mafia in Latvia. A fantasist who made up business dealings and was somehow involved in the death of the man shown as a victim of the plaintiff and his business dealings, and that the programme makers knew this to be the case so strongly they actually showed his dead or dying body on screen, darkened the studio, with the presenter all in black, and used silent credits at the end as a mark of respect to the man they claimed in the programme the plaintiff knew and had business dealings with."

8. It seems to me that the aforementioned paragraph must be considered to be the sting of the overall programme as proposed by Mr. Ganley, and that he accepts that wider and more general meanings may attach to the programme than those pleaded by him in the statement of claim at paras 6(a) to (g) inclusive.

9. The pleadings closed with the reply of the plaintiff which was delivered on the 23rd April 2013. At paragraph 1 thereof Mr. Ganley gave notice that not only would he rely upon the words published in the course of the television documentary to support the meanings pleaded in the statement of claim but that he would also rely upon the sounds and images accompanying the words. More importantly, however, in the context of the present appeal are paragraphs 2 and 3 wherein Mr. Ganley pleads that paragraphs 8, 9 and 10 of the defence cannot sustain or support a plea of justification and that RTE is not entitled to prove the truth of those allegations to support a plea of justification of meanings which he, Mr. Ganley, has not pleaded.

The Discovery Process

10. By letter dated the 20th December 2012, RTE requested Mr. Ganley to make discovery of the following documents: -

- (a) all documents, records, notes or memoranda relating to or referring to the Plaintiff's role in the Anglo Adriatic Investment Fund;
- (b) all documents, records, notes or memoranda relating to or referring to administration of Anglo Adriatic Investment Fund including but not limited to:
 - (i) records relating to the identity of persons working for the fund
 - (ii) the minutes of meetings held between representatives of the fund including any meetings attended by either the Plaintiff or Kosta Tribecka
 - (iii) correspondence to/from or referring to the Plaintiff and/or Kosta Tribecka and
 - (iv) documentation relating to the losses suffered by persons who deposited vouchers in the fund;
- (c) all documents, records, notes or memoranda relating to or referring to the Plaintiff's role, vis-à-vis the Latvian Government in the early stages of Latvian independence;
- (d) all documents, records, notes or memoranda relating to or referring to the Plaintiff's application to the Ministry of Finance in Latvia in respect of Ganley International Bank;
- (e) all documents, records, notes or memoranda relating to or referring to the Plaintiff's controlling interest in one of Europe's largest on-shore gas fields located in the Balkans;
- (f) all documents, records, notes or memoranda relating to or referring to the Plaintiff's role as an advisor on technology and terrorism to the Club De Madrid group of international heads of government;
- (g) all documents, records, notes or memoranda relating to or referring to the Plaintiff's interest in the contract for a telecommunications network in Iraq in 2004 including but not limited to all documentation in respect of the cancellation/termination/withdrawal by the Coalition Provisional Authority in Iraq in March 2004;
- (h) all declarations made by or on behalf of the Plaintiff in respect of his nationality in respect of his business interests and the companies of which he is or was listed as a director;
- (i) all documents, records, notes or memoranda relating to or referring to the Plaintiff's interest in the U.S. company, Rivada Networks, prior to 2007.

11. Mr. Ganley agreed to make discovery in the aforementioned terms and swore his original affidavit of discovery on the 27th August 2014. The discovery made in that affidavit was not favourably received by RTE. The affidavit had listed some 389 documents but these had not been ascribed to the categories in respect of which discovery had been agreed. Further, in part 2 of the first schedule, claims of privilege had been made in respect of generic categories of documentation and no individual documents had been listed. I would here observe that one such category was "professional communications of a confidential nature passing between the defendants and their solicitors and counsel" which I assume ought to have read "between the plaintiff and his solicitors and counsel".

12. By consent order of the High Court dated the 4th February 2015, RTE was directed to make discovery of all documents in its possession concerning twelve specific categories identified in that order. It is not necessary, for the purposes of this judgment, to

detail further the terms of the discovery save to note that the affidavit was to be sworn by Katie Hannon, the journalist who presented the 'Prime Time' programme, within a period of eight weeks.

13. In light of RTE's criticism of his first affidavit of discovery, Mr. Ganley swore a further affidavit of discovery on the 10th April 2015. Once again, RTE expressed reservations about the completeness of this affidavit and in its letter of the 29th April 2015 maintained that it ought not be required to finalise its own affidavit of discovery until satisfied that Mr. Ganley had fully complied with his discovery obligations. In that letter RTE expressed concern about the limited number of documents that had been listed in the first and second schedules having regard to the breadth of the discovery that had been sought. It queried how a certain electronic file which had, according to Mr. Ganley, been stored on his computer system and which related to a telecommunications network in Iraq had been "wiped", as he claimed in 2008. It questioned how only electronic files relating to this matter had been wiped from the system while others remained intact. RTE also complained, *inter alia*, about Mr. Ganley's failure to discover any documents, records, notes or memoranda referring to the Anglo Adriatic Investment Fund or the U.S. company, Rivada Networks.

14. By letter dated the 1st May 2015, Mr. Ganley's solicitors complained bitterly about the approach taken by RTE to his discovery. They accused RTE of trying to delay the proceedings and of seeking to find reasons to withhold its own discovery. Consistent with this approach, Mr. Ganley issued a motion seeking to strike out the defence of RTE for failure to comply with the order for discovery to which it had agreed on the 4th February 2015. The following week RTE responded by issuing its own motion dated the 7th May 2015 concerning not only what it claimed was the inadequacy of Mr. Ganley's discovery and for an order that he be cross-examined in relation thereto, but also its own application seeking leave of the court to file its affidavit of discovery in court in a sealed format until such time as Mr. Ganley had been cross-examined on his affidavits of discovery.

15. As the aforementioned motions were not heard until 2017, I will complete my summary of the history of the dispute between the parties concerning discovery before returning to consider those applications in greater detail.

16. A third affidavit of discovery was sworn by Mr. Ganley on the 24th July 2015. In that affidavit, he stated that in 1997 and in the period that followed, a number of files relating to the Anglo Adriatic Investment Fund had been lost as a result of anarchy consequent upon the outbreak of civil disorder in Albania. The property of Anglo Adriatic had been looted and the company's staff had been airlifted from Albania. Mr. Ganley nonetheless acknowledged that some additional records might be in the possession of former employees, consultants or agents of the Fund.

17. In his affidavit of the 24th July 2015, Mr. Ganley retracted what he had earlier said regarding the wiping of certain records concerning the telecommunications network in Iraq from his office system in 2008. He stated that this had in fact occurred in 2004 and 2005 when the hard drive of the computer belonging to his personal assistant had become corrupted and all of the material for the previous year had been lost. According to Mr. Ganley, specialist I.T. consultants had been unable to retrieve this documentation.

18. By letter dated the 1st December 2015, RTE once again took issue with the nature and extent of the discovery that had been made by Mr. Ganley. It pointed to the fact that only six documents dating from 2004, which was the most relevant year in terms of his dealings in respect of the telecommunications network in Iraq, had been discovered. These were described as a meagre selection of general documents favourable to Mr. Ganley. The following paragraph from the aforementioned letter demonstrates RTE's frustration with Mr. Ganley's approach to his discovery obligations:-

"We first asked you for discovery on the 20th December 2012. It is now December 2015 and your client still has not addressed it properly. While our position is not that simplistic this case involves your client's involvement in a large investment fund in Albania, his role as an alleged advisor to the Latvian government in the 1990s, his proposal allegedly to set up a bank, his controlling interests in one of Europe's largest on-shore gas fields, his effort to become involved in a national telecommunications network in Iraq and various other matters. Are was seriously to believe that even in the most extraordinary circumstances such enterprises between them could generate a total of 509 documents over a space of many years. We exclude from the schedule in your affidavit of discovery the one hundred and eight documents which are alleged to comprise all documents, notes and memoranda regarding an interest in six television stations in Central America because we never asked for any discovery in this category despite the fact that you have made it.

We would add that we had in the most recent affidavit got sketchy details of the alleged disappearance of records owing to the corruption of your client's personal assistant's computer. We are amazed that between your affidavit of discovery in April 2014 and that sworn in July, you allegedly realised that such a cataclysmic event happened not in 2008 but in 2004 and 2005. We cannot imagine how anyone could possible get such a thing wrong and we note no indication of any kind was given as to the detailed nature of the Iraqi documents alleged to have been lost or of any efforts at any time since to retrieve them. In addition, it is now claimed that Anglo Adriatic Fund documents were destroyed by damp/mildew in or around the early 2000s. Again no details are given, just are none are given in relation to the alleged loss of documents of a similar nature in 1996 or 1997.

If your client is serious about his efforts to make proper discovery, he should have no concern about cross examination on the subject. We, are greatly concerned in the circumstances that, as we have earlier pointed out, he should not know what we can prove until he makes a serious effort to engage with discovery. We have made it quite clear we do not believe he has."

19. By this time, RTE had adopted the position that it would not furnish its discovery in accordance with the court order of the 4th February 2015 until it had received what it considered to be full and complete discovery from Mr. Ganley and until such time as he had been cross-examined on his affidavits. This was made clear in a letter dated the 27th January 2016, wherein it was stated that the cross-examination of Mr. Ganley would be undermined if he was to have access to RTE's discovery in advance of that process.

20. It is not in my view necessary to detail further the dispute between the parties concerning what RTE maintained were the inadequacies in the discovery made by Mr. Ganley in his three affidavits over a three year period. Accordingly, I will now return to consider the motions issued by the parties on the 30th April 2015 and the 7th May 2015.

21. By notice of motion dated the 30th April 2015, Mr. Ganley applied to strike out the defence of RTE for failure to comply with the order for discovery of the 4th February 2015. Almost immediately thereafter, by notice of motion dated the 7th May 2015, RTE sought:

- (i) an order directing Mr. Ganley to make further and better discovery;
- (ii) liberty to cross-examine Mr. Ganley on his affidavits of discovery of the 27th August 2014 and the 10th April 2015;

- (iii) an order dismissing his claim for want of prosecution on the basis that he had failed to make proper discovery; and
- (iv) an order permitting RTE to file its affidavit of discovery in court in a sealed format until further order of the Court.

Orders made by Barrett J. on the 1st March 2017

22. Concerning the relief mentioned in the preceding paragraph, by his order of the 1st March 2017, the High Court judge:

- (i) required Mr. Ganley to swear a further affidavit of discovery in the terms therein recited;
- (ii) granted RTE liberty to cross-examine Mr. Ganley on his first two affidavits of discovery;
- (iii) refused to dismiss Mr. Ganley's claim due to his failure to make proper discovery;
- (iv) rejected RTE's application for permission to file its affidavit of discovery in court in terms not disclosed to Mr Ganley until further order; and
- (v) reserved the costs of RTE's motion to the trial of the action.

Jurisdiction of the Appellate Court

23. While it is true to say that an appellate court, when dealing with appeals from interlocutory orders made by a High Court judge in the exercise of his or her discretion, is in as good a position as the High Court judge to assess the validity of any such order given that the appellate court is privy to the affidavits upon which the application was grounded, it is not the role of the appellate court to rehear interlocutory applications. Its role is to review the decision made by the High Court judge. And, it is for the appellant to establish that there is good reason why the appellate court should interfere with the order made in the court below.

24. Furthermore, in order to succeed in its appeal against an interlocutory order made by the High Court judge in the exercise of his or her discretion, the appellant must be in a position to demonstrate that the High Court judge erred in the manner of his or her approach to the application such that the order made should be considered unreasonable or unjust to the point that the proper administration of justice would warrant setting aside or varying the order. In other words, the appellate court should remain mindful of the fact that a High Court judge enjoys a "discretion" and that being so there will usually be more than one legally permissible outcome to the application. It does not follow that because two judges might decide the same application differently that one of them was necessarily wrong such that their order should be set aside. Accordingly, a significant margin of appreciation must be afforded a High Court judge when an appellate court comes to review the manner in which that judge exercised their discretion on an interlocutory application, even if it be the case that the appellate court, had it been deciding the application itself at first instance, might have made a somewhat different order.

Issues relating to discovery

25. In the course of his judgment concerning RTE's application to strike out the statement of claim, the High Court judge correctly identified the jurisdiction of the court to dismiss a plaintiff's claim for failure to comply with any order of the court. The relevant order is O. 31, r. 21 of the Rules of the Superior Courts which provides as follows:-

"21. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly."

26. Concerning his jurisdiction to strike out Mr. Ganley's claim, the High Court judge also referred to the guidance provided by Clarke J. in *Dunnes Stores v. Irish Life Assurance* [2008] IEHC 114 where he stated as follows:-

"3.5. I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."

27. The High Court judge also addressed the circumstances in which a court might permit a party cross-examine the deponent to an affidavit of discovery. He referred, in particular, to the decision in *Ryanair Limited v. Van Zwol and Others* [2016] IEHC 264 which is authority for the proposition that such an order should only be made when other remedies have proved inadequate and in circumstances where such an examination is necessary for the purpose of disposing fairly of the issues which the court would have to determine in the course of the proceedings.

28. Having considered the detailed judgment of the High Court judge, the submissions of the parties and all of the materials that were before the High Court judge when he made the orders which he did concerning the reliefs sought by RTE in its notice of motion dated the 7th May 2015, and having regard to the prevailing legal principles, I am satisfied that there is no good reason why this Court should interfere with the manner in which Barrett J. exercised his discretion. In my view the High Court judge applied the correct legal principles to the facts presented and exercised his discretion in a manner that was reasonable and just in all of the circumstances. In my view, RTE has failed to establish good reason why this court should interfere with those orders.

29. Taking each of the reliefs sought in the order in which they appear in the notice of motion, the High Court judge was correct as a matter of law when he stated that to strike out a plaintiff's claim for want of prosecution, on the basis that proper discovery had not been made, was a remedy of last resort and that the court should shy away from such a drastic approach unless satisfied that the deficiency could not be cured in any other way. In my view, it was perfectly open to the trial judge to conclude, as he did, that a fair trial could be achieved notwithstanding Mr. Ganley's default in terms of discovery up to that point in time.

30. The High Court judge was clearly entitled to take the view that the evidence did not go sufficiently far as would have warranted

him, in the proper exercise of his discretion, to strike out the claim. In this regard he was entitled to rely upon *Leahy v. OSB Group Limited & Others* [2015] IEHC 10 where Noonan J. at para. 30–31 of his judgment stated as follows:-

"30. It appears to me from the above authorities that before I could accede to an application to strike out the plaintiff's claim, I would first have to be satisfied that there is an ongoing failure to comply with the discovery order herein, secondly that such failure is clearly deliberate and thirdly the consequence of that failure will be to deprive the defendants of a fair trial. It is certainly true to say that there is at least an ongoing technical failure to comply with the order in the sense that although the plaintiff says he has now produced everything he has, he has not sworn a formal supplemental affidavit of discovery. However, that can presumably be remedied easily and quickly.

31. If that deficiency is cured, then it is in my view not absolutely clear that there is a continuing failure to comply with the order."

31. It is very clear from the judgment of the High Court judge concerning Mr. Ganley's default, which is summarised commencing at para. 51 of his judgment, that he could have exercised his discretion and dismissed Mr. Ganley's claim. However, it was equally valid for him to do precisely what he did which was to recoil from taking such a drastic step in circumstances where he was satisfied that there was another avenue open to him to ensure that proper discovery would be made. That avenue was to direct that Mr. Ganley swear a further affidavit of discovery and to permit RTE the opportunity to cross-examine Mr. Ganley concerning his default. That approach, in my view, was not only within the discretion of the High Court judge but was one which struck a fair and just balance between the parties. Rather than terminate Mr. Ganley's right of access to the court by reason of his failure to make full and proper discovery, he considered that RTE's interests and its ability to obtain a fair hearing would adequately be protected by affording it the right to cross-examine Mr. Ganley in respect of his affidavits. In granting RTE a right to cross-examine Mr. Ganley he invoked a jurisdiction which is sparingly deployed and which he considered would likely ensure that RTE would receive a fair trial based on full and proper discovery.

32. For the aforementioned reasons I am quite satisfied that the High Court judge did not err in the manner in which he exercised his discretion when he refused to strike out the plaintiff's claim for failure to comply with the discovery to which he agreed as per RTE's letter of the 20th December 2012.

33. Insofar as he granted RTE an order permitting it to cross-examine Mr. Ganley on his first two affidavits of discovery, the High Court judge, in the course of his judgment, sets out in very significant detail his reasons for so doing. He engages fully with the correspondence sent by RTE to Mr. Ganley's solicitors which identified the many deficiencies in his affidavits. He also paid attention to the content of the affidavit of Ms. Trish Whelan, supporting RTE's application for the relief, to which I have earlier referred.

34. The trial judge's findings which support the manner in which he exercised his discretion are set out at para. 51 of his judgment. His findings were as follows:-

"52. First, the deficiencies in Mr Ganley's discovery to date are not attributable to any 'inadequate handling' of matters by any of his advisors.

53. Second, the court considers that the clear absence of information that must be available (examples of this information have been recited previously above) cannot but be deliberate.

54. Third, this failure does not appear to the court to be attributable to any want of understanding on the part of Mr Ganley as to his obligations under the discovery process.

55. Fourth, it is obvious that there has been a complete breakdown in that (wary) trust which is a feature of the typical discovery process.

56. Fifth, there is no acceptance on the part of Mr Ganley that the discovery process thus far has been deficient and that improvements will be forthcoming.

57. Sixth, it is clear that the courts generally recoil from striking out a defence for want of discovery; such reluctance must pertain a fortiori where some alternative route of securing proper discovery is available.

58. Seventh, it appears to the court that notwithstanding such deficiencies as present to this time in Mr Ganley's discovery, it is still possible through the interventions that [sic] court will make pursuant to this judgment to ensure that the eventual trial of proceedings will nonetheless be fair."

35. Apart from the aforementioned summary, the High Court judge also addressed specific aspects of Mr. Ganley's discovery so as to demonstrate that unless some alternative remedy to striking out his claim was deployed, proper discovery might not be made with the result that RTE might not receive a fair trial. I will refer only to three aspects of the High Court judgment concerning the gaps in Mr. Ganley's discovery:

(i) The High Court judge viewed with some scepticism the fact that all of the documents relating to the bid for a telecommunications licence in Iraq could have been held solely on the computer of his personal assistant. He queried why there were no equivalent documents on his own computer concerning the bid, not even a single e-mail. The High Court judge stated that it did not ring true of the operations of any commercial enterprise of substance in an electronic age that the loss of saved material on a single hard disk would mean that all copies of that saved material had been thereby lost forever.

(ii) Concerning the lack of documentation relating to the Anglo Adriatic Fund which was, according to Mr. Ganley, lost as a result of looting and civil disorder in Albania, the High Court judge noted that whilst Mr. Ganley stated that additional records might be in the possession of former employees, consultants or agents of the Fund, their names had not been disclosed. He also noted that the Fund had opened up centres and branches in a number of metropolitan areas in Albania such as to render it suspicious that records would not have been retained in those branches which had been left intact notwithstanding the civil disorder relied upon by Mr. Ganley.

(iii) The High Court judge relied upon a letter written by Addleshaw Goddard solicitors of the 13th July 2004 which had threatened proceedings in respect of two allegedly defamatory articles published in the Los Angeles Times. It was alleged that the articles were highly damaging of Mr. Ganley's reputation and that of Liberty Mobile and Guardian Net. The letter

went on to contend that Guardian Net had lost the telecommunications contract in Iraq due to what was stated in the article. Notwithstanding these facts Mr. Ganley had not discovered this letter and, as had been observed by Ms. Trish Whelan in her affidavit, it was unlikely that such a letter would have been sent unless the solicitors concerned had been in possession of extensive documentation in relation to the loss of the telecommunications contract.

36. In my view, the evidence before the High Court judge was more than sufficient to justify his conclusion that the cross-examination of Mr. Ganley on his affidavits of discovery was necessary for the purpose of disposing of the issues that the court would have to determine in the course of the proceedings. The nature and extent of Mr. Ganley's default in terms of his first two affidavits of discovery is set out in clear terms by the High Court judge in the course of his judgment. The evidence was more than sufficient to support his conclusion that there had been conscious non-compliance by Mr. Ganley with his discovery obligations. Relevant also is the fact that he exercised his discretion in making an order for cross-examination as an alternative remedy to striking out the claim in circumstances where he remained of the view that notwithstanding Mr. Ganley's default in terms of discovery, RTE might, nonetheless, receive a fair trial if that default could be remedied by cross-examination.

37. As to the failure of the High Court judge to accede to RTE's application that it be permitted to withhold its discovery until such time as it had conducted its cross-examination of Mr. Ganley and he had fully complied with his discovery obligations, once again I am satisfied that the High Court judge was fully entitled to direct RTE to make discovery forthwith. The High Court judge cannot be criticised for concluding that the rules pertaining to discovery insofar as they applied to RTE could not be brushed aside by reason only of Mr. Ganley's failure to make proper discovery and that RTE would have to comply with the consent order made on the 4th February 2015. That discovery order was not conditional in any respect.

38. The fact that, in obliging RTE to comply with its obligations under the order of the 4th February 2015, the High Court judge might have disadvantaged RTE in terms of the efficacy of its potential cross-examination of Mr. Ganley does not provide any valid basis upon which this Court could interfere with the order made by the High Court judge. He was perfectly entitled to conclude that the aforementioned possibility provided insufficient justification to ignore the Court's earlier order concerning RTE's discovery. I would observe that in most cases the discovery of one party is delivered in advance of the completion of discovery by the other party with the result that there is always the risk that the unscrupulous litigant, knowing the extent of their opponent's discovery, might risk withholding a document which, whilst relevant, is prejudicial to their interests. Discovery is something of an act of faith. However, just because it was established that Mr. Ganley had shown himself to be somewhat resistant to making full and complete discovery, does not provide any legal basis upon which RTE might reasonably argue that the High Court judge was incorrect in law or unreasonable in the manner in which he exercised his discretion in requiring RTE to make discovery in accordance with the commitment it made on the 4th February 2015.

39. It follows that I am satisfied that RTE's appeal against the refusal of the High Court judge to fashion what he described as an *ad hoc* process that would have departed entirely from the typical discovery regime provided for in the Rules of the Superior Courts and allow RTE's discovery to be postponed in that fashion is unstateable. Even if the High Court judge had the jurisdiction to make such an order, it cannot be stated that he erred in law or in principle when he refused to grant the relief sought. He took the view, correctly in my opinion, that it was better to try and bring the parties into line with the existing rules rather than to depart further from accepted practice.

40. To conclude, I can find no fault with the manner in which the High Court judge dealt with the interlocutory applications made on foot of Mr. Ganley's notice of motion dated the 30th April 2015 and RTE's notice of motion dated the 7th May 2015.

Costs Order made by the High Court judge

41. Little by way of discussion is required concerning RTE's appeal against the order of the High Court judge, whereby he reserved unto the trial of the action, the costs of (i) the plaintiff's application to strike out paragraphs 8, 9 and 10 of the defendant's defence, (ii) RTE's application seeking *inter alia* to require Mr. Ganley to make further and better discovery and make himself available for cross-examination on his affidavits of discovery of the 27th August 2014 and the 10th of April 2015, (iii) RTE's application to be permitted to comply with its order for discovery by providing sealed discovery, and (iv) Mr. Ganley's application to strike out RTE's defence for failing to comply with the order for discovery of the 4th February 2015.

42. Order 99, R. 1(4A) of the Rules of the Superior Courts provides as follows:-

"The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

43. It is clear from the use of the word "shall" in the aforementioned rule that unless it is not possible to justly adjudicate upon the issue of costs following the hearing of an interlocutory application the court must deal with that issue.

44. The benefit of the aforementioned rule is obvious. The judge who hears an interlocutory application is likely to be better placed than the trial judge to make a fair and just decision concerning the costs of that application. In most proceedings interlocutory applications are heard by judges other than those ultimately assigned to the substantive hearing. It follows that the judge who hears the substantive proceedings is unlikely to be fully familiar with the circumstances and factors that may be material to the exercise of the Court's discretion. Where a trial judge, following the conclusion of substantive proceedings, is called upon to determine the costs of an earlier interlocutory application, in many instances they will have to embark upon a consideration of affidavits and other materials which may not necessarily have come to their attention in the course of the substantive proceedings. Such an approach has the potential to add significantly to the costs of proceedings and adversely impact upon the Court's own scarce resources, apart altogether from greatly increasing the potential for an unjust result.

45. Being fully conversant with all of the materials which were the subject matter of the various applications, all of which were dealt with by him in extraordinary detail in his judgment, the High Court judge in this instance should have had no difficulty in adjudicating upon the issue of costs in respect of each application and should not have postponed that issue to be dealt with by the trial judge at the conclusion of the proceedings. There was no benefit to be gained by reserving the costs to the trial judge in circumstances where, in my view, the outcome of the substantive proceedings could not impact upon a valid assessment as to who should bear the costs of the various motions. On the facts of the present case that postponement cannot be justified.

46. For these very straightforward reasons I would allow this aspect of the appeal. It is of course a matter for argument as to how the costs of the relative High Court applications which were postponed by the High Court judge should now be dealt with in light of this Court's conclusions as earlier set forth.

Refusal to strike out paragraphs 8, 9 and 10 of the Defence

Jurisdiction and threshold for intervention

47. The jurisdiction of the Court to strike out any part of a defence is to be found in O. 19, r. 27 of the R.S.C. which provides as follows:

"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."

48. Ignoring for a moment that aspect of the rule as relates to a pleading that might be considered scandalous, the rule is one which is clearly designed to ensure, insofar as either party is concerned, that they are not required to absorb the unnecessary expense and/or unwarranted delay of having to respond to a pleading that is wholly unconnected with the substance of the dispute.

49. In the present case, the court was not asked to consider any part of the defendant's defence as scandalous or embarrassing. What was urged upon the court was that paragraphs 8, 9 and 10 were, as a matter of law, unsustainable and for that reason should be considered unnecessary and/or prejudicial with the result that they should be struck out.

50. Some guidance as to the threshold at which the court will intervene and strike out a pleading in a defamation action is to be found in the decision of Eady J. in *Hamilton v. Clifford* [2004] EWHC 1542 where he stated that the bar for judicial intervention was set relatively high and that a judge should intervene only if satisfied that it would be perverse for the jury to uphold the canvassed meaning. Further helpful direction is provided by Simon Brown L.J. in *Jameel v. Wall Street Journal Europe* [2003] EWCA Civ 1694 when he said in this regard that "The Judge's function is no more and no less than to pre-empt perversity".

51. It is not disputed that a defendant is entitled to plead so as to justify any reasonable meaning of the words published which a jury, properly directed, might find to be the real meaning and that the full range of potentially permissible meanings must be allowed to stand for the jury's consideration. Walsh J. in *Quigley v. Creation Press Ltd.* [1971] IR 269 made clear that a judge should not withhold a matter from the jury unless satisfied that it would be wholly unreasonable for the jury to attribute a libellous meaning to the words complained of. Accordingly, on hearing an application to strike out some aspect of a defence in a defamation action, a judge must be careful not to transgress upon that entitlement by supplanting his or her own judgement for that of the jury. The importance of the role of the jury and the somewhat lesser and more limited role of the trial judge concerning meanings is made clear in a description of their respective roles in *Mapp v. News Group Newspapers Ltd.* [1998] QB 520, wherein at p. 523 Hirst L.J. stated that:

"It is for the judge to rule, when asked to do so, whether the words are capable of bearing a particular meaning or meanings alleged in the statement of claim; in other words, to lay down the limits of the range of the possible defamatory meanings of which the words are capable. It is for the jury to determine the actual meaning of the words within that permissible range."

52. It is very clear indeed from the authorities that a judge's jurisdiction to strike out some aspect of a defendant's defence which proposes an alternative meaning to the words alleged to be defamatory should be sparingly invoked. The remedy of striking out some aspect of a defence proposing an alternative meaning was, in my view, aptly described in *Polly Peck Plc v. Trelford* [1986] QB 1000, a decision to which I will later return, as a drastic remedy which should only be available in cases where it was clear that the particulars to which the plaintiff objected could not reasonably disclose an answer to his claim.

53. More recently, however, it was Sedley L.J. in *Berezovsky v. Forbes* [2001] EWCA Civ 1251 who notably stated, concerning the exercise of the court's discretion on such an application, that the court was engaged with "an exercise in generosity not in parsimony" which, once fairly performed, would "not be second-guessed on appeal by this court: the longstop is the jury."

54. Having considered the judgment of the High Court judge, it is clear beyond doubt that in considering the application brought by Mr. Ganley to strike out paragraphs 8, 9 and 10 of RTE's defence, the High Court judge correctly identified the threshold at which the court might reasonably intervene and grant the relief sought.

Pleadings in defamation proceedings: the prevailing jurisprudence.

55. Having discussed the threshold at which the court might intervene to strike out some aspect of a defendant's defence concerning meanings, it is next necessary to consider briefly a number of the more significant decisions concerning what is permissible in terms of pleading in a libel action, particularly insofar as a defendant is concerned. This is necessary in order to review the decision made by the High Court judge to refuse Mr. Ganley's application.

56. I will briefly deal with the facts of what I consider to be the authorities of greatest assistance to the issues raised on this appeal. The first decision I will engage with is that of the Court of Appeal, and in particular the judgment of O'Connor L.J., in *Polly Peck*, following which I will consider, albeit briefly, the decision of a different division of the Court of Appeal in *Lucas Box v. News Group Newspapers Ltd.* [1986] 1 All ER 177. I will also discuss the decision of the New Zealand Court of Appeal in *Templeton v. Jones* [1984] 1 NZLR 448, a decision which was disapproved of in *Polly Peck*.

57. In *Polly Peck*, the plaintiff, businessman Asil Nadir, issued proceedings on the basis of three articles published in an edition of "The Observer" newspaper dated the 24th April 1983. In respect of two of these articles, which concerned financial irregularities at a number of his companies, Mr. Nadir complained only of certain passages which he alleged to be defamatory. In particular, he pleaded that these passages meant and were understood to mean that he had deceived or negligently misled shareholders and the general public with respect to certain aspects of specified projects. He subsequently applied to have certain particulars supporting the defendant's plea of justification and fair comment struck out on the basis that they were irrelevant or alternatively constituted an attempt to justify matters other than those about which he had specifically complained.

58. On studying the statement of claim, O'Connor L.J. concluded that the particulars of which Mr Nadir had complained, which related to the commercial viability and reliability of accounts of certain of his companies, shared a "common sting" with the matters which he had pleaded, the said sting being that he had deceived or negligently misled shareholders, investors and the general public in general in relation to his business. In the view of O'Connor L.J., it was reasonable for the defendant to identify this as the "sting" of the libel of which Mr. Nadir complained, and to plead particulars in defence of the truth of it.

59. What follows are what I will describe as the headline principles identified in a lengthy section of the judgment of O'Connor L.J. in

Polly Peck which commences at p. 1020:-

"The first principle is that where a plaintiff chooses to complain of part of a whole publication, the jury is entitled to see and read the whole publication".

"The second principle is that where a 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. The difficulty with this apparently self-evident proposition is in deciding whether the two libels are indeed distinct in the sense that the imputation defamatory of the plaintiff's character in the one is different from the other".

60. O'Connor L.J. later, at p. 1032, states in this context that:-

"Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication".

61. This is now known as the *Polly Peck* defence and it may be relied upon by any defendant who contends 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.

62. At p. 1021, O'Connor L.J. proceeded to state that:-

"The third principle is that it is for the jury to decide what the natural and ordinary meaning of the words complained of is. This simple proposition has become enmeshed in the question how far the plaintiff can, by his pleading, limit the meanings which may be canvassed at the trial".

63. Later in his judgment, at p. 1023, O'Connor L.J. added in relation to this:-

"I do not think that a plaintiff is 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".

64. Connor L.J. continued at p. 1021 that:-

"The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties".

65. Some final guidance is provided by O'Connor L.J. at p. 1032 of his judgment wherein he observed that:-

"In 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, 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, as he is required to do by R.S.C., Ord. 82".

66. It is important to observe that, in the course of his judgment in *Polly Peck*, O'Connor L.J. specifically rejected the approach of the New Zealand Court of Appeal in *Templeton*. In that case the plaintiff, a parliamentary candidate named Robert Jones, alleged that he had been libelled by the defendant, Hugh Templeton. A television programme called "Eye Witness News" had published extracts from a speech made by Mr. Templeton. At paragraph 5 of his statement of claim, Mr. Jones relied on the following published extracts:

"Among other things, Mr Templeton described Mr Jones as a man who despised bureaucrats, politicians, women, jews (sic) and professionals" and "He wants us to take him seriously. Wealth is not a basis for that. It depends on the character of the man and his record. Mr Jones is a man who seems to hate. Mr Jones is a man who despises many people ... bureaucrats, civil servants, politicians, women, jews and professionals. Doesn't it sound familiar? The politics of hatred".

67. Mr. Jones sued in respect of the allegation that he despised Jews which, at paragraph 6 of his statement of claim, he pleaded was false, malicious and defamatory. He ignored all of the other allegations made against him.

68. The defendant pleaded justification and fair comment and sought to support his plea with particulars relevant to all of the categories of conduct referred to in paragraph 5 of the statement of claim. Based upon the much earlier decision in *Brembridge v. Latimer* (1864) 12 WR 878; 10 LT 816; 4 NR 285, Cooke J. struck out all of the particulars relied upon by the defendant save those which referred to Mr. Jones's attitude to Jews. He considered that the allegations were specific and severable and for this reason it was not permissible for the defendant to seek to prove the truth of conduct set out in paragraph 5 of the statement of claim in respect of which Mr. Jones was not suing.

69. In the course of his judgment in *Polly Peck*, O'Connor L.J. dealt with the approach of the Court in *Templeton* and in so doing stated that he was very doubtful that the allegation of anti-Semitism was, as had been found by Cooke J., clearly severable from the rest of the passage in which it was set. He stated the following at p. 1031 of his judgment:-

"Even if the offer of counsel to amend the statement of claim be taken to be an offer to plead a false innuendo that, for example, the words in their natural and ordinary meaning mean that the plaintiff supports and/or promotes anti-semitism, I am very doubtful that the allegation is clearly severable from the rest of the passage. With great respect to the New Zealand Court of Appeal, I would have thought that the words in their context were at least capable of meaning that the plaintiff was an intolerant bigot, preaching politics of hatred in the hope of political advantage and that, if that was the sting of the passages a whole, the defendant was entitled to introduce the particulars which were rejected".

70. I pause here momentarily to state that, in my view, it is not necessary in order to determine this appeal to decide whether or not *Templeton* was correctly decided on its own specific facts, although I cannot identify any flaw in the reasoning of O'Connor L.J. concerning that decision, which reasoning indeed seems to have received the implicit approval of the Supreme Court in the judgment

of Hardiman J. in *Bradley v. Independent Star Newspapers Ltd.* [2011] IESC 17, [2011] 3 IR 96. What is particularly important, however, for the purposes of this appeal is that the facts in Templeton are entirely different from those which present for consideration on this appeal.

71. In the within proceedings it is submitted on behalf of Mr. Ganley that the meanings for which he contends at paragraph 6 of his statement of claim are separate and distinct with the result that it cannot be reasonably argued by RTE that there is a common sting defence available, notwithstanding the fact that he himself has refused to identify any particular words from the programme to which those meanings are to be attached. Rather, he has chosen to rely upon the entire programme to support each of the meanings pleaded. In this respect the two sets of proceedings are fundamentally different. That difference is made even starker by reason of the fact that at paragraph 12 of his replies to particulars, Mr. Ganley himself sets out what he claims to be the sting of the programme as a whole which includes that he is "a fantasist who makes up business dealings".

72. In *Lucas Box v. News Group Newspapers Ltd.* [1986] 1 WLR 147, the plaintiff sued in respect of two articles which she claimed to mean that she had knowingly assisted Italian terrorists. In their defences, the defendants denied that the articles bore the alleged meanings; they later amended their defences to plead the truth of the articles, however they did not in their particulars specify the meanings which they claimed were justified. In the Court of Appeal, Ackner L.J. disapproved of this approach, stating that, upon a plea of justification, a defendant was required to include particulars of the meaning which it attributed to the words it sought to justify, and thus "make it clear to the plaintiff what is the case which [the defendant] is seeking to set up" so that the plaintiff can prepare to meet it.

73. The importance of the decision in *Lucas Box*, is that where a defendant denies that the words complained of support the meaning or meanings contended for by the plaintiff, he or she 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.

RTE's Defence.

74. Having considered those principles which are material to the pleadings in the present proceedings and the case law from which they emerge, it is necessary now to consider how they impact on RTE's defence and the appellant's submissions that the High Court judge erred in law when he refused to strike out what Mr. Ganley maintains are the offending paragraphs of its defence. I will briefly revisit RTE's defence for this purpose and in so doing I will identify Mr. Ganley's objections to the allegedly offending pleas.

75. In its defence, RTE denies that the words broadcast in their ordinary or natural meaning or by way of innuendo bore or were understood to bear any of the several meanings alleged at paragraph 6 of the statement of claim, save for the meaning pleaded at 6(f). The meaning pleaded at 6(f) is that "the Plaintiff falsely and misleadingly claimed to have done a deal to bundle six television stations together in Central America". RTE maintains that these facts are true in substance and in fact.

76. At paragraph 8 of its defence RTE denies that the words broadcast bore the meanings pleaded at 6(c) and (d) of the statement of claim. At 6(c) it is pleaded on behalf of Mr. Ganley that the words broadcast meant that Mr. Ganley had a direct business relationship with Kosta Tribecka who worked for him at the Anglo Adriatic Fund, and at 6(d) that Mr. Ganley had a close friendship with Kosta Tribecka and had accompanied him on a trip. RTE further pleads that these meanings for which Mr. Ganley contends are not defamatory of him, or, in the alternative, that they are true in substance and in fact to the extent that Mr. Ganley and Mr. Tribecka both worked in connection with the Anglo Adriatic Fund and were among a small numbers of persons engaged in doing so. Mr. Ganley objects to this reliance on the fact that Mr. Tribecka worked in connection with Anglo Adriatic, which is described in his written submissions as an "unnecessary and irrelevant issue" which does not go to justifying the separate and distinct meaning pleaded by Mr. Ganley, namely that the two had a direct business relationship and that Mr. Tribecka worked for him.

77. The last two sentences of paragraph 8 of the defence have evoked much by way of criticism from the appellant. It is submitted on behalf of Mr. Ganley that these two sentences could not possibly provide justification for the meanings pleaded at paragraph 6(c) and (d) and for that reason should have been struck out by the High Court judge. Although set out earlier in the judgment, I will repeat the sentences here for ease of reference:-

"The Fund itself accepted vouchers many of which were bought on an unofficial market, but it was never allowed to invest them in privatised enterprises. People who had deposited vouchers in the Fund felt aggrieved that the Fund ceased trading with little or no explanation to depositors".

78. At paragraph 9 of its defence RTE pleads that, if the broadcast bore the meaning pleaded at paragraph 6(b) of the statement of claim, namely that Mr. Ganley had falsely claimed to be a paid advisor of the government of Latvia, the words broadcast were true to the extent that Mr. Ganley frequently exaggerated his role vis-à-vis the Latvian government in the early stages of Latvian independence. The complaint made concerning this plea is that RTE is only entitled to seek to justify the separate and distinct meaning pleaded by Mr. Ganley, namely that he had falsely claimed to be a paid advisor to the government of Latvia. According to Mr. Ganley, it is entirely irrelevant whether or not he had exaggerated his role vis-à-vis the Latvian government, as was pleaded by RTE, and for that reason paragraph 9 of the defence should be struck out.

79. The greater part of the argument on the appeal focused upon the permissibility of the plea at paragraph 10 of the defence which sets out what RTE claims to have been the sting of the entire programme, namely that Mr. Ganley had a tendency to make false or exaggerated claims in respect of business or other matters. In support of this sting, RTE pleads that, in addition to the matters already pleaded, it intends to rely upon the further facts pleaded at 10 (a) to (g) inclusive.

80. The objection to this plea is that the High Court judge, in allowing it to stand, would have to have been satisfied that the broadcast was capable of bearing one single meaning or, to use RTE's terminology, a common sting. This, according to Mr. Ganley, was inconceivable. He sought rely upon what he maintained were the separate and distinct meanings pleaded in a statement of claim such as those at 6(e) and 6(g). At 6(e) it is pleaded that the programme meant that he could be linked to the death of Kosta Tribecka, and at 6 (g) that his actions had caused the Anglo Adriatic Fund to lose the life savings of thousands of Albanians. These were separate and distinct propositions which it is submitted are incapable of "bearing a single meaning". Thus Mr. Ganley maintains that RTE could not reasonably submit that the impugned broadcast had conveyed to a reasonable viewer the generalised theme for which it contends, namely that he had a tendency to make false and exaggerated claims in respect of his business and other matters.

Judgment of the High Court judge.

81. In a judgment which carried out an extensive review of the law in relation to what is permissible in terms of pleading in defamation proceedings, the High Court judge expressed himself satisfied that he was obliged to exercise significant restraint when asked to invoke his jurisdiction to strike out the allegedly impermissible paragraphs of RTE's defence. He cannot, in my view, and for the

reasons earlier stated, be faulted for this approach.

82. At paragraph 100 of his judgment the trial judge identified three questions which he considered it was necessary for him to answer in order that he might rule upon RTE's application to strike out paragraph 10 of the defence. These were 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?

83. The answer to these questions are, I believe, dispositive of the appeal certainly insofar as it concerns the refusal of the High Court judge to strike out paragraph 10 of the defence. I am also satisfied that, in the manner in which he has answered those questions, "yes, no, yes", he has provided a sound basis for refusing Mr. Ganley's application.

84. The nature, desired objective and proposed validity of Mr. Ganley's application to strike out paragraphs 8, 9 and 10 of the defence is rather elegantly expressed by Barrett J. at paragraph 103 of his judgment where he states as follows:-

"Mr Ganley is effectively seeking, through his application to strike out elements of RTE's defence, to engage in 'blue pencilling' of the type which case-law points to as objectionable, complaining of narrow aspects of the impugned RTE broadcast but objecting to RTE's seeking to justify that broadcast by reference to such alternative meaning as RTE reasonably contends it to be capable of conveying to a reasonable man. Notably, however, and although the form of RTE's defence is not dependent on such acknowledgement, Mr Ganley does in the course of his pleadings acknowledge that the impugned broadcast asserts generally (and rightly or wrongly) that he displays a disregard for the truth and is a fantasist when it comes to descriptions of his business affairs. The issue between the parties is whether RTE's defence can range beyond the 'blue pencilled' parameters of para. 6 of Mr Ganley's statement of claim. It seems to the court that the impugned broadcast can reasonably be contended as having conveyed to a reasonable viewer the generalised themes that Mr Ganley has shown a general disregard for the truth and is a fantasist when it comes to descriptions of his business affairs. It follows that RTE must therefore, by reference to the above-stated principles, be allowed to plead the alternative meanings that it contends for and to seek to justify what it contends is the purported common 'sting' of the impugned broadcast. Consistent with, *inter alia*, *Lucas-Box*, RTE has fully particularised the alternative meanings which it intends to demonstrate as being the meanings that the impugned broadcast bore, which meanings it maintains it will be able to prove are true in both substance and fact. Mindful that the bar for judicial intervention in this area is set relatively high and that the court's role ought to be and is, to use the terminology of *Berezovsky*, 'an exercise in generosity not in parsimony', the court must therefore decline to accede to Mr Ganley's application to strike out the impugned elements of RTE's defence at this time".

Discussion and decision

85. In my view, it is difficult to fault the statement of Barrett J. in the last preceding paragraph having regard to the line of authority which he decided to follow for the purpose of dealing with RTE's application. He decided to follow the decisions of the English Court of Appeal in *Polly Peck* and *Lucas Box* and went on to conclude that when they were properly applied to the pleadings in the within proceedings it was clear that there was nothing which was either legally objectionable or superfluous in RTE's defence such as would warrant him taking the "drastic" step of striking out any aspect of it.

86. I would here observe that it is now over thirty years since *Polly Peck* was decided and, as was noted by Barrett J. in the course of his judgment, there has been no retreat from its conclusion by the English courts in the years since. Further, the approach taken in *Polly Peck* has since been approved of in many other much-discussed decisions such as that of Donaldson M.R. in *Khashoggi v. IPC Magazine* [1986] 1 WLR 1412. In that case the plaintiff obtained an injunction against a woman's magazine restraining the further publication of an article alleging that she had had an adulterous affair with the president of a foreign country. The magazine was nonetheless successful in having that injunction discharged on the grounds that it intended to justify the common sting of several allegations in the article (the sting being one of promiscuity), even though it might not be possible to prove the particular facts of the allegation in respect of which the injunction had been granted.

87. Further support for the approach in *Polly Peck* is to be found in the decision of Clarke M.R. in *Warren v. The Random House Group Ltd.* [2007] EWHC 2856 (QB) at paragraph 102. Likewise, the decision in *Lucas Box*, also relied upon by the trial judge in coming to his decision, has been favourably supported in more recent times in decisions such as that of Purchas L.J. in *Prager v. Times Newspapers Ltd.* [1988] 1 WLR 77.

88. As already stated, many of the key principles which apply to pleadings in defamation actions are not in dispute. One of these is 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. This was the approach adopted by the defendant in its plea that is set out in the first sentence of paragraph 8 of the defence where it is claimed that the words broadcast meant that Mr. Ganley and Mr. Tribecka both worked in connection with the Anglo Adriatic Investment Fund. The defendant was entitled to pursue in its pleadings the alternative meaning for which it will contend at the trial of the action, so as long as it is a meaning which the words are capable of supporting. It is to be remembered that it is for the judge to decide what meanings any words relied upon by a plaintiff might reasonably bear, but it is ultimately for the jury to decide as a matter-of-fact what is the true and natural meaning of the words. Accordingly, it would have been legally incorrect for Barrett J. to have struck out the alternative meaning proposed by RTE unless satisfied that no reasonable person would consider the programme might validly support that meaning. In my view, he made no error in refusing to do so.

89. At the hearing of the appeal, it was conceded by RTE that the last two sentences of paragraph 8 of the Defence were intended to support an alternative meaning to that pleaded by the plaintiff at paragraph 6(g) of the statement of claim. For that reason, it would in my view have been well within the High Court judge's discretion to leave the pleadings stand even if Mr. Ganley is correct that the plea does not relate to the meanings pleaded by him at 6(c) and (d), or indeed that pleaded by the defendant at paragraph 8 of its defence. The sentences concerned are not objectionable in the sense that they will not result in any additional cost if they are allowed to stand. They do not enlarge the issues to be determined and they are certainly not embarrassing. In circumstances where I am satisfied that even though these two sentences are irregular, as a stand-alone irregularity they did not provide any or any sufficient justification for an interlocutory application to strike them out. Accordingly, I would not interfere with the discretion exercised by the trial judge when he refused to strike these sentences from the defence.

90. The same considerations as discussed in relation to the first part of paragraph 8 of the defence arise in respect of the refusal of the High Court judge to strike out paragraph 9 of the defence. The plea advanced by RTE at paragraph 9 is that the broadcast should be understood to mean that Mr. Ganley frequently exaggerated his role vis-à-vis the Latvian government in the early stages of Latvian independence, rather than that which was it was claimed to mean by Mr. Ganley, namely that he falsely claimed to be a paid advisor to the government of Latvia. Having regard to the principles earlier discussed, there is no legal reason why RTE should not plead what it contends are the real meanings of the broadcast and which it intends to prove are true in substance and in fact. Of course, RTE should not be permitted to advance an entirely implausible meaning. However, for my part, I am fully satisfied that the words broadcast by RTE are capable of holding the meaning for which it contends. It follows that the High Court judge did not err in law in failing to strike at paragraph 9 of the defence.

91. As to the plea at paragraph 10 of the defence and his application of the decision in *Polly Peck*, the High Court judge was correct to conclude that it was not open to Mr. Ganley, by reason of the manner in which he has chosen to plead the meanings he ascribes to the programme, to seek to limit the meanings which RTE might canvass at the trial. He could not, by seeking to rely upon what have been described as a number of carefully chosen and allegedly separate imputations, deny RTE the opportunity to justify what it maintains is the overall criticism of him conveyed by the broadcast, namely that he had a tendency to make false and exaggerated claims in respect of business and other matters.

92. Even though Mr. Ganley claims that the broadcast supports eight separate and distinct meanings, that alone cannot deny RTE its entitlement to pursue a *Polly Peck* style defence and to contend that these seemingly separate and distinct allegations have in fact a common sting and for that reason may reasonably be considered to be variants on the generalised theme referred to in the last preceding paragraph. The High Court judge could only have invoked the drastic remedy of striking out that aspect of RTE's defence if he was satisfied that the impugned broadcast could not have conveyed to a reasonable viewer the aforementioned generalised theme.

93. In my view, it is difficult to see how the High Court judge could have accepted Mr. Ganley's arguments based upon his allegedly separate and distinct meanings to deny RTE the entitlement to set up a defence based upon a common sting when Mr. Ganley himself has not been able to identify specific words in the broadcast capable of supporting the individual meanings proposed. Instead, he has chosen to rely upon the *entire broadcast* to support all of the meanings pleaded at paragraph 6 of the statement of claim; indeed, he contends for a common sting arising out of the broadcast at paragraph 12 of his replies to particulars. In so doing he has, in my view, expressly acknowledged that the programme has wider and more general meanings and those pleaded by him in the statement of claim.

94. In such circumstances it is inconceivable that the High Court judge would have concluded that Mr. Ganley had established beyond doubt that the broadcast was incapable of reasonably bearing the meaning contended for by the defendant.

95. The High Court judge was also, in my opinion, correct to conclude that by including separate complaints, the meanings whereof are denied, RTE could not be denied the opportunity to plead that the programme was not capable of supporting those meanings and to go on to state what it asserts is the true meaning of the programme and the sting of the overall broadcast. There is nothing oppressive about permitting such an approach.

96. It follows that it avails Mr. Ganley nothing to contend that the meaning pleaded at paragraph 6(e), namely that he was somehow involved in the death of Mr. Tribecka, could never be justified by the sting that he was a fantasist with a tendency for exaggeration when it came to his business dealings. The High Court judge was clearly correct as a matter of law when he concluded there was nothing to preclude RTE from seeking to justify what it maintains is the sting of the whole programme even though faced with seemingly distinct allegations of defamation made by Mr. Ganley. It is perfectly open to RTE to plead that any particular meaning, such as that pleaded by Mr. Ganley at 6(e) to the effect namely that he was somehow involved in the death of Mr. Tribecka, cannot be borne out by the programme and go on to plead, as it does, that insofar as the balance of the claims are concerned the overall sting applies. In other words, the scope of the defence of justification does not depend upon the manner in which the claim is pleaded in that the defendant must be entitled to justify the words in any meaning which they are capable of bearing.

97. The approach of the trial judge in relation to paragraph 10 of the defence is, I believe, well supported not only by the reasoning in *Polly Peck* but also by the decision in *Williams v. Reason* [1988] 1 WLR 96 where it was clearly stated that the scope of the defence of justification should not depend upon the way in which the plaintiff pleads his case but rather on the meaning which the words are found to bear.

98. The decision in *Prager v. Times Newspapers Ltd.* [1988] 1 WLR 77 also provides good support for the approach of the trial judge. What was under consideration in that case was, according to Purchas L.J. at p. 86 of his judgment, "the proposition which asserts that the scope of the defence of justification should not depend upon the way the plaintiff pleads his case, but on the meanings which the words published are capable of bearing". He stated that, where a claimant complains that words are defamatory of him in their natural and ordinary meaning, "it is still open to a defendant to plead so as to justify any reasonable meaning of the words published which a Jury, properly directed, might find to be the real meaning".

99. Further support, if it be needed, for the approach of Barrett J. to the plea of RTE at paragraph 10 of its defence is to be found in the decision of Clarke M.R. in *Warren v. The Random House Group Ltd.* [2007] EWHC 2856 (QB) at paragraph 102:-

"[A] defendant is entitled to justify a common sting derived from parts of a publication, taken as a whole, of which the claimant does not complain, in so far as they are relevant to the meaning of the words complained of and to the sting of the alleged libel. The claimant is not entitled to use a blue pencil on the words published of him so as to change their meaning and then prevent the defendant from justifying the words in their expurgated form. Whether a defamatory statement is separate and distinct is a question of fact and degree in each case. The action should concern itself with the essential issues necessary for a fair determination of the dispute between the parties".

100. For the sake of completeness I would also observe that contrary to what was submitted on behalf of Mr. Ganley, the decision of Hardiman J. in *Bradley v. Independent Star Newspapers Ltd.* provides no support for the appellant's contention that the High Court judge erred in law in failing to strike out paragraphs 8, 9 and 10 of RTE's defence. In that case the plaintiffs maintained that the meaning of a particular newspaper article which had been published by the defendant was that they had been guilty of armed robbery. The newspaper, in its defence, sought by reference to the text of the article to contend that the meaning to be ascribed to the article was that the plaintiffs were *suspected* by An Garda Síochána of committing serious crimes. That plea was ruled out as being impermissible because the court was satisfied that the article was simply incapable of bearing that meaning if considered by a reasonable man. It had been clearly contended in the article that the plaintiffs were *guilty* of armed robbery, not that they were *suspected of committing serious crimes*.

101. As is readily apparent, the facts in *Bradley* were very different from those which arise for consideration in the present case. Nonetheless it is important, in light of the appellant's submissions, to make clear that the decision does not in any way undermine the approach adopted in *Lucas Box* which is that where a plaintiff complains that certain words or statements made are defamatory of him in their ordinary and natural meaning, the defendant is entitled to justify those words in any meaning which those words are capable of conveying to a reasonable man. In *Bradley*, Hardiman J. concluded that the words were simply not capable of conveying the meaning proposed by the defendant to a reasonable man.

102. The High Court judge was correct as a matter of law when he concluded that RTE was entitled to seek to justify the words broadcast of which Mr. Ganley complains in any meaning that those words are capable of conveying to a reasonable man and he cannot be faulted for concluding that the broadcast as a whole, upon which Mr. Ganley relies, is capable of the meaning pleaded by the defendant. In fact, this is what Mr. Ganley himself contends for in his replies to particulars. The defence was in compliance with the principles laid down in *Polly Peck* and *Lucas Box* and RTE had made clear in its plea of justification the particulars upon which it intended to rely to support that plea.

103. Finally, while it is true to say, as was submitted on his behalf, that if Mr. Ganley does not establish that the words complained of bore the meanings pleaded in paragraph 6 of his statement of claim, RTE will have a complete defence to the claim, it does not follow that RTE is not entitled to plead its defence in the manner it has.

104. For all of the aforementioned reasons, I am satisfied that the High Court judge was correct in law and in fact when, and for the reasons which he outlined in his detailed judgment, he declined to invoke his jurisdiction to strike out any aspect of the defendant's defence.

Conclusion

105. Having considered the submissions of the parties in relation to the defence delivered by RTE on the 15th November 2012, I am satisfied that the High Court judge was correct in law and in fact when, in the exercise of his discretion, he refused to strike out paragraphs 8, 9 and 10 of the defence.

106. His decision was in accordance with the principles detailed by O'Connor L.J. in *Polly Peck*, a decision which has survived repeated scrutiny over a period of in excess of 30 years and which, whilst never previously considered in this jurisdiction, would appear to me to be good law. He was also correct to conclude that the manner in which the defendant had pleaded its defence was fully in accordance with the principles and guidance provided in the *Lucas Box* decision.

107. For the reasons set out in greater detail earlier this judgment, I would dismiss Mr. Ganley's appeal against the refusal of the High Court judge to strike out paragraphs 8, 9 and 10 of RTE's defence.

Summary

Appeal No. 2017/118: Order of Barrett J. – 1st March 2017

108. This is Mr. Ganley's appeal against that part of the High Court judge's order which granted RTE leave to cross-examine him in respect of his affidavits of discovery sworn on the 27th August 2014 and 10th April 2015. This order was made on foot of RTE's notice of motion dated 7th May 2015.

For the reasons earlier set forth I would dismiss this appeal.

Appeal No. 2017/116: Order of Barrett J. – 1st March 2017

109. The first appeal under this record number is RTE's appeal against the High Court judge's order requiring it to forthwith make discovery in accordance with the order of the High Court of the 4th February 2015. That order was made on foot of Mr Ganley's motion of the 30th April 2015.

For the reasons earlier set forth in this judgment I would dismiss this appeal.

110. The second appeal under this record number is RTE's appeal against the Order of the High Court judge which reserved unto the trial judge the costs of Mr Ganley's motion dated the 30th April 2015.

For the reasons earlier set forth in this judgment I would allow this appeal. And, what I would propose in this regard is that this Court would hear submissions from the parties as to how those costs ought to be dealt with when it comes to consider the costs of the appeals determined by this court.

111. The third appeal under this record number is RTE's appeal against the High Court judge's refusal to permit it file its affidavit of discovery in the High Court in a sealed format rather than in accordance with the High Court Order of the 4th February 2015. That Order was made on foot of RTE's notice of motion dated the 7th May 2015.

For the reason earlier set out in this judgment, I would dismiss this appeal.

112. The fourth appeal under this record number is RTE's appeal against the order of the High Court Judge which reserved unto the trial judge the costs of its motion dated the 7th May 2015.

For the reason earlier set forth I would also allow this appeal. And, again what I would propose is that this Court would hear submissions from the parties as to how those costs ought to be dealt with when it comes to consider the costs of the appeals determined by this court.

Appeal No. 2017/117: Order Barrett J. 1st March 2017 (Notice of motion – 18th March 2016)

113. The final appeal is Mr. Ganley's appeal to strike out paras 8-10 inclusive of RTE's defence.

For the reason set out earlier in this judgment I would dismiss this appeal also.