

THE HIGH COURT

[2011 No. 10988 P.]

BETWEEN

SUSAN STEIN

PLAINTIFF

AND

DANA ROSEMARY SCALLAN

TV3 TELEVISION NETWORK LIMITED

DEFENDANTS

THE HIGH COURT

[2011 No. 10989 P.]

BETWEEN

SUSAN GORRELL

PLAINTIFF

AND

DANA ROSEMARY SCALLAN

TV3 TELEVISION NETWORK LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 30th day of November, 2016

1. The first defendant in these two sets of proceedings seeks orders pursuant to O. 29 of the Rules of the Superior Courts directing the plaintiffs to furnish security for costs for these proceedings. Order 29 of the Rules of the Superior Courts makes provision for the making of an order requiring a plaintiff to grant security for costs:-

"Order: 29: Security for costs

1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.

4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."

2. As the second defendant in each case settled with the plaintiffs, the Court shall refer to the first defendant as the defendant in this case.

3. The substantive proceedings on behalf of the plaintiffs seek:

- a. damages for defamation;
- b. punitive and aggravated damages pursuant to the Defamation Act, 2009;
- c. a correction order pursuant to the Defamation Act, 2009;
- d. an order, pursuant to the Defamation Act, 2009 prohibiting the further publication of the statement the subject matter of these proceedings.

The statement of claim of the plaintiff

4. Susan Stein is the sister of the defendant and she resides in Donnellson in Iowa in the United States. Ms. Gorrell is the niece of the defendant and the daughter of the other plaintiff and she resides at the same address. Both plaintiffs maintain that they had close links in this jurisdiction and have a reputation and good name within the State.

5. On 14th October, 2011 TV3 broadcast an interview with the defendant who was at that time running a political campaign to become President of Ireland. The interview was conducted by Ursula Halligan, Political Editor and journalist with TV3. The subject matter of the interview concerned what the first named defendant alleged to be false allegations of a sexual nature which had been circulated by the plaintiffs in relation to the defendant's brother, Mr. John Brown. In the particulars of the statement of claim the plaintiffs say they shall be relying on the entire interview, the words uttered therein and the meaning and context of those words at the time of the action but without prejudice to the generality, the following words will be relied upon as being defamatory:

- a. the plaintiffs had spread "*false and malicious lies*" about the first named defendant's brother;

- b. that the plaintiffs had made "*false accusations*" against the first named defendant's brother;
- c. that the plaintiffs had circulated "*unsubstantiated and malicious rumours about the first named defendant's brother that the defendant would not give in to lies, or deception, or bullying*" from the plaintiff;
- d. that the plaintiffs had sent a malicious e-mail to the first named defendant;
- e. that there were extensive media coverage that would relay "*those lies and false accusations*";
- f. that the defendant was being "*pressurised*" by the plaintiffs;
- g. that the plaintiffs were engaged in a character attack of the defendant;
- h. that the plaintiffs had attempted to destroy the defendant's good character and integrity;
- i. that the defendant felt that this was an attempt to make her stand down from the presidential race;
- j. that the plaintiffs had circulated "*false and malicious lies used at moments of opportunity in order to try to destroy the defendant's character*";
- k. that the defendant would not "*bend to bullying and intimidation or blackmail or any form of pressure*";
- l. that these accusations were "*raised... in the course of my presidential campaign with the obvious desire to destroy my character*";
- m. that the defendant was the victim of "*a malicious attack in order to destroy my character*";
- n. that these accusations concerning the defendant's brother "*first arose in a family dispute court case 5 or 6 years ago*";
- o. that these accusations are only raised at times "*convenient*" to suit the purposes of the plaintiffs;
- p. that these accusations concerning the defendant's brother "*were never acted upon*";
- q. that these accusations concerning the defendant's brother "*now arrived, conveniently, in the middle of my presidential campaign*";
- r. that "*for 35 years ... no one has ever ... either the alleged victim or the family have taken action on this ... so I know these are false and malicious lies*";
- s. that the defendant knew these accusations "*were not true*" because the first time they were "*ever raised was in a court case – never before*" and these accusations were not "*acted upon at that time*";
- t. that "*the fact that no action was taken by the family or the alleged victim ... proves that this was a false allegation*";
- u. that if "*they were the truth (i.e. the accusations) why would they have only appeared in a family dispute court case and why would they come to the surface now in my presidential campaign*";
- v. that if "*it were me or someone related to me who had been the victim of abuse I would certainly act upon it*" and the statement of claim said the said words were published of the plaintiffs and referred to the plaintiffs or were capable to be understood by reasonable people to refer to the plaintiffs.

6. The defendant stated that the allegations she was referring to were of a sexual nature and had emanated from certain members of her family against another member of her family. She stated that these same members of her family were engaged in a campaign of threats, bullying, lies and deception. The defendant knew that it was public knowledge that the plaintiffs were involved in a court case with the defendant and her brother John Brown in and around the same time and at one stage in the interview stated "much of the detail of the court case is now on social websites and a lot of people will know what we are talking about". The defendant agreed with this, thereby confirming that the people to whom she was referring were the plaintiffs.

The Legal Principles

7. The leading case on security for costs applications in this jurisdiction is *Connaughton Road Construction Road Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7 (herein "*Connaughton Road*"). Clarke J. quoted the judgment of Morris P. (as he was then) in *Inter Finance Group v. KPMG, Pete Marwick* (Unreported, High Court, 29th June, 1998), and the relevant test is set out in the following terms:-

"(1) In order to succeed in obtaining security for costs, an initial onus rested upon the moving party to establish:

(a) That he had a *prima facie* defence to the plaintiff's claim, and

(b) that the plaintiff would not be able to pay the moving party's costs if the moving party be successful.

(c) In the event that the above two facts are established, then security ought to be required unless it could be shown that there were specific circumstances in the case with ought to cause the court to exercise its discretion not to make the order sought."

In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not of course, exhaustive."

Nature of the application

8. In considering a security for costs application, the Court ought not to embark upon a substantive assessment of the merits of the plaintiff or defendant's case as stated in the judgment of Charleton J. in *Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512:

"The task for the court, rather than to attempt to decide the case, is to apply the test mandated by the case law. This approach emphasises that no assessment of ultimate liability ought to be made, much less any decision beyond stating whether there is a reasonable prospect of a defence succeeding at trial. Consequently these motions should be brief applications."

9. Second, it is important to note that while the onus of proof lies on the moving party for the first two limbs of the Connaughton Road test, if these are established by the moving party, the onus should then shift onto the plaintiff to prove the existence of a special circumstance that ought cause the Court to exercise discretion in their favour.

Prima Facie Defence

10. In *Tribune Newspapers (in receivership) v. Associated Newspapers Ltd.* (Unreported, High Court, 25th March, 2011) Finlay Geoghegan J. set out that the defendant seeking to establish a *prima facie* defence must establish first, the existence of admissible evidence and secondly relevant arguable legal submissions.

11. Counsel for the plaintiffs state that the defendant has not made out a *prima facie* defence in order to bring the application for security of costs. This is denied by counsel for the defendant who states that a *prima facie* defence has been clearly established by the defendant. They refer to the affidavit of the defendant sworn on the 12th July, 2013 which sets out a defence consisting of the following elements:

- (i) A plea of truth and reliance on s. 16 of the Defamation Act, 2009;
- (ii) A plea of honest opinion and reliance on s. 20 of the Defamation Act, 2009;
- (iii) A denial that either plaintiff was identified;
- (iv) A denial that either plaintiff has a sufficient reputation in Ireland to bring the proceedings;
- (v) The meanings that it is contended for by the plaintiffs are denied.

12. Counsel for the defendant urged the court not to make a judgment on the disputed matters. They referred to the dicta of Barrington J. in *Lismore Homes Ltd. (in receivership) v. Bank of Ireland Finance Ltd.* [1999] I.R. 501:-

"The most important thing to remember about an application for security for costs is that it is an interlocutory motion. It will usually be made when the facts of the dispute have yet to be established. Our law recognises an oral hearing cross examination as a primary method of resolving the disputed facts in question. It is dangerous to attempt to resolve such questions on affidavit unless there is objective evidence which points conclusively in one direction or the other. Normally therefore there is no reason why a motion for security for costs should occupy 4 days in the High Court or even 7 days in the Supreme Court as happened in this case."

13. This Court is mindful of traversing into the assessment of the merits of the case. The case, if it is to proceed, is a defamation case which will largely turn on the jury's assessment of the adequacy of the defence as set out by the defendant. There is a core conflict of fact which in this Court's view ought to be dealt with at this interlocutory stage. It is not the function of the Court to assess whether the defence contended for is likely to succeed at full hearing, or even has a good prospect of succeeding. This Court, having regard to the affidavit sworn by the defendant setting out the defence, finds that the hurdle of establishing a *prima facie* defence has been met. Admissible evidence and arguable submissions have been furnished by the defendant.

The plaintiffs' financial position

14. The financial position of the plaintiffs was a matter of dispute between the parties. Counsel for the plaintiffs argued that they cannot afford to lodge the security sought. The cost estimates of proceeding submitted by both parties differ by a large sum. The defendant seeks security for €450,000 whereas the plaintiffs estimate the costs amounting to €189,000.

15. The defendant contends that the plaintiffs have assets that would enable the plaintiffs to put forward the security sought. Counsel for the plaintiffs deny this and suggest that if this security for costs is granted by the Court, this would bring the plaintiffs' claim to an end. This may well be the case, but it does and should not influence the Court in any way.

16. Counsel on behalf of the plaintiffs referred to the commercial legal expenses insurance which had been taken out by the two plaintiffs separately. The documents referred to a company known as BCR Legal Assist Limited and the policy was described as after the event legal expenses insurance policy. The basis on which the insurance operated is as follows. The insurer agreed to indemnify the insured against the payment of the opponents' costs and own costs and disbursements where applicable, if the proceedings are not successful up to the limit of indemnity stated in the schedule. In the case of each of the plaintiffs, the limit of indemnity is €150,000, totalling €300,000.

17. The relevant terms of the agreement are set out as follows:

"

[...]

2. INSURANCE

Observance of Terms

The Insured and the Appointed Representative must observe and comply with the terms and conditions of this Policy. Any term or

condition of this Policy insofar as it relates to anything to be done or complied with by either the Insured or the Appointed Representative shall be conditions precedent to the Insurer's liability to make any payment under this Policy.

2.1 Subject to the terms and conditions of this Policy, the Insurer agrees to indemnify the Insured against the payment of Opponent's Costs and Own Costs (where applicable) and Disbursements if the Proceedings are not Successful up to the Limit of Indemnity stated in the Schedule.

2.2 The Insurer shall only be liable to bear VAT to the extent that VAT is irrecoverable by the Insured. For the avoidance of doubt, any element of VAT which the Insurer is obliged to pay shall be encompassed within the Limit of Indemnity.

2.3 If the Insurer is adjudged bankrupt, deemed insolvent or subject to any insolvency process during the Period of Insurance, the Insurer reserves the right to withdraw cover under the Policy in which case the Insurer shall have no liability to make any payment in respect of Opponent's Costs or Own Costs (where applicable) and Disbursements.

2.4 The Insurer is not liable to make any payment under this Policy until the Conclusion of the Proceedings unless Opponent's Costs are awarded against the Insured by order of the Court in which case the Insured shall be entitled to indemnity immediately.

2.5 If in the Proceedings an order is made for payment of costs by the Insured to the Opponent and an order is or has also been made for the payment of costs by the Opponent to the Insured, then the assessed sum of each such costs order shall be computed separately and set off against each other and the net assessed costs, if any, payable by the Insured to the Opponent shall be indemnified under this Policy.

2.6 Subject to the terms and conditions of this Policy, and for the avoidance of doubt, the Insurer shall have no liability under this Policy if:

2.6.1 The Proceedings are settled or compromised on the basis of any payment to the Insured; or

2.6.2 The Proceedings are settled or compromised on the basis that the Insured and the Opponent agree to bear their respective costs and disbursements; or

2.6.3 The Proceedings are discontinued, struck out or withdrawn without the Coverholder's prior written consent

3. EXCLUSIONS

The Insurer shall not indemnify the Insured in respect of:

3.1 Opponent's Costs and/or Own Costs and Disbursements incurred prior to the Inception Date unless agreed by the Coverholder in writing.

3.2 Opponent's Costs and/or Own Costs and Disbursements if the Insured is Successful in the Proceedings.

3.3 Opponent's Costs and/or Own Costs and Disbursements incurred as a result of delay or default on the part of the Insured or the Appointed Representative.

3.4 Opponent's Costs and/or Own Costs and Disbursements in any case where the Proceedings are discontinued, abandoned or withdrawn without the Coverholder's prior written consent.

3.5 Opponent's Costs and/or Own Costs and Disbursements if the Proceedings are struck out.

3.6 Opponent's Costs and/or Own Costs and Disbursements if the Appointed Representative ceases to act or the Insured withdraws instructions (without the Coverholder's prior written consent) from or fails to co-operate with the Appointed Representative.

3.7 Own Costs and Disbursements which are ordered by the Court to be paid to the Insured by the Opponent.

3.8 Any matter in respect of which the Insured is, or would be but for the existence of this Policy, entitled to indemnity under any other policy of insurance.

3.9 Opponent's Costs and/or Own Costs and Disbursements if the Proceedings are discontinued owing to the Insured's lack of funds, including but not limited to insufficient insurance cover.

3.10 Any liability under this Policy arising from any fraudulent act by the Insured.

3.11 Opponent's Costs and/or Own Costs and Disbursements if the Proceedings have, in the Coverholder's opinion, been conducted in such a manner to have prejudiced the Insurer's position.

3.12 Own Costs and Disbursements if the retainer with the Appointed Representative is deemed unenforceable.

3.13 Any war and civil war or nuclear risks, any risks of financial guarantee, financial default, bankruptcy or insolvency, risks of loss, damage or expenses of whatsoever nature resulting from or in connection with any act of terrorism, or any risks or radioactive contamination.

4. CONTROL OF THE PROCEEDINGS

4.1 The Insured must provide the Appointed Representative all information and assistance required to progress the Proceedings including but not limited to a complete and truthful account of the facts and all the relevant and necessary documentation, information and evidence in the Insured's possession. The Insured must obtain and execute all documents as required and attend meetings and conferences when requested. Any failure by the Insured in these respects may entitle the Insurer to avoid liability under the Policy.

4.2 The Coverholder and the Insurer shall have direct access to the Appointed Representative and the Insured and the Appointed Representative shall co-operate fully in this regard. The Insured and the Appointed Representative undertake to keep the Coverholder

informed of all material developments in the Proceedings. At the Coverholder's request, the Insured shall instruct the Appointed Representative to produce to the Coverholder or allow inspection of any document, report, information, advice or opinion in his possession and shall provide such instructions to the Appointed Representative in relation to the conduct of the Proceedings as the Coverholder deems appropriate. The Appointed Representative's obligations to the Coverholder and the Insurer under the terms of this Policy shall prevail over any duty to or privilege of the Insured. Any costs or expenses incurred by the Insured in providing evidence or other information reasonably requested by the Coverholder shall be for the Insured's own account and are not indemnified under this Policy.

4.3 The Appointed Representative and/or the Insured shall immediately notify the Coverholder of any Part 36 offer, payment into court or any other offer of settlement. The Appointed Representative and/or the Insured shall notify the Coverholder of the discovery of any fact, evidence or other matter materially affecting or which might materially affect, the Insured's prospects of success in the Proceedings in writing within 14 days of such discovery.

4.4 The Appointed Representative and/or the Insured shall conduct the Proceedings with all due diligence and as economically as possible. In conducting the Proceedings, the Insured shall comply with all the Rules and Orders of the Court and shall follow all reasonable advice and instructions given by the Appointed Representative.

4.5 If for any reason the Appointed Representative ceases to continue acting for the Insured or (without the prior written agreement of the Coverholder) the Insured withdraws instructions from the Appointed Representative, the Insurer's liability under the Policy ceases on the date on which the Appointed Representative refuses to continue to act or the Insured withdraws instructions.

4.6 At the Coverholder's request, the Insured shall instruct the Appointed Representative to apply for the Opponent's Costs to be assessed by the relevant court or Tribunal.

[...]

18. Counsel for the defendant argued that the policy is so conditional that it cannot provide a sufficient security to the defendant.

19. It is clear to the Court that on examination of the policy that it is designed for the jurisdiction of England and Wales, and has not been amended to reflect the circumstances of this litigation. This Court notes that the governing laws referred to in the policy are those of England and Wales.

20. A similar insurance policy was considered by Kelly J. in the Court of Appeal in the case of *Greenclean Waste Management Limited v. Maurice Leahy (practicing under the style and title of Maurice Leahy Wade & Company Solicitors)* [2015] IECA 97 as follows:-

"The policy here is so conditional (even with the "prospects clause" neutralised) that it does not provide a sufficient security to the defendant to warrant refusal of an order for security for costs. The policy is voidable for many reasons which are outside the control, responsibility or, by times, knowledge of the defendant."

The policy of insurance furnished on behalf of the plaintiff does seem to provide for a number of circumstances in which the policy is voidable for reasons outside the control, responsibility and knowledge of the defendant.

21. Counsel for the defendant also argued that the issue of champerty arises having regard to the nature of the ATE policy of insurance. The Court will not make any decision in relation to that issue in circumstances where the Court does not accept that the policy of insurance provides any security to the defendant.

22. The policy does not amount to a *de facto* proof that the plaintiffs will be able to discharge the defendant's costs. On the basis of the information put before the Court, this Court finds that the plaintiffs' policy does not justify an exercise of discretion in favour of refusing the present application.

23. That said, the impecuniosity of a plaintiff is not itself a reason for this Court to grant an application for security for costs. Charleton J. in *Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512 held it is not mandatory for a Court to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant.

24. Security for costs applications serve a legitimate aim and purpose, in enabling the courts to engage in a balancing of the right of a plaintiff to litigate a case and the right of a (potentially) successful defendant not to be left without a remedy. However the Supreme Court has recognised that security for costs applications, if granted, may, if fixed at too high a sum, lead to a situation where a defendant, as set out in *Thalle v. Soares* [1957] I.R. 182:-

"May be able to defeat an honest and substantial claim because the plaintiff cannot find the necessary security."

25. This Court finds that the plaintiffs are seeking to bring a genuine claim where they allege very serious matters, and the Court exercises its discretion in finding that the plaintiffs' disputed impecuniosity is not a reason to grant the present application.

Delay

26. The plaintiffs contend that the defendant has been guilty of delay such as to disentitle the defendant to the order sought. The relevant timeline suggests to this Court that there is no appreciable delay, much less any prejudice of the type required to disentitle the defendant to the relief sought. The following is the relevant timeline:

1. 1st December, 2011 - Plenary summons
2. 4th May, 2012 - Statement of claim
3. 25th May, 2012 - Defendant's letter seeking information on assets
in the jurisdiction
4. 1st June, 2012 - Plaintiffs' letter indicating the request was
premature

5. 23rd May, 2012 - Defendant's notice for particulars
6. 21st June, 2012 - Defendant's reminder letter
7. 5th November, 2012 - Court order directing plaintiff to deliver replies within 4 weeks (this application was contested by the plaintiffs)
8. 13th February, 2013 - Replies to particulars delivered by the plaintiff
9. 10th July, 2013 - Defence delivered
10. 10th July, 2013 - Formal request for security for costs made by the defendant
11. 26th November, 2013 - Reminder letter sent
12. 13th November, 2013 - Motion for security for costs

In this Court's view there is no question here of real delay. In *See Company Limited v. Public Lighting Services Limited* [1987] I.L.R.M. Finlay C.J. pointed out that the plaintiff must have incurred significant costs between the service of the notice of appeal and the bringing of the motion seeking security for costs. In *Moore v. Cunningham* [2010] IEHC 30 Clarke J. states:-

"When an order for security of costs is made against a plaintiff, that plaintiff has to make a decision as to whether it wishes to continue with the proceedings. It may well do so. However, it has to balance various factors in considering whether continuing with the proceedings is a beneficial course of action for it to adopt. Doubtless regard will be had to the prospects of success, the extent of the damages or other relief which might be obtained, and the amount of costs which will have to be incurred, both in pursuing the proceedings and in putting up security for the defendant's costs. Similar considerations apply to all litigants in any form of litigation. However, an order for security for costs is an added factor to be taken into account by a plaintiff in a case where security is ordered. In my view, the rationale behind the delay special circumstance jurisprudence is that a party is entitled (where security is to be ordered) to be able to include that factor in its judgment as to whether to progress the proceedings from as early a time as is reasonably practicable. The test is not as to whether the relevant plaintiff might not nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up."

27. This Court is of the view that no unnecessary delay has been incurred by the defendant.

Special Circumstances Justifying a Refusal for Security for Costs Application

28. The third limb of the *Connaughton Road* test sets out that in order for the Court to refuse an order for security for costs the plaintiff must prove that there are special circumstances justifying such a refusal. Special circumstances have been identified by the plaintiffs in this case.

Public Interest

29. This Court notes that the jurisprudence on the special circumstance of "public interest" is not wholly clear. There is often a conflation in the case law of the terms "public interest", "public value", "national importance" and "public importance". For example, in *Dublin Waterworld Limited v. National Sports Campus Development Authority* [2014] IEHC 518 under the heading "public interest" Barrett J. sets out:-

"Where a plaintiff has raised a point of law of exceptional public importance [this Court's emphasis], this may constitute a special circumstance justifying refusal of an order for security for costs that might otherwise be warranted."

30. He went on to note:-

"The Comcast and Millstream cases are perhaps at the extreme end of the spectrum of cases that raise issues so exceptional as to cause the court to exercise its discretion not to make an order for security for costs. Consequently they are not perhaps the most helpful of precedents insofar as illuminating what other categories of case may raise facts that will be considered exceptional, albeit not quite as exceptional - and even exceptionality has its gradations: one exceptional circumstance may not be as exceptional as another, yet both may still be exceptional."

31. In *Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512 Charleton J. said:-

"A third special factor disentitling a defendant, in the court's discretion, to an order for security for costs is that a point of law for decision in the case may be so important that the process of the case should not be interrupted [this Court's emphasis]."

32. A heavy burden is undertaken by the plaintiffs in this case seeking to invoke this exception. At para. 22 of *Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512 Charleton J. stated:-

"There can also be a fifth factor. A point of fact of national importance [this Court's emphasis] can arise in litigation that is inescapably central to a case and which will settle a concern of great public moment. Such an issue will arise rarely. Litigation between private entities is by nature compensatory or restorative. It is only in the most extreme circumstances that any fact in contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs."

33. This Court notes that the alleged defamatory comments were made in the midst of a presidential campaign, contested by six candidates. The defendant was seeking appointment to the position of the President of Ireland, and if elected, she would have held the following powers:

- i. The power to appoint the Taoiseach in accordance with Article 13 of the Constitution;
- ii. the power under Article 13(2) to summon and dissolve Dáil Éireann on the advice of the Taoiseach;
- iii. under Article 13(2)(3) the President may at any time after consultation with the Council of State convene a meeting of either or both houses of the Oireachtas;
- iv. Article 13(4) appoints the President as the supreme commander of the Defence Forces; and
- v. pursuant to Article 26, the President may, after consultation with the Council of State, refer any bill to which the Article applies to the Supreme Court for a decision on the question as to whether such bill or any specified provision or provisions of such bill is or are repugnant to the Constitution or to any provision thereof.

34. The comments made by the defendant, in the currency of her running for the position of the Head of State, were and are a matter of public interest. The Court further considers that the *nature* [this Court's emphasis] of the comments made by the defendant ought to be scrutinised, in order to determine whether or not a special circumstance exists in the present case, that ought to cause this Court to exercise its discretion not to grant security for costs.

The Nature of the Comments Made by the Defendant: Whether True or Not

35. The Court notes that in the full transcript of the interview between the defendant and Ursula Halligan of TV3, Ursula Halligan asks:-

"Ursula Halligan Dana, why did you make your statement on Wednesday night?

Defendant I made it because false and malicious lies and accusations were being made and I had to respond. We were under tremendous pressure as a family, actually, from a freelance journalist who of course makes a living by selling stories and I was told that there would be extensive coverage of these lies and false accusations in the next couple of days. And what would you do? What would anyone do facing that? I felt I had to face it head on and put this to rest."

Further in the interview the defendant said:-

"I felt that to ignore it would be wrong to do because I was so clearly being pressurised that this was going to be spread across the newspapers over the next couple of days by a freelance journalist who makes his living by selling stories and I felt the people of Ireland needed to know right up front what was happening. Remember, I had just come through a similar type of character attack where again on the airwaves and in the newspapers of this country, I had been accused of deceiving the Irish people, of lying to the Irish people and I was not going to wait for this to happen again. I was going to face it head on and let the people of the country decide."

36. Part of the defendant's assertion of truth is that the interview concerned allegations circulating about Dana's brother, John Brown. Ms. Gorrell, the first plaintiff, alleges that she was abused by Mr. Brown.

37. After the interview, at some stage Ms. Gorrell made a complaint to the police authorities in England and Mr. Brown was tried in respect of allegations of sexual abuse. He was acquitted of all the charges. The Court, of course, notes that the onus of proof in a criminal case is of a far higher standard than that in a civil dispute, and that it is notoriously difficult to mount a prosecution involving allegations of sexual abuse alleged to have occurred many years in the past.

38. The Court notes the decision of the Supreme Court in *S.H. v. The Director of Public Prosecutions* [2006] 3 IR 575 where Professor Harry Ferguson, an expert in the social history of child welfare stated on affidavit:-

"On or about 17th December, 2002, I was contacted by the Office of the Chief Prosecution Solicitor with a view to offering an expert opinion on the history of child sexual abuse and child protection in Ireland with particular emphasis concerning the situation that pertains in the late 1960s and the perceived legitimacy of any allegations of sexual abuse made by parents or children and response to them at that time. In the light of my experience in this area and having read the relevant evidence of the victims of childhood abuse in this case...it is my opinion that it cannot be said that child sexual abuse had a sufficient public or official reality at that time such that would have made it possible to a victim successfully to initiate a complaint and/or bring a case against an alleged perpetrator. Any 'disclosure' of sexual abuse that occurred in decades prior to the late 1980s and 1990s cannot reasonably be defined or treated as a disclosure in a sense that that term is understood today, given the map of social pressure that existed which rendered the child's statement illegitimate response unthinkable. I, therefore, conclude that with respect to [the allegations in the allegation of one of the complainants in that case in 1968 cannot be regarded as constituting a complaint of sexual abuse in any meaningful sense and that it was only in 1999 that it can be said that a meaningful complaint of sexual abuse was made by him or on his behalf. In order to substantiate that opinion, I have drawn upon my own original research into the history of child sexual abuse and protection and other scholarly work in this field."

39. The defendant in this case was asked the following by Ms. Halligan:-

"Dana the fact that no action was taken doesn't necessarily mean it is not true."

The defendant replied:-

"the fact that no action was taken either by the alleged victim or by the family of the alleged victim to me proves that this is a false and malicious allegation but it was me or someone related to me I would certainly act upon it."

40. Having regard to the affidavit evidence of Professor Harry Ferguson, where a complainant delays in bringing allegations of sexual abuse, this does not mean that the complaint is false. The way in which many complaints of sexual abuse have come to light in this jurisdiction has reflected that the opposite is true, that victims of sexual abuse often delay in bringing complaints – prior to the 1990's, sexual abuse was lacking an "official reality" in this country. This contention squarely contradicts the comments made by the

defendant in the currency of the presidential campaign. This Court does not wish to traverse into the merits of the plaintiffs' claim, namely whether the allegations made by the defendant were false and defamatory or not. However, this Court finds that there is a *public value* [this Court's emphasis] in litigating claims involving allegations of sexual abuse in a civil context, where the onus of proof, beyond reasonable doubt, was not established in a criminal trial.

41. The contention that there is public value in litigating certain claims has been referred to in previous cases. This Court notes the dicta in *Comcast International Holdings Incorporated, Declan Ganley, Ganley International Limited and GCI Limited v The Minister for Public Enterprise, Michael Lowry, ESAT Telecommunications Limited, Denis O'Brien, Ireland the Attorney General* [2014] IEHC 18, at para. 71, where Ryan J. refused the security for costs application sought on the ground of public interest.

"It might be said that the plaintiff companies are unlikely to attach importance to the public interest in the State but, of course, that is not the point. *There is public value in having this controversy resolved*" [this Court's emphasis].

42. In all the circumstances of the case, the court will refuse to direct that the plaintiffs furnish security for costs of these proceedings.

43. In summary:

- a. The Court finds that the defendant has established a reasonable defence.
- b. The Court finds that there was no delay on the part of the defendant in issuing these proceedings.
- c. The Court is undecided as to the impecuniosity of the plaintiffs but notes the indication of their counsel that the case will not proceed in the event that an order for security for costs is made by this Court. The Court does not determine the issue on the basis of this statement.
- d. The Court finds that the plaintiffs have identified for this Court special circumstances which justify a refusal to grant security for costs. The comments made by the defendant whether true or not relate to her campaigning for the position of President of Ireland. The failure of Ms. Gorrell to make a complaint about her uncle prior to the interview can be understood in the terms of the evidence of Prof. Harry Ferguson given by way of affidavit in *S.H. v. The Director of Public Prosecutions* [2006] 3 IR 575.
- e. In all the circumstances of the case, the court will refuse to direct that the plaintiffs furnish security for costs of these proceedings.