**THE COURT OF APPEAL**

**Neutral Citation Number: [2019] IECA 334**

**Appeal Record Number: 2017/166**

**High Court Record Number: 2013/4383P**

**Irvine J.**
**Edwards J.**
**Whelan J.**

**BETWEEN/**

**HH**

**PLAINTIFF/RESPONDENT**

**- AND -**

**ULSTER BANK LIMITED**

**DEFENDANT**

**- AND –**

**EBS LIMITED**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Edwards delivered on the 18th of December2019**

1. This is an appeal brought by the second named defendant/appellant, EBS Limited, ("EBS"), against an order of the High Court, Mac Eochaidh J., of the 27th March, 2017. By his order, the High Court judge refused the application which had been brought by EBS to strike out that part of the plaintiff's claim as is grounded in the law of defamation. The relief was sought pursuant to O. 19, rr. 27 and 28 of the Rules of the Superior Courts ("RSC") and pursuant to the court's inherent jurisdiction.

**Background**

2. The respondent, who in order to protect the identity of the child mentioned in these proceedings I will refer to as HH, had been in a relationship with a woman (hereinafter "AA") with whom he had a son. Unfortunately, the relationship broke down with the result that the parties separated and AA later applied for a maintenance order in the District Court in respect of their son. The order was granted on the 15th May, 2000 when HH was directed to make a weekly payment of £35.00 (€44.44) to AA. It does not appear to be contested that HH set up a standing order in his own bank, Ulster Bank, the first named defendant, in order to comply with his maintenance obligations.

3. According to HH, the beneficiary of the standing order was to be AA who had an account with the EBS. For reasons which do not need to be elaborated upon here, the weekly maintenance amount was debited from HH's account with effect from the 30th June, 2000. Thereafter, the monies were transferred, on an ongoing basis, into a holding

account for EBS held with Ulster Bank. Regrettably, however, although the cause has not been firmly established, none of the aforementioned monies were ever credited to AA's account. Meanwhile, at all times HH was under the impression that the payments were being made into AA's bank account with the EBS. The true state of affairs only came to his attention 12 years later.

4. In his statement of claim, delivered on the 4th October, 2013, HH claims damages for defamation, negligence, conversion and breach of his constitutional rights. It is however, his claim for damages for defamation that is core to this appeal.

5. HH's claim, insofar as it is grounded in defamation is set out at paras. 10, 11 and 12 of the statement of claim which states as follows:-

> "10. By their actions, the defendants made a defamatory statement of and concerning the plaintiff to [AA] by falsely and maliciously conveying the meaning to her that the plaintiff had failed, refused and/or neglected to support his son financially.
>
> 11. In addition to the foregoing, the plaintiff has been defamed not only by the defendants through the meaning conveyed by their actions, but also by third parties who naturally believed he had failed, refused and/or neglected to financially support his son. This being a natural and probable consequence of the actions of the defendants and each of them.
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> 12. By reason of the foregoing, the plaintiff has been gravely defamed in his character and reputation and exposed to ridicule and contempt. His reputation as a person of standing in the community has been seriously damaged by the actions of the defendants."

6. EBS, in its notice for particulars dated the 29th October, 2013, sought full and detailed particulars of the defamatory statement to be relied upon by HH. It also sought particulars of the precise words alleged to be defamatory and the alleged manner of the publication of the defamatory statement. Particulars of the malice pleaded were also sought.

7. By letter dated the 12th February, 2014, HH replied to the aforementioned particulars and in so doing stated that by publishing bank statements to AA, EBS had signified to her that he had not paid maintenance in respect of their son. He alleged that EBS so conducted itself on a continuous basis and that the meaning conveyed by the bank statements was that he was not a responsible father. Furthermore, whilst HH maintained that the publication upon which he relied was made to AA and their son, he nonetheless reserved the right to identify further individuals to whom the statement was published including relatives, friends and acquaintances of AA.

8. It is HH's stated position that after the relationship broke down, contact between AA and the respondent broke off completely with the result that he had no contact with his son. He claims that, until relatively recently, he was unsuccessful in the efforts which he made

to maintain contact with his son over the aforementioned period. This he ascribes to the fact that AA had not received the maintenance payments to which she was entitled under the District Court Order.

9. In September 2012, HH claims to have received a phone call from AA concerning the results that their son had achieved in his Junior Certificate. At the time of the said phone call, HH was aware of ongoing IT disruptions in Ulster bank and knew that the weekly maintenance payments had not been taken from his bank account since April of that year. Accordingly, he informed AA that he would take action to ensure that she would receive the payments that were due at that time but had not been transferred. HH was shocked to discover from AA, in the course of that phone call, that she had never received any maintenance payments from him.

10. Relevant also to the present appeal is the defence of EBS as it was at the time of its application to strike out the claim for defamation. Suffice to state that the defence was a full defence which put HH on proof of all aspects of his claim and also reserved unto itself the right to apply to have the claim against it struck out prior to trial. In particular, EBS denied that it made or published any defamatory statement in respect of HH to AA or any other person in the manner pleaded at paras. 10 and 11 of the statement of claim. It is material to note that EBS did not seek to rely upon the defence of qualified privilege. In this regard, I would observe that in an amended defence dated the 15th September, 2017 EBS supplemented the defence already delivered by a claim that HH's action was statute-barred and that, if EBS by its actions made any statement which was capable of bearing any defamatory meaning, the said statement/statements were made on an occasion of qualified privilege such that they are protected by the provisions of s. 18 of the Defamation Act 2009 ("the 2009 Act") and/or under the law in force immediately prior to the commencement of that Act.

**High Court Ruling**

11. On the 27th March, 2017, Mac Eochaidh J. delivered a short *ex tempore* judgment wherein he explained his reasons for refusing the relief sought by EBS. He held that the claim of HH for defamation was not bound to fail and in so doing rejected the moving party's contention that a claim for defamation based on silence or omission was necessarily unsustainable. The High Court judge expressed himself satisfied that even though the pleadings did not expressly refer to the word "innuendo" it was clear to him that HH's claim for defamation was "obviously and clearly based upon innuendo" as had apparently been argued to be the case by counsel on his behalf. According to Mac Eochaidh J., HH was not making the case that the bank statement said something mischievous about him in an express way which was defamatory, such as that he was not a good parent or had not made payments to his son. Rather, his case was that when AA received the bank statements, which made no mention of the maintenance monies having been lodged, she understood the statements to mean that HH had not complied with his legal and moral obligations to support his son.

12. Thus it was that the High Court judge concluded that the arguments advanced did not meet the standard required in order to stop the plaintiff's claim for defamation "in its

tracks". Furthermore, he found the pleadings to be adequate to enable both defendants understand the case they had to meet and in those circumstances he refused the relief sought as per his order of the 27th March, 2017.

**The Appeal/ The Appellant's Submissions**

13. By notice of appeal dated the 12th April, 2017, EBS seeks to set aside the aforementioned order. The following are the principal grounds of appeal set out in its notice of appeal, namely:-

(a) the court has a general jurisdiction to strike out claims and should have exercised it as HH's claim for defamation is one which is bound to fail. The appellant placed particular emphasis upon the decision of the English Court of Appeal in *Alexander v. Arts Councils for Wales* [2001] 1 W.L.R. 1840;

(b) the High Court judge erred in his finding that the respondent had made out a claim in defamation which was not bound to fail, in spite of the fact that the pleadings do not identify a published defamatory statement within the meaning of the 2009 Act. The bank statements were not capable of constituting the publication of a defamatory statement within the meaning of the 2009 Act either implicitly or explicitly;

(c) the bank statements constitute an omission rather than a positive action on the part of EBS and thus cannot constitute an actionable statement;

(d) the statement of claim lacked sufficient particularity to allow the appellant defend against the claim;

(e) the High Court judge failed to take account of the principle that in a defamation claim, the claimant has to set out *verbatim* the alleged defamatory words in the particulars of claim. In an innuendo claim, the claimant is obliged to set out the inference to be drawn of the defamatory statement which the respondent had failed to do in paras. 10, 11 and 12 of his statement of claim.

**Respondent's Submissions**

14. On behalf of the respondent it is submitted:-

(a) that the High Court judge was correct to conclude that his claim in defamation was not bound to fail;

(b) that the High Court judge had correctly concluded as a matter of law and fact that the bank statements which did not credit the account of AA with maintenance payments might arguably constitute a statement within the meaning of the "broad definition" found in s. 2 of the 2009 Act;

(c) that the appellant had conflated the concepts of "publication" and "statement". A publication merely requires "that one person (A) conveys information to another person (B) a defamatory statement in respect of a third party (C)";

(d) the respondent maintains that he has complied with the prerequisite that his statement of claim and the particulars therein set forth must set out the extrinsic facts of the defamation with sufficient particularity. He asserts that paras. 5 to 10 of the statement of claim complies with this obligation.

**Discussion**

**RSC**

15. Although this appeal is not a rehearing of the application made at first instance, a matter to which I will later return, it is nonetheless helpful to start by considering the nature of the application which was made to the High Court judge.

16. In its notice of motion dated the 23rd January, 2017, EBS sought to rely on the provisions of O. 19, rr. 27 and 28 for the purpose of seeking to strike out that part of the claim as pleaded by HH which claims damages for defamation. It also sought to engage the court's inherent jurisdiction to strike out the defamation claim on the basis that it was "frivolous, vexatious and/or bound to fail". In the further alternative, it sought the dismissal of the "action" on the grounds that it amounted to an abuse of process. The notice of motion did not seek any relief against HH for any alleged failure on his part to comply with any earlier order or request for particulars of the defamation claim.

17. In the grounding affidavit supporting the motion, Mr. Sean Cosgrove, solicitor, having referred to the statement of claim and the plaintiff's replies to particulars dated the 12th February, 2014 stated as follows at paras. 8 and 9 of his affidavit:-

> "8. In light of the foregoing I say that the plaintiff's pleadings fails to set out any publication of a defamation statement. I therefore say and believe that as a matter of law the statement of claim discloses no cause of action and defamation. I further say and believe that the facts pleaded by the plaintiff disclose no cause of action in defamation. The plaintiff's claim in defamation is therefore unstateable and incapable of succeeding.
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> 9. I say that it is manifestly clear that the plaintiff's claim discloses no cause of action against the second named defendant in circumstances where at no point did the second named defendant publish any statement concerning the plaintiff to [AA] and/or any other third parties."

18. The relevant wording of O. 19, rr. 27 and 28, insofar as it is material to this appeal is as follows:

> "27. The Court may at any stage of the proceedings order to be struck out or amended **any matter in any indorsement or pleading** which may be unnecessary or scandalous, or which may…delay the fair trial of the action…"
>
> "28. The Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action…and in any such case or in case of the action…being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed…, as may be just" (emphasis added).

19. Although the High Court judge, in the course of his ex tempore ruling, did not engage specifically with the court's jurisdiction as aforementioned, in cases such as *Barry v. Buckley* [1981] I.R. 306 and D.K. v. King [1994] 1 I.R. 166, the court has made clear that the jurisdiction as provided for in O. 19, r. 28 is one which is confined to a pleadings-based assessment. Of greater significance, however, is the fact that the rule applies only where it is sought to strike out an *entire* pleading such as a statement of claim and not part of a pleading. That this is so was made clear by the Supreme Court in *Aer Rianta cpt v. Ryanair Limited* [2004] IESC 23 wherein it was stated that the jurisdiction of the court to strike out *part* of any pleading is to be found in O. 19, r. 17 insofar as it provides for the striking out of "any matter in any endorsement or pleading" rather than the striking out of the entire pleading or claim. Accordingly, it is clear that O. 19, r. 28 could never have been successfully invoked by EBS given that it does not contend that the balance of the statement of claim, insofar as it concerns causes of action other than defamation, does not disclose a reasonable cause of action.

20. As for the appellant's entitlement to invoke O. 19, r. 27, that right was dependent upon its ability to convince the court that the claim in respect of defamation could be considered a "matter" in the pleadings which was "unnecessary" or "scandalous" or which might "delay the fair trial".

21. Some helpful guidance as to when a pleading may be considered scandalous is to be found at para. 5.304 of H. Bieler et al, *Delaney and McGrath on Civil Procedure* (4th Edition) wherein it is stated:-

> "Pleadings will be regarded as scandalous where they seek to introduce extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. This will particularly be the case where the material is calculated to or has the effect of embarrassing or causing distress or offence to the opposing party, or to non-parties."

22. As to the approach the court should take when faced with an application to strike out any matter as scandalous or unnecessary, the following statement of Clarke J. from his judgment in *Ryanair Ltd. v. Bravofly and Anor.* [2009] IEHC 41 at para. 4.5 is of assistance:-

> "The primary test used in judging whether a pleading contains unnecessary or scandalous matters is the relevancy of the matter pleaded to the proceedings between the parties; whether the pleadings concerned seek to introduce extraneous matters for the purposes and motives unconnected with the subject matter of the dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleading which is material to the reliefs claimed."

23. EBS's complaint regarding the paragraphs of the statement of claim which support HH's claim for defamation (paras. 10, 11 and 12) cannot, in my view, be classified as either unnecessary or scandalous. The defamation claim is a standalone claim and thus cannot

be considered to be extraneous to the dispute between the parties. There is no suggestion that HH's motivation for including these paragraphs was for the purpose of embarrassing or causing distress or offence. Indeed, it is implicit from the approach adopted by EBS on this appeal, wherein it focused its submissions on the contention that HH's claim for defamation was bound to fail, that it accepts it cannot find comfort in the provisions of O. 19, r. 27. Whether the defamation claim, for the reasons advanced by EBS, should be permitted to remain part of the statement of claim for the reasons outlined by Mr. Cosgrove in his affidavit, involved an entirely different assessment.

24. For the aforementioned reasons, I am satisfied that EBS's purported reliance upon the provisions of O. 19, rr. 27 and 28 was entirely misconceived. That being so, the question for this court on the appeal must be whether or not the High Court judge is to be faulted for his failure to exercise the court's inherent jurisdiction to strike out HH's defamation claim as one which was bound to fail.

**The Court's Inherent Jurisdiction**

25. It is well established that the court's jurisdiction to strike out a claim as bound to fail stems from its entitlement to prevent an abuse of process. Concerning this aspect of the court's jurisdiction and when it should be exercised, the following is what was stated by Clarke J. in *Keohane v. Hynes* [2014] IESC 66 at para. 6.5:-

> "...The underlying basis for the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings."

26. The rationale underlying this aspect of the court's jurisdiction is perhaps obvious. The court's own resources are finite and should not be given over to hearing claims which are destined to failure. Likewise, it is to impose an unjust burden on a defendant to require it to defend a claim at a full plenary hearing when it can safely be determined at an interlocutory stage that the action is bound to fail. Whilst a successful defendant at the conclusion of a plenary hearing will likely be awarded their legal costs, in most instances those costs will only cover party and party costs and in many instances may not be recoverable at all. Thus, if a claim is obviously bound to fail, the court may, in its discretion, dismiss it in exercise of its inherent jurisdiction.

27. It is however clear from the authorities including the decision of Costello J. in *Barry v. Buckley* [1981] IR 306, that the court's inherent jurisdiction to dismiss a claim as bound to fail must be sparingly exercised. These sentiments were endorsed by Clarke J., in *Moylist Construction Ltd. v. Doheny & Ors.* [2016] IESC 9 where he observed at para. 3.6:-

> "...The default position in respect of any proceedings is that they should go to trial. Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be

engaged in when it is clear that there is no real risk of injustice in adopting that course of action."

28. It is nonetheless accepted that there are times when it is safe, on an interlocutory hearing, to reach a final determination on the validity of an entire claim or some aspect thereof. Issues of law which are relatively straightforward can often be determined without any risk of injustice to the parties, outside the remit of a full plenary hearing. Nevertheless, the courts have identified restrictions which must apply to the exercise of this type of jurisdiction on an interlocutory application. The nature and reason for this restriction was identified in the following passage from the decision of Clarke J. in *Moylist* at para. 3.12:-

> "…It seems to me that there are also limitations to the extent to which cases which involve issues of law or construction can properly be subject to an application to dismiss under the inherent jurisdiction…A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored."

29. It is to be inferred from this passage that any judge faced with an application to dismiss a claim, or some aspect of a claim, at an interlocutory stage on the basis that it is bound to fail enjoys a broad discretion to refuse such an application if satisfied that any issue of law or construction which they have been asked to determine is too complex to be safely dealt with on an interlocutory application or where they are satisfied that it may be unsafe to determine the issue absent a full trial lest circumstances or evidence emerge that might impact upon the issue.

30. There is also a very practical reason for this. Judges should not be asked to determine complex legal issues unless they are absolutely satisfied that they can make such a determination in the context of the day-to-day reality of interlocutory hearings. Different judges will have different levels of knowledge material to the application before them. Some will be confident within the confines of an interlocutory hearing to conclude that a claim is bound to fail. Other judges with lesser knowledge or who find themselves dealing with such an application in more strained circumstances may not be confident to make the legal determination sought. For my part, I believe that a judge should proceed with caution when faced with an application which has such serious consequences for the plaintiff should it succeed and should refuse the application if they consider they can only comfortably dispose of the legal issue concerned in the context of a plenary hearing. And, I for one, would express the view that an appellate court should be slow to overturn a judge who takes the cautious approach and refuses to strike out a particular claim as bound to fail on a point of law on an interlocutory application.

31. Moving on from questions of law, Clarke J. advised that particular caution is warranted where the issue the court is asked to determine may depend on facts and evidence which might be elaborated upon in the course of a plenary hearing. In *Moylist*, Clarke J.

summarised his observations regarding the treatment of factual disputes at an interlocutory stage in the following manner at para. 3.12:-

> "It seems to me to follow that from that analysis there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in Keohane) have already been held to fall into that category."

32. The reason for the caution proposed by Clarke J. is that it is not always possible for the court at an interlocutory hearing to be satisfied that it has a comprehensive overview of all of the facts. Indeed, the court's inherent jurisdiction can only be exercised on the basis that on the admitted facts, the claim cannot succeed. In most instances the facts material to any particular claim will only emerge in the course of a full oral hearing where there will be a detailed presentation of the evidence which in turn will be subject to cross-examination. It is only in very limited cases that a court on an interlocutory application will be in a position to safely conclude that a particular claim is bound to fail.

33. Lastly, the court must also have regard to some broader considerations. Firstly, the court must recognise that it has long been accepted that a claim should not be dismissed as bound to fail if, by any amendment of the pleadings it might be saved from dismissal, (see *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425. Secondly, the court's inherent jurisdiction should not be used to dismiss an innovative or weak case, as was advised by Charleton J. in *Millstream Cycling Limited v. Tierney* [2009] IEHC 571, sentiments mirrored by Clarke J. in *Keohane*. At para 6.6 of his judgment he stated:-

> "…[T]he jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law."

34. And Thirdly, an application to dismiss a claim as bound to fail pursuant to the court's inherent jurisdiction is not exclusively a pleadings-based assessment. The court is obliged to have regard to any evidence that may possibly emerge in discovery or in the course of evidence at the trial of the action. Nevertheless, what is pleaded may well be material to the application. As was cautioned by Murray J. in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321, the court's inherent jurisdiction is not to be used as a method to achieve the summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings. As he stated at p. 334 of his judgment:-

> "For this reason a primary pre-condition to the existence of this jurisdiction is that all the essential facts upon which the plaintiff's claim is based must be unequivocally identified. It is only on the basis of such undisputed facts that the court may proceed."

35. What this court can infer from the jurisprudence is that judges must exercise their jurisdiction to strike out pleadings cautiously. Courts must be slow to entertain applications to strike out pleadings where the arguments advanced by the moving party rely on findings which cannot safely be established at an interlocutory hearing. Pleadings cannot summarily be dismissed where there are legitimate disputes over facts or a pleading is underpinned by complex legal issues that require a plenary assessment.

**The Appellate Jurisdiction**

36. Of particular importance in the context of the present appeal is the role of the appellate court. Its role is to review the decision of the High Court judge in light of the application advanced by EBS. The question which the appellate court must ask itself is whether the High Court judge exercised his or her discretion in a reasonable manner having regard to the evidence and the prevailing principles. The fact that an appellate court might, if it were to consider the application *de novo*, make a different order is not a reason sufficient to justify setting aside the order of the High Court, unless the court is satisfied that it is necessary to do so in order to achieve justice between the parties. In other words, a significant margin of appreciation must be afforded to any High Court judge concerning the manner in which he or she may have exercised their discretion.

37. As already stated, the principles to be applied on an application to dismiss a claim as one which is bound to fail, recognise that the default position is that proceedings should go to trial and the procedure should not be used to achieve the summary disposal of substantial questions of law in substitution for normal plenary hearing.

38. A natural consequence of the review function of the Court of Appeal is that it should, save for in exceptional circumstances, determine the matter on the basis of the evidence which was before the High Court judge. Otherwise, the court would not review the decision but be inclined to substitute it for its own and rule how the reviewed judge might have decided had he or she all the evidence and submissions.

39. For the present appeal, this means that the submissions made to this court in relation to qualified privilege, which were not made in the court below must be excluded. The reason they were not made in the court below is, of course, the fact that the defence of EBS at the time did not seek to rely upon the defence of qualified privilege. Indeed, as matters stand it would appear that HH has yet to file a reply to that defence. Thus, in my view, fair procedures and natural justice would demand that this court exclude consideration of the defence of qualified privilege in support of EBS's contention that the defamation claim should be dismissed as bound to fail.

**Is The Defamation Pleading Bound to Fail?**

40. I will now turn to consider whether the High Court judge erred in law and/or in fact in concluding that the claim for damages for defamation as pleaded in the statement of claim is one which is bound to fail and should for that reason be struck out.

***Statement***

41. The starting point for determining whether HH's claim for defamation as pleaded, is bound to fail must be the provisions of s. 2 of the 2009 Act in circumstances where EBS maintains there exists no actionable statement: s. 2 provides as follows:-

> ""statement" includes:-
>
> (a) a statement made orally or in writing,
> (b) visual images, sounds, gestures and any other method of signifying meaning,
> (c) a statement:-
>
> (i) broadcast on the radio or television, or
> (ii) published on the internet, and
>
> (d) an electronic communication;"

42. On its face, this is a broad definition, and in its submissions EBS does not dispute that this is so. It nonetheless maintains that the definition should not encompass 'silence' or statements made by way of omission. Counsel for the appellant argued before the High Court and argues before this Court that this is so, and I believe it can be accepted without much contention that certain inactions are not covered by the definition in the statute. Such limits were identified in the case law relied upon by EBS such as *Stanley v. Shaw* [2006] BCCA 467. However, whether the actions or indeed inactions on the part of EBS as particularised in the pleadings actually constitute silence or not, i.e. the factual question, that is a matter for the trial court to determine having heard all of the relevant evidence. The question whether the issuing of the monthly bank statements, which make no reference to the plaintiff, does or does not fall under the broad definition contained in s. 2 can only be determined when the court has seen those statements and heard the evidence of all such witnesses as the parties may wish to call. In the absence of any clear indication that the bank statements sent by EBS to AA do not fall within the definition of "statement" in s. 2, in my view, it was perfectly reasonable for the High Court judge to conclude that this was a matter which should be left over to the trial of the action.

43. In deciding not to exercise the court's inherent jurisdiction it cannot, in my view, be stated that the High Court judge exercised his discretion in a manner which was inconsistent with the principles to be deployed on the application before him. It was reasonable for him to conclude that whether the actions/omissions on the part of EBS may be considered to amount to a statement within the broad definition in s. 2 was best decided within the mechanisms available at a plenary hearing. A bank statement is *prima facie* a statement and, without any relevant jurisprudence to the contrary, it was not an error of law or fact on the part of the High Court judge to defer the consideration of that issue to a plenary hearing.

44. In light of these observations it becomes clear that the High Court judge correctly identified the applicable legal principles and exercised his discretion reasonably. For that reason alone, the appellant's submissions on this point should fail.

***Publication***

45. The appellant submits that there has been no publication of the relevant statement. It argues that where there is no clear statement, it could not have been published. In other words, 'silence' cannot be published because there is nothing to communicate. However, cases based on words not said have succeeded in the past. That is why the concept of innuendo exists. This is a complex area of law where effective publication may rest on nuances of fact, on the knowledge of the recipients of a statement or on the state of mind of the publisher. This court has not seen any of the individual bank statements upon which HH intends to rely. Furthermore, AA has not been cross-examined concerning her response to any such statement and, as the case is presented, it would appear to at least be arguable that, when scrutinised, any one of these bank statements or all of them may have suggested to AA that HH did not pay what was due on foot of the maintenance order and did not want to support his son. *Prima facie*, the statement upon which HH intends to rely has been published to AA and the court, at an interlocutory stage, cannot ignore that fact.

46. I also accept the submission made on behalf of HH that 'publication' must be given its ordinary meaning. In this context, it must be accepted that the bank statement/statements were published to AA who, it is not disputed, received them. I will now address the extent to which a court, on an interlocutory application such as that with which this court is concerned, should engage with the meaning of a statement.

***Defamatory Meaning***

47. To what extent the court sitting at a pre-trial stage may engage with the meaning of a statement is perhaps the most challenging aspect of this appeal. Intuition might suggest that the meaning of a statement should be left to the judge and/or the jury at the trial of the action and should not become the focus of the court's attention on an interlocutory application. While it is true to say that it is a matter for a judge sitting alone to determine whether or not any statement is capable of a defamatory meaning, it is, of course, for the jury to determine what its true meaning is and whether or not it is defamatory. In so doing the jury will be carrying out a fact finding exercise. Once any statement is considered capable of having a defamatory meaning, it is for the jury to decide whether it is or was defamatory by reference to meaning. This is a fact finding exercise and can only be carried out by the jury.

48. Mr. Hayden SC on behalf of EBS argues that the decision in *Alexander v. Arts Council of Wales* [2001] 1 W.L.R. 1840 is authority for the proposition that the court may strike out a defamation pleading if no defamatory meaning can be attributed to it. In particular, he relies upon a passage at para. 37 which reads as follows:-

> "…[I]t is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury could not reach a factual conclusion. In those circumstances, it is the judge's duty, upon submission being made to him, to withdraw the issue from the jury."

49. May L.J. continued at para. 39:-

> "In my view, just as it is open to the judge to decide that a publication is not capable of bearing a defamatory meaning, so it is open to the judge to decide in an appropriate case that a publication is not capable of not bearing a particular defamatory meaning and that a jury's verdict to the contrary would be perverse."

50. The first matter I need to address in relation to *Alexander* is that, on its facts, that case was significantly different to those which present in the present proceedings. Alexander did not involve an application to strike out the claim at an interlocutory stage. The trial, wherein the claimant alleged that he had been defamed by the defendant in a press statement, had gone ahead. The defendant had relied in its defence on the defence of fair comment with the result that the claimant pleaded malice in reply. On the basis of the evidence, the trial judge withdrew the issue of malice from the jury as the primary facts which emerged during the trial were not capable of supporting an inference of malice. However, the exercise that was carried out by the trial judge in *Alexander* was very different from the exercise that Mac Eochaidh J. was asked to engage with.

51. It is common case that in the course of a defamation action, when all of the evidence is over, counsel on behalf of the respective parties will make submissions to the trial judge concerning the questions which the jury will be asked to answer. It will be at this stage that a defendant may submit that the statement is incapable of bearing a defamatory meaning and, as already stated, there will be cases that will be withdrawn from the jury at that stage because the trial judge is so satisfied.

52. But that is not the exercise that the court was asked to carry out further to EBS's application to dismiss the defamation claim as one which was bound to fail. The judge was asked to make that decision absent the plaintiff having the opportunity to present his evidence and make argument at the conclusion of all of the evidence. Thus, *Alexander* in my view, is not authority for the proposition that on an interlocutory application a court should make a determination that no defamatory meaning could be attributed to a particular statement.

53. The other concern with *Alexander* is that it may not sit well with the decisions discussed above concerning the jurisdiction of the courts in Ireland to strike out proceedings or pleadings. As discussed, where a finding of fact is vital to determine the viability of pleadings, a court which has not assessed those facts should not base a determination on them. This must be true of the defamatory meaning of any statement, too. Whether a statement was or is in fact defamatory can, in some cases, only be established at trial. Meaning may depend significantly on context. In particular, where a pleading is for defamation by way of innuendo, the precise meaning of a statement is difficult to establish and may only be possible in the context of a plenary hearing. The indirect nature of an innuendo renders it inherently more difficult to establish. Accordingly, in my view, the High Court judge cannot be faulted for his decision not to stop this defamation claim "in its tracks".

54. The defendant also contends that the innuendo claim has not been sufficiently particularised in the relevant paragraphs of the statement of claim and replies to

particulars. Certainly, if the plaintiff's claim is based upon innuendo, he was under an obligation to make that clear from his pleadings. A defendant is entitled to know the case they have to meet. After all, that is the purpose of pleadings. Indeed, in A. Mullis and R. Parkes, *Gatley on Libel and Slander* 12th edn. at para. 26.23 it reads:-

> "Where a claimant relies on an innuendo meaning he must plead particulars of the facts and matters on which he relies in support of that sense These facts or matters will generally incorporate either a special information of the words known to a limited class of persons (such as slang or technical terms) or facts extrinsic to the libel which, if known about, affect the way the word complained of are understood. In either case, the claimant must identify the person or persons to whom the words are published and who are alleged to have had knowledge of the special meaning or the extrinsic facts. In default of compliance with the requirements for pleading innuendo meanings, the pleading may be struck out."

55. That being so, the court should have clarified with HH that his claim was based upon innuendo and given him the opportunity to amended his pleadings. The principles recited above would apply, where a pleading, if otherwise bound to fail, would be saved by amendment.

**Summary / Conclusion**

56. With the above in mind, it is not clear that the claim as pleaded was bound to fail. The case may appear innovative or weak, but that is not a reason for dismissing it. In fact, the jurisdiction to strike out pleadings must be exercised sparingly. The limitations of the interlocutory hearing, the complexity of the issues raised and the significant consequences for the plaintiff justify this approach. Thus, if a judge has applied the correct legal principles and has decided to err on the side of caution, a significant margin of appreciation must be afforded to him. As a result, this court as an appellate court should be slow to interfere with those findings. In the present appeal, the High Court judge applied the correct law which pertains to an application to dismiss a claim as bound to fail and duly exercised his discretion. I can see no error in his judgment.

57. The court must also exclude from its consideration any argument not made in the court below. The application was made based upon the pleadings as they existed at the time and the court should not consider the appeal on the basis of pleadings later amended. To do so would deny the plaintiff a right of appeal from the adjudication by this court based upon the amended pleadings.

58. Lastly, the applications made pursuant to O. 19, rr. 27 and 28 were unsustainable.

59. For the above reasons, I would dismiss the appeal.