

THE HIGH COURT

[2021] IEHC 660
[2017 No. 9557 P.]

BETWEEN

DARRAGH MACKIN

PLAINTIFF

AND

DENIS O'BRIEN AND JAMES MORRISSEY

DEFENDANTS

THE HIGH COURT

[2017 9558 P.]

BETWEEN

GAVIN BOOTH

PLAINTIFF

AND

DENIS O'BRIEN AND JAMES MORRISSEY

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 30th day of September, 2021

Introduction

1. Identical claims are made in respect of two sets of proceedings. The plaintiff in each action is a solicitor. Both actions were commenced on 25 October 2017 and the plaintiff in each case seeks inter alia damages for defamation arising out of a press release which was published by the defendants on 26 October 2016. The press release was entitled: "STATEMENT ON BEHALF OF MR. DENIS O'BRIEN IN RESPONSE TO REPORT COMMISSIONED BY MS. LYNN BOYLAN MEP (SINN FÉIN)" (hereinafter "the press release"). The press release was issued in response to a report entitled "REPORT ON THE CONCENTRATION OF MEDIA OWNERSHIP IN IRELAND" (hereinafter "the report"). The defendants deny that the plaintiffs were the authors of the Report. The defendants admit that the press release was published by them on 26 October 2016. The press release contained inter alia the following words: - "*Sinn Féin/IRA certainly got the report they paid for*". In each case, the plaintiff claims that the press release and the statement contained within it referred to and was understood to refer to them. As is clear from para. 7 in each statement of claim, dated 11 February 2019, the plaintiff in each case claims that the words in their natural and ordinary meaning meant and were understood to mean that the plaintiff: -

- (a) received payment from an organisation, viz. the IRA;
- (b) had acted for an unlawful organisation, viz. the IRA;
- (c) was not acting in line with his professional obligations;
- (d) lacks integrity;
- (e) is unfit to be a solicitor;
- (f) is unprofessional;
- (g) is dishonourable.

2. A range of defences are pleaded on behalf of the defendants in each case, who admit the publication of the press release but not the extent of publication. The defences include the following:-
- (a) A denial that the statement referred to and was understood to refer to the plaintiff;
 - (b) A denial that the statement meant or was understood to mean in its natural and ordinary meaning or by way of innuendo the meanings pleaded by the plaintiff;
 - (c) The defences of truth, honest opinion, qualified privilege, fair and reasonable publication in a matter of public interest are pleaded;
 - (d) A denial that the plaintiff's personal and professional reputation has been gravely damaged or that the plaintiff has been brought into public scandal, odium and contempt, and that he has suffered considerable hurt, distress, embarrassment and loss;
 - (e) A denial that the statement posed a serious risk to the personal safety of the plaintiff and his family;
 - (f) The defendant pleads that they have no reason to doubt that the plaintiff is a solicitor who values his integrity, independence and impartiality and who has acted for all members and sections in the community in Northern Ireland, Ireland and internationally;
 - (g) A plea that the publication of the statement did not in any way seek to impugn or attack the plaintiff and that it is an essential part of the functions of a solicitor that he or she acts on behalf of persons who may be unpopular or controversial or subject to public criticism and that there is no basis for the plaintiff to believe that his reputation has been damaged because of submissions made in the report;
 - (h) A denial that the plaintiff is entitled to the relief claimed or to any relief;
3. At the outset of the hearing, which took place over two days, commencing on 06 July 2021, Mr. Hogan SC for the plaintiffs explained that there were three motions before the court in respect of each case. Given that both sets of proceedings are identical, it was agreed that the parties and the court would focus on the papers in respect of the proceedings under record no. 2017/9557 P. Given that both claims are identical, the contents of this judgment apply to both cases. The first of the three motions concerned an application made by the plaintiff seeking to strike out certain pleas made by the defendants, the second and third motions being applications for discovery brought by the plaintiff and defendants, respectively. In advance of the hearing, Mr. Hogan SC had spoken with Mr. Lehane SC, representing the defendants, as a result of which it was agreed that the plaintiff's motion would be dealt with first.

The plaintiff's application pursuant to O. 19, r. 29 and/or the court's inherent jurisdiction

4. On 14 January 2021, the plaintiff's solicitors issued a motion, returnable for 06 July 2021 seeking the following relief:-
- "(1) *An order pursuant to O. 19, r. 27 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, striking out the defence of truth under s. 16 of the Defamation Act, 2009, and/or striking out such imputation(s) pleaded by the Defendants as are not reasonably capable of being borne by the statement in respect of which the action is brought and or which are not reasonably capable of bearing a defamatory meaning;*
- (2) *Further and in addition or in the alternative, an Order pursuant to O. 19 r. 27 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court striking out the defence of honest opinion under s. 20 of the Defamation Act, 2009, and/or striking out such imputation(s) pleaded by the defendants as are not reasonably capable of being borne by the statement in respect of which the action is brought and/or which are not reasonably capable of bearing a defamatory meaning;*
- (3) *Such further or consequential directions as may be necessary;*
- (4) *Such further or other Order as is (sic) Honourable Court shall deem proper; and;*
- (5) *An Order providing for the costs of the within application".*
5. For the sake of convenience, I will refer to the application brought in respect of proceedings under record no. 2017 / 9557 P but an identical application was brought, at the same time, in respect of the proceedings under record no. 2017 / 9558 P. The grounding affidavit was sworn by Ms. Audrey Colleran, solicitor for the plaintiff. At para. 1, she identifies herself and at para. 2 she avers that her affidavit is sworn in support of the relevant application. At para. 3 she avers that the plaintiff is a solicitor and at all material times was a solicitor in the firm of KRW Law LLP, Belfast. At para. 4 Ms. Colleran avers that the plaintiff's claim is for damages arising out of the publication of the press release which included the words "*Sinn Féin/IRA certainly got the report they paid for*", which words are alleged to be defamatory of the plaintiff.

The press release

6. At para. 5, she exhibits a copy of the press release. That document states the following: -

*"STATEMENT ON BEHALF OF MR. DENIS O'BRIEN IN RESPONSE TO REPORT
COMMISSIONED BY MS. LYNN BOYLAN MEP (SINN FÉIN)*

Wednesday, October 26, 2016

*The Report on the Concentration of Media Ownership in Ireland makes for very
interesting reading.*

At the outset it is worth noting that it is self – described as "An Independent Study Commissioned by Lynn Boylan MEP on behalf of the European United Left / Nordic Green Left (GUE/NGL) Group of the European Parliament"

An "independent study" commissioned by a leading member of Sinn Féin? Hardly.

"The two most important controlling entities in the Irish media landscape are the national State broadcaster, RTE, and an individual businessman, Denis O'Brien" this report states.

Yet there is no focus on RTE in the context of:-

- *The largest media entity in Ireland*
- *The only entity involved in TV, radio and print*
- *Revenues subsidised by licence fees amounting to €178.9 million.*

But then this 'independent study' was never intended to be a report on the concentration of media ownership in Ireland.

Sinn Féin is very diligent and adept when it comes to pushing its agendas, overtly and covertly. After a disappointing General Election, An Phoblacht went on the attack: "State broadcaster came in for severe criticism as it slashed Sinn Féin's coverage following a poll . . . which showed the party gaining ground . . . and for two days the voices of Sinn Féin were banned from the airwaves in a bizarre episode that was reminiscent of Section 31 and state censorship" (March 7. 2016)

And on the eve of the Budget, Sinn Féin TD Eoin Ó Broin declared: - "Budget Day is all about choices. For decades, Fine Gael and Fianna Fail, have looked after the big guy, whether that be Denis O'Brien or Apple". I am absolutely convinced that the contribution that Apple has made in this country is unquantifiable in financial and social terms. What about the thousands of young women and men who did not have to emigrate and who got a chance to work, live and raise families in Cork?

I have said that Apple should not be punished for its tax arrangements in Ireland. Sinn Féin's stance on Apple has been I believe both anti – enterprise and anti – Irish. "Sinn Féin has been waiting with some relish for the EU verdict" wrote Pat Leahy in the Irish Times (August 30 2016) "and leaped into action: 'Give us back our money' demanded MEP Matt Carthy. For good measure, Sinn Féin finance spokesman Pearse Doherty also called for a public inquiry into Apple's tax arrangements'.

This report states that I am chairperson of Communicorp, as has various individuals including Dr. Colum Kenny, Dr. Roderick Flynn and Caoilfhoinn Gallagher, legal firms Jonathan Price (Belfast) and KRW Law (London) and media organisations

including the Irish Times and TV3. It may be a rather inconvenient truth, but I am not. I suppose why let the facts interfere with the agenda and the messaging . . .

Is the media objective when it is talking and writing about itself? The media industry in Ireland is in decline. This decline has been ongoing for many years and it threatens and (sic) industry that has served this country exceptionally well, providing high levels of employment and spawned a number of writers who have deservedly achieved international acclaim.

Independent News & Media (INM) was days from forced closure back 2011. Over €2 billion in shareholder value had been lost and the shares had collapsed from €27.30 to 41 cents as a previous board had racked up unsustainable levels of debt. I became am (sic) a substantial minority shareholder in INM (I am not on the board).

I am the owner of Communicorp which like RTE, TV3, the Irish Examiner and the Sunday Business Post operates in a very challenging environment. I understand the Irish Times is currently considering various funding options. I believe that some media companies will not survive this decade without radical structuring including substantial funding.

I was surprised, for example, that RTE (and others) did not seek any comment from me on the 'Report on the concentration of media ownership in Ireland' in the interests of balance and objectivity. But maybe the powers that be in Montrose felt that they had been given a 'free pass' in the report that they chose just to quote from it?

I do not believe the Irish media is objective in relation to matters relating to itself. The prime reason is survival. Every media executive and journalist knows that the future of traditional media is bleak. It makes one entity undermining another easier to justify.

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

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

Maybe instead of commissioning reports Sinn Féin would commit just . . . " [illegible thereafter]

The report

7. At para. 6 of her affidavit, Ms. Colleran exhibits a copy of the report which, she avers, was "co – authored by the plaintiff and published on the 19th October 2016". The very

first page of that report, as exhibited by Ms. Colleran contains, at the top, the logos of "KRW Law" and "Doughty Street Chambers". The title is then given as follows: -

"REPORT ON THE CONCENTRATION OF MEDIA OWNERSHIP IN IRELAND

AN INDEPENDENT STUDY

Commissioned by Lynn Boylan MEP on behalf of the European United Left / Nordic Green Left (GUE / NGL) Group of the European Parliament.

Submitted by:

	Caoilfhionn Gallagher	Gavin Booth
	Jonathan Price	Darragh Mackin
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	53 – 54 Doughty Street	3rd Floor
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8. It is fair to say that the contents of the report are critical of, *inter alia*, the first named defendant. The report's "Conclusion and Recommendations" begin on internal p. 37 of the report, in the following terms: -

"6. CONCLUSION AND RECCOMENDATIONS

Ireland

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

9. Internal p. 40 of the report contains the following immediately under the last paragraph of the conclusion and recommendations: -

"CAOILFHIONN GALLAGHER

JONATHAN PRICE

Doughty Street Chambers, London

—

GAVIN BOOTH

DARRAGH MACKIN

KRW Law, Belfast

19th October 2016".

10. Returning to Ms. Colleran's affidavit, at para. 7 thereof she refers to para. 7 of the plaintiff's statement of claim as to the pleaded meanings of the words complained of and I referred to that paragraph earlier in this judgment. At para. 8 of her affidavit Ms. Colleran avers that at para. 11 of the Defence, it is denied that the words complained of bore or were capable of bearing the meanings pleaded by the plaintiff in para. 7 of the statement of claim. At para. 9 of her affidavit Ms. Colleran refers to para. 12 of the defence delivered by the defendants which makes clear that the defendants intend to rely upon the defence of truth and intend to justify the words complained of, not in the meanings contended for by the plaintiff, but in the alternate meanings which the defendants allege the words bore and Ms. Colleran quotes those from para. 12 of the defence.

Alternate meanings pleaded in the Defence

11. At this juncture, it is appropriate to quote, verbatim, paras. 11 to 13 inclusive from the defence delivered on 18 July 2019, wherein the defendants make the following pleas in respect of the three – page press release (which is described in the Defence as "the Statement"): -

"(11) The defendants deny that the Statement meant or was understood to mean in its natural and ordinary meaning or by way of innuendo the meanings pleaded at para. 7 of the Statement of Claim. Each and every particular of meaning pleaded at para. 7 is denied as if same were herein set out and traversed seriatim.

Defence of Truth

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

Particulars of Meaning

- i. The Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study;
- ii. The Report was neither balanced nor fair since it did not focus on RTE which is the largest media entity in Ireland;
- iii. The Report was designed to advance the political agenda of Sinn Féin;

- iv. Sinn Féin supported and continues to be associated with the IRA;
- v. Any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position on media ownership and its opposition to the First Named Defendant and Independent News and Media plc, and;
- vi. The violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect.

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

The ‘sting’ of the defamation complained of

12. The numbering scheme in Ms. Colleran’s affidavit went awry after para. 9, in that it is followed by a paragraph numbered 6. There, Ms. Colleran avers that, although a matter for legal submissions she is advised by counsel and believes “. . . *that the meanings contended for by the defendants (and which they intend to prove as true) simply do not meet the sting of the defamation complained of by the plaintiff. The words complained of are not reasonably capable of bearing the alternative imputations pleaded by the defendants as aforesaid or, alternatively, the meanings pleaded by the defendants are not reasonably capable of bearing a defamatory meaning at all and should be struck out accordingly*”.
13. In the next paragraph of her affidavit (numbered 7) Ms. Colleran avers that the defendants have pleaded particulars upon which they intend to rely in support of their plea of truth pursuant to s. 16 of the Defamation Act 2019 and she avers that it follows that any particulars pleaded in support of impermissible meanings should be struck out *mutatis mutandis*. The penultimate averment made by Ms. Colleran is that, although a matter for submissions “. . . *for precisely the same reasons the plea of honest opinion is also bound to fail and should be struck out*” and her final averment is to seek relief in terms of the notice of motion. Given the aforesaid reference to the plea of honest opinion, it is appropriate, at this point, to quote, verbatim, paras. 14 to 17, inclusive from the Defence:

“Defence of Honest Opinion

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

Particulars of fact upon which honest opinions were based

- (15) The honest opinions held by the Defendants were based on the following allegations of fact: -
- i. the Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study;
 - ii. the Report was neither balanced nor fair since it did not focus on RTE which is the largest media entity in Ireland;

- iii. the Report was designed to advance the political agenda of Sinn Féin; part of Sinn Féin's agenda is to criticise Apple and the First Named Defendant;
- iv. the media industry in Ireland is in decline;
- v. the First Named Defendant invested a lot of money in Independent News and Media at a time when it was in significant financial difficulties;
- vi. RTE should have been considered in the Report but this was not done;
- vii. Sinn Féin supported and continues to be associated with the IRA;
- viii. any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position of media ownership and its opposition to the first named defendant and Independent News and Media plc;
- ix. the violence carried out by the IRA which is supported by Sinn Féin continues to have a chilling effect.

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

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

14. A replying affidavit was sworn by Ms. Gillian Cox, solicitor for the defendants, on 11 March 2021. At para. 1, she identifies herself and at para 2. she avers that her affidavit is made in opposition to the defendant's application. At para. 3, she avers that her affidavit is sworn in reply to that of Ms. Colleran. At para. 4, she refers to the pleadings and orders and at para. 5 she avers that, in summary, the plaintiff's claim is one in defamation arising out of the publication of the press release and she refers to para. 5 of the plaintiff's statement of claim, wherein the plaintiff has set out the words "*Sinn Féin/IRA certainly got the report they paid for*" as being the words upon the plaintiff sues. At para. 6, Ms. Cox avers that the plaintiff is not entitled to the relief claimed. At para. 7, she avers that the pleadings which the plaintiff seeks to have struck out "*. . . are not unnecessary or scandalous, and do not tend to prejudice, embarrass or delay the fair trial of the proceedings*" the foregoing being language used in O. 19, r. 27.
15. At para. 8, Ms. Cox avers that, nowhere in her affidavit, does Ms. Colleran depose that the pleadings which the plaintiff seeks to have struck out are unnecessary or scandalous or may tend to prejudice, embarrass or delay the fair trial of the action and she avers that she is advised by counsel that such evidence is a necessary prerequisite to an application under O. 19, r. 27. At para. 9, Ms. Cox avers that, although primarily for legal argument, she is advised that for the purpose of the application pursuant to the inherent jurisdiction of this Court, the plaintiff is not entitled to strike out the Defence of Truth under s. 16 of the Defamation Act of 2009 and/or to strike out the imputation(s) pleaded by the Defendants and/or to strike out the Defence of Honest Opinion under s. 20 of the aforesaid Act of 2009. At para. 10, Ms. Cox asks that this Court refuse the relief sought in the motion.

16. The foregoing comprises the evidence before the court and before looking at certain relevant legal authorities, it is appropriate to make reference to O. 19, r. 27 which provides 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 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".

17. It is uncontroversial to say that pleadings which are "unnecessary", in the context in which that term is used in O. 19, r. 27, constitute pleas which are irrelevant to the issues in dispute between the parties. This Court's jurisdiction under O. 19, r. 27, is complemented by the court's inherent jurisdiction to strike out proceedings where they can be shown to be unsustainable, frivolous or vexatious and there is no dispute between the parties to the present application as to the existence of these parallel jurisdictions.

Relevant authorities

18. Both sides furnished detailed written submissions which were supplemented by means of oral submissions made with great skill by Mr. Hogan SC and, in response, by Mr. Lehane SC. I have very carefully considered all submissions made, written and oral, and am very grateful to senior counsel, junior counsel and their instructing solicitors for the assistance which was provided to the court in that regard. Carefully reviewing all submissions made, it is fair to say that there is no meaningful disagreement as to relevant authorities and it is appropriate to refer to certain of these as follows.
19. In *Ryanair v. Bravofly* [2009] IEHC 41, Clarke J. (as he then was) dealt with an application by Ryanair in which it sought to strike out portions of *Bravofly's* defence and counterclaim, pursuant to O. 19, r. 27 and/or pursuant to the inherent jurisdiction of the court. From para 4.4, the learned judge stated the following: -

"[4.4] Order 19 r. 27 confers a broad discretion on a court to strike out any part of a pleading, which is unnecessary, scandalous or prejudicial. In Morony v Guest (1878) 1 LR I.R. 564 Chatterton VC, at page 571, described one of the predecessors to this rule in the following way: -

"A party is not to be called upon to answer statements which are irrelevant to the case, or which are pleaded in an unfair, ambiguous, or prolix manner; but the Court should confine the rule to cases which come within it."

Chatterton VC, however, also cautioned that: -

"The Rule is not to be abused, nor are pleadings to be scanned too finely, with regard to the power of the amendments conferred, nor can a party dictate to his opponent how he ought to plead."

[4.5] 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 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 pleadings which is material to the reliefs claimed. . ."

20. The learned judge then referred to the authorities in which the foregoing test was formulated and approved, following which he applied the general principles derived from the authorities to the particular pleadings sought to be struck out and his conclusions were then given. At para. 5.2, Clarke J. stated *inter alia* that: -

"A court should not lightly exclude matters from pleadings where there is at least some reasonable possibility that the material pleaded could be relevant. Matters should only be excluded where it is clear that such pleading is irrelevant".

21. As well as placing considerable emphasis on the foregoing, counsel for the defendants directed the court's attention to a range of authorities wherein the court's inherent jurisdiction was discussed insofar as striking out proceedings, staying proceedings, or striking out pleadings was concerned. Reference was made to the decision of Costello J. (as he then was) in *Barry v. Buckley* [1981] IR 306, being a case in which Costello J. made clear that the court has an inherent jurisdiction to stay proceedings and is not limited to the pleadings of the parties in the exercise of same. Reliance was placed on the statements made by Costello J. (at 308) wherein the learned judge stated: -

"basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the Plaintiff's claim must fail"; per Buckley L.J. in Goodson v. Grierson [1908] 1 KB 761 at p. 765. This jurisdiction should of course be exercised sparingly and only in clear cases. But it is one which enables the Court to avoid injustice . . .".

22. Counsel for the defendants also referred to the Supreme Court's decision (McCarthy J.) in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425. In that case, the plaintiff brought proceedings for specific performance of a particular contract, the relevant statement of claim contending, *inter alia*, that the option to rescind was for the benefit of the plaintiff only and was not exercisable by the vendor. On the defendant's motion, the High Court dismissed the action, accepting the defendant's contention that the facts not being in issue, there was no basis upon which the plaintiff could succeed. On appeal to the Supreme Court, the plaintiff advanced a new argument to the effect that the defendant's conduct amounted to a form of estoppel. The Supreme Court dismissed the appeal, making clear that the inherent jurisdiction of the High Court to dismiss an action was one it should be slow to exercise. In his judgment, McCarthy J. stated the following (at 428): -

"Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture . . .".

23. The court's attention was also drawn to the observations by Fennelly J. in *Delahunty v. Players and Wills (Holland) Ltd.* [2006] 1 IR 304. That case concerned a claim by a life-long smoker who instituted personal injuries proceedings against certain tobacco manufacturers, claiming that the cigarettes she smoked were defective in that they were addictive and contained substances which were inherently dangerous to her health and welfare. The second named defendant claimed, inter alia, that there was no reasonable cause of action in respect of the alleged defects in the cigarettes manufactured and sold. The second defendant appealed against an order of the High Court which refused to dismiss the plaintiff's claim against the second named defendant pursuant to O. 19, r. 28 of the Rules of the Superior Courts, as disclosing no reasonable cause of action, or, in the alternative, pursuant to the inherent jurisdiction of the court on the grounds that it had no reasonable prospects of success or was bound to fail. The Supreme Court dismissed the appeal, holding that it was not a suitable case for dismissal either under the Rules or pursuant to the inherent jurisdiction of the court, Mr. Justice Fennelly stating (at para. 16): -

"In my opinion, this is not a suitable case for the remedy either under the Rules of the Superior Courts or the inherent jurisdiction of the Court. There are complex and difficult issues of both law and fact to be decided, which are more appropriately argued and tested at the full hearing of the action . . .".

24. Counsel for the defendants also referred to the more recent decision in *Ryanair Ltd. v. Google Ireland Ltd. & Ors.* [2017] IEHC 90. In that case, the first and third named defendants brought a motion to strike out certain paragraphs of the amended statement of claim delivered in the proceedings. The application was brought pursuant to O. 19, r. 27 and under the inherent jurisdiction of the court and it was based on the defendants' claim that the relevant pleas disclosed no reasonable cause of action and/or were frivolous, vexatious and/or bound to fail. The decision of McGovern J. made reference to *Barry v. Buckley* and cited the statement made by Costello J. to which I referred earlier. McGovern J. also referred inter alia to the decision in *Sun Fat Chan v. Osseous Ltd.* and to *Delahunty v. Player and Wills Ireland Ltd.* It is clear from para. 12 of the learned judge's decision that he was satisfied that the burden rests on the moving party to persuade the court that an impugned plea discloses no reasonable cause of action, is frivolous or vexatious or is bound to fail and is incapable of being saved by way of amendment to the pleadings or the emergence of any evidence at the trial of the action. With regard to the matter before him, McGovern J. stated (at para. 25) that:

"The court has to deal with this strike out motion on the basis of well-established jurisprudence which involves exercising jurisdiction sparingly and only in a clear case".

The learned judge went on to hold that the hearing of the application raised complex and difficult issues of law which were more appropriately decided at a full hearing of the action and it could not, at that stage, be said that the relevant paragraphs of the amended statement of claim which the defendants sought to have struck out were bound to fail.

Ganley v RTE

25. In addition to the foregoing general principles, both parties acknowledge that the recent decision by the Court of Appeal in *Ganley v. RTE* [2019] IECA 18 is of particular relevance. It is appropriate to look in some detail at this decision and the principles which emerge from it. As to the facts, the plaintiff brought defamation proceedings arising as a result of an episode of "Prime Time", being a current affairs programme broadcast by RTE. The broadcast focused on the life of the plaintiff, a prominent Irish businessman and, in particular, his business interests. The plaintiff did not identify any specific words which he complained of. Rather, the plaintiff maintained that the programme as a whole was defamatory of him. The relevant episode was broadcast in November 2008. The judgment of the Court of Appeal was delivered by Irvine J. (as she then was) over a decade later in January 2019. It related to a number of appeals arising from certain interlocutory orders made by this Court (Barrett J.) in March 2017. There were five in total and one of these concerned the plaintiff's appeal against the refusal of the High Court to strike out paras. 8, 9 and 10 of the defence delivered by RTE in November 2012. Among other things, the judgment of Irvine J. comprised an analysis of the jurisdiction enjoyed by this Court to strike out a part of a defence in defamation proceedings, having regard to principles emerging from a range of authorities which the learned judge analysed. Given its relevance to what this Court has to decide, it is appropriate to quote at some length from the Court of Appeal's decision in *Ganley*, beginning with para. 47, as follows: -

"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”.

26. To pause there for a moment, the foregoing seems to me to entitle this Court to ask whether the pleas which the plaintiff seeks to strike out can fairly be said to be ‘*wholly unconnected with the substance of the dispute*’. The learned judge continued from para. 49 as follows: -

"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".*

27. It is plain from the foregoing that the threshold which must be established on an application to strike out some aspect of a defendant's defence, in particular, one which proposes an alternative meaning to the words alleged by the plaintiff to be defamatory, is a high one. The court's jurisdiction in this regard should be sparingly invoked. The authorities to which Irvine J. referred also make clear that a judge should intervene only if satisfied that it would be perverse for the jury to uphold the meaning canvassed by the defendant. Similarly, 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. The judgment of Irvine J (as she then was) in *Ganley* continued from para. 55, as follows: -

"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 liable action, particular 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 it briefly, the decision of a different division of the Court of Appeal in Lucas Box v. Newsgroup Newspapers Ltd [1986] 1 All E.R. 177. I will also discuss the decision of the New Zealand Court of Appeal in Templeton v. Jones [1994] 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. *O'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'''.

28. At paras. 66-70, inclusive, Irvine J observed that in *Polly Peck*, O'Connor L.J. rejected the approach of the New Zealand Court of Appeal in *Templeton* and, while making it clear that it was not necessary to decide whether or not *Templeton* was correctly decided on its own specific facts and whilst making clear that no flaw could be identified in the reasoning of O'Connor LJ concerning that decision which appeared to have received the implicit approval of the Supreme Court (Hardiman J) in *Bradley v. Independent Star Newspapers Ltd* [2011] IESC 17, Irvine J. made clear that, for the purposes of the appeal which was before the court, the facts in *Templeton* were entirely different. It is also appropriate to quote paras. 71 to 73, inclusive, which are as follows:

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 'made 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.*
29. At paras. 74-80, inclusive, Ms. Justice Irvine considered how the foregoing principles impacted on RTE's defence and the appellant's submission that the High Court judge erred in law when he refused to strike out what Mr. Ganley maintained to be the offending paragraphs of its defence. It is clear, from para. 81 onwards, that the Court of Appeal approved of the approach adopted in the High Court by Mr. Justice Barrett when considering alternative meanings in a ruling on an application to strike out. It is appropriate, therefore, to quote paras. 81-83, inclusive, which appear in the following terms: -

"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 alleged 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."*

30. The careful and comprehensive analysis carried out by the Court of Appeal in *Ganley* demonstrates how high the bar is set for a plaintiff who seeks to strike out elements of a defendant's defence as well as elucidating the relevant principles and, thus, guiding this Court as to the proper approach to the present application. Although acknowledging the relevance of the foregoing principles and how high the bar is set, counsel for the plaintiff submits that the present application is one which clears that high bar, justifying intervention by this Court. Counsel for the plaintiff also drew the court's attention to other authorities which, it was submitted, are of particular relevance. Among the submissions made on behalf of the plaintiff is that, before the questions referred to at para. 82 of the Court of Appeal's decision in *Ganley* can be asked, it is a *sine qua non* that the meaning of the words the Defendants intend to prove as true must be defamatory of the plaintiff. In this regard, reference was made to para. 5-22 of *Cox & McCullough* wherein the authors refer to the decision in *Broadcasting Corporation of New Zealand v. Crush* [1988] 2 NZLR 234 at p.237, where the Court of Appeal of New Zealand held that proving the truth of a non-defamatory statement would be a "*pointless exercise*". Reference was also made, on behalf of the plaintiff, to the decision in *Cruise v. Express Newspapers* [1999] 2 WLR 327 p.341 para. G/H wherein Lord Justice Brooke stated:

"Under modern pleading practice a defendant must plead any different defamatory sting(s) which he contends the words are capable of bearing, as the foundation for his plea of justification or fair comment. The focus of a strike-out application is no longer at large, as it was in Waters. The defendant is now tied to his pleadings, and the plaintiff can apply to have a plea of justification or fair comment struck out

if he contends that it is not properly arguable that the words complained of are capable of bearing the meaning(s) relied on by the defendants; or that the meaning(s) relied on are not defamatory; or that a particular meaning, although defamatory, conveys a separate and distinct sting from that relied on by the plaintiff, and the plaintiff makes no complaint about that separate sting."

31. On behalf of the plaintiff it is pointed out that "*fair comment*" is the predecessor to "*honest opinion*" and it is submitted that the foregoing applies equally to both the defence of truth and that of honest opinion. It is emphasised on behalf of the plaintiff that *Cruise* was approved by Mr. Justice Barton in *Ryanair v. Van Zwoel* [2017] IEHC 728 and I will presently examine that decision in greater detail. On behalf of the plaintiff it is also submitted that, in *McCauley v. Power & Times Newspapers Ltd* [2012] IEHC 174, Mr. Justice Kearns struck out meanings under s.14 of the Act on the basis that they were not defamatory.
32. Section 14 of the Defamation Act 2009 ('the 2009 Act') makes clear that the court, in a defamation action, may give a ruling as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff and (where the court rules that that statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning. S. 14 (2) makes clear that, where a court makes a ruling that a relevant statement is not capable of bearing the imputation pleaded by the plaintiff or that any imputation so pleaded is not reasonably capable of bearing a defamatory meaning, the court shall dismiss the action, insofar only as it relates to the imputation concerned.
33. *Ryanair v. Van Zwoel* concerned fully contested defamation proceedings arising from the publication of an article described as a "*pilot update*" sent by the defendants to Ryanair pilots in September 2013 and headed "*what the markets are saying about Ryanair*". The defendants pleaded *inter alia*, that the article had been issued by a Dutch foundation with a distinct legal personality, for which they had no responsibility. The defence contained *inter alia*, a plea of truth that the words complained of in their natural and ordinary meaning, but not in the meanings alleged by the plaintiffs, were true in all material respects. The defence also contained a second plea of honest opinion that, insofar as any of the words about which the plaintiff complained were capable of bearing any defamatory meaning, they were statements of opinion honestly held by the defendants on matters of public interest. At the hearing, the defendants indicated that they no longer sought to rely on the plea of truth and that it was not an issue between the parties. As regards the plea of honest opinion, it was submitted on behalf of the plaintiffs that, subject to certain qualifications, the same reasoning and grounds which governed the defendants' reliance on the plea of truth which had been abandoned, were applicable to the plea of honest opinion. Thus, it was argued that it, too, stood to be struck out. The defendants took issue with this contention. During the course of his judgment, Barton J examined the nature of the defence of fair comment, the common law defence having been abolished by s.15 of the 2009 Act. The learned judge stated the following (at para. 9):

"As there was some debate on the point in the course of legal argument, I should add that if the facts upon which the opinion or comments are based are themselves defamatory then the truth of those facts has to be proved before the defence can be availed of; see s.(3)(a) of the Act. Simply put, the protection afforded by the defence of honest opinion is confined to untrue comments or expressions of opinion relating to matters of public interest based on true facts contained in or discernible from the statement in question."

The court then addressed the submissions made by the respective parties, *inter alia*, to the decisions in *Cruise v. Express Newspapers* and another decision of the English Court of Appeal in *Control Risks & Anor. v. New English Library* [1990] 1 WLR 183. Mr. Justice Barton was satisfied that even if the words complained of were capable of bearing or conveying the defamatory meaning particularised by the defendants in that particular case, same did not address the defamatory meanings asserted by the plaintiff and conveyed "...if they convey at all, a 'sting' about which no complaint is made, accordingly, the Court will accede to the application and will make an order striking out the plea of honest opinion from the Defence".

34. Unlike the position in *Ryanair v. Van Zwo*, the defendants in the case before this Court have not abandoned the defence of truth and nothing in the court's decision in *Ryanair v. Van Zwo* seems to me to require this Court to take any different approach to that carefully outlined by the Court of Appeal in the later decision delivered in *Ganley v. RTE*. In other words, the appropriate course for this Court to take is to apply the principles set out in *Ganley* and, as regards each of the pleas which the plaintiff impugns, to pose the three questions (i), (ii) and (iii) identified by Ms. Justice Irvine at para. 82 of her judgment. It is fair to say that both parties to the motion regard this as an appropriate approach in circumstances where these three questions have been posed, and answered, in the written submissions furnished by both sides with, understandably, different answers to the same questions. Before this Court conducts that exercise it is appropriate, however, to refer to guidance derived from other relevant authorities, in particular on the question of *meaning*.

Meaning

35. In *Mapp v. News Group Newspapers Limited* [1998] Q.B. 520, Hurst J explained (at 526)

that: -

"...the whole purpose of the new rule is to enable the court in appropriate cases to fix in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the plaintiff's reputation, but also for the purpose of evaluating any defences raised, in particular, justification or fair comment. This applies with particular force ... where there is a defence of justification of a lesser meaning than that pleaded in the statement of claim."

36. In *McGarth v. Independent Newspapers (Ireland) Limited* [2004] IEHC 67, Mr. Justice Gilligan stated that: -

"whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over-elaborate analysis of the article because the ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. In deciding the issue, I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly the court should not take too literal approach to its task."

37. More recently Irvine J (as she then was) analysed the principles relevant to how the meaning of words should be determined in the Court of Appeal's decision in *Gilchrist v. Sunday Newspapers Ltd* [2017] 2 IR 714. From p.730 (para. 37) the learned judge made clear that the onus rests on the party seeking to strike out the relevant pleas to establish that the article complained of is not reasonably capable of bearing the imputations and meanings pleaded, going on to state that *"the test to be applied by the court is whether the article, when viewed objectively by the reasonable reader, is capable of giving rise to the pleaded meanings (see Hardiman J in Travers v. Sunday Newspapers Limited (unreported, Supreme Court, 12 October, 2015)."* Although concerned with an application pursuant to s.14 of the 2009 Act, the learned judge made clear that the role of the judge *"...is not to determine the meaning of the words or article published but to delimit the outside boundaries of the possible range of meanings that might be ascribed thereto by the notional reasonable reader."*
38. Given its relevance to the present application, it is also appropriate to quote as follows from p.731 of the Court of Appeal's decision in *Gilchrist*:

"Clarke M.R. in Jeynes v. News Magazines Limited [2008] EWCA Civ 130, (unreported, Court of Appeal of England and Wales, 31 January, 2008) helpfully summarised the principles relevant to how the meaning of words should be determined as follows: -

'[14]. (1) The governing principle is reasonableness;

(2) the hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) Over-elaborate analysis is best avoided.

(4) The intention of the publisher is irrelevant.

(5) The article must be read as a whole, and any 'bane and antidote' taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...'. "

39. Irvine J (as she then was) went on to emphasise the uniquely important position of the jury, citing from the decision in *Quigley v. Creation Limited* [1971] I.R. 269, wherein, at p.272 of his judgment, Walsh J stated: "*In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of.*"
40. The importance of the words complained of being construed in the context of which they appear was emphasised by the Court of Appeal from para. 39 onwards of the decision in *Gilchrist*. The court also made clear that whether a particular publication was capable of bearing the meanings pleaded was a question of impression and the court had to consider the whole of the publication, which included the "get up" – headlines, pictures and captions, all of which had to be taken into account.
41. The plaintiff also relies on the 14 June, 2005 decision in *McKeith v. News Group Newspapers Ltd* [2005] EWHC 1162(QB). In that case the "Sun" newspaper published a certain article under the heading "*DR? No – TV You Are What You Eat expert Gillian has dodgy nutrient degree...via post from a small US college.*" The claimant issued proceedings in libel alleging that the words complained of conveyed certain meanings whereas the newspaper asserted alternative meanings. The claimant sought to strike out one of the defendants' pleaded '*Lucas-Box*' meanings namely that the complainant had misled the public by making claims about food and nutrition which had no scientific or legal basis. The complainant contended that there was no 'common sting' between the meaning and the other relevant pleaded *Lucas-Box* meanings, namely, that the complainant had misled the public by misrepresenting and exaggerating her qualification and by performing the diagnosis and treatment of individuals which she was not qualified to do. In its decision, the court held that the complainant was entitled to confine the dispute to whether she had made false claims as to her qualifications. The court held that the claimant should not be saddled with having to enter into an expensive open-inquiry into the merits of various nutritional series.

42. On behalf of the plaintiff in the present case, it is submitted that if this Court were to come to the view that the meanings contended for by the defendants (in particular the meanings pleaded at para. 12 (ii) – (vi) of the defence) were capable of a defamatory meaning, the result would be a lengthy wide-ranging and costly exercise which the court in *McKeith v. News Group Newspapers Limited* was anxious to prevent.
43. Counsel for the plaintiff also directs this Court's attention to a recent decision in *Lidl Ireland GMBH v. Irish Farmers Association & Ors.* [2021] IEHC 381 in which this Court (Allen J) dealt with an application brought by the plaintiff for an interlocutory injunction pursuant to s.33 of the 2009 Act to prohibit the publication of certain advertisements by the defendants. In that context, the court was required to consider whether the defendants had a defence which might succeed. This Court's attention is drawn, in particular, to para. 52 of the judgment wherein Mr. Justice Allen stated:

"52. *I have already addressed the arguments as to the meaning of the first advertisement. The plaintiff counters the defendants' alternative arguments as to the truth of the sting of the advertisements with an argument that they are impermissibly attempting to prove the truth of a meaning which is far short of the true meaning of the advertisements. It is accepted that a defendant can only prove the truth of an alternative meaning where (a) the words used could convey that alternative meaning to a reasonable reader and (b) where the meaning is defamatory. See for example Polly Peck plc v. Trelford [1986] Q.B. 1000, Lucas-Box v. Newsgroup Newspapers Ltd. [1986] 1 W.L.R. 147, Bradley v. Independent Star Newspapers [2011] 3 I.R. 96 and Cox and McCullough Defamation: Law and Practice at paras. 5–22 and 14–52.*"

Application of legal principles

44. The words with which the plaintiff in each case takes issue are that: "*Sinn Féin/IRA certainly got the report they paid for*". The defendants seek to justify the "*sting*" and maintain that this statement is, *inter alia*, true and represents their honest opinion. With regard to the defence of truth and in accordance with the Lucas-Box case the defendants have provided in their defence particulars of the meanings which they attribute to the statement that: "*Sinn Féin/IRA certainly got the report they paid for*". These alternative meanings are pleaded at p. 12 (i) – (vi) of the defence delivered in each case. In light of the approach approved of by the Court of Appeal in *Ganley*, it is necessary for this Court to ask the following three questions (which appear at para. 82 in *Ganley*) in respect of each of the meanings pleaded by the defendants: -

- (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?

45. Before conducting the exercise approved of by the Court of Appeal in *Ganley* it seems to me appropriate to make two comments. Firstly, it is plain from the statement of claim that the plaintiff in each case complains, not about the entirety of the press release, but about specific words contained in it namely: "*Sinn Féin/IRA certainly got the report they paid for*". Each plaintiff pleads the meaning of those words at para. 7 of each of the statements of claim. It will be recalled that the Defences delivered in each case define "*the Statement*" as being the "*3 page press statement*" published by the defendants on 26th October, 2016 in response to the report. This is clear from para. 7 of the defence in each case. Having made clear that it is the entire three-page press statement which comprises "*the Statement*", para. 12 of each Defence pleads: "*the defendants plead that the true meaning of the Statement is set out hereunder and that, in respect of those meanings, the words published in the Statement were true...*". This is followed by particulars of meaning (i) - (vi). In other words, it is clear from the defence that the defendants plead as to what they say is the true meaning of the entire three-page press statement i.e. press release, whereas the pleaded case brought by the plaintiff relates, not to the entire of the three-page press release, but to a particular statement (comprising nine words i.e. "*Sinn Fein/IRA certainly got the report they paid for*") to which each plaintiff objects and at para. 7 of each statement of claim, pleas are made as to the meaning of that specific statement. This is the first matter which seems to me appropriate to bear in mind prior to conducting the exercise approved of in *Ganley*.
46. A second point which is appropriate to make is that the alternative meanings contended for by the defendants must be defamatory of the plaintiff or capable of such interpretation. That proposition emerges from the authorities and, as was clear from the submissions made by counsel on both sides, no issue is taken with it. This principle is also made clear in "*Defamation Law and Practice*" (Cox & McCullough, Claris Press) and it is appropriate to note that (at para. 5-22) the learned authors state inter alia that a "*...defendant is probably permitted to plead the truth of meanings (of the statement for which the plaintiff is suing) other than those meanings pleaded by the plaintiff. The two conditions to this are (a) that the meaning in respect of which truth is pleaded must be one that the words in question are capable of conveying to a reasonable person and (b) the meaning in question must be defamatory*". As regards the foregoing, the learned authors refer to the decisions in *Polly Peck* and in *Lucas-Box*. Furthermore, as the judgment of Cooke P., on behalf of the New Zealand Court of Appeal, in *Broadcasting Corporation of New Zealand v. Crush* [1998] 2 NZLR 234 (at p. 237, para. 25) makes clear: -

"A line of recent English Court of Appeal cases were cited to us in argument, the reported ones running from Polly Peck and Lucas-Box v. News Group Newspaper Ltd [1986] 1 All ER 177 to Prager v. Times Newspapers Ltd [1988] 1 All ER 300. A sheaf of unreported cases was added. Although in England the cases in this line may have altered or developed the law as formerly understood, we were referred to no statement in any of them going to the length of saying that a defendant may plead a plainly non-defamatory meaning and then prove its truth. Such a course

would seem a pointless exercise or to forecast an attempt to divert the jury from the true issues.”

47. It is plain from the court’s decision that the use of the term “defamatory” was in respect of the relevant plaintiff. In other words, it is not permissible for a defendant to plead alternative meanings which are not defamatory of the plaintiff or not defamatory at all in the context of opposing a claim by a plaintiff who has, as in the present case, pleaded that in their natural and ordinary meaning, the words complained of were defamatory of him. I now proceed to conduct the exercise approved of by the Court of Appeal in *Ganley* which involves posing 3 questions in respect of each of the alternative meanings contended for by the defendants (and pleaded at para. 12 (i) to (vi) in each Defence).

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

48. On behalf of the defendants, it is submitted that this meaning is capable of arising from the statement “*Sinn Féin/IRA certainly got the report they paid for*”, when one applies the *Gilchrist* principles. This meaning is, in my view, certainly capable of arising from the three-page press statement (i.e. the press release) as a whole and it is clear from para. 12 that the meanings contended for by the defendants are said to arise from the press statement as a whole. Sinn Féin MEP Lynn Boylan is not referred to in the words upon which the plaintiff in each case base their complaint namely “*Sinn Féin/IRA certainly got the report they paid for*”. Looking at those words specifically, it is difficult to see how they are capable of bearing the meaning contended for by the defendants. In circumstances where a jury would be entitled to read the entire of the three-page press statement which contains the sentence of which each plaintiff complains, it is possible to see how, in that context, the meaning contended for is capable of arising. That being so I would answer, in the affirmative, the question “*Is the alternative meaning contended for by the defence capable of arising from the publication?*” (hereinafter “question (i)”). On behalf of the plaintiff it is acknowledged that it is arguable that an accusation that the plaintiff lacked independence in his authorship of the Report could be considered defamatory of him. Counsel for the plaintiff, however, emphasises that this is not what the defendants claim the article means, given that the complaint is levelled at “*MEP Lynn Boylan*” who is named in meaning (i) above, and not identified in the specific words the plaintiff complains of. This is a submission which seems to me to have considerable force but, guided by the principles to which I have referred earlier in this judgment, and very conscious that this court’s discretion on the present application should be “*an exercise in generosity not in parsimony*” (see *Berezovsky v. Forbes* [2001] EWCA Civ. 1251 per Sedley L.J.), it seems to me that the press release is capable of meaning that the plaintiff wrote a report which lacked independence.
49. Assuming, for present purposes, that the words complained of by the plaintiff are capable of bearing this meaning and that such a meaning is encompassed in what is pleaded at para. 12 (i) of the defendant’s defence, it seems to me that it is a separate and entirely distinct allegation of which the plaintiff makes no complaint. The gravamen of the complaint made by each plaintiff, as is clear from para. 7 (a) – (g) of each statement of claim, is that the plaintiff acted for and was paid by an unlawful organisation, namely the

IRA. To suggest that someone lacked independence as the author of a report is fundamentally and materially different, in my view, than to suggest that they acted for and were paid by a terrorist organisation. In the proceedings before this court, the plaintiff has made a complaint as regards the latter, but not the former. These two very different allegations do not, in my view, share a "*common sting*" in the sense used in *Polly Peck*, as analysed by the Court of Appeal in *Ganley*. Thus, I must answer in the affirmative the second question referred to in para. 82 of *Ganley* namely "*Does the defence meaning arise from a separate and distinct allegation in the impugned publication about which the plaintiff does not complain?*" (hereinafter "question (ii)"). It was only if the answer to question (ii) was in the negative that the court should engage with the question "*Are proper particulars of fact provided that are capable of supporting the defence?*" (hereinafter "question (iii)"). I now turn to the plea at para. 12 (ii) of the Defence in order to ask the same questions.

"(ii) The Report was neither balanced nor fair since it did not focus on RTE which is the largest media entity in Ireland"

50. It is difficult to see how the foregoing meaning is capable of being borne out of the words in respect of which the plaintiff complains, namely "*Sinn Féin/IRA certainly got the report they paid for*". Those specific words make no reference to RTE or its size. It is, however, conceivable that this meaning contended for by the defendants is capable of arising from three-page press release which a jury would be entitled to read as a whole. Given that the words actually complained of would be read by a jury with access to the whole publication, and adopting a similar approach to that in respect of what is pleaded at 12 (i), I am answering question (i) in the affirmative.

51. The thrust of the plaintiff's complaint, however, is not that the meaning of words used suggested that he co-authored a report which was not balanced or fair because it did not focus on RTE which is the largest media entity in Ireland. Assuming, for present purposes, that the meaning contended for is defamatory of the plaintiff, it is, in my view, a meaning which arises from an entirely distinct allegation about which the plaintiff makes no complaint. There is no common sting and I regard myself as required to answer question (ii) in the negative. With great skill and sophistication, counsel for the defendants argue that the meanings pleaded at para. 12 of each defence are meanings one could take from the words used. That submission, however, ignores other essential principles, in particular those derived from *Lucas-Box*. Put simply the alternative meanings contended for by a defendant must meet the plaintiff's case. Rather than do so, the defendants, by virtue of the pleas at para. 12, indicate a preparedness to come to court to prove that the plaintiff's authored or co-authored a report lacking in independence and which was neither balanced nor fair. Even if defamatory of the plaintiff, it does not meet the case made as per the plea at para. 7 of each statement of claim. Again, it seems unnecessary to pose question (iii) as identified at para. 82 in the *Ganley* decision and I now move to examining the plea at para. 12 (iii) of the defence.

"(iii) the Report was designed to advance the political agenda of Sinn Féin"

52. It seems to me that the foregoing meaning is capable of arising from the words complained of and, thus, the answer to question (i) is in the affirmative. It is not at all

clear to me how the proposition that the report was designed to advance the political agenda of Sinn Féin is defamatory of the plaintiff. Even if I am wrong in that view and even if it is conceivable that this meaning is defamatory of the plaintiff, I am satisfied that the answer to question (ii) in respect of this meaning is in the affirmative. The plaintiff's complaint is not that the words to which he objects mean that he authored a report designed to advance Sinn Féin's political agenda. The gravamen of his complaint is of a fundamentally different character, namely, that the words used meant and were understood to mean that he acted for and was paid by an unlawful organisation, namely the IRA. In my view this meaning is not defamatory of the plaintiff and even if I am wrong in that view it is a meaning which arises from an allegation in respect of which the plaintiff makes no complaint. Again, it is unnecessary to pose question (iii) and I now turn to para. 12 (iv) of the defence.

"(iv). Sinn Féin supported and continues to be associated with the IRA"

53. Among the skilled submissions made on behalf of the defendants was to emphasise that the words of which the plaintiff complains begin *"Sinn Féin/IRA ..."* and both of the foregoing entities are named. On behalf of the defendants it is argued that, applying the *Gilchrist* principles, the meanings contended for by the defendants all come within the permissible range, having regard to the principles analysed by the Court of Appeal in *Ganley*. It seems to me, however, that the submission by counsel for the plaintiff - to the effect that the foregoing meaning may well be defamatory of Sinn Féin but it is not defamatory of the plaintiff - is entirely correct. Accepting, for present purposes, that the foregoing meaning is capable of arising from the words complained of, in which case question (i) is answered in the affirmative, the meaning is not, in my view, defamatory or capable of being defamatory of the plaintiff. Nor is there a common 'sting' which this meaning addresses, in circumstances where the 'sting' of the defamation complained of by the plaintiff is that he acted for and took payment from the IRA which was and is a terrorist organisation. By way of illustration, the defendants do not assert that the meaning contended for is that the plaintiff supported and continues to be associated with the IRA, nor do the defendants propose to prove the "truth" of such a contention. I am satisfied that the answer to question (ii) is in the affirmative. In other words, the meaning contended for by the defendants arises from an allegation in respect of which the plaintiff makes no complaint. Once more, the need to pose question (iii) does not arise and I now move to look at para. 12 (v).

"(v) any Report commissioned by Sinn Féin on media ownership would inevitably be supportive of the Sinn Féin position on media ownership and its opposition to the first named defendant and Independent News and Media Plc."

54. On behalf of the defendants, counsel rhetorically asks whether the foregoing is the product of a strained or forced or unreasonable interpretation? If one reads the three-page press release as a whole, one would be inclined to say that it is not. In other words, the foregoing meaning seems to me to be capable of emerging from the words used in the three-page press release as a whole. Several points arise, however. Firstly, the plaintiff does not complain about the contents of the press release as a whole. Rather, the proceedings relate to a very specific statement contained within the press release. It is difficult, in my view, to see how the entirety of the foregoing meaning is capable of

arising from the words complained of by the plaintiff. That said, if one reads the statement as part of and in conjunction with the entirety of the press release, the foregoing meaning could fairly be said to possibly arise. It is difficult to see, however, how such a meaning is defamatory of the plaintiff as opposed to potentially being defamatory of Sinn Féin. Even if I am entirely wrong in that view and if one assumes that question (i) is answered in the affirmative, I am entirely satisfied that question (ii) should also be answered in a similar fashion. In other words, even if the foregoing meaning is capable of being defamatory of the plaintiff, it does not meet the case made by the plaintiff. Rather, it is a meaning which arises from an entirely separate and distinct allegation about which the plaintiff makes no complaint. The plaintiff does not contend that the meaning of the words with which he takes issue are that he co-authored a report commissioned by Sinn Féin which would inevitably support Sinn Féin's position on media ownership and its opposition to the first named defendant and to Independent News and Media Plc. The essence of the plaintiff's complaint is fundamentally different ie that he acted for and was paid by a terrorist organisation. The foregoing meaning does not involve a common 'sting'. For these reasons it is unnecessary to pose question (iii) as set out in para. 82 of *Ganley*. I now turn to para. 12 (vi) of the defence.

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

55. I cannot see how the foregoing meaning is capable of arising from the words complained of by the plaintiff, even if the specific words “*Sinn Féin/IRA certainly got the report they paid for*” are read in the context of the press release as a whole. Nor is it clear to me how this meaning could be taken from the press release itself and, earlier in this decision, I quoted the press release at length. The words “*chilling effect*” are plainly not mentioned in the words of which the plaintiff complains. They are mentioned once in the following sentence which appears on the third page of the press release: “*The report references the words “chilling effect” and the law in the same sentence. I bow to Sinn Féin’s superior knowledge on these topics.*” In my view the answer to question (i) contained at para. 82 of *Ganley* is in the negative. Even if I am entirely wrong in that view, and even if one were to answer question (i) in the affirmative, the meaning is not defamatory of the plaintiff. If this meaning can be found in the words of which the plaintiff complains and/or in the press statement, a reasonable person might well think less of Sinn Féin but the contended-for meaning has nothing to do with the plaintiff. Thus, question (ii) must be answered in the affirmative, given that the meaning contended for by the defendants arises from a distinct allegation about which the plaintiff does not complain. The meaning contended for by the defendants does not meet the plaintiff's claim and there is no common 'sting'. Thus, it is unnecessary to pose question (iii).

The answers to the Ganley questions

56. Having posed the questions identified in the test laid down in *Ganley*, I am satisfied that none of the meanings contended for by the defendants at para. 12 (i) - (vi), inclusive of each Defence, satisfy the relevant test. In the manner analysed, the majority of the meanings (with the possible exception of (i) and (ii) of para. 12) do not appear to be at all defamatory of, or capable of being defamatory of, the plaintiff. I am entirely satisfied that all six of the pleaded meanings arise from separate and distinct allegations in the

impugned publication about which the plaintiff does not complain. Although unnecessary, in light of the foregoing, to address question (iii) as set out at para. 82 of *Ganley*, I also take the view that no particulars of fact have been provided that are capable of supporting any of the meanings pleaded in para. 12.

57. The defendants also plead that the words published in the press release consisted of opinions, honestly held by them, which they claim they believed to be true. Earlier in this decision I quoted, verbatim and in full, paras. 14 to 17, inclusive, of the Defence which paragraphs appear under the heading "*Defence of honest opinion*". It will be recalled that the defendants have, at para. 7 of the Defence, made clear that any reference to "*the Statement*" in the Defence constitutes a reference to the "*3-page press statement*" published by the defendants on 26th October, 2016. In other words, "*the Statement*" refers to the entirety of the press release, not to the words of which the plaintiff complains and which are contained within the press statement.
58. It is fair to say that the defendants do not expressly plead that the opinions they allege they held are in the alternative meanings set out at para. 12 of the Defence. That, however, appears to be the case made by the defendants, having regard to the particulars of fact pleaded at para. 15 of the Defence. The pleas made at para. 15 plainly appear to be made in support of the alternative meanings contended for by the defendants at para. 12. Before proceeding further, it is appropriate to quote from s. 20 of the Defamation Act which provides for the "*Defence of honest opinion*".

S. 20 Defamation Act, 2009 – the defence of honest opinion

59. Section 20 of the 2009 Act states as follows:

"20.— (1) *It shall be a defence (to be known, and in this section referred to, as the 'defence of honest opinion')* to a defamation action for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held.

(2) *Subject to subsection (3), an opinion is honestly held, for the purposes of this section, if—*

(a) *at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,*

(b) (i) *the opinion was based on allegations of fact—*

(I) *specified in the statement containing the opinion, or*

(II) *referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,*

or

(ii) *the opinion was based on allegations of fact to which—*

(I) the defence of absolute privilege, or
(II) the defence of qualified privilege,
would apply if a defamation action were brought in respect of such allegations,
and

(c) the opinion related to a matter of public interest.

(3) (a) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2) (b) (i) applies, unless—

- (i) the defendant proves the truth of those allegations, or
- (ii) where the defendant does not prove the truth of all of those allegations, the opinion is honestly held having regard to the allegations of fact the truth of which are proved.

(b) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2) (b) (ii) applies, unless—

- (i) the defendant proves the truth of those allegations, or
- (ii) where the defendant does not prove the truth of those allegations—

(I) the opinion could not reasonably be understood as implying that those allegations were true, and

(II) at the time of the publication of the opinion, the defendant did not know or could not reasonably have been expected to know that those allegations were untrue.

...”

The statutory defence of honest opinion is the successor to and a restatement of the common law defence of “fair comment”. It is also important to note at this juncture that this defence is not available to protect opinions that are not defamatory. At a level of principle, the reason for this is very obvious. Opinions which are not defamatory require no protection as they are not actionable. This principle is of considerable relevance in the application before this court and the reason is obvious in light of the analysis which I conducted earlier in respect of the pleas made concerning the defence of truth which, for the reasons given, are pleas which I am satisfied should be struck out. Earlier in this judgment, reference was made to the decision by Mr. Justice Barton in *Ryanair v. Van Zwo/* in circumstances where, in that case, the defence of truth having been abandoned, the learned judge considered an application to strike out a defence of honest opinion. It is appropriate to quote as follows from the decision of Barton J. in that case:

"26. Accepting that it is appropriate, in the circumstances of this case, that the jury should see the whole of the article in which the words complained of appear, contained as they are in the first paragraph of the 'Pilot Update', nevertheless, the opinions, if such they be, upon which the Defendants seek to rely in the defence of

honest opinion must, in my judgment, be found in or discernible from the words of the statements which are the subject matter of the proceedings. Moreover, such opinions must bear or be capable of bearing the defamatory meanings about which the Plaintiffs make complaint and not some other defamatory meanings about which no complaint is made.

27. *In my judgment, proving an honestly held opinion which is defamatory, or capable of bearing a defamatory meaning, on a matter of public interest based that conveys a separate and distinct 'sting' about which no complaint is made would be a pointless exercise and would warrant the plea being struck out.*
28. *Having carefully considered the Defence and the particulars of honest opinion pleaded in this case I am satisfied that the submissions made on behalf of the Plaintiffs are correct and that even if the words complained of were capable of bearing or conveying the defamatory meanings particularised by the Defendants, which in my view is questionable, such do not address and are not concerned with the defamatory meanings asserted by the Plaintiffs but convey, if they convey at all, a 'sting' about which no complaint is made, accordingly, the Court will accede to the application and will make an order striking out the plea from the Defence."*
60. In my view, the principles referred to by Mr. Justice Barton in *Ryanair v. Van Zwo* are of fundamental relevance in the present case. It is crystal clear that in the present application the defendants do not plead that they were expressing their opinion in the meanings complained of by the plaintiff. Insofar as the defendants claim that they were expressing opinions in the alternative meanings which they contend for, those alleged opinions were either (a) not defamatory of the plaintiff at all or (b) to the extent that could be considered to be defamatory of the plaintiff, they relate to matters in respect of which the plaintiff makes no complaint and (c) they do not share a "common sting" insofar as the claim which is made by the plaintiff is concerned.
61. It is also fair to say that para. 14 of the Defence does not identify what opinions the defendants say they held, whereas para. 15 particularises what are pleaded to be the facts upon which honest opinions were based.
62. If one compares para. 15 (i) with para. 12 (i) of the Defence, one can see that the wording used is precisely the same i.e. "(i). *the Report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study*". Paragraph 12 (i) of the Defence comprises a *meaning* which the defendants contend for in the context of a defence of truth, whereas the self-same wording used at para. 15 (i) is pleaded to be the allegation of *fact* upon which the defendants' honest opinions were based.
63. Thus, the defendants' alleged *opinion* that the report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study is alleged to be based upon the *fact* that the report commissioned by Sinn Féin MEP Lynn Boylan was not an independent study.

64. On the assumption that the defendants plead that the opinions honestly held by them constituted the meanings which they contend for, similar comments apply in respect of each and every one of the six meanings particularised. In other words, the particulars of *fact* upon which the defendants' opinions were based constitutes a verbatim repetition of the particulars of *meaning* i.e.:-

- para. 15 (i) repeats the wording in para. 12 (i);
- para. 15 (ii) repeats the wording in para. 12 (ii);
- para. 15 (iii) repeats the wording in para. 12 (iii);
- the wording in the first of the paragraphs identified as para. 15 (viii) is reflected exactly in the wording of para. 12 (iv);
- the wording used in the second paragraph identified as 15 (viii) is reflected exactly in the wording of para. 12 (v); and
- para. 15 (ix) is mirrored in the wording used in para. 12 (vi).

65. The only particulars of *fact* pleaded by the defendants as comprising the basis for their honest opinions which are not also found, verbatim, at para. 12 (wherein particulars of meaning in the context of a defence of truth are pleaded) comprise the following particulars of fact at para. 15:

(iv) *part of Sinn Féin's agenda is to criticise Apple and the first named defendant;*

(v) *the media industry in Ireland is in decline;*

(vi) *the first named defendant invested a lot of money in independent news and media at a time when it was in significant financial difficulties;*

(vii) *RTE should have been considered in the report but this was not done;"*

66. Proof, as regards honest opinion, is concerned with the facts on which the opinion is based and with proof that the opinion was honestly held, but the opinion must also be or capable of being defamatory of the plaintiff as well as bearing a defamatory meaning of which he complains. The allegations of fact pleaded by the defendants as a basis for the honest opinions they purport to rely upon do not speak to opinions defamatory of the plaintiff of which he makes any complaint. It is also appropriate to quote the following from Mr. Justice Barton's decision in *Van Zwooll*:

"18. Considering the nature of the defence, the starting point on an application such as the present is to identify the opinions, to be found in the words complained of, and which the Defendants seek to defend as honest opinion. In this regard, the Court was referred to the English Court of Appeal judgement of Nicholls L.J. in *Control Risks & Another v. New English Library* [1990] 1 WLR 183, p. 189. The Plaintiffs contend that the very reason *d'être* of the section is that the defence

is only available to protect persons who honestly believe in the truth of their opinions based on true facts published on matters of public concern, opinions which must be defamatory.

19 The proof required is not concerned with the truth of the opinion but with the facts on which the opinion is based and with proof that the opinion is honestly held."

67. On behalf of the defendants, counsel submits that the statement "*Sinn Féin/IRA certainly got the report they paid for*" sets out clearly the opinion of the defendants which was honestly held by them at the time of publication and, he further submits, the particulars of fact upon which that opinion is based are clearly set out in para. 15. That being so, submits the defendants, the plaintiff can be in no doubt as to the case that he has to meet in that regard, per *Control Risks* and *Van Zwol*. Regardless of the sophistication with which this and a wide range of submissions are made on behalf of the defendants, they do not seem to me to be an answer to the plaintiff's application. Nowhere in the pleadings did the defendants make the case that the opinion: "*Sinn Féin/IRA certainly got the report they paid for*" had a different meaning than the meanings contended for at para. 12 in the context of the defence of truth and they most certainly do not plead that they were expressing opinions in the meanings complained of by the plaintiff.
68. In short, and for similar reasons to those articulated in the context of analysing the defence of truth, the opinions which the defendants purport to rely on in the context of an "honest opinion" defence constitute opinions either not defamatory of the plaintiff or not related to matters of which the plaintiff complains and sharing no common 'sting'.

Decision in relation to the plaintiff's 'strike out' motion

69. For the reasons set out in this judgment, I am satisfied that the defences of truth and honest opinion should be struck out and it is appropriate to grant the relief sought at paras. 1 and 2 of the plaintiff's motion dated 14th January, 2021 in each case. In other words, and in circumstances where two identical motions were brought by two separate plaintiffs in respect of claims which are identical in nature, it is appropriate that the foregoing relief be granted both in the proceedings under record no. 2017/9557P (wherein Mr. Mackin is the plaintiff) and in proceedings under record no. 9558P (wherein Mr. Booth is the plaintiff). This was the first motion which came before the court and I now turn to the second application, being the defendants' motion for discovery.

The defendants' discovery motion

70. The relevant motion was issued on 22nd June, 2020, grounded on the affidavit of Gillian Cox, solicitor for the defendants, sworn on 18th June, 2020. I have carefully considered the contents of same in which Ms. Cox refers to the four categories of documentation sought, sets out the reasons said to justify each request and addresses the response received from the plaintiff's solicitors in correspondence which she exhibits. I have also carefully considered the contents of a replying affidavit sworn by Ms. Audrey Colleran, solicitor for the plaintiff, on 25th November, 2020. Counsel very helpfully provided

detailed written submissions and I am grateful for these, which I also carefully considered.

Principles of relevance to applications for discovery

71. Before looking at each of the four categories sought, it is appropriate to refer to certain well-established legal principles in respect of which there is no dispute between the parties. In a recent decision of the Supreme Court in *Tobin v. The Minister for Defence, Ireland and the Attorney General* [2019] IESC 57, the Chief Justice emphasised the importance of discovery in the following terms: “7.5....it is important not to lose sight of the valuable contribution which discovery can make. It improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, it makes a significant contribution to the administration of justice.” There could be no issue taken with the foregoing statement of general principle. Nor is it in doubt that the concepts of “relevance” as well as “necessity” are of fundamental importance in the discovery context. In *Tobin*, Clarke C.J. also stated the following:

“6. The Case Law

6.1. *It is clear from the terms of O. 31, r. 12 of the Rules of the Superior Courts, as amended, and the case law on discovery in this jurisdiction, that a court hearing an application for discovery will only order a party to make discovery if it is satisfied that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. In addition, in an effort to limit the burdens, costs and delays incurred by orders for discovery in modern practice, two further considerations have sometimes been proposed; one being that of proportionality and the other being the suggestion that alternative, more efficient methods of disclosure should first be pursued.*

6.2. *The established definition of the test of relevance is to be found in the principles outlined in the judgment of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55 (‘Peruvian Guano’). With regard to necessity, in *Ryanair plc. v. Aer Rianta c.p.t.* [2003] IESC 62, [2003] 4 I.R. 264 (‘Ryanair’), Fennelly J. held that, in order to establish that discovery of particular categories of documents is ‘necessary for disposing fairly of the cause or matter’, the applicant does not have to prove that they are in any sense ‘absolutely necessary’. He went on, at p. 277, to hold that the court should:-*

‘...consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof which are open to the applicant.’

6.3 *Arising from this analysis, the principle of proportionality has been developed in the jurisprudence of this Court as a relevant factor in assessing whether discovery*

should be ordered. In Framus Ltd. v. CRH plc [2004] IESC 25, [2004] 2 I.R. 20, Murray J. stated, considering the foregoing analysis in Ryanair, at para. 36:-

'As Fennelly J. pointed out, the crucial question is whether discovery is necessary for 'disposing fairly of the cause or matter'. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial.'

- 6.4. *The principle of proportionality has subsequently become an important criterion employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide ranging orders for discovery. In Dome Telecom Ltd. v. Eircom Ltd. [2007] IESC 59, [2008] 2 I.R. 726, Fennelly J. examined whether 'the unusual scale and extent of the burden' arising from an order for discovery was likely to 'produce genuinely useful evidential material', and held that the court was required to have 'a clear view of the litigious benefit to the plaintiff' in light of the heavy burden and cost of the discovery sought. In Astrazeneca AB and Ors. v. Pinewood Laboratories Ltd. & Ors. [2011] IEHC 159, Kelly J. held that an assessment of proportionality in the context of orders for discovery 'involves a consideration of the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of an applicant or damage the case of his opponent'.*
- 6.5. *Recalling Fennelly J.'s statement in Ryanair that the courts may, in their analysis of the necessity of an order for discovery, have regard to 'alternative means of proof' available to the plaintiff, the courts have also sought to curtail the breadth of discovery orders by sometimes introducing a requirement that alternative methods of ascertaining the information required, such as by means of the delivery of interrogatories, are pursued prior to the making of an order for discovery.*
- 6.6. *In Anglo Irish Bank Corporation Ltd. v. Browne [2011] IEHC 140, Kelly J. stated, in the context of cases on the Commercial List in particular, that:-*

'Discovery ought not to be ordered where the information sought to be gleaned by it is capable of being obtained by an alternative less expensive and less time consuming method. In this regard, I have in mind the use of interrogatories.

...

When seeking to obtain information from their opponents, the first port of call ought not to be requests for discovery if it is probable that the information which is being sought is capable of being elicited by an adroit use of interrogatories.'

- 6.7. *The advantage of serving interrogatories, in obviating the need for costly and more time-consuming discovery, has been restated by the Court of Appeal in McCabe v.*

Irish Life Assurance Plc [2015] IECA 239, [2015] 1 I.R. 346 and by Barniville J. in the High Court in Dunnes Stores & Anor v. McCann [2018] IEHC 123. In the latter case, it was held at para. 36 that:-

'If it can be shown that there are alternative means of establishing the issues in respect of which the discovery is sought other than by discovery, then the party seeking discovery may have a difficulty in discharging the onus of showing that the discovery sought is necessary in that sense.'

6.8 *Building on that case law, it is appropriate to attempt to define the broad principles which should be applied by a court which is asked to rule on a discovery application in circumstances where the party which is being required to make discovery asserts that the burden which discovery in the terms sought would impose would be excessive or disproportionate."*

72. It is acknowledged by both sides that the general principles, as outlined by the Chief Justice in *Tobin*, apply to discovery in the context of defamation proceedings and Mr. Justice Meenan made this clear in *Adams v. BBC* [2020] IEHC 441, stating: "*This comprehensive judgment sets out with clarity the principles that are applicable to an application such as this*". Although no issue was taken with any of the principles outlined by the Supreme Court in *Tobin*, counsel for the defendants submits that these principles will fall to be considered within the confines of what he described as the limited defences available and the sometimes restrictive and complex rules of pleading in defamation. Counsel for the plaintiff also refers to the decision of Ms. Justice Macken in *McDonagh v. Sunday Newspapers Ltd* [2005] 4 I.R. 528, wherein the learned judge held that in a libel action, in which a defendant pleaded justification simpliciter, there had to be before the court, at least at the time discovery was sought, sufficient information, particulars of material facts, upon which the court could (i) conclude that the application for discovery was intended to advance the plea of justification and not merely make such a case for the defendant; (ii) establish that the documents sought were relevant to the issues arising between the parties and (iii) establish that they were necessary for the purposes of disposing of the action.

Relevance

73. Relevance is, of course, at the heart of discovery, relevance being determined with reference to the pleadings. For the sake of clarity, it is useful to quote again from the Chief Justice's decision in *Tobin*, wherein he comments on the issue of relevance (at para. 7.25) and *necessity* (from para. 7.13). With regard to *relevance*, Clarke C.J. stated in *Tobin*:

"7.25. Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case. A plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the scope of the discovery sought is because of a

'kitchen sink' approach to pleading the case. Likewise, defendants have to accept that, if they deny all elements of the plaintiff's case or place the plaintiff on proof about even relatively uncontroversial elements of the plaintiff's claim, then, inevitably, the scope of the issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased"

Necessity

74. Elsewhere in *Tobin*, the Chief Justice made the following comments in respect of the issue of necessity:

"7.13. Considering all of that recent case law, it seems to me that, at the level of the broadest generality, certain fundamental principles can be discerned. First, the key criteria remain those of relevance and of necessity. However, it also seems clear that there has been much greater scrutiny of the issue of 'necessity' in more recent times. The traditional position very much accepted that if documents were relevant, their discovery would almost inevitably be necessary. However, much of the recent case law has indicated a need to move away from that position. Where there are other equally effectual means of establishing the truth and thus providing for a fair trial then discovery may not be 'necessary'. This will certainly be so where it can be shown that the cost of making discovery would be significant and would greatly outweigh the costs of pursuing some alternative procedural mechanism to establish the same facts. Similar considerations apply when the likely true relevance of documentation may not become clear until the trial but where the immediate disclosure of the documentation concerned would necessarily involve disclosing highly confidential information. Furthermore, the development of a proportionality test can itself be seen as a further refinement of the concept of 'necessity'.

7.14. It is, of course, the case that 'necessity' means that the disclosure of the documents concerned may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. The costly alternative to discovery might, of course, be that a large number of persons would be served with subpoenas requiring them to bring documents with them to the trial, but that would lead to greatly prolonged hearings while documents were being introduced into evidence, as it were, 'on the blind'. On the other hand, requiring a party to produce, at great expense, a very large number of documents, which are only likely to be of tangential relevance to the trial, is most unlikely to save costs and equally unlikely to lead to a fairer resolution of the proceedings. In that sense, the discovery of the documents in question cannot be said to be necessary.

7.15. In those circumstances, it seems to me that the starting point has to remain a consideration of what is 'relevant'. If it cannot be demonstrated that documents are relevant, then there could be no basis for requiring that they be discovered."

Category 1

75. Armed with the foregoing principles, I now turn to the categories sought in the defendants' motion for discovery. The first category of documents sought by the defendants comprises the following:

"Category 1

All documents evidencing the commissioning of the "Report on the concentration of media ownership in Ireland" (the "Report") to include, but not limited to:

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

76. In advancing reasons to justify the category sought, the affidavit sworn by the defendants' solicitor to paras. 4, 5 and 7 of the statement of claim. At para. 4 thereof, it is pleaded that the plaintiff was the co-author of the report commissioned by the GUE/NGL grouping in the European Parliament of which Sinn Féin and in particular Lynn Boylan MEP is a member. Paragraph 5 is where the plaintiff pleads publication and identifies the words complained of namely: "*Sinn Féin/IRA certainly got the report they paid for*". At para. 7 the plaintiff pleads, *inter alia* that the words mean that he had acted for an unlawful organisation. The defendants also refer to para. 4 of the Defence wherein it is pleaded that "*The report that was published by GUE/NGL, having been commissioned by Lynn Boylan MEP, was submitted by Doughty Street Chambers and KRW Law LLP, a limited liability partnership established pursuant to the Limited Liability Partnership Act (Northern Ireland), 2002*". The defendants also rely on para. 12 of the defence which pleaded the "*defence of truth*". For the reasons set out earlier in this judgment I am satisfied that the defence of truth should be struck out.
77. In arguing for category 1, Ms. Cox avers, at para. 12 of her 18th June, 2020 affidavit that "*...a key issue between the parties is therefore who exactly commissioned the report. Discovery of this category of documents is necessary in order to substantiate the defendants' pleas of truth in relation to the fact that the report was commissioned by Sinn Féin MEP Lynn Boylan and it was designed to advance the political agenda of Sinn Féin, a party which supported and continues to be associated with the IRA*". Having carefully considered the pleadings it does not appear to me that there is, in fact, any issue between the parties as to who commissioned the report. The parties appear to be in agreement that the report was published by the GUE/NGL Grouping in the European Parliament, having been commissioned by Lynn Boylan, MEP, of Sinn Féin (the latter being a member of that grouping).
78. In addition to the plea at para. 4 of the Defence which I referred to above, para. 3 of the Defence states as follows: "*3. At all material times the Report was published by the*

GUE/NGL Grouping in the European Parliament having been commissioned by Lynn Boylan MEP of Sinn Féin which is a member of that grouping in the European Parliament". Thus, it seems to me that there is no doubt about the issue of who exactly commissioned the report.

79. Furthermore, a copy of the report comprised one of the exhibits in the context of the first motion and I referred to the first and last pages of the report which, on its face, confirms who commissioned it, in that it states:

"REPORT ON THE CONCENTRATION OF MEDIA OWNERSHIP IN IRELAND

AN INDEPENDENT STUDY

COMMISSIONED BY LYNN BOYLAN MEP ON BEHALF

OF THE EUROPEAN UNITED LEFT/NORDIC GREEN LEFT

(GUE/NGL) GROUP OF THE EUROPEAN PARLIAMENT"

80. In light of the foregoing, it seems to me that category 1 is sought in order to prove a matter which is not in dispute. It is also fair to say that a material element of the reasons proffered by the defendants in support of the application for discovery of this category relate to the defence of truth which has been struck out, in circumstances where none of the meanings relied upon by the defendants meet the 'sting' of the defamation complained of by the plaintiff and the majority are not defamatory of the plaintiff at all.
81. At para. 33 of her affidavit, Ms. Cox refers *inter alia* to reply 2 (vii) and she asserts that by reason of this reply there is a discrepancy in the position adopted by the plaintiff as to who commissioned the report and she asserts that this discrepancy underscores the necessity for discovery of category 1 being made. For the sake of clarity, it is appropriate to note that the notice for particulars raised by the defendants is dated 01 August, 2019 and the relevant particular comprises item 2 (vi) which states as follows: "2. *Arising from paragraph 4 of the statement of claim...please clarify which individual or individuals within the GUE/NGL grouping commissioned the report.*" The response furnished by the plaintiff in their 3rd December, 2019 replies to particulars is as follows: "2 (vii) *The plaintiff believes the person responsible for commissioning the report was a Francesco Defeo*". The averments made by Ms. Cox at para. 33 of her 18th June, 2020 affidavit are responded to by way of para. 8 of Ms. Colleran's 25th November, 2020 affidavit wherein she makes the following averments:

"8. *In relation to para. 33, I say that the reply referred to in the replies to particulars (reply 2 (vii)) was in response to a query as to which individual within GUE/NGL grouping commissioned the report. The individual with whom the plaintiff dealt in relation to submitting the bid for the report and furnishing the completed report for approval and payment was Francesco Defeo, who I am instructed is a member of the accounts and finance staff of the GUE/NGL. For the avoidance of doubt, the report was commissioned by GUE/NGL, a group in the European Parliament, following a*

proposal by Lynn Boylan, MEP of Sinn Féin – a member of the GUE/NGL – for the report to be commissioned.”

82. No affidavit was sworn in response taking issue with the foregoing averments made by Ms. Colleran at para. 8 of her affidavit sworn on 25 November 2020. Furthermore, the fact remains that the defendants have very clearly pleaded, in paras. 3 and 4 of the Defence that the report was *“published by the GUE/NGL grouping”* and that the report was *“commissioned by Lynn Boylan MEP of Sinn Féin which is a member of that grouping in the European Parliament”*. Thus, not being an issue in dispute in the proceedings, it does not seem to me that discovery of this category can fairly be said to be relevant or necessary and I am satisfied that it would not be appropriate to order the plaintiff to make discovery of category 1. I now turn to category 2.

Category 2

83. Category 2 is expressed in the following terms:

“Category 2

All documents evidencing the invoicing, payment or payments for the ‘report on the concentration of media ownership in Ireland’ (the ‘Report’) in particular, but not limited to, any invoices, receipts and bank/financial statements relating to payments, either direct or indirect, in respect of the commissioning of the Report.”

84. It is fair to say that the reasoning deployed on behalf of the defendants in support of the request for category 2 repeats the reasoning relied upon in respect of category 1. At para. 19 of her affidavit, Ms. Cox avers *inter alia* that *“... a key issue between the parties is therefore who exactly commissioned the report and the independence or otherwise of the report”*. For the reasons outlined above, I am satisfied that this is not truly in issue.
85. In written submissions in support of the discovery motion, it is said *inter alia* that *“discovery of this category of documents is necessary in order to substantiate the defendants’ pleas of truth in relation to the commissioning of the report; discovery of this category will show who paid for the report and the ultimate source of any such payments.”* In the manner explained earlier in this judgment, I am satisfied that it is appropriate to strike out the defence of truth.
86. It is plain that a material basis for the contention that the defendants should obtain discovery of category 2 is because category 2 is sought by the defendants with a view to demonstrating that the report was unfair or lacked independence. These are not issues in the case (being contended - for meanings which did not meet the ‘sting’ of the plaintiff’s claim). There is no issue between the parties as to who commissioned the report. The source of the payment for the report is not in issue in the present proceedings in circumstances where the defendants do not intend to prove that the plaintiff received payment for the report from the IRA. Furthermore, there is no question of the plaintiff being required, at a trial, to establish that he was not paid by the IRA.

87. The plaintiff is entitled to the presumption of falsity in defamation and the burden of proof rests on the defendants. Even before this court decided that the defence of truth must be struck out, the defendants had not put the truth of the allegation that the plaintiff was paid by the IRA in issue as regards the pleas contained in their defence. In short, I am satisfied that discovery of category 2 cannot fairly be said to be relevant or necessary. It does not seem to me to relate to any issue which is in contention in this case and for the foregoing reasons I am refusing to order discovery of category 2. I now turn to category 3.

Category 3

88. Category 3 is as follows:

"Category 3

All documents evidencing the terms of reference and/or scope of the 'report on the concentration of media ownership in Ireland' (the 'Report') as commissioned, to include, but not limited to, any instructions given both to and by KRW Law LLP in relation to the commissioning and/or scope and drafting and/or wording of the report."

89. Again, it is fair to say that the reasons proffered in order to justify an entitlement to discovery of category 3 repeats the reasoning relied upon by the defendants in respect of categories 1 and 2. At para. 25 of her affidavit, Ms. Cox avers *inter alia* that "...a key issue between the parties is whether the Report was in fact an independent study and whether the Report was fair and balanced".
90. Written submissions in support of the defendant's motion add that:

"Discovery of this category of documents is necessary in order to substantiate the defendants' pleas of truth in relation to the lack of independence in relation to the report, the lack of balance and fairness and the advancement of an agenda in and through the Report". The foregoing does not appear to me to be an issue in the case. The plaintiff does not assert that the words complained of suggest that he authored a report which lacked balance, fairness or independence. His complaint is of a materially different nature in that he complains that the words suggest that he was paid by and acted for the IRA and that these matters reflect badly upon him in his professional as a solicitor.

91. At para. 25, Ms. Cox also avers *inter alia* that "discovery of this category of documents is necessary in order to substantiate the defendants' pleas of truth in relation to the lack of independence in relation to the report, the lack of balance and fairness and the advancement of an agenda in and through the Report". For the reasons explained in this judgment, the defence of truth has been struck out and the pleas to which Ms. Cox refers at para. 25 of her 18th June 2020 affidavit are not issues in the pleaded case. Nor can I see how category 3 is relevant to the defences which remain in the case being "qualified privilege" and "responsible journalism" defences. I cannot see how discovery of category

3 could fairly be said to be relevant and necessary in the context of advancing a plea under s. 26 of the 2009 Act (dealing with the “*defence of fair and reasonable publication*”) or a defence pursuant to s. 18 of the 2009 Act (the defence of “*qualified privilege*”). For these reasons I am declining to order discovery of category 3 and I now turn to the final category sought by the defendants.

Category 4

92. Category 4 comprises the following:

"Category 4

All drafts/working versions of the report on the concentration of media ownership in Ireland' (the 'Report') to include, but not limited to, any documents associated with the said drafts or portions thereof identifying the author or authors of the Report or portions thereof."

In contending for this category, Ms. Cox avers that the plaintiff's claim is one in defamation and she refers to para. 5 of the statement of claim and to the words of which the plaintiff complains (para. 27 of her affidavit). Ms. Cox goes on, at para. 28, to refer to para. 6 of the statement of claim wherein, in the context of particulars of identification, the plaintiff pleads that his name appeared on the front page of the report and his name was published in media as being an author of the report and that at all material times he was identified as an author of the report. At para. 29, Ms. Cox refers to para. 5 of the defence, wherein the following pleas are made:

"5. *Further, the Report was submitted by barristers from Doughty Street Chambers on the instructions of KRW Law LLP. At all material times the plaintiff was the Agent of KRW Law LLP and at all material times was working for and had the authority of that limited liability partnership in respect of any work that he carried out on the Report. The defendants cannot plead with greater particularity the extent of the work (if any) carried out on the Report by the plaintiff until such time as discovery and/or interrogatories have been completed.*

6. *In the premises, the defendants deny that the plaintiff was an author of the report, either as alleged or at all, and the plaintiff is put on full proof in respect of his alleged authorship of the report."*

93. It is in the foregoing context that category 4 is sought and in written submissions the defendants argue that "*a key issue in these proceedings ... is clearly going to be the authorship of the report*". It is fair to say that the reasons put forward as a basis for seeking discovery of category 4 arise from the denial by the defendants that the plaintiff was an author of the report. As the plaintiff submits, the terms of category 4 itself seem to suggest that it is the identification of the plaintiff as an author that is in question. It is submitted on behalf of the plaintiff that it is not understood how drafts or working versions of the report could be relevant to the issue as to whether the plaintiff was identified as an author in the final report actually published and which was the subject of

the press release containing words which the plaintiff asserts are defamatory of him. This seems to me to be a submission with very considerable force.

94. On behalf of the plaintiff it is also submitted that the real question in the proceedings is whether the plaintiff was identified as being an author of the report and whether the words complained of in the press release referred, or were capable of referring, to the plaintiff as one of the authors of the report. The submission is also made on behalf of the plaintiffs that, insofar as identification of the plaintiff as a co-author of the report is concerned, the following matters are relevant:

"(a) The front cover of the Report identifies by whom the Report was submitted and it names the plaintiff;

(b) The Report is written in the first person plural and signed off by the authors, including the plaintiff, on the final page of the report.

(c) The plaintiff has verified, on affidavit, that he was an author of the report."

95. The submission is also made that, while the plaintiff has provided extensive particulars of identification, the discovery sought does not relate to any of those particulars. The plaintiff also relies in opposing discovery of category 4 on s. 10 of the 2009 Act which provides as follows:

"10.— Where a person publishes a defamatory statement concerning a class of persons, a member of that class shall have a cause of action under this Act against that person if—

(a) by reason of the number of persons who are members of that class, or

(b) by virtue of the circumstances in which the statement is published,

the statement could reasonably be understood to refer, in particular, to the member concerned."

96. On behalf of the plaintiff it is submitted that drafts or working versions of the Report are not relevant to the action and that the only draft relevant to the present proceedings is the final, published draft because it was upon this published version that the defendants published their press release and based a plea of truth. It cannot be disputed that the defendants have long had a copy of the final report upon which the press release was based.

97. Taking all the foregoing into account, even if category 4 could fairly be said to be relevant in the sense used in the authorities, I am not satisfied that discovery of category 4 is necessary. It also seems to me that, even if one ignores (a) the identification of the plaintiff on the first page of the report and (b) the identification of the plaintiff on the final page of the report and (c) the affidavit sworn by the plaintiff to the effect that he was an author of the report and even if one takes the view that relevance has been established,

that is not the end of the analysis. It seems to me appropriate for this court to consider whether the information sought is capable of being obtained by an alternative, less expensive and less time-consuming method, being the use of interrogatories.

98. I have serious doubts about whether drafts or working versions of the report could fairly be said to be at all relevant to the issue as to whether the plaintiff was identified as an author in the report actually published. It is plain that at para. 6 of the defence, the defendants deny that the plaintiff was an author of "*the Report*", but that is plainly a reference to the published report, not a reference to drafts or working versions which were not published. Without deciding or purporting to decide any issue in contest, which is for a trial to determine, it seems uncontroversial to say that the defendant's three-page press release was published on 26 October, 2016 in response to the report commissioned by Lynn Boylan MEP. This is made clear at para. 7 of each defence. In other words, it was not a press release published in response to a *draft* or *drafts* or *working versions* of the report. Nor was the press release published in response to documents associated with such drafts. It is clear that at paras. 2 and 6 of the defences delivered in both cases, the defendants deny that the relevant plaintiff was the co-author of the report. Whether or not the plaintiff was the co-author of the report and leaving aside entirely the fact that the plaintiff is identified by name on the front page and on the final page of the report in response to which the defendants published the press release appears to me to be a discreet issue entirely capable of being dealt with by way of interrogatories. Moreover, it seems clear from para. 5 of each Defence, that this is a view shared by the defendants. I say this in light of the final sentence at para. 5 of each Defence in which 'interrogatories' are referred to specifically in the following plea: "*The defendants cannot plead with greater particularity the extent of the work (if any) carried out on the Report by the plaintiff until such time as discovery and/or interrogatories being completed.*" The foregoing plea fortifies me in the views expressed in this judgment as regards category 4.
99. In short, even if I am entirely wrong in the view that category 4 is not truly relevant to an issue in the pleadings, I take the view that discovery is not necessary. I take this view because whether the plaintiff was or was not an author of the report is information which is capable of being obtained, very readily, via the use of interrogatories. For these reasons I am refusing the defendants' application for discovery and I now turn to the third motion before the court, being the plaintiff's application for discovery.

The plaintiff's discovery motion

100. On 07 December, 2020 the plaintiff issued a motion seeking discovery of two categories of documentation, which application was grounded on the application sworn by Ms. Audrey Colleran Solicitor on 07 December, 2020. I have carefully considered the contents of same and the exhibits thereto. No replying affidavit was delivered on behalf of the defendants.

Category 1

101. The first category sought is as follows: "*Category 1 – all documents evidencing or recording the extent of circulation and publication of the press statement issued by the defendants on the 26th October, 2016*".

102. In support of the application for this category, which the defendants have declined to furnish, Ms. Collieran's averments at para. 6 of her affidavit refer, *inter alia*, to para. 8 of the Defence and it is appropriate to quote same as follows:

"The Defendants deny that the Statement was published in national newspapers, news websites and on the radio, either as alleged or at all. Each and every particular of publication is denied as if same were herein set out and traverse (sic) seriatim."

103. It is clear from the foregoing that, although the defendants admit publishing the statement i.e. press release on 26 October 2016, the issue of publication and circulation is in dispute in the pleadings as per para. 8 of the Defence. It is fair to say that the defendants have placed the plaintiff on proof of those who published the press release as well as the extent of the circulation of same. It is also fair to say that these matters are within the particular knowledge of the defendants. It seems uncontroversial to say that to issue a press release is to provide such a statement to media outlets with a view to onward publication by such media outlets. To say the foregoing is not to determine anything whatsoever in these proceedings. It is merely to comment on the nature of a press release.
104. In this particular case it is specifically pleaded at para. 5 of each statement of claim that *"On or about 26 October, 2016 and on dates thereafter, the defendants and each of them, their servants or agents, published to media outlets within the State a press release for publication concerning the Report. The said press release was published with a view to it being further published by various media. The said press release was published in national newspapers, news websites and on the radio. The press release contained the following words: 'Sinn Féin/IRA certainly got the report they paid for'".* Having regard to the aforementioned pleas in the Statement of claim and Defence, respectively, I am satisfied that Category 1 is both relevant and necessary in respect of the proof of an issue in dispute and it seems to me that, without such discovery, the plaintiff would be placed at a significant disadvantage. In other words, the fair disposal of the matter in issue seems to me to require discovery of category 1.
105. In written submissions, the plaintiff relies *inter alia*, on a passage in *"The Law of Defamation"* (Maher para. 13-65) in which it is explained that the extent of circulation has always been a live issue in defamation actions as it is very relevant to damages. The plaintiff also refers to s.31(4)(c) of the 2009 Act. To see that section in context, it is appropriate to set out what s.31 provides: -
- "31. (1) The parties in a defamation action may make submissions to the court in relation to the matter of damages.*
- (2) In a defamation action brought in the High Court, the judge shall give directions to the jury in relation to the matter of damages.*

- (3) *In making an award of general damages in a defamation action, regard shall be had to all of the circumstances of the case.*
- (4) *Without prejudice to the generality of subsection (3), the court in a defamation action shall, in making an award of general damages, have regard to*
- (a) *the nature and gravity of any allegation in the defamatory statement concerned,*
 - (b) *the means of publication of the defamatory statement including the enduring nature of those means,*
 - (c) *the extent to which the defamatory statement was circulated...".*

106. In my view, s.31(4)(c) of the 2009 Act, coupled with the pleas to which I have referred, put beyond doubt that Category 1 is relevant and I take the view that it is necessary to order discovery of Category 1 so that the extent of circulation can be ascertained.
107. In submissions, counsel for the plaintiff argues that the defendants in the present case have departed from what he categorises as 'normal practice' in defamation cases, by choosing not to admit and not to make disclosure in relation to publication/circulation. That submission forms no part of this Court's decision, in circumstances where defendants are free to conduct litigation as they deem appropriate. That said, by putting the plaintiff on proof in respect of the extent of publication and circulation, it would be to create a patent unfairness were this Court to refuse discovery of Category 1.
108. In submissions made with great skill, counsel for the defendants opposed the category sought. Among other things, the defendants' counsel refers to the plaintiff's replies to particulars, dated 03 December, 2019 wherein, at item number 3, the plaintiff responded to a query raised by the defendants (at item 3 of the defendants' notice for particulars dated 01 August, 2019). The query in the defendants' notice for particulars was as follows: "3. *Arising from para. 6 of the statement of claim, please identify the media reports in which the plaintiff was identified as an author of the report.*" The response furnished by the plaintiff began in the following terms: "3. *This is not a proper matter for Particulars, however, without prejudice to the foregoing, we are aware of the following publications...*". There followed a list comprising nine website addresses.
109. By reason of the foregoing, counsel for the defendants submitted that it was "curious" that the plaintiff was seeking Category 1 when they themselves had identified publications where the press release had appeared. The foregoing submission does not seem to me to be determinative of the present application. The plaintiff's reply to particulars did not purport to be an exhaustive list of publications. Rather, it was explicitly said to be a list of the publications the plaintiff was "aware of".
110. I have also carefully considered the correspondence which was exchanged between the parties and which comprises exhibit "AC2" to Ms. Colleran's affidavit. Nothing in that correspondence, in particular the letter sent by the defendants' solicitor dated 09 July

2020, convinces me that this Court should do other than order discovery of Category 1 in the terms sought by the plaintiff. Among other things, the letter from Meagher Solicitors for the defendants stated that *"the extent of circulation and publication of the press statement is a matter for the plaintiff to prove in these proceedings."* The foregoing is an uncontroversial statement but, in my view, it constitutes a strong argument in favour of this Court ordering discovery of Category 1 in the terms sought.

111. The letter of 09 July, 2020 asserted that Category 1 was not relevant to the issues disclosed in the pleadings. I take an entirely different view for the reasons set out above. As counsel for the plaintiff submits, a recent example of a case in which this Court directed such discovery is *Adams v. BBC* (unreported, High Court Meenan J, 1 July, 2020) in which publication was put in issue in the defence. The learned judge ordered the defendant in that case to make discovery of *"all documents evidencing and/or recording the circulation and extent of publication of both the programme and article within the jurisdiction of Ireland"*.
112. For all the foregoing reasons this Court is ordering that the defendants make discovery of Category 1.

Category 2

113. I now turn to Category 2, which is in the following terms: -

"Category 2 – In relation to the defence pleaded under s.26 of the Defamation Act 2009 (Fair and Reasonable Publication on a Matter of Public Interest) the plaintiff requires discovery of all documents evidencing or recording:

- (a) All attempts made by the defendants, their servants or agents, to obtain a response from the plaintiff prior to publishing the words complained of;*
- (b) all attempts made and the means used by the defendants, their servants or agents, to verify the assertions and allegations concerning the plaintiff in the words complained of."*

114. As Ms. Colleran avers at para. 8 of her affidavit *"...these documents are all relevant and necessary in the context of the Defence pleaded under s.26 of the Defamation Act 2009"*. It is useful at this juncture to quote from para. 23 of each defence which appears in the following terms: -

"Defence of Fair and Reasonable Publication on a Matter of Public Interest
The press statement published by the defendants was published in good faith in the course of or for the purpose of the discussion of a subject of public interest, the discussion of which was for the public benefit."

115. Thereafter, particulars are given under the heading *"Particulars of Subject of Public Interest"* at (i) to (v) and this is followed by the following explicit plea at para. 24:- *"24. In respect of the aforesaid, the defendants shall rely upon s.26 of the Defamation Act 2009."*

116. It is appropriate to set out what s.26 of the 2009 Act provides:

"Fair and reasonable publication on a matter of public interest.

26.— (1) *It shall be a defence (to be known, and in this section referred to, as the 'defence of fair and reasonable publication') to a defamation action for the defendant to prove that—*

(a) *the statement in respect of which the action was brought was published—*

(i) in good faith, and

(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,

(b) *in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and*

(c) *in all of the circumstances of the case, it was fair and reasonable to publish the statement.*

(2) *For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:*

(a) *the extent to which the statement concerned refers to the performance by the person of his or her public functions;*

(b) *the seriousness of any allegations made in the statement;*

(c) *the context and content (including the language used) of the statement;*

(d) *the extent to which the statement drew a distinction between suspicions, allegations and facts;*

(e) *the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;*

(f) *in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;*

(g) *in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in paragraph (f);*

- (h) *the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;*
- (i) *if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and*
- (j) *the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement..."*

117. It is clear that the wording used in Category 2 reflects the wording used in s.26(2)(i) and (j) of the 2009 Act. In arguing for discovery, counsel for the plaintiff submits that the plaintiff's version of events was not represented in the press release published by the defendants and the extent to which a reasonable attempt was made by the defendants to obtain and publish a response from the plaintiff is a matter that the court, or a jury, will be obliged to take into account in determining whether it was fair and reasonable of the defendants to publish the statement concerned, having regard to the express provisions in s.26(2)(j). Similarly, counsel for the plaintiff submits that the attempts made and the means used by the defendants to verify the assertions and allegations concerning the plaintiff in the press release are matters that the court, or a jury, will be obliged to take into account in determining whether it was fair and reasonable of the defendants to publish the statement concerned, in light of the express provisions of s.26(2)(i).
118. In opposing the discovery sought, counsel for the defendants characterises the plaintiff as seeking to treat the defendants as a newspaper or broadcaster or journalists and submits that it is 'fanciful' to suggest that, prior to publishing the press release, the defendants could or would have taken steps which such parties might. Regardless of the skill with which this submission is made, it does not seem to me to be determinative of any matter. The key question for this Court is relevance in the context of the pleadings as well as the associated principle of necessity, the overriding obligation on the court to ensure the fair disposal of the matters at issue, with limitations on discovery appropriate if, for example, numerous items of only slight relevance were sought and to order discovery would be oppressive.
119. Having regard to the pleaded case and the issues plainly in dispute in the present proceedings, I am entirely satisfied that Category 2 can fairly be said to be relevant. The defendants have made the choice to rely on s.26 of the 2009 Act as they were perfectly entitled to do. That being so, the Category 2 seems to me to be both relevant and necessary having regard to the pleadings. Nor is it asserted that to order such discovery would be unduly burdensome or oppressive. No replying affidavit was served in response to that sworn by Ms. Colleran, Solicitor for the plaintiff.
120. Furthermore, in the plaintiff's written submissions, the court's attention is drawn to a recent decision of Mr. Justice Collins (sitting in the High Court) in *Desmond v. The Irish Times Limited* [2020] IEHC 95 wherein the High Court considered the principles on an

application for discovery in the context of a Defence under s.26 of the 2009 Act. Collins J identified that an essential element of the defence is that the defendant must prove that *"in all of the circumstances of the case, it was fair and reasonable to publish the statement"*. The court made clear that, although s.26(2) structures how the court should determine whether it was fair and reasonable to publish, it does not limit the matters the court should take into account. Thus, the matters that can be taken into account include the matters listed at s.26(2)(a) to (j). Collins J observed that s.26(2)(f)(g)(i) and (j) all focus on aspects of the preparation of the statement in respect of which defamation proceedings are brought, stating:

"[54]. At the level of general principle, it appears to me that the steps taken by a newspaper in the preparation of a story for publication and the editorial decisions that determine whether, when and in what form it is published are potentially relevant – and in many cases may potentially be of considerable significance - in determining whether it was fair and reasonable to publish. As Cox & McCullough note (at 14-217) '[e]vidence will almost certainly be required to establish that it was fair and reasonable to publish the statement, with particular reference to the list of matters set out to be considered for those purposes in section 26(2) of the Act' and, where such evidence is given, it seems to me that editorial decision-making must, in principle, be a legitimate area of inquiry in examination and/or cross-examination.

[55]. Separately, section 26(1)(a)(i) requires the publisher to prove that the statement at issue was published in 'good faith.' As Maher notes (at para 9-63) it appears that 'defendants may be expected to go into evidence in order to demonstrate their 'good faith' and stand over not just the pre-publication procedures followed, but their state of mind at the time of the publication.' The same point is made in Cox & McCullough (at 14-217).

Interestingly, in this context Maher also notes that pleading a section 26 defence 'can 'open the door' to discovery by which the plaintiff may have access to the notes, emails and other material of the defendant relating to the period prior to publication' which observation is consistent only with a view that the section 26 defence may involve scrutiny of the pre-publication/editorial process to scrutiny [sic].

[56]. Maher makes this explicit in its discussion of discovery and journalistic privilege:

'A defendant pleading a section 26 defence may be required to give detailed particulars of how the offending statement was prepared and published, and may be directed to make discovery of documents and relevant material generated during that process. In addition to the normal privilege claims available to defendants facing discovery orders, media publishers may wish to claim journalistic privilege over reporter's notes and other preparatory material, such as memos created when journalists were first assigned their tasks, or early drafts of the impugned publication created in the editing process.'

[57]. *Cox and McCullough is to the same effect, with the authors noting that '[w]here there is a plea of section 26 of fair and reasonable publication on a matter of public interest, there may be a requirement to discover journalists' notes and other material relating to the issue of whether or not it was fair and reasonable to publish the statement concerned.'* While in his judgment in *Meegan v Times Newspapers Ltd* Hogan J noted that no authority is cited for that statement, it appears to me that, as a matter of principle, it is plainly correct, having regard to the terms of section 26 which I have already discussed.

[58] *I should say that I agree with Mr McCullough that those elements of section 26 that require consideration of the public interest and/or public benefit – and I am here referring specifically to section 26(1)(a)(ii) – involve an objective assessment by the court (or, where relevant, a jury). Without going so far as to suggest that documents in the possession of the publisher may never be relevant to such issues, documents directed to the publisher's assessment of and/or subjective views on those issues are unlikely to be relevant to the resolution of any issue under section 26(1)(a)(ii) – though such documents may be relevant to other elements of the section 26 defence.*

[59] *It does not follow – and I do not intend to suggest – that, whenever a section 26 defence is pleaded by a publisher, journalists' notes and other such material relating to the pre-publication/editorial process will be ipso facto be discoverable. As Hogan J emphasised in Meegan, for such material to be discoverable, the plaintiff must satisfy the court that it is both relevant and necessary having regard to the particular defence being pursued: para 12. In other words, as in any discovery application, the party seeking discovery has the burden of establishing that the documents sought are relevant and necessary by reference to the issues actually in dispute in the proceedings. Where a section 26 defence is pleaded, it may be that journalist's notes and such will be relevant and necessary and thus discoverable but that will not necessarily be the case."*

121. The foregoing analysis by Collins J fortifies me in the view that, having regard to the issues which are plainly in dispute in the present proceedings, discovery of Category 2 is both relevant and necessary. In submissions by the plaintiff, reference is made *inter alia*, to the decision in *Meegan v. Times Newspapers Limited* [2015] IEHC 696 wherein Barr J was satisfied that the defendant, by raising the defence of fair and reasonable publication on a matter of public interest, had put in issue the question as to whether the defendant acted fairly and reasonably in publishing the article in dispute. He concluded that by making such a plea, the defendant opened itself to an application for discovery of documents and that the plaintiff would only be able to adequately deal with the assertions made by the defendant if discovery was made of the journalists' notes and other background material relevant to the publication of the article in question. In that case, the court also ordered discovery of documents to deal with issues raised pursuant to s.26(2)(j) of the 2009 Act.

122. In the present case Category 2 is relevant to an issue raised in the pleadings and I am satisfied that it is necessary, in order to ensure the fair disposal of the matters at issue, that the defendants make discovery of Category 2.

Conclusion

123. Three motions were brought in each of the two cases and the foregoing judgment, although it focussed on the pleadings in the proceedings under record number 2017/9557P, also determines the same issues which arose in the three identical motions brought in proceedings under record number 2017/9558P.
124. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."* Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of orders, including as to costs, which should be made in each case. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days.